



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

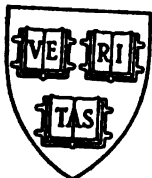
- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

~~PROPERTY~~

~~LAR~~



HARVARD LAW SCHOOL
LIBRARY

849

National Reporter System.—State Series.

THE
ATLANTIC REPORTER,
VOLUME 28,

CONTAINING ALL THE DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND,
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals,
Court of Chancery, and Supreme and Prerogative Courts
of NEW JERSEY; Court of Errors and Appeals and
Court of Chancery of DELAWARE; and
Court of Appeals of MARYLAND.

PERMANENT EDITION.

JANUARY 17—MAY 16, 1894.

WITH TABLE OF ATLANTIC CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

KF
1345
.A 1
F 2

ST. PAUL:
WEST PUBLISHING CO.
1894.

COPYRIGHT, 1894,
BY
WEST PUBLISHING COMPANY.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

CONNECTICUT—Supreme Court of Errors.

CHARLES B. ANDREWS, CHIEF JUSTICE.

ASSOCIATE JUDGES.

ELISHA CARPENTER. ¹	AUGUSTUS H. FENN.
DAVID TORRANCE.	SIMEON E. BALDWIN.
WILLIAM HAMERSLEY. ²	

DELAWARE—Court of Errors and Appeals.

JAMES L. WOLCOTT, CHANCELLOR.

CHARLES B. LORE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

IGNATIUS C. GRUBB.	CHARLES M. CULLEN.
DAVID T. MARVEL.	

Court of Chancery.

JAMES L. WOLCOTT, CHANCELLOR.

MAINE—Supreme Judicial Court.

JOHN A. PETERS, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

CHARLES W. WALTON.	ENOCH FOSTER.
ARTEMAS LIBBEY.	THOMAS H. HASKELL.
LUCILIUS A. EMERY.	WM. PENN WHITEHOUSE.
ANDREW P. WISWELL.	

MARYLAND—Court of Appeals.

J. M. ROBINSON, CHIEF JUDGE.

ASSOCIATE JUSTICES.

WILLIAM S. BRYAN.	DAVID FOWLER.
JOHN P. BRISCOE.	CHARLES B. ROBERTS.
JAMES MOSHERRY.	HENRY PAGE.
J. HUNTER BOYD.	

NEW HAMPSHIRE—Supreme Court.

CHARLES DOE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

ISAAC W. SMITH.	ALONZO P. CARPENTER.
LEWIS W. CLARK.	WILLIAM M. CHASE.
ISAAC N. BLODGETT.	ROBERT M. WALLACE.

JUDGES OF THE COURTS.

NEW JERSEY—Court of Errors and Appeals.

ALEXANDER T. MCGILL, CHANCELLOR.

MERCER BEASLEY, CHIEF JUSTICE.

JUSTICES.

DAVID A. DEPUE.
 BENNETT VAN SYCKEL.
 ALFRED REED.
 JONATHAN DIXON.

WILLIAM J. MAGIE.
 CHARLES G. GARRISON.
 JOB H. LIPPINCOTT.
 LEON ABBETT.

JUDGES.

JOHN CLEMENT.¹
 H. H. BROWN.
 ABRAHAM C. SMITH.

GOTTFRIED KRUEGER.
 JOHN W. BOGERT.
 WILLIAM W. PHELPS.

CLIFFORD S. SIMS.²**Court of Chancery.**

ALEXANDER T. MCGILL, CHANCELLOR.

VICE-CHANCELLORS.

ABRAHAM V. VAN FLEET.
 JOHN T. BIRD.

HENRY C. PITNEY.
 ROBERT S. GREEN.

Supreme Court.

MERCER BEASLEY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

DAVID A. DEPUE.
 BENNETT VAN SYCKEL.
 WILLIAM J. MAGIE.

JOB H. LIPPINCOTT.
 JONATHAN DIXON.
 ALFRED REED.

LEON ABBETT.

Prerogative Court.

ALEXANDER T. MCGILL, ORDINARY.

VICE-ORDINARY.

ABRAHAM V. VAN FLEET.

PENNSYLVANIA—Supreme Court.

JAMES P. STERRETT, CHIEF JUSTICE.

JUSTICES.

HENRY GREEN.
 HENRY W. WILLIAMS.
 J. BREWSTER MCCOLLUM.

JAMES T. MITCHELL.
 JOHN DEAN.
 D. NEWLIN FELL.

RHODE ISLAND—Supreme Court.

CHARLES MATTESON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN H. STINESS.
 PARDON E. TILLINGHAST.
 WILLIAM W. DOUGLAS.

GEORGE A. WILBUR.
 HORATIO ROGERS.
 WILLIAM W. DOUGLAS.

VERMONT—Supreme Court.

JONATHAN ROSS, CHIEF JUDGE.

ASSISTANT JUDGES.

RUSSELL S. TAFT.
 JOHN W. ROWELL.
 JAMES M. TYLER.

LOVELAND MUNSON.
 HENRY R. START.
 LAFORREST H. THOMPSON.

¹Term expired April 1, 1894.²Elected April 1, 1894.

RULES OF PRACTICE.

SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

Third Judicial District, June Term, 1893.

Rule XXII. § 3 (58 Conn. 589, 26 Atl. xvii.),
is hereby amended by adding the follow-
ing:

"The clerk shall annex to the printed copy
of the record in each case a table of contents
giving the title or nature of each separate
paper, in its order as printed, and the page
on which it is to be found."

Amendment to Rule XXII. (58 Conn. 589,
26 Atl. xvii.):

Add the following as section 6:

"The regular hours for the sessions of the
supreme court of errors will be from 10 a. m.
to 1 p. m., and from 2 p. m. to 4 p. m.; but
no new case will be taken up on Fridays after
1 p. m., except by special order of the
court, and with the consent of counsel on
both sides of the case."

28 A.

Amend Rule XVII. § 3 (58 Conn. 584, 26
Atl. xv.), as follows:

Add the words "in duplicate" after the
word "filed" in the 6th line of said section;
and after the word "counterfinding," in the
9th line, insert the words "which counter-
finding shall be filed in duplicate."

The following rule was adopted February
12, 1894, to go into effect on the first Mon-
day in April, 1894:

"To the prevailing party, upon all motions
required to be in writing which are deter-
mined by the court, shall, unless the court
remits the same in whole or in part, be taxed
the sum of ten dollars, which shall be paid
by the opposing party before he shall be en-
titled to plead further."

Certified by,

CHARLES B. ANDREWS, Chief Justice.

v

RULES OF COURT.

SUPREME COURT OF PENNSYLVANIA.

Rules in Equity.

Amendments Adopted January 15, 1894.

And now, January 15, A. D. 1894, it is ordered that the equity rules formulated and adopted May 27, 1865, under the authority of the act of 16 June, 1836, to regulate the practice in the several courts of common pleas in this commonwealth in proceedings in equity, be amended in the manner hereinbelow set forth; and that such rules, or parts thereof, heretofore in force, as may be inconsistent with these amendments, be rescinded hereby, from and after the date on which these amendments take effect.

The prothonotary of the supreme court for the eastern district is directed to give notice of these amendments by publishing them in the Legal Intelligencer and in the Weekly Notes of Cases.

The prothonotary for the western district is directed to give notice by the publication of the same in the Pittsburgh Legal Journal.

The state reporter is also directed to insert them, together with this order, in the first volume of the State Reports prepared after this date.

Per Curiam.

Filed January 15, 1894.

Pleadings.

All defenses, in equity cases, shall be made by answer or by demurrer. All issues of fact must be made by answer.

Evidence.

The office of "Examiner to Take Testimony" is hereby discontinued, except in proceedings conducted under the directions of a statute by which duties are imposed upon an examiner, as in bills to perpetuate testimony and similar cases. All testimony in cases in equity shall be taken in the same manner as is now practiced in courts of law, upon rule, commission, letters rogatory, or in open court. Rules may be entered for the purpose of taking testimony on the equity side of the several courts of common pleas, in the same manner and with the same effect as upon the common-law side of the same courts.

Hearing.

The hearing of cases in equity shall be conducted before the judge sitting as chancellor, or before a referee; and the office of master in chancery is hereby discontinued, except in proceedings where decrees or interlocutory orders are to be executed, or their execution supervised by an officer of the court, as in partition, the sale of real estate, the execution of deeds, and the like. When a case in equity is at issue upon demurrer, it shall be placed on the argument list then next to be heard. When it is at issue upon answer, it shall be placed on the equity trial list. Cases upon the trial list shall be heard in court in the same manner that actions at law wherein trial by jury has been waived are now heard by courts of law. The evidence shall be given or read in open court, and exceptions to the admission or rejection of evidence and of witnesses may be taken in the same manner and with the same effect as is now practiced in the trial of actions at law. The judge shall sit continuously during the trial of causes in equity, in the same manner as during the trials of actions at law.

Findings.

The counsel for the respective parties may present to the judge, sitting as chancellor, requests for findings both of fact and law. After hearing the evidence and the suggestions or argument of counsel, the judge may adopt or affirm these requests, or any of them; he may qualify or deny them; or he may state his findings of fact or of law in his own language. The requests so presented, with the answers thereto, and the findings of the judge, both of law and fact, shall be filed by the prothonotary and become thereby part of the record of the court in the said case.

Referees.

When a case in equity is at issue upon answer, it may be taken from the list by the parties, and its trial referred to a person

agreed upon by them, who shall be called a "Referee." He shall proceed at once upon his appointment to fix a day for trial, which shall not be more than three months after his said appointment; at which time, unless the cause be continued, he shall proceed to hear the parties, and sit from day to day continuously for that purpose. He shall hear the testimony, seal bills of exceptions to the admission and rejection of evidence, make findings of fact and of law, act upon the points or requests that may be presented by counsel, and prepare the form for a final decree. When his findings and decrees are ready, he shall give notice to counsel for the respective parties of a time and place when and where the same may be examined by them. If no exceptions be filed within ten days after the day fixed for such examination, the referee shall deliver to the prothonotary his findings, the requests of counsel, and the form of decree prepared, who shall file the same, and thereupon the court shall enter the decree prepared by the referee. If exceptions be filed, the referee shall hear them within ten days thereafter, and, within ten days after such hearing, decide upon the same, and file said exceptions, his action thereon, together with his original findings, the requests of counsel, and the form of a decree with the prothonotary of the court. At any time within ten days after this is done, exceptions may be taken to the action of the referee, and filed with the prothonotary. The case shall thereupon be placed upon the equity argument list next to be heard in said court, and the exceptions heard by the court or judge, acting as chancellor in the case, and disposed of; whereupon the proper decree shall be made and entered, subject to the right of appeal to the supreme court, as provided by law.

Accounts.

In cases involving complicated accounts, or questions requiring the aid of experts, if the parties do not refer, the court may call in the aid of an accountant or other expert as an assessor. The charges to be allowed for such services shall not exceed the rate per diem commonly paid by business men for similar services, and shall be taxed as costs in the case, or paid as the court may direct.

Trial.

A trial in equity shall be conducted, as near as may be, as a trial at law is now conducted. When entered upon, it shall not be interrupted or postponed except for cause shown to, and approved by, the court or referee; and the costs of all such postponements shall be paid by the party at whose instance the same may be ordered, and shall not abide the result, or be taxed in the general bill of the successful party. Continuances for cause may be made where the list is called, with or without terms, as is now practiced in the courts of common law.

Trial by Jury.

After a case in equity is at issue upon questions of fact, either party may move a rule upon the other party to show cause, on five days' notice, why the issues of fact, or some of them, shall not be tried before a jury. If, on the return of the rule, such trial be awarded, the court shall frame the issues in the form of separate questions. The verdict rendered shall not be general, but shall consist of an answer to each question so submitted. These answers, made to inform the conscience of the chancellor, shall not be binding upon him in any case.

Trial and Argument Lists.

The preparation of trial and argument lists shall be regulated by an order of the several courts, so as to make the practice in regard thereto conform as nearly as may be practicable to the practice in the said courts in actions at law.

Injunction Cases.

Preliminary injunctions may be granted, in accordance with the present practice, on bill and injunction affidavits; but upon the hearing, at the end of four days, or such other time as may be fixed, the evidence must be taken subject to cross-examination, and ex parte affidavits will not be received. Witnesses may be examined orally before the judge, or testimony may be taken on short rule, or, when necessary, testimony may be taken before any person authorized to administer an oath, on notice to the other side to appear and cross-examine. In cases when testimony is taken on notice alone, the certificate of counsel that he had not sufficient time to enter and serve a rule shall stand in lieu of such formal entry and service.

Fees.

The fees of referees shall be adjusted upon a statement of the number of days actually occupied with the trial and the preparation of the findings and decree. Parts of days on which the parties met and adjourned shall not be included. For days actually spent in the trial and disposition of the case, a per diem shall be allowed, "fixed by the court in which the cause is pending, upon consideration of the character of the labor actually performed, but in no case to exceed twenty dollars per day. The referee shall state separately the number of days occupied in the trial, and those occupied in preparing the findings and decree." For parts of days on which meetings and adjournments have taken place, the referee shall be allowed five dollars each, to be paid by the party at whose instance the adjournment may be made, and not otherwise.

Appeals.

Whenever an appeal shall be taken from an order or decree in equity, the appellant shall file in the court below, with his notice of

appeal, a brief statement of the errors he alleges to have been made by the order or decree appealed from, or the findings on which it rests. No other errors shall be assigned in the supreme court unless leave be granted on motion and notice to the other party. If the reasons for the appeal do not affect the whole decree, and its enforcement, as to so much as is not complained of, is not inconsistent with the relief asked on appeal, leave will be granted to proceed as to that part of the decree, notwithstanding the appeal.

Stenographers.

The evidence on the trial of cases in equity may be taken by stenographers in the same manner and under the same rules as to noting exceptions and filing the notes of the trial as are in force on the law side of the several courts.

Appearance and Answers.

Unless otherwise provided by law, the defendant or defendants shall be required, in the first instance, to appear and answer the exigency of the bill, by the service upon each

defendant therein named of a printed copy thereof, on which shall be indorsed a notice in the following form:

"You are hereby notified and required to cause an appearance to be entered for you in the within-named court, and file your answer to the within bill of complaint, within fifteen days after the service hereof on you, and to observe what the said court shall direct. You are also notified that, if you fail to enter your appearance and file your answer within fifteen days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence. [Here insert date of notice.] _____,

"Solicitor for Plaintiff."

In cases in which the defendant cannot prepare his answer within fifteen days, the court may, on motion with notice, extend the time for answer, not exceeding thirty days additional.

It is further ordered that these amendments shall take effect on the first Monday of March next, and be applicable to all cases in equity put at issue, either on answer or demurrer, on or after that day.

CASES REPORTED.

	Page		Page
Abbott, Appeal of (Pa.).....	132	Barnard, Barlow v. (N. J. Err. & App.)...	597
Abell v. Brady (Md.).....	817	Barnes v. Starr (Conn.).....	980
Adams, Appeal of (Pa.).....	132	Barnes, Buchanan v. (Pa.).....	195
Adams, Willis v. (Vt.).....	1033	Bartlett, Savage v. (Md.).....	414
Aderhold v. Oil Well Supply Co. (Pa.)....	22	Bassett, Conant v. (N. J. Ch.).....	1047
Aetna Ins. Co. v. Confer (Pa.).....	153	Bates v. Keith (Vt.).....	865
Albert v. Albert (Md.).....	388	Baxter, Jenkins v. (Pa.).....	682
Albert, Gernert v. (Pa.).....	576	Bay, Posner v. (Md.).....	1096
Alexander v. City of Elizabeth (N. J. Sup.)	51	Bealmear, Burnett v. (Md.).....	898
Allegheny Nat. Bank, Appeal of (Pa.)....	158	Bechtold v. Read (N. J. Ch.).....	264
Allen v. Kirwan (Pa.).....	495	Beck v. Ashkettle (R. I.).....	333
Allen v. Woodruff (Conn.).....	532	Beede v. Fraser (Vt.).....	880
Allen, Hughes v. (Vt.).....	882	Behling v. Southwest Pennsylvania Pipe	
Almy, State v. (N. H.).....	372	Lines (Pa.).....	777
Alpaugh v. Wilson (N. J. Ch.).....	722	Beihof v. Loeffert (Pa.).....	216
Altemus, Appeals of (Pa.).....	1068	Beihof v. Loeffert (Pa.).....	217
Altouna & P. Connecting R. Co. v. Tyrone		Bell, Taylor v. (Pa.).....	208
& C. R. Co. (Pa.).....	997	Benner v. Weeks (Pa.).....	355
American Surety Co., Borden v. (Pa.)....	301	Bennett v. Howard (R. I.).....	333
American Telegraph & Telephone Co.,		Bernhardt v. Western Pennsylvania R. Co.	
Brunner v. (Pa.).....	690	(Pa.).....	140
Ammon, Hassinger v. (Pa.).....	679	Berry, Potter v. (N. J. Sup.).....	668
Amos H. Van Horn v. Coogan (N. J. Ch.)	788	Bethlehem Iron Co., Naylor v. (Pa.).....	1011
Anthony v. City of Providence (R. I.)....	766	Bigley v. Borough of Bellevue (Pa.).....	23
Armstrong v. Michener (Pa.).....	447	Billings, Hahn v. (R. I.).....	1027
Armstrong v. United States Exp. Co. (Pa.)	448	Birch v. Conrow (Pa.).....	1009
Arnold v. Philadelphia & R. R. Co. (Pa.)...	941	Bird, Conover v. (N. J. Sup.).....	428
Arnold, Long Island Brick Co. v. (R. I.)	801	Bitner, Zimmerman v. (Md.).....	820
Arnreich, North Baltimore Pass. R. Co. v.		Bitterling v. Deshler (Pa.).....	445
(Md.).....	809	Bittle v. Camden & A. R. Co. (N. J. Err.	
Arthurholt v. Susquehanna Mut. Fire Ins.		& App.).....	305
Co. of Harrisburg (Pa.).....	197	Bittle v. State (Md.).....	405
Ashbach, Hoats v. (Pa.).....	437	Black, Appeal of (Pa.).....	238
Ashburner's Estate, In re (Pa.).....	361	Black v. Herring (Md.).....	1063
Ashhurst, Peckham v. (R. I.).....	337	Black, Powers v. (Pa.).....	133
Ashkettle, Beck v. (R. I.).....	333	Blackmer's Estate, In re (Vt.).....	419
Atherton, Appeal of (Pa.).....	934	Blairstown Creamery Ass'n, Cook v. (N.	
Atkinson v. Farrington Co. (N. J. Ch.)...	315	J. Sup.).....	384
Atlantic City, Wood v. (N. J. Sup.).....	427	Blairstown Creamery Ass'n, Raub v. (N.	
Avia v. Borough of Vineland (N. J. Sup.)...	1039	J. Sup.).....	384
Axford v. Thomas (Pa.).....	443	Blandin v. Goodwin (Md.).....	894
		Blaney, Sill v. (Pa.).....	251
Backus, Tarrant v. (Conn.).....	46	Board of Aldermen of City of Newport,	
Baden Gas Co., Cleminger v. (Pa.).....	293	State v. (R. I.).....	347
Badger v. Whitcomb (Vt.).....	877	Board of Chosen Freeholders of Cumber-	
Bailey, Appeal of (Pa.).....	932	land, Lewis v. (N. J. Sup.).....	553
Bailey, Brown v. (Pa.).....	245	Board of Chosen Freeholders of Mercer	
Bain, Hall v. (R. I.).....	371	County, Mechanics' Mut. Loan Ass'n v.	
Baker, Hopkins v. (Md.).....	284	(N. J. Sup.).....	810
Baker, Kennedy v. (Pa.).....	252	Board of Chosen Freeholders of Morris	
Baker, Miller v. (Pa.).....	648	County v. Hough (N. J. Err. & App.)...	86
Baldwin v. Town of Worcester (Vt.).....	633	Board of Police Com'rs of City of Cam-	
Ballin, Kalmus v. (N. J. Err. & App.)....	791	den, Dodd v. (N. J. Sup.).....	311
Ballin, Kantrovitch v. (N. J. Err. & App.)	791	Board of Public Works of City of Trenton,	
Ballman v. Heron (Pa.).....	914	Green v. (N. J. Sup.).....	1043
Baltimore Baseball Club & Exhibition Co.		Board of Public Works of City of Trenton,	
of Baltimore City v. Pickett (Md.).....	279	Roebing v. (N. J. Sup.).....	1043
Baltimore Breweries' Co. v. Ranstead		Board of Street & Water Com'rs of Jer-	
(Md.).....	273	sey City, McDermott v. (N. J. Sup.).....	424
Baltimore Traction Co. of Baltimore City		Board of Township Committee of Township	
v. State (Md.).....	307	of Kearney, Hudson County Catholic	
Baltimore & O. R. Co., Duggan v. (Pa.)...	182	Protectory v. (N. J. Sup.).....	1043
Baltimore & O. R. Co., Duggan v. (Pa.)...	186	Bodwell, In re (Vt.).....	989
Baltimore & O. R. Co., Keng v. (Pa.).....	940	Bodwell v. Bodwell (Vt.).....	870
Bancroft, Oakland Cemetery Co. v. (Pa.)...	1021	Bole v. New Hampshire Fire Ins. Co. (Pa.)	205
Bank of America Loan & Trust Co. v. Bur-		Bond v. State (Md.).....	407
dick (R. I.).....	907	Bonnet v. Hope Manuf'g Co. (N. J. Err. &	
Barber, City of Philadelphia v. (Pa.).....	644	App.).....	601
Barber, Douglass v. (R. I.).....	805	Booth v. City of Bayonne (N. J. Sup.)...	381
Barhight v. Tammany (Pa.).....	135	Booth v. City of Philadelphia (Pa.).....	993
Barker, Frishmuth v. (Pa.).....	368	Borden v. American Surety Co. (Pa.).....	301
Barker's Estate, In re (Pa.).....	365	Borough of Bellevue, Bigley v. (Pa.).....	23
Barker's Estate, In re (Pa.).....	368	Borough of Chambersburg, Linn v. (Pa.)	842
Barlow v. Barnard (N. J. Err. & App.)...	597	Borough of Honeybrook, Trego v. (Pa.)...	639

	Page		Page
Borough of McKeesport v. Wood (Pa.)...	574	Catsburg Coal Co. v. Vanesse v. (Pa.).....	200
Borough of Millvale, Gschwend v. (Pa.)...	139	Central Bank, Bughman v. (Pa.).....	209
Borough of Neptune City, White v. (N. J. Sup.).....	378	Central New Jersey Land & Imp. Co. v. City of Bayonne (N. J. Err. & App.)....	713
Borough of Norwalk, Norwalk Gaslight Co. v. (Conn.).....	32	Central R. Co. v. Brewer (Md.).....	615
Borough of Sewickley, Commissioners of Sewickley Waterworks v. (Pa.).....	169	Central Trust Co. v. Continental Iron Works (N. J. Err. & App.).....	595
Borough of Sharon Hill, In re (Pa.).....	636	Chadwick v. Chadwick (N. J. Ch.).....	1051
Borough of Taylor, In re (Pa.).....	934	Chambers, Appeal of (Pa.).....	123
Borough of Versailles, In re (Pa.).....	230	Charroux, Lauzon v. (R. I.).....	975
Borough of Vineland, Avis v. (N. J. Sup.)	1039	Cherbonnier v. Goodwin (Md.).....	594
Boston & L. R. Co., Morse v. (N. H.).....	286	Cherington, Long v. (Pa.).....	1086
Bottom, Miltimore v. (Vt.).....	872	Chestnut St. Nat. Bank v. Ellis (Pa.).....	1062
Bourn, Loomis v. (Conn.).....	569	Childs, Appeal of (Pa.).....	132
Bowdoin v. Hammond (Md.).....	769	Chilton v. City of Carbondale (R. I.).....	838
Bowen v. Lincoln Bldg. & Loan Ass'n of Jersey City (N. J. Err. & App.).....	67	Choquette v. City of Woonsocket (R. I.).....	346
Bowling v. Turner (Md.).....	1100	City of Allegheny v. Millvale, E. & S. St. R. Co. (Pa.).....	202
Boyd v. Sachs (Md.).....	391	City of Bayonne, Booth v. (N. J. Sup.).....	581
Bradfield, City of Philadelphia v. (Pa.).....	360	City of Bayonne, Central New Jersey Land & Imp. Co. v. (N. J. Err. & App.).....	713
Bradley v. West Chester St. R. Co. (Pa.)...	500	City of Bayonne, Taylor v. (N. J. Sup.)....	380
Brady v. Brady, three cases (Md.).....	515	City of Bridgeport, Randall v. (Conn.)....	525
Brady v. City of Wilkes Barre (Pa.).....	1085	City of Camden, Flancher v. (N. J. Sup.)....	82
Brady v. Evans (Md.).....	1061	City of Carbondale, Chilton v. (Pa.).....	833
Brady, Abell v. (Md.).....	817	City of Elizabeth, Alexander v. (N. J. Sup.).....	51
Brady, Naylor v. (Md.).....	515	City of Lancaster, Lancaster County v. (Pa.).....	854
Brady, Sadtler v. (Md.).....	515	City of Newark v. Waters (N. J. Sup.).....	717
Brewer, Central R. Co. v. (Md.).....	615	City of New London, Gardner v. (Conn.)....	42
Breyer, Commonwealth v. (Pa.).....	824	City of Passaic, Post v. (N. J. Sup.).....	553
Brower, Lennox v. (Pa.).....	830	City of Philadelphia v. Barber (Pa.).....	644
Brown, Appeal of (Pa.).....	646	City of Philadelphia v. Bradfield (Pa.).....	360
Brown v. Bailey (Pa.).....	245	City of Philadelphia v. Henry (Pa.).....	946
Brown v. Brown, two cases (Vt.).....	668	City of Philadelphia v. Henry, two cases (Pa.).....	947
Brown v. Burr (Pa.).....	828	City of Philadelphia v. Masonic Home of Pennsylvania (Pa.).....	954
Brown, Hollis v. (Pa.).....	399	City of Philadelphia v. Meighan (Pa.).....	304
Brown, Landon v. (Pa.).....	921	City of Philadelphia v. Merkle v. (Pa.).....	360
Brown, Mulford v. (N. J. Ch.).....	513	City of Philadelphia, Booth v. (Pa.).....	993
Brown, Timlin v. (Pa.).....	236	City of Philadelphia, Clabby v. (Pa.).....	996
Brundred v. Egbert (Pa.).....	142	City of Philadelphia, Colligan v. (Pa.).....	993
Brundred, Wiley v. (Pa.).....	173	City of Philadelphia, Fitzpatrick v. (Pa.)....	998
Brundred, Wiley v. (Pa.).....	180	City of Philadelphia, Gallagher v., two cases (Pa.).....	998
Brunner v. American Telegraph & Telephone Co. (Pa.).....	690	City of Philadelphia, Johnson v. (Pa.).....	993
Bryn Mawr Hotel Co., Walton v. (Pa.)...	438	City of Philadelphia, McCloskey v. (Pa.)....	993
Buchanan v. Barnes (Pa.).....	195	City of Philadelphia, Mellor v. (Pa.).....	991
Buchanan v. Kerr (Pa.).....	195	City of Philadelphia, Ottersbach v. (Pa.)....	991
Buchanan v. Town of Barre (Vt.).....	878	City of Philadelphia, Peters v. (Pa.).....	996
Budd, Lear v. (N. J. Sup.).....	800	City of Philadelphia, Pilkington v. (Pa.)....	993
Bughman v. Central Bank (Pa.).....	209	City of Philadelphia, Powell v. (Pa.).....	993
Builders' Iron Foundry, De Marcho v. (R. I.).....	661	City of Philadelphia, Reyenthaler v. (Pa.)....	940
Bumstead v. Judges of Court of Monmouth Common Pleas (N. J. Sup.).....	558	City of Philadelphia, Righter v. (Pa.).....	1015
Bunnell, Wells v. (Pa.).....	851	City of Philadelphia, Shaw v. (Pa.).....	354
Burdick, Bank of America Loan & Trust Co. v. (R. I.).....	967	City of Philadelphia, Smith v. (Pa.).....	993
Burgess v. Nash (Vt.).....	419	City of Philadelphia, Taylor v. (Pa.).....	993
Burnet v. Crane (N. J. Err. & App.).....	591	City of Philadelphia, Winnals v., two cases (Pa.).....	993
Burnett v. Bealmear (Md.).....	898	City of Pittsburgh, Dawson v. (Pa.).....	171
Burnham, Jennings v. (N. J. Err. & App.)	1048	City of Pittsburgh, Ferguson v. (Pa.).....	118
Burr, Brown v. (Pa.).....	828	City of Providence, Anthony v. (R. I.)....	766
Busch v. Groschwitz (Pa.).....	438	City of Providence, Goddard v. (R. I.).....	765
Busch v. Groschwitz, three cases (Pa.)....	439	City of Scranton v. Bush (Pa.).....	926
Bush, City of Scranton v. (Pa.).....	926	City of Waterbury, Shannahan v. (Conn.)....	611
Butler Sav. Bank v. Osborne (Pa.).....	163	City of Wilkes Barre, Brady v. (Pa.).....	1085
Butterworth, Commonwealth v. (Pa.).....	507	City of Woonsocket, Choquette v. (R. I.)....	346
Callahan, Hopper v. (Md.).....	385	City of Woonsocket, Daigneault v. (R. I.)....	346
Cambridge Female Seminary, Webster v. (Md.).....	25	City & Suburban R. Co., Green v. (Md.)....	626
Camden & A. R. Co., Bittle v. (N. J. Err. & App.).....	305	Clabby v. City of Philadelphia (Pa.).....	993
Campbell, Gormley v. (Pa.).....	353	Clapp v. Hoffman (Pa.).....	362
Campbell & Zell Co. v. Roediger (Md.)....	901	Clark, Meade v. (Pa.).....	214
Carpenter v. United States Life Ins. Co. of New York (Pa.).....	943	Clarke, Githers v. (Pa.).....	232
Carpenter, Senft v. (R. I.).....	963	Clarke, Johnson v. (N. J. Ch.).....	558
Carroll v. Williams (R. I.).....	902	Clement's Estate, In re (Pa.).....	932
Carson, Foster v. (Pa.).....	356	Cleminger v. Baden Gas Co. (Pa.).....	293
Carson, Rooney v. (Pa.).....	996	Clifford v. Prudential Ins. Co. of America (Pa.).....	1085
Cass v. Pennsylvania Co. (Pa.).....	161	Cochran v. Pew (Pa.).....	219
Cassidy, Catanach v. (Pa.).....	297	Colburn v. Town of Groton (N. H.).....	95
Caswell v. Caswell (Vt.).....	988	Coleman's Estate, In re (Pa.).....	137
Catanach v. Cassidy (Pa.).....	297	Colgan's Estate, In re (Pa.).....	946
Cathers, Medary v. (Pa.).....	1012	Colligan v. City of Philadelphia (Pa.).....	993
		Collignon v. Collignon (N. J. Ch.).....	794

	Page		Page
Collins v. Richardson (Vt.).....	877	Devausney, In re (N. J. Ch.).....	459
Collins v. Richmond Stove Co. (Conn.).....	534	Devecmon, Kuykendall v. (Md.).....	412
Commercial Union Tel. Co., Rugg v. (Vt.).....	1036	Dickinson v. Grand Lodge A. O. U. W. of Pennsylvania (Pa.).....	293
Commissioners of Calvert County v. Gantt (Md.).....	101	Directors of Poor and of House of Employment of Montgomery County v. Nyce (Pa.).....	990
Commissioners of Sewickley Waterworks v. Borough of Sewickley (Pa.).....	169	Dirickson v. Showell (Md.).....	806
Commonwealth, Appeal of (Pa.).....	187	Disborough v. Disborough (N. J. Err. & App.).....	3
Commonwealth, Appeal of (Pa.).....	353	D. L. Esterly Sons, Keiser v. (Pa.).....	636
Commonwealth, Appeal of (Pa.).....	354	Dodd v. Board of Police Com'rs of City of Camden (N. J. Sup.).....	311
Commonwealth, Appeal of (Pa.).....	1071	Dodson v. Taylor (N. J. Sup.).....	318
Commonwealth v. Breyasse (Pa.).....	824	Donnelly, Warren Manuf'g Co. v. (N. J. Sup.).....	671
Commonwealth v. Coyle (Pa.).....	507	Dorland, Goldberg v. (N. J. Sup.).....	569
Commonwealth v. Coyle (Pa.).....	576	Douglas v. James (Vt.).....	319
Commonwealth v. Haeseler (Pa.).....	1014	Douglass v. Barber (R. I.).....	805
Commonwealth v. Hinkson (Pa.).....	1081	Downey v. Pittsburgh, A. & M. Traction Co. (Pa.).....	1019
Commonwealth v. Matz (Pa.).....	1079	Draper v. Monroe (R. I.).....	840
Commonwealth v. Sage (Pa.).....	863	Drost v. Hall (N. J. Ch.).....	81
Commonwealth v. Taylor (Pa.).....	348	Drovers' & Mechanics' Nat. Bank, Putzell v. (Md.).....	276
Commonwealth v. Thomas Potter, Sons & Co. (Pa.).....	492	Duff v. Patterson (Pa.).....	250
Conant v. Bassett (N. J. Ch.).....	1047	Duggan v. Baltimore & O. R. Co. (Pa.).....	182
Condon v. Sprigg (Md.).....	395	Duggan v. Baltimore & O. R. Co. (Pa.).....	186
Confer, Aetna Ins. Co. v. (Pa.).....	153	Dunn, Leavitt v. (N. J. Err. & App.).....	590
Conklin v. Davis (Conn.).....	537	Dunnington v. Evans (Md.).....	1097
Connolly v. Lerche, two cases (N. J. Sup.).....	430	Dunseath v. Pittsburgh, A. & M. Traction Co. (Pa.).....	1021
Conover v. Bird (N. J. Sup.).....	428	Dyer, Harris v. (R. I.).....	971
Conrow, Birch v. (Pa.).....	1009	Earl, Winters v. (N. J. Ch.).....	15
Conroy, Greenway v. (Pa.).....	692	Earle, Lynch v. (R. I.).....	763
Conschohocken Tube Co. v. Iron Car Equipment Co. (Pa.).....	1119	East End Homestead Loan & Trust Co., Fuller v. (Pa.).....	148
Consolidated Gas Co. of Baltimore City v. Graff (Md.).....	391	Edelman v. Latshaw (Pa.).....	475
Consumers' Water Co., Stroud v. (N. J. Sup.).....	578	Edelstein v. Fraser (N. J. Sup.).....	434
Continental Iron Works, Central Trust Co. v. (N. J. Err. & App.).....	595	Edison Electric Light Co. v. McCorkell (Pa.).....	1083
Coogan, Amos H. Van Horn v. (N. J. Ch.).....	788	Edwards, Kearns v. (N. J. Sup.).....	723
Cook v. Blairstown Creamery Ass'n (N. J. Sup.).....	384	Egan, Hill v. (Pa.).....	646
Cook v. Town of Barton (Vt.).....	631	Egbert, Brundred v. (Pa.).....	142
Corning, Tilton v. (N. H.).....	17	Elliott v. Newport St. R. Co. (R. I.).....	339
Corrigan, Murphy v. (Pa.).....	947	Ellis, Chestnut St. Nat. Bank v. (Pa.).....	1082
Coster, Wallis Iron Works v. (N. J. Sup.).....	592	Emory v. Goodwin (Md.).....	894
Cote v. Murphy (Pa.).....	190	Enterprise Powder Manuf'g Co., Daw v. (Pa.).....	841
Coulston's Estate, In re (Pa.).....	1020	Esterly Sons, Keiser v. (Pa.).....	636
Council of Town of Cranston, In re (R. I.).....	608	Evans v. Reading Chemical & Fertilizing Co. (Pa.).....	702
Coyle, Commonwealth v. (Pa.).....	576	Evans, Brady v. (Md.).....	1061
Coyle, Commonwealth v. (Pa.).....	634	Evans, Dunnington v. (Md.).....	1097
Cram, Lee Bros. Furniture Co. v. (Conn.).....	540	Ewing, Appeal of (Pa.).....	186
Crandall, Appeal of (Conn.).....	531	Exchange Bank of Wheeling v. Sutton Bank (Md.).....	563
Crane, Burnet v. (N. J. Err. & App.).....	591	Eyre, Smith v. (Pa.).....	1005
Crawford v. Simon (Pa.).....	491	Fahey, Mottu v. (Md.).....	387
Crescent Pipe-Line Co., Michael v. (Pa.).....	204	Fairchild, Rhees v. (Pa.).....	928
Crocker v. Hopps (Md.).....	99	Faist, Lady Lincoln Lodge v. (N. J. Ch.).....	555
Cunningham v. Fourth Baptist Church (Pa.).....	490	Faitoute v. Sayre (N. J. Ch.).....	711
Curtis, Powell v. (Md.).....	390	Farmers' Mut. Fire Ins. Co. of Salem County, Garrison v. (N. J. Sup.).....	8
Daigneault v. City of Woonsocket (R. I.).....	346	Farrington Co., Atkinson v. (N. J. Ch.).....	315
Dalrymple, Warren Manuf'g Co. v. (N. J. Sup.).....	671	Felts v. Delaware, L. & W. R. Co. (Pa.).....	838
Daly, Reilly v. (Pa.).....	493	Fennell v. Guffey (Pa.).....	1118
Dammann v. Dammann (Md.).....	408	Fenner, Appeal of (Pa.).....	1084
Darby Borough School Dist., Appeal of (Pa.).....	636	Ferguson, Appeal of (Pa.).....	130
Darlington v. Darlington (Pa.).....	503	Ferguson, Appeal of (Pa.).....	132
Davis, Conklin v. (Conn.).....	537	Ferguson v. City of Pittsburgh (Pa.).....	118
Davis, Lippincott v. (N. J. Err. & App.).....	587	Ferguson v. Lauterstein (Pa.).....	852
Davis, Shaw v. (Md.).....	619	Fey v. Hinkleman (Md.).....	886
Davis, Waterman v. (Vt.).....	664	Fidelity Insurance, Trust & Safe-Deposit Co., Appeal of (Pa.).....	1079
Daw v. Enterprise Powder Manuf'g Co. (Pa.).....	841	Fidelity Title & Deposit Co., Keepers v., two cases (N. J. Err. & App.).....	535
Dawson v. City of Pittsburgh (Pa.).....	171	Fidelity Title & Trust Co., Appeal of (Pa.).....	301
Dayton, Tappan v. (N. J. Prerog.).....	1	Fidelity & Casualty Co. of New York, Phillipsburg Horse-Car Co. v. (Pa.).....	823
Deacle v. Deacle (Pa.).....	839	Fidelity & Deposit Co. of Maryland v. Haines (Md.).....	393
Dean v. Rounds (R. I.).....	802	Filer, Wheeler & Wilson Manuf'g Co. v. (N. J. Ch.).....	13
Deering v. Smith (Vt.).....	630		
De Hart, In re (N. J. Err. & App.).....	603		
Delaware L. & W. R. Co., Felts v. (Pa.).....	838		
De Marcho v. Builders' Iron Foundry (R. I.).....	661		
Denby, Hanes v. (N. J. Ch.).....	708		
Denniston v. Philadelphia Co. (Pa.).....	1007		
Deahler, Bitterling v. (Pa.).....	445		

	Page		Page
Firemen's Ins. Co. of Chicago, Strunk v. (Pa.)	779	Goodwin, Blandin v. (Md.)	894
First Baptist Church of Hoboken v. Syme (N. J. Ch.)	461	Goodwin, Cherbonnier v. (Md.)	894
First Nat. Bank, Wright v. (N. J. Ch.)	719	Goodwin, Emory v. (Md.)	894
First Nat. Bank of Baltimore v. Lindenstruth (Md.)	807	Gormley v. Campbell (Pa.)	853
First Nat. Bank of Plattsburg v. Post (Vt.)	989	Gormley, Wettengel v. (Pa.)	934
Fish, Marsh v. (Vt.)	987	Graeff v. Philadelphia & R. R. Co. (Pa.)	1107
Fisher, Appeal of (Pa.)	1077	Graff, Consolidated Gas Co. of Baltimore City v. (Md.)	391
Fishing Creek Lumber Co., In re (Pa.)	1018	Granby Mining & Smelting Co. v. Lavery (Pa.)	207
Fiske v. Paine (R. I.)	1026	Grand Lodge A. O. U. W. of Pennsylvania, Dickinson v. (Pa.)	293
Fiske, State v. (Conn.)	572	Granger, Hanna v. (R. I.)	639
Fiske, State v. (R. I.)	348	Green v. Board of Public Works of City of Trenton (N. J. Sup.)	1043
Fitzpatrick v. City of Philadelphia (Pa.)	993	Green v. City & Suburban R. Co. (Md.)	626
Flaucher v. City of Camden (N. J. Sup.)	82	Green v. Tulane (N. J. Ch.)	9
Flint, State v. (Conn.)	28	Green, Lee v. (N. J. Ch.)	904
Floyd, Robinson v. (Pa.)	258	Greenway v. Conroy (Pa.)	692
Folsom, Order of Solon v. (Pa.)	1078	Greenwood v. Henry (N. J. Ch.)	1053
Foot v. Woodworth (Vt.)	1034	Gregg, Holmes v. (N. H.)	17
Foreman v. Pennsylvania R. Co. (Pa.)	353	Gregg, Pennington v. (Md.)	565
Forney's Estate, In re (Pa.)	1086	Gregg, Thomas v. (Md.)	565
Ft. Pitt Bldg. & Loan Ass'n v. Model Plan Bldg. & Loan Ass'n (Pa.)	215	Grocers' Supply & Storage Co. of Pittsburgh, Tower v. (Pa.)	229
Ft. Pitt Nat. Bank of Pittsburgh, Iron City Nat. Bank of Pittsburgh v. (Pa.)	195	Gross v. Partenheimer (Pa.)	370
Foster v. Carson (Pa.)	356	Grosz, Busch v. (Pa.)	433
Fourth Baptist Church, Cunningham v. (Pa.)	490	Grosz, Busch v., three cases (Pa.)	439
Frankford & S. P. City Pass. R. Co., Kraut v. (Pa.)	783	Gschwend v. Borough of Millvale (Pa.)	139
Frankford & S. P. C. Pass. R. Co., Lott v. (Pa.)	299	Guckert v. Hacke (Pa.)	249
Frantz, McCleary v. (Pa.)	929	Guffey, Fennell v. (Pa.)	1118
Fraser, Beede v. (Vt.)	890	Guffey, Wolf v. (Pa.)	1117
Fraser, Edelstein v. (N. J. Sup.)	434	Gump v. Sibley (Md.)	977
Frazee v. Frazee (Md.)	1105	Gundelsweiler v. H. W. Jayne Chemical Co. (Pa.)	946
Freemann, Johnson v. (Pa.)	786	Hacke, Guckert v. (Pa.)	249
Freiberg v. Stoddart (Pa.)	1111	Haeseler, Commonwealth v. (Pa.)	1014
Fried, Taylor v. (Pa.)	993	Hagy v. Poike (Pa.)	846
Friendship Liberal League, Appeal of (Pa.)	303	Hahn v. Billings (R. I.)	1027
Frishmuth v. Barker (Pa.)	368	Hahn v. Hutchinson (Pa.)	167
Fritts v. New York & N. E. R. Co. (Conn.)	529	Haines v. Merrill Trust Co. (N. J. Err. & App.)	796
Fritz, Johnstone v. (Pa.)	148	Haines, Fidelity & Deposit Co. of Maryland v. (Md.)	393
Fritz's Estate, In re (Pa.)	642	Haldeman, J. C. McNaughton Co. v. (Pa.)	647
Fry v. Myers (N. J. Sup.)	425	Hale's Estate, In re (Pa.)	1071
Fullam v. Rose (Pa.)	497	Halfman v. Pennsylvania Boiler Ins. Co. (Pa.)	837
Fuller v. East End Homestead Loan & Trust Co. (Pa.)	148	Halfmann, Supplee v. (Pa.)	941
Fuller v. Mowry (R. I.)	606	Hall v. Bain (R. I.)	371
Fulmer, Jenks v. (Pa.)	841	Hall v. Otterson (N. J. Ch.)	907
Gallagher v. City of Philadelphia, two cases (Pa.)	993	Hall v. Pierson (Conn.)	544
Gantt, Commissioners of Calvert County v. (Md.)	101	Hall, Drost v. (N. J. Ch.)	81
Gardiner, Moore v. (Pa.)	1018	Hall, Phillips v. (Pa.)	502
Gardner v. City of New London (Conn.)	42	Hallenbeck v. Getz (Conn.)	519
Garrison v. Farmers' Mut. Fire Ins. Co. of Salem County (N. J. Sup.)	8	Hammer, Woelfel v. (Pa.)	146
Garrison v. Hill (Md.)	1062	Hammer, Woelfel v. (Pa.)	147
Garst, Oakdale Manufg Co. v. (R. I.)	973	Hammer's Estate, In re (Pa.)	231
George, Western Pennsylvania Gas Co. v. (Pa.)	1004	Hammond, Bowdoin v. (Md.)	769
Gerber v. Meredith (Pa.)	638	Hampton, Hawley v. (Pa.)	471
Gerhard's Estate, In re (Pa.)	684	Hanaford v. Hawkins (R. I.)	605
German-American Ins. Co. of New York, McKelvy v. (Pa.)	1115	Hanes v. Denby (N. J. Ch.)	798
German Sav. Bank of Baltimore City v. Renshaw (Md.)	281	Haney v. Pittsburg, A. & M. Traction Co. (Pa.)	235
Gernert v. Albert (Pa.)	576	Hanna v. Granger (R. I.)	650
Getz, Hallenbeck v. (Conn.)	519	Hanno, Sherman v. (N. H.)	18
Gibb, Appeal of (Pa.)	1023	Hanover Nat. Bank of New York, Appeal of (Pa.)	1077
Gibson's Estate, In re (Pa.)	1079	Hardy v. Hardy (Md.)	887
Gilbert, Kelly v. (Md.)	274	Hardy, La Farrier v. (Vt.)	1030
Gilmore, Sommer v. (Pa.)	654	Hare v. Headley (N. J. Ch.)	452
Githers v. Clarke (Pa.)	232	Harris, Appeal of (Pa.)	927
Glorieux v. Schwartz (N. J. Ch.)	470	Harris, In re (Del. Ch.)	329
Goddard v. City of Providence (R. I.)	765	Harris v. Dyer (R. I.)	971
Goff, Peck v. (R. I.)	1029	Harris v. Schuylkill River E. S. R. Co. (Pa.)	296
Goldberg v. Dorland (N. J. Sup.)	599	Harris, Mowry v. (R. I.)	657
Goodenough, Pennsylvania R. Co. v. (N. J. Err. & App.)	3	Harrison v. Reeves (Pa.)	653
Goodno, Watson v. (Vt.)	987	Hartman v. Pittsburg Inclined Plane Co. (Pa.)	145
Goodwin v. Schott (Pa.)	356	Haslet v. Kent (Pa.)	501
Goodwin v. Schott (Pa.)	358	Hassinger v. Ammon (Pa.)	679
		Hawkins v. Young (N. J. Ch.)	511
		Hawkins, Hanaford v. (R. I.)	605
		Hawley v. Hampton (Pa.)	471

	Page		Page
Hayes, Savings Bank of Newport v. (R. I.)	966	Johnson v. Reading City Pass. R. Co. (Pa.)	1001
Haynes v. Synnot (Pa.)	882	Johnson v. Safe-Deposit & Trust Co. of Baltimore (Md.)	890
Hays' Estate, In re (Pa.)	158	Johnson v. Smith (Pa.)	144
Headley, Hare v. (N. J. Ch.)	452	Johnson, Labbee v. (Vt.)	986
Heere v. Penn Nat. Bank of Reading (Pa.)	688	Johnston, Appeal of (Pa.)	139
Heinour v. Jones (Pa.)	228	Johnstone v. Fritz (Pa.)	148
Henry, Appeal of (Pa.)	151	Jones, Heinour v. (Pa.)	228
Henry, City of Philadelphia v. (Pa.)	946	Joyce, Moore v. (Pa.)	1080
Henry, City of Philadelphia v., two cases (Pa.)	947	Judefind v. State (Md.)	406
Henry, Greenwood v. (N. J. Ch.)	1053	Judges of Court of Monmouth Common Pleas, Bumstead v. (N. J. Sup.)	558
Henry, Phillips v. (Pa.)	477	Jutte, Terreri v. (Pa.)	226
Heron, Ballman v. (Pa.)	914	Kalmus v. Ballin (N. J. Err. & App.)	791
Herring, Black v. (Md.)	1063	Kantrovitch v. Ballin (N. J. Err. & App.)	791
Heston v. Heston (N. J. Ch.)	8	Kaskell, North Baltimore Pass. R. Co. v. (Md.)	410
Heubler, Price v. (Conn.)	524	Kearns v. Edwards (N. J. Sup.)	723
Hill v. Egan (Pa.)	646	Keeler, Appeal of (Pa.)	1018
Hill, Garrison v. (Md.)	1062	Keena, State v. (Conn.)	522
Hillside Coal & Iron Co., Plummer v. (Pa.)	853	Keepers v. Fidelity Title & Deposit Co., two cases (N. J. Err. & App.)	586
Hinchman v. Philadelphia & W. C. T. R. Co. (Pa.)	652	Keiser v. D. L. Esterly Sons (Pa.)	636
Hines, Hodenpyl v. (Pa.)	825	Kelth, Bates v. (Vt.)	865
Hinkleman v. Fey (Md.)	886	Kelley v. Ryder (R. I.)	907
Hinkson, Commonwealth v. (Pa.)	1081	Kelly v. Gilbert (Md.)	274
Hiss v. Welk (Md.)	400	Kelly v. Northrop (Pa.)	364
Hoats v. Aschbach (Pa.)	437	Kelly, Safe-Deposit & Trust Co. of Pittsburgh v., two cases (Pa.)	221
Hodenpyl v. Hines (Pa.)	825	Keng v. Baltimore & O. R. Co. (Pa.)	940
Hodges' Estate, In re (Vt.)	663	Kennedy v. Baker (Pa.)	252
Hodgson, State v. (Vt.)	1089	Kennedy v. McKennedy (Pa.)	241
Hoffman v. Whelan (Pa.)	498	Kenny v. O'Neil (N. J. Sup.)	537
Hoffman, Clapp v. (Pa.)	363	Kent, Haslet v. (Pa.)	501
Hoffmeister v. Pennsylvania R. Co. (Pa.)	945	Kerr, Buchanan v. (Pa.)	136
Holley v. Town and Borough of Torrington (Conn.)	613	Kerr's Estate, In re (Pa.)	354
Hollis v. Brown (Pa.)	360	Keystone Watch-Case Co., Appeal of (Pa.)	1003
Holmes v. Gregg (N. H.)	17	Kirby, Mergenthaler v. (Md.)	1065
Hook v. Mutual Fire Ins. Co. of Berks County (Pa.)	690	Kirwan, Allen v. (Pa.)	495
Hope Manufg Co., Bonnet v. (N. J. Err. & App.)	601	Klages v. Philadelphia & R. Terminal R. Co. (Pa.)	862
Hopkins v. Baker (Md.)	284	Knight, Thropp v. (N. J. Ch.)	1037
Hopper v. Callahan (Md.)	885	Knight's Estate, In re (Pa.)	303
Hopps, Crocker v. (Md.)	99	Koenigsberg v. Lennig (Pa.)	1016
Hough, Board of Chosen Freeholders of Morris County v. (N. J. Err. & App.)	86	Kopitzsch Soap Co., Penn Nat. Bank of Reading v. (Pa.)	1077
Howard, Appeal of (Pa.)	915	Kraut v. Frankford & S. P. City Pass. R. Co. (Pa.)	733
Howard, Bennett v. (R. I.)	333	Kuser, Lovegrove v. (N. J. Sup.)	313
Hoyt v. McNally (Vt.)	417	Kuykendall v. Devecmon (Md.)	412
Hudson County Catholic Protectory v. Board of Township Committee of Township of Kearney (N. J. Sup.)	1043	Labbee v. Johnson (Vt.)	986
Hughes v. Allen (Vt.)	882	Lackawanna Tp., In re (Pa.)	927
Hummel's Estate, In re (Pa.)	1113	Lady Lincoln Lodge v. Faist (N. J. Ch.)	555
Humphreys v. Slemons (Md.)	1101	La Farrier v. Hardy (Vt.)	1030
Hutchinson, Hahn v. (Pa.)	167	Lancaster County v. City of Lancaster (Pa.)	854
H. W. Jayne Chemical Co., Gundelsweiler v. (Pa.)	946	Landon v. Brown (Pa.)	921
Illingworth v. Rowe (N. J. Ch.)	456	Lane, Raphael v. (N. J. Sup.)	421
Inhabitants of Township of Pohatcong, Merrell v. (N. J. Sup.)	673	Langdon v. Templeton (Vt.)	896
Iron Car Equipment Co., Conshohocken Tube Co. v. (Pa.)	1119	Larich v. Moles (R. I.)	661
Iron City Nat. Bank of Pittsburgh v. Ft. Pitt Nat. Bank of Pittsburgh (Pa.)	195	Latshaw, Edelman v. (Pa.)	475
Irwin's Estate, In re (Pa.)	505	Lauterstein, Ferguson v. (Pa.)	852
Jackson v. Pittsburg, A. & M. Traction Co. (Pa.)	257	Leauzon v. Charroux (R. I.)	975
Jackson, Wolcott v. (N. J. Ch.)	1045	Lavery, Granby Mining & Smelting Co. v. (Pa.)	207
Jacobus v. Meskill (N. J. Sup.)	383	Lawrence, Strouse v. (Pa.)	930
James, Douglas v. (Vt.)	319	Lear v. Budd (N. J. Sup.)	809
Jamieson, In re (R. I.)	333	Leavitt v. Dunn (N. J. Err. & App.)	590
Jarecki Manufg Co., Appeal of (Pa.)	180	Lee v. Green (N. J. Ch.)	904
Jarman, Appeal of (Pa.)	1020	Lee Bros. Furniture Co. v. Cram (Conn.)	540
Jayne Chemical Co., Gundelsweiler v. (Pa.)	946	Leedom, Appeal of (Pa.)	921
J. C. McNaughton Co. v. Haldeman (Pa.)	647	Leedom v. Leedom (Pa.)	1024
Jenkins v. Baxter (Pa.)	682	Lehigh Val. Coal Co., Mulhern v. (Pa.)	1087
Jenks v. Fulmer (Pa.)	841	Lehigh Val. Coal Co., O'Boyle v. (Pa.)	1088
Jennings v. Burnham (N. J. Err. & App.)	1048	Lehigh Val. R. Co. v. Snyder (N. J. Err. & App.)	376
Jennings v. Scarborough (N. J. Sup.)	559	Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (N. J. Err. & App.)	79
Jepherson v. Tucker (R. I.)	610	Leighton, Manning v. (Vt.)	630
Johnson, Appeal of (Pa.)	448	Leisenring, Appeal of (Pa.)	364
Johnson v. City of Philadelphia (Pa.)	993	Lennig, Koenigsberg v. (Pa.)	1016
Johnson v. Clarke (N. J. Ch.)	558	Lennox v. Brower (Pa.)	839
Johnson v. Freemann (Pa.)	780	Leonard v. Village of Rutland (Vt.)	885

	Page		Page
Lerche, Connelly v., two cases (N. J. Sup.)	430	Mechanics' Mut. Loan Ass'n v. Board of Chosen Freeholders of Mercer County (N. J. Sup.)	310
Lerche, Wenzel v. (N. J. Sup.)	430	Medary v. Cathers (Pa.)	1012
Levy's Estate, In re (Pa.)	1068	Meehan, May v. (Pa.)	204
Lewis v. Board of Chosen Freeholders of Cumberland (N. J. Sup.)	553	Meighan, City of Philadelphia v. (Pa.)	304
Liggett v. Shira (Pa.)	218	Mellor, Appeal of (Pa.)	368
Linck v. MacMillan (Pa.)	850	Mellor v. City of Philadelphia (Pa.)	991
Lincoln Bldg. & Loan Ass'n of Jersey City, Bowen v. (N. J. Err. & App.)	67	Mercantile Library Co. of Philadelphia v. Taylor (Pa.)	1068
Lindenstruth, First Nat. Bank of Baltimore v. (Md.)	807	Meredith, Gerber v. (Pa.)	636
Linderman, National State Bank of Camden v. (Pa.)	1022	Mergenthaler v. Kirby (Md.)	1065
Linn v. Borough of Chambersburg (Pa.)	842	Merklee, City of Philadelphia v. (Pa.)	360
Lippincott v. Davis (N. J. Err. & App.)	587	Merrell v. Inhabitants of Township of Po-hatcong (N. J. Sup.)	673
Loeffert, Beihof v. (Pa.)	216	Merrill Trust Co., Haines v. (N. J. Err. & App.)	796
Loeffert, Beihof v. (Pa.)	217	Merriman v. Phillipsburg Borough (Pa.)	122
Loewenthal v. Rubber Reclaiming Co. (N. J. Ch.)	454	Meskill, Jacobus v. (N. J. Sup.)	383
Long v. Cherington (Pa.)	1086	Michael v. Crescent Pipe-Line Co. (Pa.)	204
Long v. Miller (Pa.)	233	Michener, Armstrong v. (Pa.)	447
Long Island Brick Co. v. Arnold (R. I.)	801	Miller v. Baker (Pa.)	648
Loomis v. Bourn (Conn.)	569	Miller, Long v. (Pa.)	233
Lott v. Frankford & S. P. C. Pass. R. Co. (Pa.)	299	Miller's Estate, In re (Pa.)	441
Lovegrove v. Kuser (N. J. Sup.)	313	Miller's Estate, In re (Pa.)	443
Lowry v. Philadelphia Optical & Watch Co. (Pa.)	1004	Millvale, E. & S. St. R. Co., City of Allegheny v. (Pa.)	202
Lucas v. O'Brien (Pa.)	304	Millward-Cliff Cracker Co., In re (Pa.)	1072
Lucot v. Rodgers (Pa.)	242	Millward-Cliff Cracker Co., In re, four cases (Pa.)	1077
Lutz v. Lutz (N. J. Ch.)	315	Miltimore v. Bottom (Vt.)	872
Lynch v. Earle (R. I.)	763	Minogue, Schuylkill County v. (Pa.)	643
McCann v. Preston (Md.)	1102	Minton's Estate, In re (Pa.)	847
McCleary v. Frantz (Pa.)	929	Model Plan Bldg. & Loan Ass'n, Ft. Pitt Bldg. & Loan Ass'n v. (Pa.)	215
McCleary, Thompson v. (Pa.)	254	Moies, Larich v. (R. I.)	661
McClellan's Estate, In re (Pa.)	151	Monroe, Draper v. (R. I.)	340
McCloskey v. City of Philadelphia (Pa.)	993	Moore v. Gardiner (Pa.)	1018
McCorkell, Edison Electric Light Co. v. (Pa.)	1083	Moore v. Joyce (Pa.)	1080
McDermott v. Board of Street & Water Com'rs of Jersey City (N. J. Sup.)	424	Moore v. Wilder (Vt.)	320
McDevitt v. People's Natural Gas Co. (Pa.)	948	Morch v. Raubitschek (Pa.)	369
McDonald v. O'Neill (Pa.)	1081	Morewood Ave., In re (Pa.)	123
McGillick, Workmen's Mut. Bldg. Loan Ass'n v. (N. J. Ch.)	468	Morewood Ave., In re (Pa.)	130
McGinley, Appeal of (Pa.)	132	Morewood Ave., In re, five cases (Pa.)	132
McGrail v. McGrail (N. J. Ch.)	511	Morewood Ave., In re (Pa.)	133
McGurk v. McGurk (N. J. Ch.)	510	Morris v. O'Connor (N. J. Sup.)	56
McHugh v. Schlosser (Pa.)	291	Morris v. Wrightson (N. J. Sup.)	56
Mack, Reiff v. (Pa.)	609	Morse v. Boston & L. R. Co. (N. H.)	286
McKelvy v. German-American Ins. Co. of New York (Pa.)	1115	Mottu v. Fahey (Md.)	387
McKennedy, Kennedy v. (Pa.)	241	Mowry v. Harris (R. I.)	657
McLaughlin v. McLaughlin (Pa.)	302	Mowry, Fuller v. (R. I.)	606
McLean v. Pittsburgh Plate-Glass Co. (Pa.)	211	Moyer, Appeal of (Pa.)	684
McMillan v. Philadelphia Co. (Pa.)	220	Mulford v. Brown (N. J. Ch.)	513
MacMillan, Linck v. (Pa.)	850	Mulhern v. Lehigh Val. Coal Co. (Pa.)	1087
McMullin, Pike v. (Vt.)	876	Muller's Estate, In re (Pa.)	491
McNally, Hoyt v. (Vt.)	417	Murphy v. Corrigan (Pa.)	947
McNamara v. New York, L. E. & W. R. Co. (N. J. Sup.)	313	Murphy, Cote v. (Pa.)	190
McNaughton Co. v. Haldeman (Pa.)	647	Mutual Fire Ins. Co. of Berks County, Hook v. (Pa.)	690
McNeal v. McNeal (Pa.)	997	Mutual Reserve Fund Life Ass'n, Silk v. (Pa.)	445
McNeal v. Ryan (N. J. Sup.)	552	Myers, Fry v. (N. J. Sup.)	425
Madara v. Pottsville Iron & Steel Co. (Pa.)	639	Nash, Burgess v. (Vt.)	419
Manning v. Leighton (Vt.)	630	National Bank of Catasauqua v. North (Pa.)	694
Manning v. Shriver (Md.)	899	National Bank of Republic of New York, Appeal of (Pa.)	1077
Man's Estate, In re (Pa.)	939	National Docks & N. J. Junction Connecting R. Co. v. Pennsylvania R. Co. (N. J. Ch.)	71
Manufacturers' Natural Gas Co., Stoughton v. (Pa.)	227	National Docks & N. J. Junction Connecting R. Co. v. United New Jersey Railroad & Canal Co. (N. J. Ch.)	673
Marsh v. Fish (Vt.)	987	National State Bank of Camden v. Linderman (Pa.)	1022
Marshall, Steigleder v. (Pa.)	240	Naylor v. Bethlehem Iron Co. (Pa.)	1011
Martin's Estate, In re (Pa.)	575	Naylor v. Brady (Md.)	515
Masonic Home of Pennsylvania, City of Philadelphia v. (Pa.)	954	Naylor v. Pennsylvania Steel Co. (Pa.)	1012
Mathewson v. Mathewson (R. I.)	801	Nelson v. Pierce (R. I.)	806
Matthews v. Park Bros. & Co. (Pa.)	435	New Hampshire Fire Ins. Co., Bole v. (Pa.)	205
Matthews v. Philadelphia & R. R. Co. (Pa.)	936	New Jersey Zinc & Iron Co., Lehigh Zinc & Iron Co. v. (N. J. Err. & App.)	79
Matz, Commonwealth v. (Pa.)	1079	Newport St. R. Co., Elliott v. (R. I.)	338
May v. Meehan (Pa.)	204		
Meade v. Clark (Pa.)	214		

	Page		Page
Newport Waterworks v. Sisson (R. I.)	336	Peters v. City of Philadelphia (Pa.)	993
New York, L. E. & W. R. Co., McNamara v. (N. J. Sup.)	813	Pew, Cochran v. (Pa.)	219
New York & N. E. R. Co., Fritts v. (Conn.)	529	Pfingsten, Reimler v. (Md.)	24
Nonnemacher v. Nonnemacher (Pa.)	439	Philadelphia Co., Denniston v. (Pa.)	1007
North, National Bank of Catasaqua v. (Pa.)	694	Philadelphia Co., McMillan v. (Pa.)	220
North Baltimore Pass. R. Co. v. Arnreich (Md.)	809	Philadelphia Optical & Watch Co., Lowry v. (Pa.)	1004
North Baltimore Pass. R. Co. v. Kaskell (Md.)	410	Philadelphia Optical & Watch Co., Pairpoint Manufg Co. v. (Pa.)	1003
North Hudson County R. Co., Spurr v. (N. J. Sup.)	582	Philadelphia Traction Co., Walters v. (Pa.)	941
Northrop, Kelly v. (Pa.)	364	Philadelphia Trust, Safe-Deposit & Ins. Co. v. Philadelphia & E. R. Co. (Pa.)	960
Norwalk Gaslight Co. v. Borough of Norwalk (Conn.)	32	Philadelphia & B. R. Co., Rowland v. (Conn.)	102
Nyce, Directors of Poor and of House of Employment of Montgomery County v. (Pa.)	999	Philadelphia & E. R. Co., Philadelphia Trust, Safe-Deposit & Ins. Co. v. (Pa.)	960
Oakdale Manufg Co. v. Garst (R. I.)	973	Philadelphia & R. R. Co. v. Snowdon (Pa.)	1067
Oakland Cemetery Co. v. Bancroft (Pa.)	1021	Philadelphia & R. R. Co., Arnold v. (Pa.)	941
O'Boyle v. Lehigh Val. Coal Co. (Pa.)	1088	Philadelphia & R. R. Co., Graeff v. (Pa.)	1107
O'Brien, Lucas v. (Pa.)	364	Philadelphia & R. R. Co., Matthews v. (Pa.)	936
O'Brien, O'Connor v. (R. I.)	705	Philadelphia & R. R. Co., Pennsylvania S. V. R. Co. v. (Pa.)	771
O'Connor v. O'Brien (R. I.)	765	Philadelphia & R. R. Co., Pennsylvania S. V. R. Co. v. (Pa.)	784
O'Connor, Morris v. (N. J. Sup.)	50	Philadelphia & R. R. Co., Schnatz v. (Pa.)	952
Oil-Well Supply Co., Appeal of (Pa.)	163	Philadelphia & R. R. Co., Smith v. (Pa.)	641
Oil Well Supply Co., Aderhold v. (Pa.)	22	Philadelphia & R. Terminal R. Co., Klages v. (Pa.)	862
O'Neill, Kenny v. (N. J. Sup.)	557	Philadelphia & W. C. T. R. Co., Hinchman v. (Pa.)	652
O'Neill, McDonald v. (Pa.)	1081	Philler, Appeal of (Pa.)	1072
Oppenheimer, Talcott v. (Pa.)	355	Phillips v. Hall (Pa.)	502
Order of Fraternal Guardians' Estate, In re (Pa.)	479	Phillips v. Henry (Pa.)	477
Order of Fraternal Guardians' Estate, In re (Pa.)	482	Phillipsburg Borough, Merriman v. (Pa.)	122
Order of Pente, Stambler v. (Pa.)	301	Phillipsburg Horse-Car Co. v. Fidelity & Casualty Co. of New York (Pa.)	823
Order of Solon v. Folsom (Pa.)	1078	Pickett, Baltimore Baseball Club & Exhibition Co. of Baltimore City v. (Md.)	279
Ormsby v. Pinkerton (Pa.)	300	Pierce, Nelson v. (R. I.)	806
Orth v. West View Oil Co. (Pa.)	180	Pierce, Peck v. (Conn.)	524
Osborne, Butler Sav. Bank v. (Pa.)	163	Pierson, Hall v. (Conn.)	544
Ott, Wilson v. (Pa.)	848	Pike v. McMullin (Vt.)	876
Ottersbach v. City of Philadelphia (Pa.)	991	Pilkington v. City of Philadelphia (Pa.)	993
Otterson, Hall v. (N. J. Ch.)	907	Pinkerman, State v. (Conn.)	110
Owings v. Safe-Deposit & Trust Co. of Baltimore (Md.)	812	Pinkerton, Ormsby v. (Pa.)	300
Paciello, Shermer v. (Pa.)	995	Pittsburgh, A. & M. Traction Co., Downey v. (Pa.)	1019
Paine, Fiske v. (R. I.)	1028	Pittsburgh, A. & M. Traction Co., Dunseath v. (Pa.)	1021
Pairpoint Manufg Co. v. Philadelphia Optical & Watch Co. (Pa.)	1003	Pittsburgh, A. & M. Traction Co., Haney v. (Pa.)	235
Paethorpe's Estate, In re (Pa.)	689	Pittsburg, A. & M. Traction Co., Jackson v. (Pa.)	257
Paethorpe's Estate, In re (Pa.)	690	Pittsburgh Co., Sparks v. (Pa.)	152
Park Bros. & Co., Matthews v. (Pa.)	435	Pittsburgh, C. & S. L. R. Co., Pittsburgh, V. & C. R. Co. v. (Pa.)	155
Partenheimer, Gross v. (Pa.)	370	Pittsburg Inclined Plane Co., Hartman v. (Pa.)	145
Patterson, Duff v. (Pa.)	250	Pittsburgh Plate-Glass Co., McLean v. (Pa.)	211
Patterson, Snyder v. (Pa.)	1006	Pittsburgh, V. & C. R. Co. v. Pittsburgh, C. & S. L. R. Co. (Pa.)	155
Payne v. Payne (N. J. Ch.)	449	Plummer v. Hillside Coal & Iron Co. (Pa.)	853
Pearson, Souther v. (N. J. Ch.)	450	Poike, Hagy v. (Pa.)	846
Peck v. Goff (R. I.)	1029	Poor Dist. of Dallas Tp. v. Poor Dist. of Eaton Tp. (Pa.)	1070
Peck v. Pierce (Conn.)	524	Poor Dist. of Eaton Tp., Poor Dist. of Dallas Tp. v. (Pa.)	1070
Peckham v. Ashhurst (R. I.)	337	Posner v. Bay (Md.)	1096
Penney's Estate, In re (Pa.)	255	Post v. City of Passaic (N. J. Sup.)	553
Pennington v. Gregg (Md.)	505	Post, First Nat. Bank of Pittsburg v. (Vt.)	989
Penn Nat. Bank of Reading v. Kopitzsch Soap Co. (Pa.)	1077	Potter v. Berry (N. J. Sup.)	668
Penn Nat. Bank of Reading, Heere v. (Pa.)	688	Potter, Sons & Co., Commonwealth v. (Pa.)	492
Pennsylvania Boiler Ins. Co., Halfman v. (Pa.)	837	Pottsville Iron & Steel Co., Madara v. (Pa.)	639
Pennsylvania Co., Cass v. (Pa.)	161	Powell v. City of Philadelphia (Pa.)	993
Pennsylvania R. Co., Foreman v. (Pa.)	358	Powell v. Curtis (Md.)	390
Pennsylvania R. Co. v. Goodenough (N. J. Err. & App.)	3	Powers v. Black (Pa.)	133
Pennsylvania R. Co., Hoffmeister v. (Pa.)	945	Preston, McCann v. (Md.)	1102
Pennsylvania R. Co., National Docks & N. J. Junction Connecting R. Co. v. (N. J. Ch.)	71	Price v. Heubler (Conn.)	524
Pennsylvania Steel Co., Naylor v. (Pa.)	1012	Probate Court of Middletown, Southwick v. (R. I.)	334
Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co. (Pa.)	771	Prospect Methodist Episcopal Church, Shedwick v. (Pa.)	499
Pennsylvania S. V. R. Co. v. Philadelphia & R. R. Co. (Pa.)	784		
People's Natural Gas Co., McDevitt v. (Pa.)	948		
Pepper's Estate, In re (Pa.)	353		
Percy Summer Club v. Welch (N. H.)	22		

	Page		Page
Prudential Ins. Co. of America, Clifford v. (Pa.)	1085	Schnatz v. Philadelphia & R. R. Co. (Pa.)	952
Public Alley in Borough of West Chester, In re (Pa.)	506	School Dist. of Braddock Borough, White v. (Pa.)	136
Pullen v. Pullen (N. J. Ch.)	719	Schoonmaker, Appeal of (Pa.)	133
Putzell v. Drovers' & Mechanics' Nat. Bank (Md.)	276	Schott, Goodwin v. (Pa.)	356
Pyott's Estate, In re (Pa.)	915	Schott, Goodwin v. (Pa.)	358
Pyott's Estate, In re (Pa.)	921	Schuylkill County v. Minogue (Pa.)	643
Ralston's Estate, In re (Pa.)	139	Schuylkill River E. S. R. Co., Harris v. (Pa.)	296
Randell v. City of Bridgeport (Conn.)	523	Schwartz, Glorieux v. (N. J. Ch.)	470
Ranstead, Baltimore Breweries' Co. v. (Md.)	273	Scott, Appeal of (Pa.)	258
Raphael v. Lane (N. J. Sup.)	421	Scott, Appeal of (Pa.)	365
Raritan River R. Co., Vunk v. (N. J. Sup.)	593	Second & Third Sts. Pass. R. Co., Winther v. (Pa.)	472
Raub v. Blairstown Creamery Ass'n (N. J. Sup.)	384	"Security Co.," Appeal of (Pa.)	1116
Raubitschek, Morch v. (Pa.)	369	Seiss, Valentine v. (Md.)	892
Read, Bechtold v. (N. J. Ch.)	264	Sellman, Steele v. (Md.)	811
Reading Chemical & Fertilizing Co., Evans v. (Pa.)	702	Seuf v. Carpenter (R. I.)	903
Reading City Pass. R. Co., Johnson v. (Pa.)	1001	Shannahan v. City of Waterbury (Conn.)	611
Reading School Dist., Roland v. (Pa.)	995	Sharp, Roberts v. (Pa.)	1023
Reading School Dist., Roland v. (Pa.)	1007	Shaw v. City of Philadelphia (Pa.)	354
Real-Estate Title Ins. & Trust Co. of Philadelphia, Wheeler v. (Pa.)	849	Shaw v. Davis (Md.)	619
Reeves, Harrison v. (Pa.)	653	Shedwick v. Prospect Methodist Episcopal Church (Pa.)	499
Reiff v. Mack (Pa.)	639	Sheeler, Appeal of (Pa.)	482
Reilly v. Daly (Pa.)	493	Sherman v. Hanno (N. H.)	18
Reimer's Estate, In re (Pa.)	186	Shermer v. Paciello (Pa.)	905
Reimler v. Pfingsten (Md.)	24	Shillito v. Shillito (Pa.)	637
Renshaw, German Sav. Bank of Baltimore City v. (Md.)	281	Shipley, Textor v. (Md.)	1000
Reyenthaler v. City of Philadelphia (Pa.)	840	Shira, Liggett v. (Pa.)	218
Rhees v. Fairchild (Pa.)	928	Shoe v. Ziegler (Pa.)	298
Richardson, Collins v. (Vt.)	877	Showell, Dirickson v. (Md.)	896
Richmond Stove Co., Collins v. (Conn.)	534	Shriver, Manning v. (Md.)	899
Righter v. City of Philadelphia (Pa.)	1015	Sibley, Gump v. (Md.)	977
Ritchie v. Waller (Conn.)	29	Silk v. Mutual Reserve Fund Life Ass'n (Pa.)	445
Ritter, Appeal of (Pa.)	1011	Sill v. Blaney (Pa.)	251
Road in Leet Tp., In re (Pa.)	238	Simon, Crawford v. (Pa.)	491
Roberts v. Sharp (Pa.)	1023	Sisson, Newport Waterworks v. (R. I.)	336
Robinson, Appeal of (Conn.)	40	Skiff v. Stoddard (Conn.)	104
Robinson v. Floyd (Pa.)	258	Slayton v. Smilie (Vt.)	871
Robinson v. Winch (Vt.)	884	Slayton v. Wells (Vt.)	632
Rodgers, Lucot v. (Pa.)	242	Slemmons, Humphreys v. (Md.)	1101
Roebing v. Board of Public Works of City of Trenton (N. J. Sup.)	1043	Sloan's Estate, In re (Pa.)	1084
Roediger, Campbell & Zell Co. v. (Md.)	901	Slocum, Stout v. (N. J. Ch.)	7
Rogers, Werts v. (N. J. Sup.)	726	Smilie, Slayton v. (Vt.)	871
Roland v. Reading School Dist. (Pa.)	995	Smith, Appeal of (Pa.)	255
Roland v. Reading School Dist. (Pa.)	1007	Smith v. City of Philadelphia (Pa.)	923
Rooney v. Carson (Pa.)	996	Smith v. Eyre (Pa.)	1005
Rose, Fullam v. (Pa.)	497	Smith v. Philadelphia & R. R. Co. (Pa.)	641
Ross, Sutherland v. (Pa.)	437	Smith, Deering v. (Vt.)	630
Rounds, Dean v. (R. I.)	802	Smith, Johnson v. (Pa.)	144
Rouse, Appeal of (Pa.)	847	Smith, Steffen v. (Pa.)	295
Rowe, Illingworth v. (N. J. Ch.)	456	Snover, Tunison v. (N. J. Sup.)	310
Rowland v. Philadelphia & B. R. Co. (Conn.)	102	Snowdon, Philadelphia & R. R. Co. v. (Pa.)	1067
Rubber Reclaiming Co., Loewenthal v. (N. J. Ch.)	454	Snyder v. Patterson (Pa.)	1006
Rudd v. Rudd (Vt.)	869	Snyder, Lehigh Val. R. Co. v. (N. J. Err. & App.)	376
Rugg v. Commercial Union Tel. Co. (Vt.)	1036	Sommer v. Gilmore (Pa.)	654
Ryan, McNeal v. (N. J. Sup.)	552	Souther v. Pearson (N. J. Ch.)	450
Ryder v. Ryder (Vt.)	1029	Southwest Pennsylvania Pipe Lines, Behling v. (Pa.)	777
Ryder, Kelley v. (R. I.)	807	Southwick v. Probate Court of Middletown (R. I.)	334
Sachs, Boyd v. (Md.)	391	Sparks v. Pittsburgh Co. (Pa.)	152
Sadtler v. Brady (Md.)	516	Sprigg, Condon v. (Md.)	595
Safe-Deposit & Trust Co. of Baltimore, Johnson v. (Md.)	880	Spurr v. North Hudson County R. Co. (N. J. Sup.)	582
Safe-Deposit & Trust Co. of Baltimore, Owings v. (Md.)	812	Stambler v. Order of Pente (Pa.)	301
Safe-Deposit & Trust Co. of Baltimore, Wethered v. (Md.)	812	Starr, Barnes v. (Conn.)	980
Safe-Deposit & Trust Co. of Pittsburgh v. Kelly, two cases (Pa.)	221	State v. Almy (N. H.)	372
Sage, Commonwealth v. (Pa.)	863	State v. Board of Aldermen of City of Newport (R. I.)	347
Savage v. Bartlett (Md.)	414	State v. Fiske (Conn.)	572
Savings Bank of Newport v. Hayes (R. I.)	966	State v. Fiske (R. I.)	348
Sayre, Faitoute v. (N. J. Ch.)	711	State v. Flint (Conn.)	28
Scarborough, Jennings v. (N. J. Sup.)	559	State v. Hodgson (Vt.)	1089
Schlosser, McHugh v. (Pa.)	291	State v. Keena (Conn.)	522
		State v. Pinkerman (Conn.)	110
		State v. Welch (N. H.)	21
		State v. White (R. I.)	968
		State v. Wilkins (Vt.)	323
		State, Baltimore Traction Co. of Baltimore City v. (Md.)	397
		State, Bittle v. (Md.)	405
		State, Bond v. (Md.)	407

	Page		Page
State, Judefind v. (Md.).....	406	Trevose Model Brick Manuf'g Co., In re (Pa.).....	1023
State, Taylor v. (Md.).....	815	Trimmer v. Todd (N. J. Ch.).....	581
State, United States Electric Power & Light Co. v. (Md.).....	768	Trimmer v. Todd (N. J. Ch.).....	583
State, Yunger v. (Md.).....	404	Tryon, Thompson v. (Vt.).....	873
Stearns v. Stearns (Vt.).....	876	Tubbs' Estate, In re (Pa.).....	1109
Steele v. Sellman (Md.).....	811	Tucker, Jepherson v. (R. I.).....	610
Steffen v. Smith (Pa.).....	295	Tulane, Green v. (N. J. Ch.).....	9
Steigleder v. Marshall (Pa.).....	240	Tull, Appeal of (Pa.).....	479
Steinman, Appeal of (Pa.).....	1117	Tunison v. Snover (N. J. Sup.).....	310
Stockwell v. Webster (Pa.).....	837	Turner v. Warren (Pa.).....	781
Stoddard, Freiberg v. (Pa.).....	1111	Turner, Bowlink v. (Md.).....	1100
Stoddard, Skiff v. (Conn.).....	104	Tyrone & C. R. Co., Altoona & P. Connecting R. Co. v. (Pa.).....	997
Stoffet v. Stoffet (Pa.).....	857	United New Jersey Railroad & Canal Co., National Docks & N. J. Junction Connecting R. Co. v. (N. J. Ch.).....	673
Stone v. Westcott (R. I.).....	662	United States Electric Power & Light Co. v. State (Md.).....	768
Stong's Estate, In re (Pa.).....	480	United States Exp. Co., Armstrong v. (Pa.).....	448
Stoughton v. Manufacturers' Natural Gas Co. (Pa.).....	227	United States Life Ins. Co. of New York, Carpenter v. (Pa.).....	943
Stout v. Slocum (N. J. Ch.).....	7	Vacation of Public Road in Palo Alto, In re (Pa.).....	649
Straus, Sullivan v. (Pa.).....	1020	Vaill v. Town Council of New Shoreham (R. I.).....	344
Stroud v. Consumers' Water Co. (N. J. Sup.).....	578	Valentine v. Seiss (Md.).....	892
Strouse v. Lawrence (Pa.).....	930	Van Dyke, Winkleblake v. (Pa.).....	937
Strunk v. Firemen's Ins. Co. of Chicago (Pa.).....	779	Vanesse v. Catsburg Coal Co. (Pa.).....	200
Sullivan v. Straus (Pa.).....	1020	Van Horn v. Coogan (N. J. Ch.).....	788
Supplee v. Halfmann (Pa.).....	941	Van Horn v. Van Horn (N. J. Err. & App.).....	609
Supreme Sitting of Order of Iron Hall, Ware v. (N. J. Ch.).....	1041	Van Horne, In re (R. I.).....	341
Susquehanna Mut. Fire Ins. Co. of Harrisburg, Arthurholt v. (Pa.).....	197	Village of Rutland, Leonard v. (Vt.).....	885
Sutherland v. Ross (Pa.).....	437	Vogel v. Webber (Pa.).....	226
Sutton Bank, Exchange Bank of Wheeling v. (Md.).....	563	Vunk v. Raritan River R. Co. (N. J. Sup.).....	593
Sweet v. Wood (R. I.).....	885	Waller, Ritchie v. (Conn.).....	29
Syma, First Baptist Church of Hoboken v. (N. J. Ch.).....	461	Wallis Iron Works v. Coster (N. J. Sup.).....	502
Synnott, Haynes v. (Pa.).....	882	Walters v. Philadelphia Traction Co. (Pa.).....	941
Talcott v. Oppenheimer (Pa.).....	353	Walton v. Bryn Mawr Hotel Co. (Pa.).....	488
Tammany, Barhight v. (Pa.).....	135	Ware v. Supreme Sitting of Order of Iron Hall (N. J. Ch.).....	1041
Tanney v. Tanney (Pa.).....	287	Warren, Turner v. (Pa.).....	781
Tappan v. Dayton (N. J. Prerog.).....	1	Warren Manuf'g Co. v. Dalrymple (N. J. Sup.).....	671
Tarrant v. Backus (Conn.).....	46	Warren Manuf'g Co. v. Donnelly (N. J. Sup.).....	671
Taylor v. Bell (Pa.).....	208	Waterman v. Davis (Vt.).....	684
Taylor v. City of Bayonne (N. J. Sup.).....	380	Waterman's Will, In re (R. I.).....	1028
Taylor v. City of Philadelphia (Pa.).....	993	Waters, City of Newark v. (N. J. Sup.).....	717
Taylor v. Fried (Pa.).....	993	Watson v. Goodno (Vt.).....	987
Taylor v. State (Md.).....	815	Watson v. Watson (N. J. Ch.).....	467
Taylor, Commonwealth v. (Pa.).....	348	Webber, Vogel v. (Pa.).....	226
Taylor, Dodson v. (N. J. Sup.).....	316	Webster v. Cambridge Female Seminary (Md.).....	25
Taylor, Mercantile Library Co. of Philadelphia v. (Pa.).....	1068	Webster, Stockwell v. (Pa.).....	837
Templeton, Langdon v. (Vt.).....	866	Weeks, Benner v. (Pa.).....	355
Terreri v. Jutte (Pa.).....	223	Welk, Hiss v. (Md.).....	400
Textor v. Shipley (Md.).....	1090	Welch, Percy Summer Club v. (N. H.).....	22
Thomas v. Gregg (Md.).....	565	Welch, State v. (N. H.).....	21
Thomas, Axford v. (Pa.).....	443	Welles' Estate, In re (Pa.).....	1116
Thomas Inflatable Tire Co., White v. (N. J. Ch.).....	75	Welles' Estate, In re (Pa.).....	1117
Thomas Potter, Sons & Co., Commonwealth v. (Pa.).....	492	Wells v. Bunnell (Pa.).....	851
Thompson v. McCleary (Pa.).....	254	Wells, Slayton v. (Vt.).....	632
Thompson v. Tryon (Vt.).....	873	Wenderoth, Appeal of (Pa.).....	491
Thropp v. Knight (N. J. Ch.).....	1037	Wentzel, In re (Pa.).....	694
Tilton v. Corning (N. H.).....	17	Wenzel v. Lerche (N. J. Sup.).....	430
Timlin v. Brown (Pa.).....	236	Werts v. Rogers (N. J. Sup.).....	726
Todd, Trimmer v. (N. J. Ch.).....	581	West Chester St. R. Co., Bradley v. (Pa.).....	500
Todd, Trimmer v. (N. J. Ch.).....	583	Westcott, Stone v. (R. I.).....	662
Tolles v. Winton (Conn.).....	542	Western Pennsylvania Gas Co. v. George (Pa.).....	1004
Tower v. Grocers' Supply & Storage Co. of Pittsburgh (Pa.).....	229	Western Pennsylvania R. Co., Bernhardt v. (Pa.).....	140
Town and Borough of Torrington, Holley v. (Conn.).....	613	Westmoreland Paper Co., Youghiogheny Natural Gas Co. v. (Pa.).....	149
Town Council of New Shoreham, Vaill v. (R. I.).....	344	West View Oil Co., Orth v. (Pa.).....	180
Town of Barre, Buchanan v. (Vt.).....	878	Wethered v. Safe-Deposit & Trust Co. of Baltimore (Md.).....	812
Town of Barton, Cook v. (Vt.).....	631	Wettengel v. Gormley (Pa.).....	934
Town of Groton, Colburn v. (N. H.).....	95	Wheeler v. Real-Estate Title Ins. & Trust Co. of Philadelphia (Pa.).....	849
Town of Jericho, Town of Underhill v. (Vt.).....	879	Wheeler & Wilson Manuf'g Co. v. Filer (N. J. Ch.).....	13
Town of Underhill v. Town of Jericho (Vt.).....	879		
Town of Worcester, Baldwin v. (Vt.).....	633		
Tradesmen's Nat. Bank of New York, Appeal of (Pa.).....	1077		
Trego v. Borough of Honeybrook (Pa.).....	639		

	Page		Page
Wheelock, In re (R. I.)	966	Winton, Tolles v. (Conn.)	542
Whelan, Hoffman v. (Pa.)	498	Woelfel v. Hammer (Pa.)	146
Whitcomb, Badger v. (Vt.)	877	Woelfel v. Hammer (Pa.)	147
White v. Borough of Neptune City (N. J. Sup.)	378	Wolcott v. Jackson (N. J. Ch.)	1045
White v. School Dist. of Braddock Borough (Pa.)	136	Wolf v. Guffey (Pa.)	1117
White v. Thomas Inflatable Tire Co. (N. J. Ch.)	75	Wolf v. Wolf (Pa.)	164
White, State v. (R. I.)	968	Wood v. Atlantic City (N. J. Sup.)	427
Wilcox's Estate, Wyman v. (Vt.)	321	Wood v. Wood (Conn.)	520
Wilder, Moore v. (Vt.)	320	Wood, Borough of McKeesport v. (Pa.)	574
Wiley v. Brundred (Pa.)	173	Wood, Sweet v. (R. I.)	335
Wiley v. Brundred (Pa.)	180	Woodruff, Allen v. (Conn.)	532
Wilkins, State v. (Vt.)	323	Woodworth, Foote v. (Vt.)	1034
Williams, Carroll v. (R. I.)	902	Workingmen's Mut. Bldg. Loan Ass'n v. McGillick (N. J. Ch.)	468
Willis v. Adams (Vt.)	1033	Wright, Appeal of (Pa.)	648
Wilson, Appeal of (Pa.)	230	Wright v. First Nat. Bank (N. J. Ch.)	719
Wilson, Alpaugh v. (N. J. Ch.)	722	Wrightson, Morris v. (N. J. Sup.)	56
Wilson v. Ott (Pa.)	848	Wyman v. Wilcox's Estate (Vt.)	321
Winch, Robinson v. (Vt.)	884	Youghiogheny Natural Gas Co. v. Westmoreland Paper Co. (Pa.)	149
Winkleblake v. Van Dyke (Pa.)	937	Young, Hawkins v. (N. J. Ch.)	511
Winnals v. City of Philadelphia, two cases (Pa.)	993	Yunger v. State (Md.)	404
Winters v. Earl (N. J. Ch.)	15	Ziegler, Shoe v. (Pa.)	298
Winther v. Second & Third Sts. Pass. R. Co. (Pa.)	472	Zimmerman v. Bitner (Md.)	820

REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in 24 Atl. This list does not include cases where an opinion has been filed on the denial of the rehearing.]

Shackamaxon Bank v. Yard (Pa.) 24 Atl. 635.

THE
ATLANTIC REPORTER.
VOLUME 28.

(150 Pa. St. 280)

TAPPAN v. DAYTON et al.

(Prerogative Court of New Jersey. Dec. 18, 1893.)

ADMINISTRATOR'S SALE—ADVERTISEMENT—LENGTH
OF PUBLICATION.

1. Notice of an administrator's sale of land, in virtue of an order of an orphans' court, for the payment of debts, published in a German newspaper, under the requirements of the supplement to the act relative to sales of land under a public statute or in virtue of any judicial proceeding, which was approved March 16, 1891, (P. L. 161,) must be in the English language.

2. Where the time appointed for such a sale was the 10th day of February, and the last insertion of the notice of sale in one of the newspapers selected for its publication was on the 2d day of February, it is held that the sale was illegal because of the noncompliance with the requirement of the statute, (1887, p. 28,) which provides that the notice shall be published four weeks successively, once a week, next preceding the time appointed for the sale.

(Syllabus by the Court.)

Appeal from orphans' court, Middlesex county; Rice, O'Gorman, and Freeman, Judges.

On the petition therefor of William F. Dayton and Anne E. Dayton, administrators of the estate of Jonathan Dayton, deceased, land belonging to the estate was sold for the payment of debts, and, from the order of confirmation, Adelbert T. Tappan, the purchaser, appeals. Reversed.

Alan H. Strong, for appellant. Silas D. Grimstead, for respondents.

McGILL, Ordinary. This appeal is from an order of the Middlesex county orphans' court, which confirms the sale of land belonging to the estate of Jonathan Dayton, deceased, by the administrators of that estate to pay debts, at which sale the appellant was the purchaser. No objection is made to the proceedings in the orphans' court by which the sale was authorized. The illegality suggested rests entirely upon alleged irregularities in the advertisements of the notice of sale. The law which regulates those advertisements is found in the supplement to the statute entitled "An act relative to sales of land under a public statute or in virtue

of any judicial proceedings," which was approved March 17, 1887, (P. L. 28,) and provides, among other things, that where an administrator shall be authorized by public statute or the direction of a court of competent jurisdiction, to make sale of lands, he shall give notice by public advertisements signed by himself, and set up at five or more public places in the county, one whereof shall be in the township, ward, or city where the real estate is situate, at least four weeks next before the time of sale, and shall likewise cause the notice to be published in two newspapers printed and published in the county in which the land is situate, of which one shall be a newspaper printed and published at the county seat, etc., for at least four weeks successively, once a week, next preceding the time appointed for selling the same; and in the further supplement to the same act, which was approved March 16, 1891, (P. L. 161,) and enacts "that in all counties in this state wherein, at the county seat thereof, there is now published in the German language a paper, which has been or may be designated by law to publish the laws of this state, it shall be the duty of the officer having charge of the sale of real estate, to select and publish all advertisements of sales and adjournments thereof, in one such paper."

The first objection urged is that, when the sale in question took place, there was a paper in Middlesex county published in the German language, answering the description in the supplement last referred to, in which notice of the sale was advertised in the English, not in the German, language; the insistent being that, because of the publication in English, there was a fatal departure from the requirement of the law. It is observed that the statutes under which the publication was made have for their object, as indicated in their titles, sales of land under public statute or in virtue of judicial proceedings. It is also noted that the law of 1891, which requires publication in a German paper, is silent as to the language in which the publication in it shall be made. The sale in question was in virtue of a judicial proceeding in the orphans'

court, and the publication of notice of that sale is part of a judicial proceeding. It is the public proclamation of the court's officer or agent, in obedience to the court's order. When the sale is made, it must be reported to the court, (Revision, p. 768, § 76,) and confirmed by that tribunal, before conveyance is made to the purchaser. In that confirmation the fullness and fairness of the terms of the notice of the sale are considered, as well as the publication of that notice, and, in order that the court may know those terms, the notice itself must be presented for judicial inspection and review. By the seventeenth section of the act respecting amendments and jeofalls, passed November 21, 1794, (Revision, p. 12,) all proceedings whatever, in every court of law or equity in this state, are required to be in the English tongue and language, and in no other tongue or language. The precise question suggested by the objection is whether the act of 1891, from its requirement that notice of sale shall be advertised in a newspaper published in the German language, so implies that such notice shall be in the German language as to repeal, pro tanto, the seventeenth section of the statute respecting amendments and jeofalls. That section has existed upon our statute book for nearly 100 years, and during all that time the records of our courts have uniformly been in the English language, intelligible to all persons who speak and read the language of our country. Was it the purpose of the legislature to single out one foreign language, and give it a place in our judicial proceedings? In the case of *North Baptist Church v. City of Orange*, 54 N. J. Law, 111, 22 Atl. 1004, the supreme court, in construing a statute which provides that notice of a contemplated municipal improvement shall be published in all the newspapers within the municipality, one of which, from the enactment of the law, and continuing thence to the time of the action, was in fact printed in the German language, held that the implication was that the notice published in the German paper was to be in the German language. Its reasoning is as follows: "The notice of the time and place when the present ordinance would be considered was printed in this paper, as it was in the other two papers, in the English language. This, we think, was a mistake. The primary meaning of the word 'publish' is 'to make known.' The medium through which intelligence is communicated in a German newspaper is the German language. The object to be attained by including such papers in the class of publications is to bring knowledge home to a body of readers by whom, as a rule, the English language is not readily, or not at all, legible. A notice contained in a German paper in language other than the German is not published, but only printed." Without stopping to consider the cogency of this reasoning, it is observed that the case so decided materially differs

from the one now under discussion. In it the implication or inference was not combated by an existing statute which defined the policy of our law, upon a vitally important subject, for almost a century. In the case under discussion the meaning of the statute of 1891 must be determined in view of such a statute and the policy it establishes. Was it the intention of the legislature that the act of 1891 should be accorded a meaning that would in any particular supersede the law of 1794? One rule of construction applicable here is stated in *Sedg. St. Const.* 106, as follows: "Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject, and it is therefore but reasonable to conclude that the legislature, in passing a statute, did not intend to interfere with or abrogate any prior law relating to the same matter, unless the repugnancy between the two is irreconcilable, and hence a repeal by implication is not favored; on the contrary, the courts are bound to uphold the prior law, if the two acts may well subsist together." This rule has been repeatedly recognized and applied by our courts. *Britton v. Blake*, 35 N. J. Law, 208, 36 N. J. Law, 442; *State v. Commissioners of Railroad Taxation*, 37 N. J. Law, 228; *Landis v. Landis*, 39 N. J. Law, 274; *Craft v. Jachetti*, 47 N. J. Law, 207; *Nichols v. Disner*, 29 N. J. Law, 293; *Plum v. Lugar*, 49 N. J. Law, 557, 9 Atl. 779. Another rule, also applicable, is this: Where no repealing words are inserted in the later of two apparently inconsistent statutes, a strong presumption arises that no repeal was intended, or it would have been expressed. *McNeely v. Woodruff*, 13 N. J. Law, 352, 356; *Henry v. City Council of Camden*, 42 N. J. Law, 335; *Plum v. Lugar*, supra. The act of 1891 does not contain a repealing clause, and, in face of the rules stated, it appears to me to be impossible to give it the construction contended for. The disfavor of repeals by implication or inference, and the presumption against repeal in absence of a repealing clause, I think outweigh the implication here invoked. The law of 1891 is silent as to the language in which the notice of sale shall be published, and does not forbid publication in English; hence no violence is done it to hold that it contemplates publication in that language. To imply that publication in the German language was intended is not a necessary implication. Holding that the publication is to be in English reasonably reconciles and harmonizes the provisions of both statutes. It may well be that the legislative intent in the passage of the act of 1891 was to place notices of sales where they would be seen by a notably industrious and saving people, who although able to read and understand English, prefer habitually to read a paper in their native tongue, and look to it for information. The first objection is not sustained.

The next objection rests upon this state of facts: That the sale was advertised for the 10th of February, 1893; that on that day it was adjourned to the 21st of February; that notice of the sale was published in two papers, in one of which, the New Brunswick Home News, it was inserted on the 5th, 12th, 19th, and 26th of January, and the 2d of February, but not again before the day appointed for the sale; and that the adjournment of the sale was inserted in the same paper on the 11th and 18th days of February. The omission to advertise the notice of sale in that paper after the 2d of February is insisted upon as a fatal irregularity. I think that this objection is well taken. As has been seen, the statute requires that the notice of sale shall be published for at least four weeks successively, once a week, next preceding the time appointed for the sale. The failure to publish the notice between February 2d and February 10th, a period of eight days immediately preceding the time appointed for the sale, shows an inexcusable noncompliance with the statute, in that, for more than a week next preceding the time appointed for the sale, notice of it was not published in that paper. The purpose of the requirement that the publication should fit closely upon the sale is obviously to keep freshly in the public mind the pendency of the sale, and the mischief of the omission to publish within the last week may be twofold, in permitting the sale to be lost sight of, and, possibly, in impressing intending purchasers with the belief that it has been abandoned. However this may be, the courts hold that strict compliance with the requirements of the statute is essential to the validity of the sale. *Parsons v. Lanning*, 27 N. J. Eq. 70; *State v. Hand*, 41 N. J. Law, 518. The order appealed from will be reversed, but without costs, because the objections here urged were not presented to the orphans' court.

(61 N. J. E. 306)

DISBOROUGH v. DISBOROUGH.

(Court of Errors and Appeals of New Jersey.
Dec. 11, 1893.)

ALIMONY.

In divorce cases, where an appeal is taken in good faith by the wife, whether she was complainant or defendant in the court below, the expense must be borne by the husband if it appears that the appellant is otherwise without the means to prosecute her appeal.

(Syllabus by the Court.)

Bill by Julia C. Disborough against Isalah Disborough for divorce. From a decree dismissing the bill, (28 Atl. 852,) complainant appealed. Complainant now moves for an allowance of alimony. Granted.

Mark Scoy, for the motion. George M. Robeson, opposed.

GARRISON, J. Julia C. Disborough filed her bill against Isalah Disborough for divorce a mensa et thoro upon the ground of the defendant's extreme cruelty. The most substantial allegation was that the defendant accused the complainant of administering poison to him, and caused her arrest therefor. The learned vice chancellor who heard the testimony reached the conclusion that the husband had reasonable ground for believing the truth of his accusation, and hence that the arrest was not an act of violence amounting to extreme cruelty. 28 Atl. 852. A decree was advised dismissing the complainant's bill. From this decree the complainant has appealed, and now applies to this court for an order directing the payment to her of alimony, and a counsel fee, and for the printing of the case to be used upon appeal, and that she be relieved from making the deposit required by the rules of this court. This motion is resisted by the defendant.

Upon the filing of her bill in the court of chancery the complainant was allowed a counsel fee of \$50, and alimony at the rate of \$5 per week. 20 Atl. 980. Upon appeal this court affirmed this order, (48 N. J. Eq. 640, 25 Atl. 20,) and in so doing passed upon the defendant's capacity, and the necessity of such payments. It is not suggested that any change has occurred affecting the matters thus adjudicated; the question raised now being the propriety of granting the motion in the face of the decree of the chancellor dismissing the complainant's bill. This contention is without force. In a recent unreported case (*Stickle v. Stickle*)¹ we allowed a similar motion upon the application of a wife against whom in the court below a decree of divorce had been pronounced upon the ground of her adultery. Where an appeal is taken in good faith by a wife, whether she was complainant or defendant below, the expense must be borne by the husband when it appears that the appellant is otherwise without the means to prosecute her appeal.

The defendant is ordered to pay to his wife a counsel fee of \$100, and alimony at the rate of \$5 per week, commencing from the date of the filing of her notice of appeal; also that he furnish the printed case for use on this appeal, and that she be relieved from making the deposit of \$100 provided for in the rules of this court.

(55 N. J. L. 577)

PENNSYLVANIA R. CO. v. GOOD-
ENOUGH et ux.(Court of Errors and Appeals of New Jersey.
Dec. 4, 1893.)

INJURIES TO WIFE—NEGLECT OF HUSBAND.

In an action by a husband and wife for a personal injury to the wife his contributory negligence will defeat the suit. *Dixon, J.*, dissenting.

(Syllabus by the Court.)

¹ No opinion filed.

Error to supreme court.

Action by William Goodenough and Sarah Goodenough, his wife, against the Pennsylvania Railroad Company, to recover for personal injuries sustained by the wife. There was judgment for plaintiffs, and defendant brings error. Reversed.

Samuel H. Grey and William S. Gummere, for plaintiff in error. John W. Westcott and Samuel K. Robbins, for defendants in error.

REED, J. This action was brought by a husband and his wife to recover for an injury to the wife, caused by a collision between the wagon in which they were driving and a train on the railroad of the plaintiff in error. At the trial it was urged by the defense that the husband, who was driving, was negligent, and that his negligence contributed to the wife's injury. The trial justice, however, charged that the negligence of the husband could not be imputed to the wife. This is assigned for error. To ascertain how far the conduct of the husband affects the right to recover in an action of this kind it is essential that the posture of the husband in relation to the suit shall be ascertained. If he is a party interested in the subject-matter of the action, then it follows that he cannot be permitted to recover when his negligent conduct contributed to the creation of the cause of the action. The rule at common law is entirely settled that for a tort to the wife, either ante or post nuptial, the husband must be joined with the wife in an action. Dicey, Parties, p. 409; 1 Chit. Pl. 73; Com. Dig. tit. "Baron and Feme," (V;) Schonler, Husb. & Wife, 141. Upon the rendition of judgment, the husband has the right to receive the money. Bish. Mar. Wom. § 913. So completely is the husband identified with the prosecution of the action that he can release the cause of action. Beach v. Beach, 2 Hill, 260; Ballard v. Russell, 33 Me. 196; Southworth v. Packard, 7 Mass. 95; Anderson v. Anderson, 11 Bush, 327; Bish. Mar. Wom. § 912. If the wrong to the wife is inflicted through the connivance of the husband, his conduct is an answer to the action, although he may press the suit. Tibbs v. Brown, 2 Grant, Cas. 39. So his power over the action, and the effect of his conduct upon the result, are entirely settled at common law. There can be no doubt that if his negligence assisted to create the cause of action it would, at common law, be a complete defense to the action. Has this been changed by any legislation in this state? I think it quite clear that it has not. On referring to the act relating to the property of married women, (Revision, p. 696,) we find that the real and personal property of every married woman, and the rents, issues, and profits thereof, shall be her sole and separate property. Personal torts do not create rights of property. The right to sue for such is not assignable. They do not survive the death of the injured

person, because, in the language of Lord Ellenborough in *Chamberlain v. Williamson*, 2 Maule & S. 408: "Executors are the representatives of the temporal property,—that is, the debts and goods of the deceased,—but not of their wrongs, except where those wrongs operate to the temporal injury of the personal estate." The language of the section itself is inapplicable to a right to sue for a tort, for no rent, issue, or profit, in the sense of the statute, can arise out of a tort. Section 11 of the act provides that she may maintain an action in her own name, and without joining her husband therein, for all breaches of contract, or for the recovery of all debts, wages, earnings, money, and all property which by this act is declared to be her separate property, and she shall have in her own name the same remedies for the recovery and protection of such property as if she were an unmarried woman. If a right to sue for a tort is property, then, by force of this section, the husband was an unnecessary party to this action. Yet section 22 of the practice act obviously refers to this class of personal torts, in an action for which both must join. This section provides that in any action by a husband and wife for an injury to the wife in respect of which she is necessarily joined as coplaintiff, it shall be lawful for the husband to add thereto claims in his own right arising ex delicto. This is a copy of section 40 of the common-law procedure act of 1852, (15 & 16 Vict. c. 76,) which undoubtedly refers to personal injuries to the wife, in actions to recover damages for which husband and wife must sue jointly.

If any doubt remained in respect to the general rule in this state that the husband must join with the wife in actions for personal injuries to the wife, it would be dissipated by section 24 of the practice act, which states the exception to the rule in such terms as to show the existence of the rule itself. This section provides thus: "Any married woman being in a state of separation from her husband, may bring suit in her own name for the recovery of damages for any injury done to her person or reputation; and it shall not be lawful for the husband of such married woman to control, discontinue, release, or in any way interfere with such action, but the same shall proceed and be under the control and direction of said married woman, as if she were a feme sole." So it is perceived that in all instances except when the feme covert is living in a state of separation from her husband he retains his common-law power of control over and interest in the action. The husband has not a mere power to sue for the wife, but he has a power coupled with an interest in the suit. Retaining this control over the suit, and this right to release, and consequently to compromise it for money, he cannot be permitted to create the cause of action by his negligent or fraudulent conduct, and

then reap the benefit which this interest in the action confers. We think the charge in this respect was erroneous, and the judgment must be reversed.

DIXON, J., (dissenting.) The plaintiff, William Goodenough, and Sarah, his wife, were riding along a public street across the railroad of the defendant, in a wagon drawn by a horse which was driven by the husband, when a collision between the vehicle and a train of the defendant occurred, and the wife received severe bodily injury. This suit was brought to recover compensation for the injury thus suffered by the wife, and a verdict was obtained assessing her damages at \$2,700, upon which a judgment was rendered that she recover that sum against the defendant. On writ of error to review this judgment, the only serious question presented on the record is whether the trial justice erred in charging the jury that, unless the husband was acting as agent of the wife, his negligence was not imputable to her. It is insisted by the defendant that such negligence should be so imputed, because of the marriage relation, and the legal necessity therefrom arising of joining the husband as a plaintiff in the suit. The argument rests upon the premise that the husband has a legal interest in the cause of action, and in whatever compensation may be recovered, and thence is deduced the conclusion that the husband's contributory negligence must preclude any recovery. I deny the premise.

It must, of course, be remembered that we are not dealing with the damages which a husband sustains by the physical injury of his wife, such as the expenses of her cure, and the loss of her service and society. These must be sued for by the husband alone, (except as our statute permits them to be joined with such a cause of action as is now before us.) Against the husband's claim for those damages no doubt his contributory negligence would be a defense. But the cause of action now under consideration is the direct injury to the wife's person, and the loss which she as an individual thereby suffers. In such a cause of action, and in any recovery at law thereupon, the husband, I think, has no legal interest. It may be assumed that such a cause of action, before it is merged in a judgment, does not come within the legal notion of "property." In Blackstone's classification of the various kinds of property (2 Bl. Comm. 438) he ranges damages for injury sustained as property acquired and lost by suit and judgment at law, saying that, although the injured party has a right to damages the instant he receives the injury, and this right is given by the law of nature, yet a judgment is necessary to convert this right into "property." So far as this classification excludes from the legal definition of property a right to damages for an injury to property, it has been criticised, but with regard to an injury to the person

it seems to be generally accepted as correct. Assuming its correctness, our married women's acts, which relate to a wife's property only, do not affect the right to these damages before judgment, and therefore we must consider whether the husband had a legal interest in such damages at common law.

It must be admitted that the husband was a necessary party to be joined with his wife in a suit for the recovery of such damages. But this was not because of his legal interest in the damages. He was a necessary coplaintiff with his wife in all suits at law for the vindication of her rights. Even when he had relinquished his power over his wife's rights, he was so joined. *Innell v. Newman*, 4 Barn. & Ald. 419. And after our statute had terminated the husband's interest in his wife's property, but before the latter statute authorizing a married woman to sue alone for her property, it was necessary that her husband should be joined as a coplaintiff; so that the necessity of joining him in the suit is not indicative of any legal interest in the cause of action. As is frequently stated in the books, he is joined for the sake of conformity. It may also be admitted that, unless he had surrendered his power, the husband could settle for the damages, or could release the wrongdoer from responsibility to the wife. *Southworth v. Packard*, 7 Mass. 95; *Anderson v. Anderson*, 11 Bush, 327; *Beach v. Beach*, 2 Hill, 260; *Ballard v. Russell*, 33 Me. 196. This, however, arose, not from the theory that the damages belonged to the husband, but from the power which he had over all rights of action belonging to his wife. He could make them his by reducing them to his own possession. Settling for the damages was so reducing them, and releasing the wrongdoer was deemed equivalent to settlement. The distinction between a husband's power over his wife's rights in action and a legal interest in them forms the basis of decision in *Stall v. Fulton*, 30 N. J. Law, 430, and *Peterson v. Mulford*, 36 N. J. Law, 481, where it was held that the husband's creditors had no claim on such rights of the wife, unless the husband had chosen to exercise his power over them so as to make them his own. If, without the exercise of such power, those rights were the property of the husband, the claims of his creditors could not have been denied. Having thus noticed those rules of the common law which might seem to favor the contention of the defendant, and having shown that they presuppose nothing antagonistic to the dictate of nature that compensation for a personal injury should belong to the person injured, it must further be noticed that there are rules of common law which clearly recognize this natural claim as legally subsisting in the case of married women. In an action for a battery or other personal tort done to the wife the wife must join. *Bac. Abr. tit. "Baron & Feme,"* p. 306. She must join be-

cause she is the meritorious cause of action, the husband joining for conformity only. *Dengate v. Gardiner*, 4 Mees. & W. 6. If the husband dies before or pending the suit, the right of action survives to the wife. *Bac. Abr. tit. "Baron & Feme,"* p. 304. But if the wife dies before or pending suit, the right of action is extinguished. *Id.* p. 306; *Stroop v. Swarts*, 12 Serg. & R. 76. In view of the common-law maxim, "*actio personalis moritur cum persona*," these rules plainly indicate to whom the right of action belongs. Because it survives the husband, it is not his; it dies with the wife, because it is hers. I conclude, then, that at common law the husband has no legal interest in the right or cause of action which accrues to a married woman for a tort to her person. He has some power over it, but no legal interest in it.

I have said that our married women's acts do not seem to affect this right of action; yet it would be entirely in accord with the spirit of those laws if by judicial construction their terms were made to embrace it. That the legislature should have placed all a wife's real and personal property, and the rents, issues, and profits thereof, beyond her husband's power of disposal, and made them her sole and separate property, as though she were a single woman, and should have left this most intimate right, which concerns her very existence, unsecured to her, can be reasonably accounted for only on the ground of inadvertence. But the defendant's argument is rested also upon the supposition that the husband has a legal interest in the compensation recovered in a suit for his wife's personal injury. This support likewise, in my opinion, fails. When a recovery has taken place, when the cause of action has become merged in a judgment, then I think our married women's acts become operative upon it. As already stated, the judgment is property, and all property received or obtained by a married woman, in any manner whatsoever, belongs by force of the statute to her alone, as if she were a single woman. It may be suggested that, the judgment being recovered by the husband and wife together, the property is not received or obtained by the wife, within the meaning of the statute. The same thing might be urged with respect to a chattel given by a third person to the wife, but delivered to the husband for her. At common law it would have been absolutely his. But now, I presume, he would be deemed a mere agent in the transaction, and the chattel would be hers. Similarly, in this case, the husband appears with his wife in obtaining the property, but it is obtained on her account, and for her; and within any just view of the statute it is obtained by her, and not by her husband. Reason seems, therefore, to lead to the conclusion that the husband has no legal interest in such a judgment as is now before us.

Turning to previous judicial decisions, they appear to tend in the direction above pointed out. Counsel for the defendant relies upon *Carlisle v. Sheldon*, 38 Vt. 440; *Peck v. Railroad Co.*, 50 Conn. 379; *City of Joliet v. Seward*, 86 Ill. 402; and *Yahn v. City of Ottumwa*, 60 Iowa, 429, 15 N. W. 257. While in these cases it was said that the negligence of a husband driving would be imputed to the wife riding with him, yet in every case the imputability was placed, not on the relation of husband and wife, but on that of driver and passenger. This will be seen by a quotation from the opinion in *Carlisle v. Sheldon*, which is the only case of husband and wife cited in the other decisions. The Vermont court said: "The wife stands in no different position from that which she would occupy if the driver of the vehicle in which she was carried had been, instead of her husband, one employed for that purpose. * * * If she had been a passenger in a stage coach on this occasion, and had received the same injury, * * * the driver would be treated as being her agent. * * * There is nothing in the marital relation which would change the situation of the wife in respect to her husband's negligence under such circumstances, for the same consequences would have followed if the relation, instead of being that of husband and wife, had been that of parent and child, or master and servant, or if she had been an entire stranger." This is substantially the doctrine of *Thorogood v. Bryan*, 8 C. B. 115; and, if that doctrine had been repudiated in Vermont, as it has been in New Jersey, (*Railroad Co. v. Steinbrenner*, 47 N. J. Law, 161,) it may fairly be inferred from the language above quoted that *Carlisle v. Sheldon* and the cases following it would have been decided differently. I have found only two cases where the decision rested on the mere relation between husband and wife, and only one of these is directly on the point presented by the case in hand. Both, however, tend to corroborate the opinion which I have formed. In *Everts v. Everts*, 3 Mich. 580, it was held, in an action by husband and wife for an assault upon the wife, that no act or words of the husband, unless the wife was privy to or participant in them, could be proved in mitigation of damages. In *Hoag v. Railroad Co.*, 111 N. Y. 199, 18 N. E. 643, an action by an administrator of a married woman to recover damages for her death, caused by the negligence of the defendant, it was adjudged that the contributory negligence of the husband in carelessly driving across the railroad track, whereby his wife, a passenger in his vehicle, was killed, was not imputable to the wife, and so did not bar the suit of her administrator. Yet, under the New York statute, as under ours, what would have defeated the action of the injured person in case death had not ensued would defeat the action of the adminis-

trator. Both upon reason and authority, then, I think the jury in the trial of this case were properly instructed that the contributory negligence of the husband constituted no defense. The judgment below should be affirmed.

(53 N. J. E. 88)

STOUT et al. v. SLOCUM.

(Court of Chancery of New Jersey. Nov. 27, 1893.)

JUDGMENT—EQUITABLE RELIEF—REMAND TO WRONG COURT.

Judgment being entered in the common pleas on a case certified from the circuit, the case was returned to the circuit, where defendant moved to open the judgment. The chief justice denied the motion, and ordered the case remanded to the common pleas. Defendant had no notice of the remand till after execution was issued and the time had elapsed in which he could give bond on bringing error. *Held* that, in the absence of a showing of meritorious defense, the court of chancery could not enjoin process on the judgment, on the ground that the remand to the common pleas was improper.

Bill by R. T. Stout and another against Britton Slocum to enjoin execution on a judgment. Bill dismissed.

Chauncey H. Beasley, for complainants. James Steen, for defendant.

BIRD, V. C. The object of this bill is to overcome a judgment at law, which cannot be relieved against at law, although it is said to have been irregularly obtained, whether such inability results from the neglect of the attorney or the mistake of the judge. The judgment was obtained in the court of common pleas, upon a cause which was certified to that court from the circuit. The judgment being so obtained, the case was again returned to the circuit, and, after it was so in the circuit court, a rule was asked for directing that the judgment should be opened. The chief justice denied the motion, and the order denying such motion also included directions that the cause be remanded to the common pleas, when it is alleged it ought to have been remanded to the circuit, supposing it was in the circuit. This mistake or irregularity of the court was unknown to the defendant in the suit at law, the complainant in this suit, and the execution was issued out of the common pleas, and a levy taken upon the property of the defendant. This fact brought to his attention the exact situation, but, when he learned that the judgment had been entered in the common pleas, 15 days had elapsed, so that he was deprived of the statutory right to give bond to the plaintiff upon taking a writ of error.

Upon the return of the order to show cause in this case why the suit at law should not be restrained till the determination of the rights of the parties, it was insisted that this was a proper case for the interference

of a court of equity to restrain proceedings at law. There seems to be nothing in the case to warrant this court in interfering. To say nothing about other defects in the bill, and the proofs verifying the fact of the judgment and orders, there is not a single allegation, nor a shadow of proof, that the complainants had the slightest merits in their defense to the action at law. This is fundamental. Equity never undertakes to relieve a defendant against a judgment at law, unless he can show merits. Mere accident or mistake or irregularity is not under any consideration sufficient. In the case of *Insurance Co. v. Hodgson*, 7 Cranch, 336, Chief Justice Marshall said: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties of availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal certainty be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law." 2 Story, Eq. Jur. § 887; 1 High, Inj. § 114. There is not a single fact set forth in the bill or affidavit to lead the mind of the court to conclude that the judgment of the common pleas was in any particular wrong, or that it would be against conscience to enforce it. Besides, in this case, it appears by the bill itself that, upon the application for a rule to show cause why the judgment should not be opened, the chief justice refused to entertain the motion. This is very strong proof that the judge who heard the application was satisfied with the judgment. It certainly would be an unheard of proceeding for this court to attempt in any particular to review the proceedings of a court of law, when it has jurisdiction of the cause and the parties. But it is said that there was a mistake made by the circuit judge in remanding the cause to the common pleas, instead of allowing it to remain in the circuit. I think that this is as much a mistake or oversight of the counsel for the defendant in the cause as an oversight or mistake upon the part of the circuit judge. He made the application for the order, and, failing, he left it to the counsel of the other side to prepare and present such an order as he saw fit. It clearly was the business of the applying counsel to see that an order was drawn in conformity to the rights of his client, even though the decision of the court was adverse. But it is claimed that upon reading the provisions of the statute, and the various

orders of the court, it will appear that the order signed by the chief justice, remanding the cause to the common pleas, instead of to the circuit, was in that particular erroneous; and that, because of that error, the counsel of the defendant in the suit at law was misled for so long a period of time that he was deprived, by the strict rules of law, of any redress. As the case stands, this leaves it for this court to assume that the chief justice committed this error; or, if it does not amount to this, it is an assumption that this court has the power to review the action of the chief justice in this particular, and to declare that the order which he signed was irregular and unlawful. I am not aware that any court of equity has ever gone so far. The order to show cause will be discharged, and the bill dismissed, with costs.

(56 N. J. L. 235)

HESTON v. HESTON.

(Court of Chancery of New Jersey. Nov. 27, 1893.)

WRITS—FRAUDULENT SERVICE—DIVORCE.

Petitioner for divorce wrote to his wife in another state, asking her to meet him at a certain place within the state; and, she complying, petitioner did not meet her, but the sheriff did, and served citation on her. *Held*, that the service should be set aside as fraudulent.

Bill by Joshua Heston against Clara B. Heston for divorce. On motion to set aside service of citation. Motion granted.

Samuel Walker, Jr., for complainant. William Holt, for defendant.

BIRD, V. C. The motion in this case is to set aside the service of a citation because such service was procured by circumvention and fraud. The defendant was living in Pennsylvania with her father-in-law, and the petitioner, having filed his petition for divorce, wrote her, asking her to meet him at a certain place in the city of Trenton. She came into the state, and attended at the place designated by the petitioner in his letter. The petitioner did not meet her, as was implied in his letter that he would, but the sheriff was there in attendance, and served a process of citation and copy of the petition upon her. I think that, when the process of the courts is procured to be served by such devices, it is always characterized as fraudulent, and will not be recognized. I think that this should especially be the rule in courts of equity. The motion will be granted, with costs.

(52 N. J. E. 91)

GARRISON v. FARMERS' MUT. FIRE INS. CO. OF SALEM COUNTY.

(Supreme Court of New Jersey. Nov. 13, 1893.)

INSURANCE—RENEWAL—CONDITIONS—ALTERATION OF BUILDING.

1. Where a policy of fire insurance is renewed from year to year, the description of

the insured property in the original policy must be applied to the condition of the property at the date of the last renewal.

2. A building was described in a policy as a sawmill, size, 29 by 48 feet. The portion used for a sawmill was first built. Then an addition was built onto the old building, with no partition between the two portions. In the lower story of the new part, and in the upper story of both parts, was placed machinery for a sash and blind manufactory. The size of the whole structure was 43 by 48 feet, but the size of each part did not appear. *Held*, that the insurance was upon the entire structure, and so the new part is not to be regarded as a distinct building, the existence of which breaks the warranty.

(Syllabus by the Court.)

Action on a policy of insurance by William F. Garrison against the Farmers' Mutual Fire Insurance Company of Salem County. After verdict for plaintiff, defendant obtained a rule to show cause why a new trial should not be granted. Rule discharged.

Argued February term, 1893, before the CHIEF JUSTICE, and DIXON, MAGIE, and REED, JJ.

J. H. Huffman and W. D. Edmunds, for plaintiff. C. H. Sinnickson and M. P. Grey, for defendant.

REED, J. This action is upon a policy of fire insurance. The policy was originally written in July, 1888, for one year. It was renewed yearly, the last renewal having been made in July, 1891, for one year. The property insured was destroyed by fire on the following January 30th. The main defense interposed at the trial was that there was, in the policy, a misdescription of the property insured, which avoided the contract of insurance.

The building was described as a sawmill. The evidence showed conclusively that at the time the policy was originally written, and for nearly three years afterwards, a part of the building used as a sawmill was also used as a sash and blind factory. It was uncontradicted that the rate of insurance for a sash and blind factory was nearly, if not quite, double the rate for a sawmill. One of the conditions attached to the policy is this: "If he [the insurer] should cause the subject insured to be described in the policy otherwise than it really is, so that the same will be charged at a lower premium than otherwise proposed, or such description be false or fraudulent, such insurance will be void and of no effect." The plaintiff, however, insisted that there was no such use of any part of the building on or after July, 1891, the date of the last renewal. The trial justice charged that the policy in respect to description of the insured property must be read as of the date of the last renewal; that the question for the jury was whether, at that date, the building was used as a sash and blind factory. If it was not so used, then the description of the building as a sawmill was correct. The jury found that it was used then and subsequently only

as a sawmill. To this part of the charge an exception was sealed.

We see no error in this construction of the contract. It is indeed true that the terms of the old contract were continued in the new; but the risk assumed under the old contract expired with it, and each renewal was the beginning of a new risk. *Noyes v. Insurance Co.*, 54 N. Y. 668. So far as the descriptive clauses were concerned, they are properly applicable to the insured premises at the time of the assumption of the new contract.

Again, it was the subject-matter of an exception that the court charged that falsity in description, which under the terms of this condition avoided the policy, was an intentional false description. But, inasmuch as the falsity of the description of the insured building was ignored by the jury in its general finding for the plaintiff, there is no ground for the exception. The effect of the verdict appears in this way: The jury was charged that, inasmuch as it was contradicted that the rate of insurance for a sash and blind factory was greater than for a sawmill, it follows that, if the mill was improperly described as a sawmill because of its use also as a sash and blind factory, this misdescription avoided the policy. The finding of the jury necessarily involved the finding that there was no misdescription in this respect, and therefore there could be no falsity in such description.

It is contended, further, that there was a misrepresentation which, under the third condition, avoided the policy. This condition provides that "if any person insuring any property in this company shall make any misrepresentation or concealment in the application, or otherwise, such assurance shall be void." It appears in the testimony that a two-story building was first erected, in the lower story of which was placed the sawing machinery. Afterwards, alongside of this building, another structure, two stories in height, was erected, in the lower and upper stories of which, as well as in the upper story of the building first erected, the planing and other machinery of the sash and blind business was placed. The buildings were completed at the time the original insurance policy was executed. In the application it is stated that there are no other buildings near the insured property. There were no other buildings near, unless the last-erected structure is to be regarded as a building distinct from the first-erected building, and the insurance is confined to the latter-named building. The building last erected was joined to the first. There was no partition between them. The upper story of both was used for machinery belonging to the sash and blind business. The entire structure was designed to be used for the combined business of sawing lumber and manufacturing sash and blinds. It is true that the size of the building insured, as stated in the applica-

tion, is 29 by 48 feet, and the size of the combined buildings is actually 43 by 48 feet. But it does not appear in the testimony that the dimensions first mentioned are applicable to the sawmill portion of the structure; it does not appear what the dimensions of each part are; so that for the purpose of fire insurance the entire structure can, in my judgment, be regarded only as a single building. Mr. Hand, a witness for the defendant, is an insurance agent, and as such had made a survey of this property for another company. He was asked, "What was the character of that building,—was it in more than one part, or not?" He replied, "Well, it is what I should call one building,—frame building,—as an insurance agent." In his report to his company he so treats it as a single building 43 by 48 feet in size. Mr. Reuben Townsend, who made the survey for the present insurance, referred to his memorandum of that survey. He was asked, "What sized building did you find there?" and replied, "I see, by my notes here, 42 by 48, two stories." He then mentions an additional one-story lean-to, 13 by 15, which was a roof attached to the entire building, under which wood was sawed. So I conclude that the structure, although parts were erected at different times, was clearly, for insurance purposes, a single structure, and was so treated.

The remaining inquiry is, what effect has the misdescription of the size? It was by some inadvertence described in the application as a building 29 by 48, when its dimensions were really 43 by 48 feet. This question must, I think, be answered by an appeal to the terms of the first condition already set out. If this misdescription caused the insurance to be charged at a lower premium than would have been charged if the building had been properly described, it avoided the policy; otherwise, not. This question was left to the jury, and the verdict displays its finding that it did not. The misrepresentations which, by the terms of the third condition attached to the policy, ipso facto avoid it, must be referred to other misrepresentations than those of mere description of the premises; otherwise, the first condition would not only be a nullity, but would be entirely misleading. The rule should be discharged.

(52 N. J. E. 169)

GREEN v. TULANE et al.

(Court of Chancery of New Jersey. Dec. 12, 1893.)

GIFT INTER VIVOS.

T. deposited with G. three coupon bonds, together with a paper signed by himself, as follows: "Having deposited in the hands of C. S. G. three \$1,000 bonds of the state of New Jersey, I hereby authorize and direct him, in case of my death, to deliver said bonds to Miss M. P. and her sister A. C., to be equally divided between them. Dated

May 15, 1873. [Signed] P. T." The bonds matured January 1, 1893. G. collected the coupons during T.'s lifetime, and paid the proceeds to T. After T.'s death (March, 1887) the bonds were claimed by T.'s personal representatives, and by the ladies mentioned in the paper. *Held*, that the latter were entitled. (Syllabus by the Court.)

Bill of interpleader by Ellen G. Green, executrix of Caleb S. Green, deceased, against Paul M. Tulane and another, administrators of the estate of Paul Tulane, deceased, and Frances F. Clifton, executrix of Marien Passage, deceased, and of Adelaide C. Clifton, deceased, to determine the rights of defendants to certain bonds in the custody of complainant. Heard on pleadings and proofs in open court. Decree for defendant Clifton.

The other facts fully appear in the following statement by PITNEY, V. C.:

The pleadings and evidence disclosed the following facts: Paul Tulane, late of Princeton, was, in his lifetime, a friend and benefactor of two sisters, residents of the same town, Mrs. Adelaide C. Clifton and Miss Marien Passage, having for years before his death made them a yearly allowance in cash. On the 15th of May, 1873, he deposited with the late Hon. Caleb S. Green, of Trenton, three coupon bonds of the state of New Jersey, known as "war bonds," of \$1,000 each, payable to bearer, and maturing on the 1st day of January, 1893, numbered, respectively, 20, 21, and 22, and at the same time handed to Judge Green a paper, signed by himself, in these words: "Having deposited in the hands of Caleb S. Green three \$1,000 bonds of the state of New Jersey, I hereby authorize and direct him, in case of my death, to deliver said bonds to Miss Marien Passage and her sister Adelaide Clifton, to be equally divided between them. Dated May 15, 1873. Paul Tulane." There is no evidence to show that at the date of the deposit Mr. Tulane was sick, or in any peril or fear of immediate death. During Mr. Tulane's lifetime, either Judge Green or his son, who was his law partner, cut the interest coupons from these bonds, and paid the proceeds to Mr. Tulane. He died March 27, 1887. The bonds still remained in Judge Green's hands, and came into the hands of his executrix, the complainant, at his death, in 1891. Both Mrs. Adelaide Clifton and Miss Passage survived Mr. Tulane, but each died, testate, before Judge Green. The defendant Mrs. Frances F. Clifton was named executrix of the will of each. The administrators of Mr. Tulane, and Mrs. F. F. Clifton, as executrix of Mrs. Adelaide Clifton and of Miss Passage, each claimed the bonds from Judge Green in his lifetime, and, after his death, from his executrix, whereupon she filed her bill against them, praying that she might be permitted to deliver the bonds into the custody of the court, and be discharged, and that the contending parties might interplead, etc. The contestants answered, setting forth their respective claims, and the cause

was brought to hearing at one time on all the issues. After hearing the evidence, an order was made at once for the delivery into the custody of the court of these bonds, which was done, and the court took time to consider the rights of the defendants.

William M. Lanning, for complainant. John F. Hageman, Sr., and John F. Hageman, Jr., for defendant Mrs. Clifton. W. D. Holt, for defendant Tulane's administrators.

PITNEY, V. C., (after stating the facts.) The rules of law governing this case are well settled, and it seems to me that the result of their application is not open to doubt. The case is one of gift, pure and simple, and there is not a particle of consideration, either meritorious or valuable. The simple question, then, is, was the gift so far completed by the unrevoked acts of the donor that it is considered in law to be complete? The rule is well settled that, in order to make a perfect gift, it must be, if a chattel, so far delivered, or, if real estate, so completely conveyed, that the title vests in the donee without any aid from this court as against the donor or his or her heir or personal representative. If anything more must be done by the donor in order to vest the title, so that the donee, or his or her heir or personal representative, shall do some further act, then the gift is not complete. This is so whether the gift be direct, or by means of a trust either in a third person or in the donor himself. 1 Perry, Trusts, §§ 96-98, 100. In the section last cited, Mr. Perry says: "If the donor or settlor propose to make a stranger the trustee of his property, and the property is a legal estate, capable of legal transfer and delivery, the trust is not perfectly created, unless the legal interest is actually transferred to or vested in the trustee. It is not enough that the settlor executed a paper purporting to pass it, if in fact the paper does not have that effect. The intention of the settlor to divest himself of the legal title must be consummated and executed, or the court will not enforce the trust." And Lord Eldon, in *Ellison v. Ellison*, 6 Ves. 662, says: "I take the distinction to be that if you want the assistance of the court to constitute you cestui que trust, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you cestui que trust, as upon a covenant to transfer stock, etc.; but if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this court." And see *Lewin, Trusts*, *84.

In this case the subject of the gift was negotiable bonds, which passed by delivery. No writing or assignment on the part of the donor, or transfer on the books of the state, was necessary in order to transfer the title. When, therefore, Mr. Tulane delivered the

bonds to Judge Green, he put it in his power to dispose of them, and make title to them to anybody that he saw fit without any further act on the part of Mr. Tulane. The title at law became vested in Judge Green. He obtained it by the voluntary act of the former owner of the bonds. This seems clear enough. The only question is, for whom did Judge Green hold them? He never made any claim to them on his own account, nor does his executrix, and I do not see how the administrators of Tulane can make any claim to them in the absence of some paper signed by Judge Green, or other proof that he held them in trust for Mr. Tulane. It may be suggested that the fact that he paid Mr. Tulane the interest which accrued upon them up to his death is evidence that he did hold them in trust for him. I think that is true, so far as concerns the interest accruing up to that time, but in a matter of trust it is easy enough to separate the principal from the interest, and the mere fact that he paid the interest to Mr. Tulane goes no further than to show *prima facie* that he held the bonds for his benefit during his lifetime. But, then, Mr. Tulane has himself declared in writing who were to be the cestuis que trustent of the bonds at and after his death. He has said that they were to go to Mrs. Clifton and Miss Passage, and he has directed that the holder of the legal title and the actual possessor of the bonds should deliver them to those ladies, to be shared between them equally; and that paper he never revoked. It is not necessary now to determine whether he could have done so at any time after notice had been given to the beneficiaries in remainder of the gift, and they had formally accepted it. It is enough to say that nothing of the kind was done, and Paul Tulane died without having resumed possession of the bonds, or having revoked his direction in writing that they should be delivered to the beneficiaries named. The result is that the gift was a complete one, and Mrs. Clifton is entitled to the subject of it.

The only ground upon which I can conceive that the gift can be attacked is that it was testamentary in its nature. By the terms of the declaration of trust, if it be viewed in that light, the bonds were to be delivered to the beneficiaries "in case of my death." Inasmuch as death is a certain event, that was tantamount to saying, "at my death." Admitting that the result was a reservation by implication of a life estate to the donor, I am still unable to perceive how it follows that the gift must, under the circumstances, be treated as testamentary in its character. It is quite competent for one to make a settlement on another in *praesenti*, reserving a life estate to himself, without bringing the affair within the definition of a "testamentary disposition" or of a "gift causa mortis." The authorities in support of this position are numerous.

In *Moore v. Darton*, 4 De Gex & S. 517, 20 Law J. Ch. 626, a Miss Darton loaned to Moore (the plaintiff) £100, and he signed the following document: "Received of Miss Darton, for the use of Ann Dye, £100, to be paid to her at Miss Darton's decease, but the interest at four per cent. to be paid to Miss Darton." Underneath was written: "I approve the above. Betty Darton." This document was given to Miss Darton. The money was not paid to her in her lifetime. After Miss Darton's death, it was held by Vice Chancellor Knight Bruce that Moore was a trustee for Ann Dye for £100. He said: "The consequence is that Mr. Moore, having received this money, became trustee of it for the use of Miss Darton for life, and, subject to her life interest, for the use of Ann Dye, whom I think entitled accordingly."

Stone v. Hackett, 12 Gray, 227, was, like this, a bill of interpleader. The plaintiff had received from Dr. Kittredge several shares of stocks in different railroads, and had signed a memorandum to the effect that the said several shares were purchased with the money of Dr. Kittredge, and (page 228) "are in my hands in trust for the following purposes and uses, that is to say: The income and dividends on said several shares are to be paid to the said Kittredge during his lifetime." At his decease, they were to be divided among various charitable institutions; and then it adds: "Said Kittredge retaining the right to modify said uses, or to revoke said trust." And it was held that the charitable beneficiaries were entitled; and, after showing that the gift was complete, the learned judge who spoke for the court proceeds, (page 232:) "Nor are we able to see any force in the suggestion that the trust which the donor created in some of its features looked to a disposition of the property which was the subject of the gift after his death. We know of no principle of law which renders such a transfer of property *inter vivos* invalid. The entire *jus disponendi* was in the donor. Perhaps, if there were any facts to show that the transaction was intended to be testamentary in its character, and was entered into for the purpose of evading the provision of law regulating the execution of last wills and testaments, there might be some ground for impeaching the validity of the conveyance, and withholding the sanction of the court from the trusts which the donor intended to establish. But it is not necessary to determine this question, because there is no evidence from which any such intent on the part of the donor in the present case can be inferred."

In *Dickerson's Appeal*, 115 Pa. St. 198, 8 Atl. 64, the decedent, by declarations in writing, signed by himself, and placed with the securities, and by having the bonds registered on the books of the company in his name, as trustee for his children, there constituted himself a trustee of certain nego-

liable bonds, of which he retained the possession, and which were found among his papers after his death. It was held that the trust must be enforced, though he retained the actual use of the income during his lifetime.

Barlow v. Loomis, 19 Fed. 677, decided by Judge Wheeler, in the United States circuit court for the district of Vermont, was this: The testator, on three several occasions, delivered and transferred to the defendant Loomis certain stocks and bonds, and in each case took written declarations from Loomis, in two of them providing that Loomis should hold the stocks and bonds in trust to pay the interest and dividends to the testator during his lifetime, and at his decease to transfer them to the other defendants in the cause, and, in the third case, that Loomis should hold the bonds for the benefit of the other defendants at the death of the testator, the testator reserving the right to demand and have the income while he should live, and to revoke the trust altogether, and have the bonds returned to him, if he should so elect. Loomis paid the income to Barlow during his life. He did not revoke the trust, but died leaving the stocks and bonds in the possession of Loomis. The bill was brought to have the stocks and bonds brought into the assets of the estate, so that the complainant, who was the residuary legatee, might have the benefit of them. Judge Wheeler said: "The sole inquiry is as to the effect of what he (the testator) did do. He could control the disposition of his estate after his death only by will, executed according to the statute of wills; but he could divest himself of this property during life by mere delivery and transfer, such as he fully accomplished. Had there been no reservations, there would have been no question. But these reservations were all optional and personal to himself. If he did not exercise his right to them, they were gone. He died without exercising the right, and it expired with him, leaving the property absolutely gone out of his estate, and wholly beyond the complainant's rights."

In *Clough v. Clough*, 117 Mass. 83, decedent handed to his brother, the defendant, \$800, of which he had repaid him in his lifetime \$400, and, as to the balance, set up that it had been given to him by his brother, the decedent, in trust for his minor son, with instructions to invest and hold the same till the son should be 21 years old, and then to pay the same to him with all accumulations. The plaintiff requested the judge to instruct the jury "that if they found that the deceased directed the defendant, in case he died, to keep the money, and give it to the child if he lived to be twenty-one years of age, and, if he did not, to divide it between the mother and sister of the deceased, that would not be in law a gift to the child, mother, or sister, and that such a disposition could only be made by will,"—which the judge declined to

do. There was a verdict for the defendant, and that verdict was sustained.

In *Davis v. Ney*, 125 Mass. 590, the deceased, Mary Ney, a depositor in a savings bank, delivered her bank books, accompanied by an assignment of her deposits, to one Emery, upon the oral agreement that he should draw for her what money she wanted during her lifetime, and pay the balance, if any, left at her death, to her son. In pursuance of this agreement, Emery paid Mary Ney certain sums of money before her death, and the balance remaining after her death he paid to her son, who was appointed executor of her will. The court said: "The delivery of the bank books to Emery, accompanied by an assignment, constituted a valid gift, and gave to him a complete title in the fund represented by the books. In form, the conveyance to Emery was absolute; but it appears from the statement of facts that it was accompanied by an oral agreement, between Mrs. Ney and Emery, that he should pay her during her life such sums as she wanted, and that, upon her death, he should pay over the balance to her son. The appellant contends that this was not a complete gift; that it was an attempt to evade the statute of wills; and that the transaction was a mere form, the nominal title being in Emery, and the real ownership and possession being in Mrs. Ney." And, further on: "It does not appear, upon the case stated, that it was the intent of Mrs. Ney to make a disposition of this property in its nature testamentary,"—and held that the son was entitled to it.

This ruling was followed in *Gerrish v. Institution*, 123 Mass. 150. At page 163 the judge says: "In the case at bar, the claimants offered to prove declarations of the testator made to them at different times, in language which fairly implied that he intended to give to them an immediate equitable title in the principal fund, reserving only the income for life. These declarations define the nature of the trust assumed, and show that a testamentary disposition of the property was not intended."

In *Gilman v. McArdle*, 99 N. Y. 451, 2 N. E. 464, a married woman placed in the hands of McArdle a sum of money, with directions to hold it for the support and maintenance of herself and her husband as long as they lived, and, after the death of the survivor of them, to use the residue to pay their funeral expenses, the erection of suitable monuments to their memories, and to expend the amount remaining in his hands, after such payments, for Roman Catholic masses to be said for the repose of the souls of herself and her husband. Both the wife and husband died, and there was a considerable balance left in the hands of McArdle, and this suit was brought by the administrator of the original donor to recover it. Judge Rapallo, in his opinion, at page 459, 99 N. Y., and page 467, 2 N. E., uses this language: "The learned

judge who rendered the judgment in the present case expressed the opinion that the disposition in question would have created a valid trust if contained in a will, though not valid under the circumstances of this case as a disposition *inter vivos*; but it seems to us that any trust of property which would be valid if created by will can be created by the owner of the property in his lifetime, provided it is then to go into operation, although it is to be executed after his death, and that, in the case of money or personal property, it may be created by oral agreement, accompanied by a transfer or delivery of the property, and that such delivery will pass the title to the property, and that, as a trust, its validity is to be tested by the same rules, whether it be created by will or by contract *inter vivos*."

Other authorities in the same direction were cited in the elaborate and valuable briefs of the counsel for Mrs. Clifton, but the foregoing suffice.

I will advise a decree in favor of Mrs. Clifton, and that the administrators of Tulane pay the costs of this suit, including the amount of costs paid to the complainant, all of which have been incurred by their unwarranted demand upon the complainant for the possession of these bonds.

(52 N. J. E. 164)

WHEELER & WILSON MANUF'G CO. v. FILER et al.

(Court of Chancery of New Jersey. Nov. 22, 1893.)

MORTGAGES—FORECLOSURE—PLEADING—PARTIES.

1. The fact that a bill to foreclose a mortgage alleges nothing in terms against a defendant against whom it prays process is not ground for demurrer, if he is informed by the notice annexed to his subpoena that he is made a party because he holds a mortgage on the premises, and claims some lien thereunder.

2. In a bill to foreclose a mortgage, a prayer for relief and discovery against "said defendants hereinafter named" can only refer to defendants already mentioned, and not to a defendant mentioned merely in the following prayer for process.

Bill by the Wheeler & Wilson Manufacturing Company against Johnson H. Filer, David S. Coney, and others to foreclose a mortgage. Said Coney demurs. Demurrer overruled.

The other facts fully appear in the following statement by PITNEY, V. C.

This is a bill to foreclose, by mortgagee against mortgagor, based on an ordinary legal mortgage, duly signed and sealed by the defendant, conveying certain lands to secure the debt. The bill contains no allegation that any other person besides the mortgagor claims any lien upon, or to have any interest in, the mortgaged premises. The prayer for relief is the ordinary one for sale, etc., and that the defendants be foreclosed, etc., and is directed against "said defendants hereinafter named." In the list

of defendants against whom process is prayed, and which follows the prayer for relief, but nowhere else in the bill, is found the name of David S. Coney. Annexed to the subpoena is a notice or ticket addressed to Coney, under the ninth section of the chancery act, stating that he is made a party because he holds a mortgage upon the premises described in the bill, and by virtue thereof claims to have some lien upon or interest in the mortgaged premises. This subpoena, with the ticket or notice, was returned, duly served upon Coney. Coney now demurs, and "for cause of demurrer shows that the said bill of complaint contains no allegation of any kind whereby it appears that the said David S. Coney is a proper or necessary party defendant thereto, and that the said bill contains no allegations of any kind against the said David S. Coney, and that there is nothing therein contained that the said David S. Coney should be required to answer. Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and humbly prays the judgment of this honorable court whether he should be compelled to make any further or other answer to said bill, and prays to be hence dismissed, with his costs and charges in this behalf most wrongfully sustained."

W. Berault, for complainant. H. S. Alvord, for defendant Coney.

PITNEY, V. C., (after stating the facts.) My first impression was—and I so expressed it—that the demurrer was well taken, but subsequent reflection and consideration lead me to a contrary conclusion. It is undoubtedly the general rule, as expressed by Lord Redesdale, (*Mitt. Ch. Pl.* p. 160,) that "the plaintiff must show some claim of interest in the defendant in the subject of the suit, which can make him liable to the plaintiff's demands, or the defendant may demur." And Justice Story, following this authority, says (*Story, Eq. Pl.* § 519) that an objection may be taken by demurrer to the substance of the bill for want of interest of the defendant in the subject-matter of the suit. And see section 262; also, *Hare, Disc.* § 2, p. *65; *Daniell, Ch. Pr.* p. *321 et seq. An examination, however, of the context of these writers, and of the cases cited by them, shows that this rule is applied by the courts only to cases where either discovery is sought for the purpose of obtaining evidence, or some specific relief is prayed against the defendant personally. Now, a bill to foreclose differs from such a bill, in that it is a proceeding *in rem*, and the defendants are made parties only because they claim to have an interest in the subject-matter. No personal relief is usually prayed against them, and none is prayed in this case. Nor is the bill here one for discovery. It prays none

against this defendant, and manifestly was not intended as an instrument for obtaining evidence. The necessity for connecting the defendant in some way with the subject-matter of the suit, when he is to be interrogated about it, is manifest, because, if he know nothing personally, it is idle to interrogate him. Any defendant who is made a party because he claims an interest in the mortgaged premises may disclaim such interest, and be discharged, with his costs, if he have not pleaded simply for the purpose of making costs. *Daniell*, Ch. Pr. pp. *706, *709, and cases cited. Where a complainant in a foreclosure suit attempts to state why he makes a person claiming a lien upon or interest in the mortgaged premises a party, he may do so either by simply stating that such party claims some interest in or lien upon the mortgaged premises, without attempting to specify it, (2 *Jones*, Mortg. § 1473,) or he may specify it according to his information and belief. The former is quite sufficient, for the simple reason that it is no part of the complainant's duty to undertake to set out the defendant's case. The defendant has no right to have complainant describe it, and if he attempts to do it his statement does not bind the defendant, for he may nevertheless, and in many cases must, for his proper protection, set it out again in due form in his answer. But while, from the very nature of the case, there is no duty or necessity laid upon the complainant to describe in his bill the defendant's claim, nevertheless the practice of so doing, which has prevailed so long in this state, is a good one, and tends to save the costs of an answer, and serves to notify the other defendants of the character of all the claims made against the property. It should not be discouraged. But this consideration cannot change the real nature of the case, which is that the complainant, when he has stated his mortgage, has stated his case, and made out his right to the aid of the court against the mortgaged premises, and all persons interested in them; and the nature of the claims made by other parties to the premises is not a part of his case. The mere fact that they have such claims is all that is necessary in order to authorize him to bring them into court. Now, the insertion of a name in the prayer for process seems to me to amount, by implication, to an allegation that such person does claim an interest in the premises, and also that it is subsequent to the complainant's mortgage, for, unless he have such claim, he should not be made a party. But whether I am right or not in this notion that the mere insertion of the name in the prayer for process is in effect an allegation that the defendant claims an interest in the premises, it seems to me that the defendant in this case cannot say that he is injured by the omission to state in the bill the reason for making him a party, when he has that information by the notice or ticket annexed to the subpoena, and served

with it. This notice is just as serviceable to him in that behalf as if the information it contained had been placed in the bill, and I am unable to see how its absence from the bill entitles him to demur. The object of a demurrer is to defend a party against a demand, protect his rights, and save him costs and trouble; in short, to serve some useful purpose, and not to enable his solicitor to make complainant's solicitor pay him a bill of costs for an oversight that cannot possibly harm him, or cause him the least inconvenience or expense.

One Gould was named a defendant in the same manner as was the demurrant, and was served with a notice attached to the subpoena stating that he was made a party because he held a lien claim upon the mortgaged premises; and he has promptly answered, setting out his claim, and alleging that it is prior to complainant's mortgage, and praying, as he has a right to, if it is prior, to be entirely dismissed from the suit, with costs. It is difficult to see how he was injured by the omission to state his claim in the bill.

There are other circumstances which seem to be equally fatal to the demurrer. It is doubtful, to say the least, whether upon the language of the prayer for relief and discovery, which names no defendants, but says, merely, "said defendants hereinafter named," either relief or discovery is prayed against demurrant. He certainly does not come within the description of "said defendants," for he had not been previously named in the bill; and it would seem that the words which follow, "hereinafter named," ought to be construed as referring only to those previously named, as indicated by the word "said." To construe them as including more is to deny all force to the word "said." If, then, by the true construction of the bill, neither relief nor discovery is prayed against demurrant, there is nothing in it for him to defend, and nothing to demur to, for a demurrer is a defense; and it seems clear enough that there can be no sort of relief decreed against a party against whom none is prayed. If this view is correct, then the real error, if any, of which demurrant has a right to complain, is the award and issuance of process against him without stating in the bill any reason for so doing; and, if the statutory notice or ticket annexed to the subpoena is inefficient to cure such defect, then his remedy, if he had no interest in the mortgaged premises, was to move the court to strike his name from the prayer for process, and to suppress the process itself, or to strike his name from it, if it be joined with others there. If he had an interest in the premises, which he desired to protect, he could answer, and set out that interest in his own way. From whatever direction, then, we consider the uninteresting—because technical and unmeritorious—question raised by this demurrer, we find it to be bad. I

will advise an order that the demurrer be overruled, with costs, unless the complainant shall desire to amend, in which case it will be upon terms that demurrant consent that such amendment be made without costs.

(52 N. J. E. 52)

WINTERS v. EARL.

(Court of Chancery of New Jersey. Dec. 11, 1893.)

MORTGAGE — DEED ABSOLUTE IN FORM — PAROL EVIDENCE—BURDEN OF PROOF—COSTS.

1. A deed absolute on its face, executed as a security, will be declared to be a mortgage.

2. The fact that the deed was executed as a security may be proved by parol evidence.

3. The burden of proof in such a case rests on the party alleging that the deed is not what it purports to be on its face.

4. On a bill to redeem, the general rule is that the mortgagor will be required to pay costs, but this rule may be dispensed with when the mortgagee's conduct has been oppressive.

(Syllabus by the Court.)

Bill by Collins Winters against William H. Earl to have a deed absolute in form declared a mortgage. Heard on pleadings and proofs in open court. Decree for complainant.

Francis J. Swayze, for complainant.
Charles M. Woodruff, for defendant.

VAN FLEET, V. O. The object of this suit is to have a deed absolute on its face declared to be a mortgage. The principle is well established that if a debtor makes a conveyance, absolute on its face, to his creditor as a security for a debt, the deed will be considered in equity to be a mortgage, and the fact that it was executed as a security, and not as an unconditional conveyance, may be established by parol evidence. *Phillips v. Hulsizer*, 20 N. J. Eq. 308, and the cases there cited. Any legal means of proof may be used to establish the fact that the deed was executed as a security. In the absence of a written defeasance, the evidence in such cases usually consists of the declarations of the grantee; the relations subsisting between the parties at the time the deed was executed; the retention by the grantor, subsequent to the execution of the deed, of the possession of the land, and the exercise of dominion over it in making improvements and repairs, paying taxes, and the like; the value of the property compared with the consideration actually paid or allowed; an understanding that the consideration should be repaid; and the payment of interest on it subsequent to the date of the deed. *Sweet v. Parker*, 22 N. J. Eq. 453. The burden of proof is, of course, on the party claiming that the deed is not what it purports to be on its face, and, in order to prevail, his proof must outweigh that of his adversary.

The deed in question was made by the complainant to the defendant on the 8th day of June, 1889, and conveyed about eight acres of rough land, with a small house, the whole

being then worth not much over \$500. The complainant was a laborer, who occasionally drank to excess, and the defendant was the proprietor of a saloon and restaurant. When the deed was made, the land was in process of foreclosure. The person who was prosecuting the foreclosure suit had purchased the mortgage for the purpose of foreclosing it. He wanted to get rid of the complainant as a neighbor, and he foreclosed the mortgage in order that he might buy the land at the foreclosure sale, and then expel the complainant from it. The complainant knew that this was the purpose of the foreclosure, and, as was natural, desired, with strong desire, to defeat it. Through a third person he applied to the defendant for help. This person testifies that he asked the defendant, on behalf of the complainant, to furnish the money required to take up the mortgage, and that the defendant, after two or three interviews, promised to furnish sufficient money to help the complainant "out of the scrape." The complainant says that, when the deed was made, it was distinctly understood between the defendant and himself that the deed was to stand as a security, the same as a mortgage, and that, when he repaid the defendant the money advanced to take up the mortgage, he was to have his property back, and that the defendant said all he wanted in the mean time was the interest on his money. The complainant further says that when he signed the deed the defendant promised to give him "articles" to show that he held the deed as a security, but that the defendant has never performed his promise. The defendant, on the contrary, denies that the deed was executed as a security, but he admits that he made a promise to reconvey. When first asked to state the bargain under which the deed was made, the defendant said: "There was no bargain, only that he didn't want Mr. French to have the property." (Mr. French was the complainant in the foreclosure suit.) Subsequently, the defendant said he told the complainant, when the deed was executed, that whenever he wanted to sell the property he would give him the first chance to buy, and that the complainant replied he would give as much as anybody. This is the position in which the evidence of the parties themselves puts the case. The evidence of the complainant shows that the deed was executed as a security, while the defendant says it was executed as an unconditional conveyance, and that the only right the complainant retained rested on a parol promise that he might repurchase the property, provided he would pay as much as any other person.

But there is other evidence tending to show the real character of the deed. Two different persons applied to the defendant, about a year after the execution of the deed, to purchase the land. To the first he said that he could not sell then, because the complainant had a right to redeem the land, but he would

let the applicant know when the complainant's right to redeem had expired. On cross-examination this witness somewhat changed his evidence. On being asked whether the defendant did not say that the reason he could not sell was because he had promised to convey to the complainant, and that he had the preference, he replied that the defendant did say so; but he subsequently testified that, while he could not repeat the words used by the defendant, the fact they conveyed to his mind was that the complainant had a right to have his property on repaying, within a time limited, the money which the defendant had advanced. The other applicant made an offer of \$500 for the property. The defendant had paid \$366. He declined this offer, saying that he had promised to hold the property for the complainant, and he was going to do it. At the time the deed was made, a tenant was in possession of the land under a letting for three years, at an annual rent of \$48. After the delivery of the deed the complainant remained on the land with the tenant, and collected the rent, up to spring of 1892. He also paid the taxes on the property, and paid to the defendant the interest of \$366, in annual payments, for three years. The first payment was made June 9, 1890, (the deed was delivered, it will be remembered, June 8, 1889,) the second payment was made June 19, 1891, and the third, June 7, 1892. For the first payment the defendant gave the complainant a receipt in which he stated that he had received from the complainant \$21.96, "in full for one year's interest." The complainant also, during the three years succeeding the delivery of the deed, made permanent improvements on the property. He had a well dug; also, a ditch made, at a cost of \$15 besides his own labor. He put windows in the house, and also new boards on one of its sides. He removed rocks and stones from the garden, and built a stone fence, which added, as seems to be undisputed, at least, \$50 to the value of the property. He also planted currant bushes and fruit trees. These improvements added, as the proofs show, at least \$100 to the value of the property.

These facts corroborate the truth of the complainant's evidence, and go very far to prove that the defendant's story cannot be true. They show that the defendant for three years recognized the \$366, which he had advanced to take up the mortgage, as a debt which the complainant owed him, by receiving interest on it from the complainant, and that for the same period he allowed the complainant to deal with him as though his rights in the land were merely those of mortgage, and to exercise a dominion over the land which indicated that he was its owner. But the defendant insists that while the course of dealing between the complainant and himself may, in some of its aspects, justify the belief that the relation existing between them, in respect to the land, was that

of creditor and debtor, yet such, in truth, was not the fact, but that the complainant's annual payments to him were not made in discharge of interest, but as payments in the nature of rent. He says the way these payments happened to be made was this: That when the deed was made he did not know the tenant in possession of the land, nor whether he was good or not, but he knew that the complainant boarded with him. He therefore arranged with the complainant that he should collect the rent of the tenant, and out of it pay the taxes, and the interest on the \$366 which he had advanced to take up the mortgage, and the balance the complainant might take for keeping the property in repair, and for his services in taking care of it. The complainant denies that any such arrangement was made or suggested. His denial is supported by the probabilities of the case. It is manifest that the natural effect of such an arrangement would have been to induce the complainant, if it was true that his only right in respect to the property was the bare right to repurchase it on paying as large a price as any other person might offer, to refrain from making either repairs or improvements. Every addition he made to the value of the property was so much money thrown away. Nay, worse than that, for every dollar he added to the value of the property lessened his chance of his being able to get it back. By increasing the value of the property he necessarily increased the price which he must pay on its repurchase. The fact that the complainant increased the value of the property by permanent improvements, to the extent of at least \$100, shows almost conclusively that he did not understand that any such arrangement existed as that set up by the defendant. The defendant's conduct shows also, I think, quite strongly, that no such arrangement existed. He was offered, about a year after the deed was made, \$500 for the property. This was \$134 more than he had paid,—an advance on his investment of \$366 quite sufficient, as it seems to me, to satisfy the greed of even an avaricious person. The person who made the offer was eager to purchase, and able to pay at once. Now, in this situation of affairs, it is somewhat difficult to understand why, if the defendant regarded himself as the absolute owner, and subject to no duty to the complainant except to reconvey, he did not require the complainant, soon after this offer was received, either to enter into a contract of purchase, or to increase his annual payment from \$21.96 to \$30. But he did neither; on the contrary, for two years subsequent to the offer, he continued to receive from the complainant merely the interest on the sum which he had advanced to take up the mortgage. This course of conduct was perfectly consistent with the complainant's claim that the deed was executed as a security, but utterly inconsistent with the defendant's claim that it was executed as an unconditional con-

veyance. In my opinion, the decided weight of the evidence on the point in dispute is with the complainant. All the material undisputed facts of the case lead to the conclusion that the deed was executed as a security, and it must consequently be declared to be a mortgage. Costs will be allowed to neither party against the other. On a bill to redeem, the mortgagor is, as a general rule, required to pay costs, but this rule, I think, should be dispensed with in this case. The defendant's conduct in resisting redemption has been oppressive. He has resisted the complainant in a case where, as I think, it is manifest from his own conduct that he knew the complainant was asking for nothing which he was not justly entitled to. As I look at the case, it would be more consonant with justice to award costs against the defendant than in his favor.

(66 N. H. 147)

TILTON v. CORNING, Sheriff.

(Supreme Court of New Hampshire. Grafton. March 15, 1890.)

ELECTIONS—CORRUPT PRACTICES—INQUIRY—JURISDICTION.

Act 1885, c. 94, § 5, provides that an inquiry concerning corrupt practices in elections shall be made by "any justice of the peace or police judge." Gen. Laws, c. 215, § 7, prohibits proceedings in civil cases before a justice of the peace in a town having a police court. Chapter 252, § 8, gives a police court exclusive cognizance, as against justices of the peace, of crimes and offenses committed in a town in which such court is established. Chapter 285, § 2, gives a justice of the peace the same powers as a coroner. *Held*, that an inquisition as to corrupt practices in elections was like a coroner's inquest, and not within the exclusive jurisdiction of a police court in a town having such court.

Petition by George H. Tilton against Benjamin H. Corning, sheriff, for a writ of habeas corpus, presented to a justice of this court, and adjourned into the law term. Writ denied.

The plaintiff was summoned to testify before a justice of the peace in an inquiry made by the justice in the town of Littleton, concerning a Littleton election, under Laws 1885, c. 94, § 5. Counsel raised and argued the question whether the police court of Littleton has exclusive jurisdiction of the inquiry.

O. Ray, for plaintiff. W. Heywood, for defendant.

DOE, C. J. "Writs and proceedings in civil actions shall not be made returnable before a justice of the peace within any town or city having a police court." Gen. Laws, c. 215, § 7. "Police courts have * * * exclusive cognizance of all crimes and offenses committed within the town in which such court is established, so far as justices of the peace have jurisdiction." Gen. Laws, c. 252, § 8. Under the act of 1885, (c. 94, § 5,) an inquiry concerning alleged corrupt practices in an election is made by "any justice of the

v.28A.no.1—2

peace or police judge." The inquisition is not an ordinary criminal prosecution, but a process of discovery, like a coroner's inquest. "Any justice of the peace and quorum shall have and exercise the same powers * * * as a coroner." Gen. Laws, c. 285, § 2. It has not been understood that the authority of a justice of the peace and quorum to act as a coroner is limited to towns in which there is no police court. There are reasons for inferring that the legislature intended an election inquest might be conducted in any town by a justice of the peace. The police court of Littleton has not exclusive jurisdiction in this case. Case discharged.

BINGHAM, J., did not sit. The others concurred.

(66 N. H. 621)

HOLMES et al. v. GREGG et al.

(Supreme Court of New Hampshire. Hillsborough. March 15, 1890.)

SALE—INSPECTION—SEVERABLE CONTRACT.

1. A purchaser of lumber, to be of certain dimensions, has a right, on its being shipped to him in cars in which it cannot be inspected, to remove it, and inspect and measure it, before determining to accept or reject it.

2. Under a contract for the sale of lumber of different dimensions and prices, in the absence of an express stipulation that it shall be entire, the purchaser can reject the lots not conforming to the contract and accept the rest.

Exceptions from Hillsborough county; before Justice W. H. H. Allen.

Assumpsit by Holmes Bros. & Co. against Gregg & Son for lumber sold and delivered. Pleas, the general issue and a tender. Trial by the court, and a general finding that the sum tendered was sufficient. Judgment for defendants. Exceptions.

The plaintiffs are lumber dealers in Chicago, and the defendants are manufacturers of doors, sash, blinds, etc., in Nashua. One of the plaintiffs, being in Nashua soliciting orders, received from the defendants an order for five lots of lumber of different dimensions and prices, all amounting to about \$1,000. The lumber sent by the plaintiffs came to the defendants' yard in box cars in which it could not be examined. When unloaded and examined three of the five lots were accepted and used by the defendants, and the others, not conforming to the order in dimensions, quality, quantity, and price, were rejected, and piled in their yard, where they remain subject to the plaintiffs' order. The defendants seasonably informed the plaintiffs of their action, and tendered the price of the accepted lots.

C. W. Holitt and Sulloway & Topliff, for plaintiffs. G. B. French, for defendants.

DOE, C. J. The defendants rightfully inspected and measured the lumber before determining to accept or reject it. Benj. Sales, §§ 918, 1042, 1049-1051, 1342, 1343, 1348-1350. Without an express stipulation that the con-

tract was or was not entire, the parties might have understood that it was severable in such a sense that the defendants could accept the lots that conformed to the contract, and reject the rest. In the general finding for the defendants there is no error of law. Judgment for the defendants.

ALLEN, J., did not sit. The others concurred.

(66 N. H. 160)

SHERMAN v. HANNO et al.

(Supreme Court of New Hampshire. Grafton. March 15, 1890.)

EQUITY—REFORMATION OF MORTGAGE—WRIT OF ENTRY—DESCRIPTION OF PROPERTY—OBJECTIONS WAIVED.

1. Error in describing land in a mortgage as "situated in said Lyman" is corrected by an accompanying reference to the record of a deed which describes the land as "situated in Lyman and Lisbon," but a decree for the reformation of such mortgage may be granted if practically useful as an evidence of title.

2. Where the mortgagee's writ of entry in foreclosure insufficiently described the land as described in the mortgage, but referred to a previous deed for a more particular description, the mortgagor waived objection that the writ insufficiently described the demanded premises by not objecting at the proper time for settling the pleadings and obviating defects by amendment, since the deed may have sufficiently described the demanded premises.

3. The description in the writ of entry was properly adopted in the judgment and writ of possession, since the mortgagor had waived objection to such description.

Case reserved from Grafton county; before Justice Bingham.

Writ of entry by Joseph F. Sherman against R. P. Hanno and George W. Cobleigh, and bill by defendants against plaintiff for the reformation of a mortgage. Judgment for defendants on writ of entry, and decree for reformation of the mortgage.

The Little farm is one tract of land in the towns of Lyman and Lisbon. The buildings and most of the farm are in Lyman. The part in Lisbon is claimed by both parties. O. and G. A. Carr, owning the farm, conveyed it to Clough by a mortgage of which the defendants asked a reformation. The mortgage described the farm as a "tract of land situated in said Lyman, together with the buildings thereon, meaning to convey the same as was deeded the said O. and G. A. Carr by Milo G. Little and wife by their deed dated October 15, 1868, and recorded in the Grafton county registry, Lib. 307, folio 248, reference being had to said records for a more particular description of said premises." The deed thus referred to was the conveyance by which the mortgagors acquired the title of the whole farm. The mortgagors and the mortgagee intended that the whole farm should be included in the mortgage, and supposed it was included. By mistake the words "and Lisbon" were omitted after "Lyman." A correction of the mistake is the relief sought in the bill in

equity. Subject to the mortgage, the farm was conveyed by the mortgagors to the plaintiff. Clough foreclosed the mortgage by a year's possession after entry under process of law against the plaintiff, Sherman, and conveyed the farm to the defendant Hanno. In the foreclosing writ of entry (Clough v. Sherman) the demanded premises were described as a tract of land "situate in said Lyman, * * * being the same * * * conveyed by Joseph Little and Mary Little to Milo G. Little by their deed dated August 28th, 1865." The deed thus referred to was a conveyance of the whole farm to the grantor of the mortgagors, and was described in his deed to them as "recorded in the Grafton county registry, Lib. 287, Fol. 472, reference being had to said records for a more particular description of said premises." The description in Clough's writ of possession was the same as in the writ of entry. After the foreclosure was completed, Clough learned that the farm was crossed by the town line. The defendants contend that the mortgage was not foreclosed on the land in Lisbon.

Bingham, Mitchell & Batchellor, for plaintiff. Ladd & Fletcher and Drew & Jordan, for defendants.

DOE, C. J. The error in the clause of the mortgage that described the land as "situated in said Lyman" was corrected by the accompanying reference to the record of a deed of land situated in Lyman and Lisbon. *Colby v. Collins*, 41 N. H. 301, 303. The meaning of the mortgage was expressly declared to be that it conveyed the land that was conveyed to the mortgagors by the recorded deed, to which reference was made for a more particular description. The mistake, being corrected in the paper in which it occurred, is immaterial.

Elliott v. Heath, 6 N. H. 426, was a writ of entry, in which the demanded premises were described as "a certain tract of land situated in said Boscawen, being all that part of the homestead farm of the late Nathaniel Gookin, of said B., which was conveyed to Joseph Elliott by P. Gookin, administrator of the goods and estate of said Nathaniel, except what has been conveyed by said Joseph Elliott to Joseph Couch by deed dated February 1, 1827, the tract demanded being the same that was conveyed to me by my father, J. E., by deed dated March 26, 1827." The case was tried on the general issue. A verdict was returned for the plaintiff. The defendant moved in arrest of judgment because the land demanded was not sufficiently described in the declaration. This motion did not prevail, and judgment was rendered on the verdict. In the opinion the court say: "It does not appear that either of the deeds [mentioned in the declaration] has been recorded. It is laid down by Stearns, as to declarations in writs of entry, 'that the de-

scription should be so certain as to enable the tenant to understand what is demanded against him, and the sheriff to deliver the seisin without any information from the demandant.' Stearns, Real Act. 151. * * *

The rule that the description of the land must be sufficiently certain to enable the sheriff to deliver the seisin without any information from the demandant seems to go further than is essential. In most instances the sheriff would be obliged to inquire of some one as to the location of the lands described in his writ, and in all instances he might require the demandant to point them out. It is undoubtedly the case that the premises demanded must be described in the count with as much precision as in any common conveyance or assurance of land. Jack. Real Act. p. 13. If this be the true rule, the description in this case is sufficient. It is copied from the deed, and is without doubt sufficient to pass the title to the land, and we see no reason why a declaration of the same certainty should not be sufficient for the rendition of a judgment." In *Woodman v. Lane*, 7 N. H. 241, 242, 250, 251, (decided in 1834, a year after *Elliott v. Heath*.) It was assumed that the sufficiency of such a description in a writ of entry was not an open question. *Atwood v. Atwood*, 22 Pick. 283, (decided in 1839,) was a writ of dower. In the written demand made by the plaintiff on the defendant for an assignment of dower before suit the land was described by a reference to a recorded deed in which the defendant was a grantee. The defendant objected to the description, contending that he could not be compelled to go to the registry to ascertain in what land the plaintiff claimed dower. "This description," say the court, "was sufficiently certain. All that is required is that the description of the land should be such as to give notice to the tenant to what land the demand referred; and, as the tenant was a party to the deed referred to, he could be left in no doubt as to the lands in which dower was demanded." The plaintiff claimed dower in land in lots 5 and 6. After verdict for the plaintiff, the defendant moved in arrest of judgment upon the ground that the declaration described the land in lot 5 by a reference to a deed, and to the place where it was recorded. This objection was sustained. "In the description of the land within that lot," say the court, "reference is had to Blinn's deed, and, unless the description can be aided by that reference, it is not sufficiently definite and certain. And it is very clear that it cannot be thus aided. Such a reference would be good in a conveyance of the land, or in a demand of dower before action brought. * * * But when lands are demanded the description of them must be so certain that seisin may be delivered by the sheriff without reference to any description dehors the writ. It is not necessary in every case to describe the land demanded by metes and bounds, but there must be a

certain description in the writ itself, and no defect can be cured by a reference to any existing conveyance. As to this part of the demandant's claim, therefore, she is not entitled to judgment; but as to the lands included in No. 6, those, we think, are described with sufficient certainty. The demandant, however, may amend her declaration, or take judgment for dower in lot No. 6." In *Flagg v. Bean*, 25 N. H. 49, 50, 64, 65, and *Colby v. Collins*, 41 N. H. 301, 305, the case of *Elliott v. Heath*, (before cited,) in which the law of this state had been settled, was overlooked, and it was held that "the principle adopted by the courts" was correctly stated in the Massachusetts case, *Atwood v. Atwood*.

The question whether land is properly described in pleading by a reference to a deed is not determined by statute, or by a special rule relating to this particular question, but by the application of the general rule that procedure may be what justice and convenience may require. *Boody v. Watson*, 64 N. H. 162, 171, 9 Atl. 794. It is just and convenient that the declaration in a writ of entry should inform the defendant what land the plaintiff claims, and that, if the defendant is dissatisfied with the information there given, he should object to it at the earliest opportunity. It is not a matter of law, as it is not the fact, that a reference to a deed in a declaration is always sufficient or always insufficient. It may be enough for the practical purposes of defense; it may be the only description the plaintiff can conveniently furnish; and neither party is unnecessarily and unreasonably harassed by technical rules of procedure. In many instances the common law regards as sufficiently certain whatever can be made certain. A count in a writ of entry describing the demanded premises as bounded northerly by land of A., easterly by land of B., southerly by land of C., and westerly by land of D., may not be better than a count describing the same premises as land conveyed by E. to F. On the north side there may be wild and unoccupied land, conveyed to A. by a deed that is not recorded. On the east may be an abandoned farm, which passed to B. by recorded devise or unrecorded descent. On the south, a farm may be occupied by a tenant of C., who took it by the levy of an execution. On the west, unoccupied land may belong to D. or to G., each claiming a prescriptive title determinable by a jury trial. When a tract is described by such abutments in the declaration, judgment, and writ of possession, and objection is first made after judgment, the description cannot be disregarded as immaterial, or because the given boundary cannot be located without a laborious and expensive investigation of the titles and boundaries of four other tracts. A count describing land as lot 4, in range 5, and a second count describing it as bounded by a line beginning on

the north side of a highway leading from A.'s sawmill to B.'s house, at the southeast corner of C.'s land, and thence running, giving courses and distances, through stakes and stones, to the first-mentioned bound, may be less useful as a means of finding the land than a third count referring to a deed. The description given in a deed referred to in pleading may be clear, definite, and full, or ambiguous, indefinite, and scant. If it is sufficient, and the deed is in the defendant's possession, or he is the register in whose office it is recorded in the book and on the page referred to, the fact may be found at the trial term that he was properly referred to the deed or record. If the description in the deed is insufficient, or it would be unreasonably inconvenient for him to find the deed or go to the registry, the fact may be found that the reference does not give him adequate information. A reference to a deed or record, without an averment of facts showing that he has convenient access to it, and without an annexed copy of it, or an offer to produce a copy, may be bad pleading. To a count apparently defective in this respect the defendant may seasonably demur. By a seasonable written motion to strike out the reference he can obtain a decision of the question whether he is entitled to a better description. If, as a matter of law or fact, a reference to a deed could never be a good description in pleading when its sufficiency was seasonably denied, that circumstance would not affect the result in this case.

It does not appear whether in the foreclosure suit of *Clough v. Sherman* there was a trial and a verdict, or whether the judgment against Sherman was rendered on default. If he was defaulted, his position is no better than it would have been after judgment on an adverse verdict. If there was a trial, Clough must have proved that the land described in the deed referred to in his declaration was the Little farm, described in the deed referred to in his mortgage, unless Sherman waived his right to require proof of that fact. An objection to such evidence could be made when the evidence was offered, but not after judgment, or after verdict. If made when the evidence was offered, it might not be sustained. The only pertinent objection would relate, not to the evidence, but the pleading. *Capron v. Anness*, 136 Mass. 271, 272. An objection made by Sherman to evidence offered in support of the reference clause of the declaration might not be a seasonable denial of the sufficiency of that clause. It might be unreasonable and unjust that a continuance of the case, or much delay, expense, or inconvenience should be caused by his raising at the trial a question of pleading which he could have raised at an earlier day. "If a brief statement is defective and insufficient, the proper practice is to move the court to reject it. The party will then be obliged to put his statements

into a substantial and definite form, or the brief statement will be stricken out. Or a party may object to evidence as it is offered, which would be admissible under a sufficient brief statement, as inadmissible under a defective one. The former practice of moving to reject the brief statement is preferable, however, as the parties will then go to trial without any uncertainty as to their position." *Folsom v. Brawn*, 25 N. H. 114, 121. In that case it was held that an objection to an insufficient brief statement was not seasonably made after the evidence was closed.

The proposition that in a writ of entry a reference to a deed for a description of the demanded premises is "entirely immaterial and may be disregarded," as if it had been struck out on motion, or held bad on demurrer, and that evidence in support of it "is irrelevant and inadmissible," (*Flagg v. Bean*, 25 N. H. 49, 65; *Colby v. Collins*, 41 N. H. 801, 806,) cannot be sustained. "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required * * * proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict. * * * This rule is founded in good sense and sound reason. Every one can see why the verdict cures the defect in such a case. It cures it because the matter omitted was necessarily involved in the issue." *Elliott v. Heath*, 6 N. H. 428, 429. The defect is equally cured whether the proper form of objection was a demurrer or a motion to strike out a clause. Before trial the only objection Sherman could have made to the clause of the foreclosing writ of entry referring to a deed was that it did not give him due information. Upon a decision sustaining this objection he would have been entitled to an amendment sufficiently describing the demanded premises. If an objection, seasonably made by him to the reference clause, would have been sustained, it is now too late to make it. There was an appropriate time for his denial of the sufficiency of that clause, and for obviating the objection by an amendment. By not presenting the objection at that time he waived it. *McConihe v. Sawyer*, 12 N. H. 396, 405; *Hopkins v. Railroad Co.*, 36 N. H. 9, 13; *Ireland v. Drown*, 61 N. H. 638, 639. The general rule, to which pleading is not an exception, is that rights are waived when not seasonably asserted. *Watson v. Walker*, 23 N. H. 471, 497, 498; *State v. Richmond*, 28 N. H. 232, 242-244, 247; *Haynes v. Thom*, 28 N. H. 386, 398; *Frost v. Martin*, 29 N. H. 306, 316; *Drew v. Towle*, 30 N. H. 531, 539; *State v. Rand*, 33 N. H. 216, 227, 228; *Warren v. Glynn*, 37 N. H. 340, 344; *State v. Flanders*,

38 N. H. 324, 334; *Robinson v. Potter*, 43 N. H. 188, 191, 192; *Peebles v. Rand*, Id. 337, 342; *Carter v. Beals*, 44 N. H. 408, 411; *Wendell v. Abbott*, 45 N. H. 349, 352, 353; *Bundy v. Hyde*, 50 N. H. 116, 122; *Murphy v. Orain*, 59 N. H. 244, 245; *Battle v. Knapp*, 60 N. H. 361, 362; *Crowell v. Londonderry*, 63 N. H. 42, 49; *Bergeron v. Bank*, Id. 195, 196.

In contemplation of law, Sherman admitted the sufficiency of the reference clause of the declaration by filing a plea that did not deny it, or allowing judgment to go by default, or taking some other course that did not include a seasonable objection. This admission was properly accepted and acted upon in the rendition of the judgment in which it was considered and adjudged that Clough recover "the tenements aforesaid with the appurtenances," or land otherwise identified by a substantial and formal adoption of the description given in the declaration. The writ of possession properly followed the form and substance of the judgment it was issued to enforce. Gen. Laws, c. 235, § 13. On a writ of error or other direct attack the implied admission would be as conclusive as an express agreement of record that the judgment should describe the premises as they were described in the declaration. In the mortgage the reference to a deed was effective, because the contracting parties assented to it, and by following it the land could be found. For a similar reason the reference to a deed in the foreclosing pleading and process is effective against the party whose admission of its sufficiency is a part of the record. In the present action the plaintiff's contention is a collateral attack, to which the judgment is not open. *Fowler v. Brooks*, 64 N. H. 423, 13 Atl. 417; *State v. Kennedy*, 65 N. H. 247, 23 Atl. 431; *Kimball v. Newport*, 47 Vt. 38; *Mussey v. White*, 58 Vt. 45, 3 Atl. 319; *Kittredge v. Martin*, 141 Mass. 410, 6 N. E. 95; *Wilkerson v. Schoonmaker*, 77 Tex. 615, 14 S. W. 223; *McCormick v. Sullivant*, 10 Wheat. 192, 199, 200; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 557, 558, 8 Sup. Ct. 217; *In re Cooper*, 143 U. S. 472, 506, 12 Sup. Ct. 453. There is no occasion to inquire whether the writ of possession did or did not enable the officer (to whom Clough delivered it for service) to find the land therein described. It was for Clough to find the land of which he desired possession. His inability to find it, or a difficulty encountered by him in the search, would not have been a grievance of which Sherman could complain. The fact that Clough did not know until the foreclosure was completed that the Little farm was crossed by a town line is immaterial. The officer caused him to have possession of the land described in the final process. That land was the whole farm, and the lease under which Sherman occupied it as tenant of Clough during the year after Clough's entry, described it as the Little farm, and as the farm of which Clough took possession by foreclosure. The decree for a

reformation of the mortgage, which the defendants ask in their bill, is not legally necessary, but it may be rendered if it will be practically useful as evidence of their title. In the real action there will be judgment for the defendants.

BINGHAM, J., did not sit. The others concurred.

(66 N. H. 178)

STATE v. WELCH.

(Supreme Court of New Hampshire. Coos.
March 15, 1890.)

RIGHT OF FISHERY—PUBLIC WATERS—ACCESS.

1. Gen. Laws, c. 179, § 1, which forbids the taking of fish from any pond wholly within the control of a person who owns the land around it, and has expended money and labor in stocking it with fish for his own use, does not apply to North pond, in the town of Stark, of an area of about 400 acres, which is public water, and therefore not "wholly within the control" of the riparian proprietors.

2. The fact that defendant could not go to North pond without trespassing on private land did not change into a criminal offense his exercise of the public right to fish in public water.

Exceptions from Coos county; before Justice A. P. Carpenter.

Jacob W. Welch was indicted for catching and killing trout, in violation of Gen. Laws, c. 179, § 1, and excepts to a verdict for the state. Verdict set aside.

Indictment under Gen. Laws, c. 179, § 1, for catching and killing 10 trout from North pond, in Stark, May 1, 1884. The pond is a natural body of water, about a mile and a third long, of irregular shape, averaging about one-third of a mile in width. The defendant offered to show that its area is from 300 to 500 acres. The prosecution claimed that North pond lies wholly within the limits of lots 133, 143, 144, and lot 2, range 19, as drawn to the rights of the original proprietors; that lot 2, range 19, was formerly a part of Stratford; that the other three lots have always been a part of Stark, formerly Percy; that in the original survey of the townships some of the boundary lines of those four contiguous lots passed through the pond; that in 1775, when the townships were granted to the original proprietors of Stratford and Percy, the pond was not reserved for public use, but was conveyed as land included in the bounds of the granted premises; that, when the lots were divided among the proprietors, the bed of the pond was assigned as part of the four lots in which it was located; and that by the original grants of the townships the pond became private property, and it could not be taken for public use without due process of law and compensation.

Ladd & Fletcher and Aldrich & Remick, for defendant. J. H. Dudley, Co. Sol., and O. Ray, for the State.

DOE, C. J. The statute is expressly made applicable "only to such ponds, streams, or

springs as are wholly within the control of some person owning the land around the same, who has made some improvement or expended money or labor in stocking the same with fish for his own use." It is alleged in the indictment that North pond was "owned by, and wholly within the control of, the Percy Summer Club;" that the club owned the land around the pond, and had made improvements, and expended money and labor in stocking the pond with trout for their own use. One of the reserved questions was raised by the objection (presented by the defendant at the trial) that the club had no such private right as was necessary to bring the case within the statute. Whatever view is taken of the evidence tending to show, as the state claimed, that the club owned the surrounding land, it had no tendency to show that they owned the pond. The bed of the pond was reserved, set apart, and held in trust for public use. The club could not acquire the title by prescription, or by grant from the king, or the executive branch of the provincial or state government. *Manufacturing Co. v. Robertson*, 66 N. H. 1, 6, 7, 17, 19, 22, 26-28, 25 Atl. 718. If the original grants of the townships in which the pond was situated had been made by the provincial or state legislature, the title of the pond would have remained in the public trustee. 66 N. H. 6, 25 Atl. 718. As the title is not claimed under a legislative grant, it is not necessary to inquire whether the legislature can convert the pond into private property by some other form of conveyance than a grant of a township. The pond, being public property, is not wholly within the control of any private persons, within the meaning of the statute, and the indictment cannot be maintained.

The evidence offered by the defendant to show that he went to the pond over an ancient public way was immaterial. The object of the statute was to protect private rights in certain private ponds, and not to abolish a public fishery, or make it depend upon a pond's happening to be accessible from a highway. If the defendant could not go to North pond without committing a trespass by crossing private land, (a point involving questions of law and fact on which no opinion is expressed,) this circumstance did not change into a criminal offense his exercise of the public right of fishing on public land covered with water.

In *State v. Roberts*, 59 N. H. 256, 484, the size of the pond did not appear, and in the decision of questions raised by the parties it is said, (page 258:) "There is no suggestion that the public have any rights in its waters other than as a breeding place for the supply of fish to other streams, or a channel for their passage." The state's title was not lost by a judgment for the state, asked and given on one of the grounds on which it could be legally rendered. In *Chase v.*

Baker, Id. 347, the size of the pond is not stated, and there was no occasion to go beyond the ground on which it was held that the defendant was entitled to judgment. Verdict set aside.

CARPENTER and BINGHAM, JJ., did not sit. The others concurred.

(66 N. H. 180)

PERCY SUMMER CLUB v. WELCH.

(Supreme Court of New Hampshire. Coos. March 15, 1890.)

INJUNCTION—RIGHT TO FISH.

Injunction will not lie to restrain persons from fishing in North pond, in the town of Stark.

Exceptions from Coos county; before Justice A. P. Carpenter.

Bill by the Percy Summer Club to enjoin Jacob W. Welch from fishing in North pond, in the town of Stark. A temporary injunction was granted, and defendant moves to dissolve it. Injunction dissolved, and bill dismissed.

O. Ray, for plaintiff. Ladd & Fletcher, for defendant.

DOE, C. J. The bill cannot be maintained. *Manufacturing Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718; *State v. Welch*, 66 N. H. —, 28 Atl. 21. Injunction dissolved, and bill dismissed.

CARPENTER and BINGHAM, JJ., did not sit. The others concurred.

(158 Pa. St. 401)

ADERHOLD et al. v. OIL WELL SUPPLY CO.

(Supreme Court of Pennsylvania. Nov. 13, 1893.)

LEASES—SHERIFF'S SALE—LIABILITY OF PURCHASER—SURRENDER.

1. A purchaser of a leasehold interest at sheriff's sale is charged with notice of the contents of the lease, and is subject to all the covenants and conditions thereof.

2. Under an oil lease providing that, on failure to drill a well within six months, a rent of \$500 a year shall be paid till the well is completed, and giving the tenant the right to protect himself from "further payments or liabilities" accruing under the lease, by a surrender of it, a surrender 18 months after its date will not release the tenant from the \$500 rent for the year previous.

Appeal from court of common pleas, Butler county; John M. Greer, Judge.

Action by Albert Aderhold and another against the Oil Well Supply Company for rent. Judgment for plaintiffs. Defendant appeals. Affirmed.

James O. Boyce, A. T. Black, and T. C. Campbell, for appellant. Stephen Cummings and S. F. Bowser, for appellees.

WILLIAMS, J. The appellant was a purchaser of an oil lease at sheriff's sale. As

such purchaser, he could acquire no greater interest or estate than that actually held by the lessee, and he would take subject to all the covenants and conditions contained in the lease. He was bound, therefore, to inquire. Failing to do so, he is fixed with notice of all that inquiry would have disclosed. If he had inquired, he would have learned the date of the lease from plaintiffs to Shay. He would have learned, further, that the lessee was bound to complete one well within six months after date of the lease, and that, failing in this, he had covenanted to pay a rent of \$500 per year until such well was completed. At the same time, he would have learned that the lessors had the right to terminate the lease upon default of performance on the part of the lessee, and that the tenant had the right to protect himself from "further payments or liability" accruing under the terms of the lease by a surrender of it to his lessors. Fixed with notice of the terms of the lease, the Oil Well Supply Company became the purchaser of Shay's leasehold interest, and of the tools and machinery on the ground. It did not drill a well, but took possession of, and sold, the drilling tools, pipe, and other articles on the lot, and offered the leasehold interest for sale. It held the lease for somewhat over a year, and until after a year's rent had accrued. It then surrendered the lease; and, when this suit was brought to recover the rent that had fallen due before the surrender took place, it set up its own act of surrender as a discharge, not only from further or accruing liabilities, but also from those already accrued. But liabilities once accrued confer a right of action on the lessor. He may release or surrender this right by his own act, but his debtor cannot surrender it for him, or extinguish it by any act of his. This is well settled. *Galey v. Kellerman*, 123 Pa. St. 491, 16 Atl. Rep. 474; *Leatherman v. Oliver*, 151 Pa. St. 646, 25 Atl. Rep. 309; *Nesbit v. Godfrey*, 155 Pa. St. 251, 25 Atl. Rep. 621. A termination of the lease by the act of the lessor in asserting a forfeiture releases the lessee from his covenants, from and after the day of such termination. The term may be ended by the act of the lessor, with the same effect upon rents due or covenants broken as though it had ended by its own limitation. The right of action accrued is vested in the lessor, in either case, and may be asserted without regard to the fact that the term has ended. The doctrine contended for by the appellant makes the contract unequal and unjust. The tenant secures all he desired,—the control of the territory covered by the lease for a period of more than 18 months,—on a promise to complete one well on the land, or pay an annual rent of \$500. When called upon to perform its covenants, it surrenders its lease, and insists that it has thereby relieved itself from past, as well as future, liability, and extinguished its landlord's right of action.

It would require a plain, unambiguous, stipulation that a surrender should operate as a release of all rents due, and damages accrued, to induce us to give to the act of the tenant such an effect as is claimed for it in this case. There is no such plain, unambiguous stipulation in the lease before us, but a provision that enables the tenant to escape further or future liability by a surrender of his lease, without having tested its value by drilling. It has had the advantages of the option the lease afforded. It has escaped from its obligation to complete a well by the surrender. It must now pay the stipulated rent to the lessor for the year during which it held the land without operating it. The judgment is affirmed.

(158 Pa. St. 495)

BIGLEY v. BOROUGH OF BELLEVUE.

(Supreme Court of Pennsylvania. Nov. 13, 1893.)

BOROUGHS — HIGH CONSTABLES — EMPLOYMENT AS POLICEMEN — SALARIES — REDUCTION DURING TERM OF OFFICE.

A high constable of a borough is entitled as such to fees for service of process for the borough, and, for other services rendered the borough, has a right to compensation by salary or fees as the borough may determine. Plaintiff was elected high constable under an ordinance of the borough, which provided that it should be the duty of the police force to take care of the street lamps, and that they should receive as compensation two dollars per day. The borough council passed a resolution that plaintiff, "high constable of the borough," be appointed lamplighter for the year, and that his compensation be fixed at two dollars per day. *Held*, that the per diem was not an official salary that could not be reduced during plaintiff's term of office as high constable, but compensation for an employment that might at any time be discontinued.

Appeal from court of common pleas, Allegheny county; S. A. McClung, Judge.

Action by William Bigley against the borough of Bellevue for salary. Judgment for defendant. Plaintiff appeals. Affirmed.

When plaintiff was elected high constable of the borough of Bellevue, in 1890, Ordinance No. 36 was in force in said borough. Said Ordinance No. 36 provided for the organization and regulation of a police force in said borough. Section 3 of said ordinance provided that the high constable of the borough should be chief of the said police force. Section 4 provided that it should be the duty of the members of the said police force to light, extinguish, and take care of the street lamps, etc. Section 5 provided that the members of said police force should receive as compensation for their services two dollars per day for every day they were employed by the borough. On April 1, 1890, the town council of the borough passed the following resolution: "Resolved, that William Bigley, high constable of the borough be, and is hereby, appointed borough policeman and lamplighter for the year commen-

cing March 4, 1890, and that his compensation be fixed at two dollars per day." Plaintiff performed the duties of borough policeman and lamplighter in 1890, 1891, and up until April 18, 1892, and received the compensation of two dollars per day provided for such services, up to and including March, 1892. For the services rendered by plaintiff in April, 1892, he was tendered compensation at the rate of two dollars per day, but refused to accept it. On April 15, 1892, the town council of defendant passed Ordinance No. 73, repealing Ordinance No. 36, and all conflicting ordinances, and on April 18, 1892, the burgess of defendant notified plaintiff that he (plaintiff) was discharged as policeman and lamplighter, and that Charles P. Carson was appointed in his place. For some time after April 18, 1892, plaintiff pretended to act as policeman and lamplighter, claiming that defendant had no power to discharge him, and presented several bills to defendant for compensation, at the rate of two dollars per day for services as borough policeman and lamplighter. The town council of defendant never fixed any salary for the high constable of the borough, unless it did by such ordinance and resolution.

Geo. H. Quail, for appellant. Lawrence Johnston and H. M. Scott, for appellee.

WILLIAMS, J. The plaintiff was the high constable of Bellevue. As such he was entitled to fees for the service of process issued by the burgess for the enforcement of the ordinances and the preservation of the public peace. For serving notices and similar services rendered the borough he has a right to compensation, either by a salary or fees, as the borough may determine. But his official duties were not onerous. He obtained employment from the borough in lighting the street lamps, and patrolling the streets from 2 o'clock P. M. of each day until 2 o'clock A. M. of the next, at the price of two dollars per day. He served in this capacity for one or more years. At length the borough decided for some reason to discontinue the employment, and gave the plaintiff notice. This action is brought to recover three months' pay alleged to have accrued since the discontinuance of the service, on the ground that the per diem was an official salary that could not be reduced during the term of office of the incumbent. As the borough might have employed any other person to perform the same service, we cannot agree that the plaintiff's wages are to be regarded as an official salary. The borough could discontinue the work it employed him to do, or change the workman, without coming in conflict with the constitutional provision which forbids the decrease of an officer's salary during his term of office. The learned judge of the court below was quite right in his view of this case, and the judgment must be affirmed.

REIMLER et al. v. PFINGSTEN.

(Court of Appeals of Maryland. Nov. 23, 1893.)

SUBROGATION TO RIGHTS OF MORTGAGEE.

A husband, while in failing circumstances, paid off a mortgage with money advanced to him for such purpose by his wife on an express promise of repayment, and then deeded the property to a person who redeeded it to the husband and wife. Held that, after the deeds were set aside and the property sold at the suit of the husband's creditors, the wife was entitled to a lien on the proceeds of the sale for the amount advanced by her.

Appeal from the circuit court of Baltimore city.

Bill by Gottlieb Reimler and others against Bertha C. Pfingsten to set aside a deed, and for the sale of certain property. From a decree setting aside the deeds and ordering a sale, but reserving to defendant a lien on the proceeds, plaintiffs appeal. Affirmed.

Argued before ROBINSON, C. J., and ROBERTS, BRYAN, BRISCOE, McSHERRY, and FOWLER, JJ.

Ben. Kurtz and Jesse N. Bowen, for appellants. Thos. G. Hayes, for appellee.

FOWLER, J. The question presented on this appeal is a plain one, having been virtually disposed of at the hearing. The appellee, Bertha C. Pfingsten, having advanced to her husband, William H. Pfingsten, some \$1,500 to pay off a mortgage held by the Pennsylvania Avenue Building Association upon his promise to repay said sum to her, and he having failed so to do, he conveyed to one Gith certain leasehold property,—the same that had been mortgaged to the building association, and Gith conveyed the same to said Pfingsten and his wife, and the survivor of them. These conveyances were executed at a time when Pfingsten was in failing circumstances, and, a bill having been filed by the appellant, these deeds were set aside, and the property conveyed by them was ordered to be sold for the payment of Pfingsten's debts. The court below, however, upon the evidence before it, reserved to the appellee a lien on the proceeds of sale for the amount advanced by her to pay off the building association mortgage. We have examined the testimony, and are satisfied that the appellee loaned the money mentioned to her husband for the purpose of paying off said mortgage indebtedness, and that she made said loan upon the express promise of repayment. It is clear the transaction between herself and her husband was free from fraud, with no intention on her part, at least, of defrauding his subsisting creditors. Under such circumstances the appellee must, according to the plainest principles of justice and equity, be substituted for and have the right of the building association under the mortgage, which we have seen she paid off. The mortgage in question was a valid lien prior to the claims of the appellants, and the claim of the appellee was therefore properly

recognized and protected by the court below. So we have held in two recent cases, *Mil-holland v. Tiffany*, 64 Md. 461, 2 Atl. 831; *Cone v. Cross*, 72 Md. 102, 19 Atl. 391. Decree affirmed, with costs.

(78 Md. 193)

WEBSTER v. CAMBRIDGE FEMALE SEMINARY et al.

(Court of Appeals of Maryland. Nov. 16, 1893.)

FEMALE SEMINARY — PRIVATE CORPORATION — MATERIAL ALTERATION OF CHARTER — WHEAT CONSTITUTES.

Where a private corporation is chartered for the exclusive education of girls, a subsequent act of the legislature authorizing the trustees to lease to the county school commissioner so much of the buildings and grounds as are not necessary for the use of the seminary is not an alteration of the charter inconsistent with the purposes for which the corporation was formed, and unconstitutional, since it is not the necessary effect of such a lease to change the seminary into a mixed school for boys and girls.

Appeal from circuit court, Dorchester county, in equity.

Bill by Noah Webster against the Cambridge Female Seminary and others to restrain defendants from carrying into effect a certain lease, and for other relief. Decree for defendants, and complainant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and BOYD, JJ.

Charles Marshall and John G. Mills, for appellant. Bernard Carter, A. L. Miles, and S. T. Milbourne, for appellees.

ROBINSON, C. J. This case must be considered as one of more than ordinary importance. The right to alter, amend, or repeal the charter of a private corporation is reserved in express terms by the constitution of this state, and the question in this case involves the exercise of this power by the legislature. The Cambridge Female Seminary was incorporated by the act of 1858, with power to issue shares of capital stock, to the amount of \$10,000, for the purpose of erecting the necessary buildings for said institution. The trustees to be elected under the charter were authorized to employ teachers, fix their salaries, and to do all other things necessary for the proper conduct and management of the seminary; and upon the subscription of \$3,000 to its capital stock the state agreed to appropriate \$500 annually, to be expended, in the language of the act, "for the purposes of female education." By a subsequent act the legislature appropriated the further sum of \$5,000 to aid in the erection of additional buildings and the purchase of the necessary equipments for the school. Notwithstanding the liberal aid thus extended by the state, the seminary was not as successful as its promoters hoped and expected. It managed,

however, it seems, to struggle along till 1890, when its principal resigned. Its revenues were not in fact sufficient to pay the salaries of teachers and to meet the necessary current expenses, so the trustees were obliged to borrow money, and to mortgage the buildings and grounds to secure the payment of the loan. One of the mortgages was overdue, and there was no money in the hands of the trustees to pay either interest or principal. In this condition of affairs they made application to the school commissioners of the county for financial aid and assistance. Of the 120 shares of stock which had been subscribed by different persons, 66 shares remained unpaid, and, as the school commissioners were in need of buildings for school purposes, they agreed to take these 66 shares, provided the trustees would lease to them, for the use of the public schools, so much of the buildings and grounds as were not in fact necessary for the use of the seminary. This offer the trustees accepted, and the lease was accordingly executed. In addition to the subscription of the 66 shares of stock at \$40 per share, the school commissioners also agreed to pay to the trustees of the seminary \$500 annually, to be applied by them for the purposes of female education, and also agreed to put and keep the buildings and grounds in proper repair, and to insure the buildings at their own expense. The principal and vice principal of the "consolidated schools," for so they are called by the lease, were to be elected by the trustees of the female seminary and the trustees of the Cambridge Academy, the latter being also parties to the lease, subject, however, to the approval of the school commissioners. Such are the terms of the lease, and these terms, so far as the seminary was concerned, would seem to be beneficial in every respect, for, without the pecuniary assistance thus extended by the school commissioners, it could no longer be maintained as a school for the education of girls and young women. The complainant, however, is a stockholder of the defendant corporation, the female seminary, and this is a bill filed by him to restrain the parties from carrying into effect the terms of the lease, and to restrain the school commissioners from taking possession of or using in any manner the buildings and grounds belonging to the seminary, and, further, to have the lease itself declared to be null and void; and this relief he claims on the following grounds: (1) Because the trustees had no power, under the original charter, to lease any part of the seminary buildings or grounds to the school commissioners; (2) that the legislature could not, by the amendatory act of 1892, confer this power upon the trustees; (3) that the school commissioners had no power to subscribe to the capital stock of the defendant corporation, nor had they the power to become a party to the lease in question.

Whether the trustees had the power, under the original charter, to lease any part of

the buildings or grounds, is a question we shall not stop to consider. Be that as it may, the legislature had the power, it is conceded, to alter and amend its charter, provided such amendment does not change fundamentally the nature of the charter and the objects for which it was granted; and, this being so, the question comes to this: Does the act of 1892 change fundamentally the nature and character of the charter of the female seminary? Or, in other words, are its provisions inconsistent with the objects and purposes for which it was incorporated? And in considering this question it may not be amiss to refer briefly to the origin and object of the constitutional reservation to amend and repeal the charters of private corporations. In the well-known Dartmouth College Case, the supreme court, after full consideration, decided that the charter of a private corporation, when accepted, was an executed contract between the state and the corporators, and as such was within the protection of the federal constitution, which forbids a state from passing any law impairing the obligation of contracts; and, this being so, the court held that the legislature of New Hampshire could not by a subsequent act impair or interfere with the franchises and privileges granted to that corporation under its original charter. This decision, and the grounds on which it is based, have been, it is true, the subject of a good deal of criticism, but the decision itself has been affirmed by the supreme court in a number of cases, and must now be considered as the settled law of this country. In his concurring opinion, Mr. Justice Story, however, suggested that the legislature, in chartering a private corporation, might reserve the power to alter and amend it, and that the subsequent exercise of this power, under such a reservation, would not be an impairment of the obligation of the contract, within the meaning of the constitution; and, since that decision, this state and other states, by constitutional provision or by general law or by special acts, have in express terms reserved the power to amend or repeal the charters of corporations; the object being, as we have heretofore said, to preserve to the state control over corporate grants, should the legislature at any time deem the exercise of this power necessary and proper. *State v. Northern Cent. Ry. Co.*, 44 Md. 131. The reservation is therefore a condition upon which the charter is granted, and, when it is accepted, the right to exercise the power is as binding as if it were written in the body of the charter itself. *Jackson v. Walsh*, 75 Md. 304, 23 Atl. 778. The right, therefore, of the legislature to alter or amend the charter of the defendant corporation is not, and could not, be denied. At the same time, we agree with the appellant that it could not change fundamentally the nature and character of the charter it-

self. It could not, under the guise of an amendment, substitute a new and different charter, with distinct and different purposes, and oblige the stockholders to accept it. Nor could it divest property rights acquired under the legitimate exercise of the powers granted. Independent altogether of the contract clause of the federal constitution is the provision which declares that no one shall be deprived of his property without due process of law.

At the same time, the legislature, it is equally clear, has the right to amend or repeal the franchises, privileges, or immunities granted to the corporation. If its property was exempted from taxation, this may be revoked. If its charter prescribed the rates of tuition to be charged, these could be changed. If it prescribed the mode and manner by which the seminary was to be managed and controlled, these and all other like rules and regulations may be altered and amended, as the legislature may in its judgment determine. In the *Sinking Fund Cases*, 99 U. S. 700, after reviewing the several cases in the supreme court, in which the extent of the reserved power to amend or repeal the charters of corporations had been considered, the chief justice says: "Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say that, whatever rules congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendments." And in that case it was held that, under this reserved power, congress could lawfully enact that the corporation should set apart a portion of its earnings as a sinking fund for the payment of its debts to the United States. And in *Miller v. State*, 15 Wall. 478, the supreme court held that where the charter of a corporation was subject to amendment or repeal, in the discretion of the legislature, it was competent for the legislature to provide by law that a municipality should have the right to elect seven directors of a railroad company in place of four, the number which it had been originally empowered to elect, though such change resulted in giving the majority of the board to the municipality; and in answer to the arguments that the right to elect all the directors except four had become vested in the stockholders owning a majority of the shares, and that the amendatory act, giving to the city the power to elect seven, impaired that vested right, Mr. Justice Clifford said: "The court is of an entirely different opinion, as the legislature, in conceding that right, made the concessions subject to the reserved power to alter or repeal as ordained in the constitution of the state and the several statutes mentioned, which clearly gives to the legislature the power to augment or diminish the number, or to change the apportionment, as

the ends of justice or the best interests of all concerned may require." So tested by these well-settled principles, we do not see on what grounds the amendatory act of 1892 can be said to change materially, or to be in any manner inconsistent with, the objects and purposes for which the seminary was chartered. It merely authorizes the trustees to lease to the school commissioners so much of the buildings and grounds as were not necessary for the use of the seminary. The property belonging to the seminary was already incumbered with mortgage debts, which the trustees were unable to discharge; and, besides, they were without the means necessary to maintain it as an institution for purposes of female education. By the contract which the amendatory act authorized the trustees to make, the mortgage debts were paid with the money furnished by the school commissioners, and the annual rental to be paid by them for the use of part of the buildings and grounds enabled the trustees to maintain the seminary for the objects and purposes for which it was incorporated.

The argument, however, is that the necessary effect and operation of the lease in question was to change the seminary, which was chartered for the education of females, into a mixed school for boys and girls. We agree with the appellant that the defendant corporation was chartered for the education exclusively of girls and young women. That such was its object and purpose is plain, we think, not only from the title of the act of incorporation, but from every provision in the charter itself. It was so understood and accepted by the incorporators themselves, and it was so conducted and managed down to 1890, when the lease was made, and it was for the purposes of female education that the state agreed to appropriate annually the sum of \$500. But it does not seem to us that the lease itself can by any fair rule of construction be held to change the seminary into a mixed school for boys and girls. The buildings were, it seems, larger than actually necessary for the seminary, part of them being occupied as residences for the teachers, and in the lease is reserved in express terms ample accommodations for the use of the seminary; and, as we construe it, the lease simply means that the school commissioners shall be permitted to use and occupy part of the buildings and grounds for public school purposes. The proof in the record shows, it is true, that the buildings have been used in a manner not warranted by the terms of the lease, as we have construed it. Instead of reserving and using part of the buildings for the exclusive education of females, the girls of the seminary and the boys and girls attending the public school occupy, it appears, the same room, with an aisle, merely, between, and recite to the same teachers in the same class. In the face of such facts as

these, it can hardly be said that the seminary is conducted as a school exclusively for the education of females, such as was contemplated by the defendant's charter. The relief prayed, however, is not on the ground that the trustees have permitted the use of the buildings in a manner not warranted by the lease, but upon the ground that they had no power, either under the original charter or the amendatory act of 1892, to lease any part of the buildings to the school commissioners, even though they did reserve suitable and necessary accommodations for the exclusive use of the seminary. It was filed upon the theory that the trustees had no power whatever to lease any part of the buildings, and the relief prayed is to enjoin the parties from carrying into effect the terms of the lease, and to prevent the trustees of the Cambridge Academy or the school commissioners from taking possession of, or using in any manner, the property belonging to the female seminary. There is a general prayer, it is true, "for other and further relief," but under such a prayer the complainant is not entitled to relief beyond the general scope and object of the bill. *Fenby v. Johnson*, 21 Md. 106. Whether the legislature has the power, by amending the charter of the defendant, to convert the seminary, chartered originally for the exclusive education of females, into a mixed school for boys and girls, is a question not presented by the pleadings in this case, and in regard to which we are not to be understood as expressing any opinion. What we mean to decide is that the legislature had the power, by the amendatory act of 1892, to authorize the trustees to execute the lease in question, and that the lease so executed does not in itself change, or authorize the trustees to change, the seminary into a mixed school for boys and girls.

Now, as to the power of the school commissioners to subscribe to the stock of the female seminary, and to lease part of the buildings and grounds for public school purposes, we have but a word to add. The Code provides that they shall have the general supervision and control of all schools in their respective counties; they shall build, repair, and furnish schoolhouses; they shall fix the salaries of teachers; they shall purchase and distribute text books, and shall perform such other duties as may be necessary to secure an efficient administration of the public school system. The powers thus conferred are broad and comprehensive. Whether they are broad enough to authorize them to lease buildings for school purposes it is quite unnecessary, for the purposes of this case, to decide. Be that as it may, they are public, and not private, corporations, and, being public corporations, the legislature had, beyond all question, the power to authorize them to lease the buildings of the seminary for school purposes. It follows from what we have said that the decree below must be affirmed.

(68 Conn. 248)

STATE v. FLINT.

(Supreme Court of Errors of Connecticut.
July 6, 1893.)

CITY ORDINANCES—GAMING—"POLICY PLAYING."

1. Under Gen. St. § 2573, empowering common councils of cities to make ordinances to suppress gaming, an ordinance punishing any person managing a place or shop for the purpose of playing, or allowing others to play, the game or scheme commonly known as "policy," is not invalid on the ground that said statute does not create or define the offense prohibited in the ordinance, nor prescribe the penalty, nor make the acts described criminal, nor empower common councils to make them so; the power granted being adequate, and "policy playing" being a phrase in such current use as to need no definition.

2. An ordinance punishing any person managing a place or shop for the purpose of playing, or allowing others to play, the game known as "policy," does not conflict with Gen. St. § 2559, punishing any keeper, resident, or frequenter of a house resorted to for gaming, or reputed to be a gaming house or place frequented for gaming purposes; since under the ordinance it need not be proved that the place was resorted to for playing policy, nor that it had such reputation, nor that defendant resided in it.

3. It is no objection to a penal ordinance that a conviction under it may leave defendant subject to be again put in jeopardy under a state statute, since if the acts charged in both proceedings are the same, the first judgment will be a bar.

Appeal from court of common pleas, New Haven and Fairfield counties; Walsh, Judge.

Prosecution of Harry J. Flint for keeping a place for playing in and conducting and carrying on the game of "policy," contrary to ordinance. From a judgment of the court of criminal appeals affirming a judgment of conviction, defendant appeals. Affirmed.

S. Judson, Jr., for appellant. J. Chamberlain and W. B. Grover, for the State.

BALDWIN, J. By section 2573 of the General Statutes "the court of common council of any city" has "power to make, alter, and repeal ordinances or by-laws to suppress and punish all kinds of gambling and gaming, pool selling, policy playing, lottery dealing, bucket-shop business, and the staking or deposit of money or collaterals for the same on margins or otherwise against a rise or fall in the markets of the price of stocks, bonds, or merchandise, and to prevent idlers and persons without apparent employment from enticing persons into places where gambling of any kind is carried on." After this enactment the court of common council of the city of Bridgeport made the following ordinance: "Every person, whether as principal, agent or servant, who shall manage, or have any interest in the keeping or managing of, any place or shop for the purpose in whole or in part of playing, conducting or carrying on, or of allowing any other person or persons to play, conduct or carry on, the game, business or scheme commonly known as policy; or who shall write, transfer, sell or deliver, or buy in whole or in part, any of

the slips, tickets, tokens or chances used in or connected with such game, business or scheme of policy; or who shall in any other way knowingly take any part whatever in such game, business or scheme of policy, or in any part thereof—shall be fined not more than one hundred dollars." It was assigned by the defendant, as a cause of demurrer to a complaint against him, brought under this ordinance, that section 2573 does not create or define the offense alleged in the complaint, nor prescribe a penalty, nor make the acts charged a criminal offense, nor give power to courts or common council to make them such; but that this section is a sufficient authority for the enactment of city ordinances to suppress and punish "policy playing," and that that phrase is one in such current use as to need no statutory definition, was determined in the case of *State v. Carpenter*, 60 Conn. 97, 102, 22 Atl. 497. A further cause of demurrer was that the acts described in the ordinance constitute the crime of gaming or gambling, which is punishable by the general laws of the state, and that, as these provide a different penalty, the ordinance is inconsistent with the statute, and therefore void. The general laws of the state on the subject of gaming provide (Gen. St. § 2559) that "every person who shall keep a place resorted to for the purpose of gaming, or which is reputed to be a gaming house, or place frequented for the purposes of gaming, or who shall engage in playing at any game for any valuable thing, or who shall reside in, or frequent such place for such purposes, shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both." That "playing policy" is a method of gambling may also be considered as settled by the case of *State v. Carpenter*, supra; but the particular acts complained of are not covered by section 2559. The defendant is charged with keeping "a place for playing in and conducting and carrying on the game, business and scheme commonly known as policy." This constitutes an offense under the ordinance, but not under the statute against gaming and gaming houses. That makes it unlawful to "keep a place resorted to for the purpose of gaming, or which is reputed to be a gaming house or place frequented for the purpose of gaming," or to "reside in or frequent such place for such purpose," thus touching only places either in fact resorted to for gaming purposes, or having the reputation of being gaming houses or places of resort for gaming purposes. The complaint in question does not charge that the defendant kept a place of such a character. He could be convicted on proof that he kept a place for playing policy, although it had in fact never been resorted to for that purpose, and had not the reputation of being a place for playing policy, or a place resorted to for playing policy, and although he did not reside in it. It is an appropriate mode of suppressing pol-

icy playing to prohibit keeping such a place as the complaint, following the language of the ordinance, describes; but by keeping it, the statute, strictly construed, as all penal statutes must be, was not necessarily violated. The defendant further urges that his conviction under this complaint may leave him subject to be again put in jeopardy by a prosecution under the statute for keeping a place resorted to for policy playing, or reputed to be such a place of resort. If the acts charged upon him in both proceedings were the same, the judgment in the first would be a bar to the second. *Southport v. Ogden*, 23 Conn. 128, 132. If they were different, he could be rightfully punished for both offenses. *State v. Welch*, 36 Conn. 215, 217; *Cooley*, Const. Lim. (6th Ed.) 239. There is no error in the judgment appealed from. The other judges concurred.

(68 Conn. 155)

RITCHIE v. WALLER.

(Supreme Court of Errors of Connecticut.
May 22, 1893.)

LIABILITY FOR ACTS OF SERVANT — DEVIATION FROM LINE OF DUTY — AMENDMENT OF PLEADING.

1. Where a servant sent to get a load, on his return, for the purpose of calling at a shop on his own account, goes somewhat out of his usual route, and leaves the team unhitched while he goes into the shop, the master will be liable for an injury to a person from the running away of the team, the servant's acts being in the execution of the master's business, though deviating somewhat from the line of his duty.

2. Allowing plaintiff, after introducing his evidence, to amend the allegation of his complaint that the damage was done by defendant, so as to conform to the evidence that it was done by his servant, is a proper exercise of the discretion given by Gen. St. § 1023.

Appeal from superior court, Fairfield county; J. M. Hall, Judge.

Action by Peter Ritchie against William Waller. Judgment for plaintiff. Defendant appeals. Affirmed.

J. J. Rose and G. P. Carroll, for appellant. N. W. Bishop and E. O. Hull, for appellee.

TORRANCE, J. This is an action against a master for damage caused by the negligence of his servant. The court below, upon the facts found, decided that the injury occurred solely through the negligence of the servant. One of the claims of the defendant, though it was not pressed on the argument, is that the court, as matter of law, erred in so doing. Upon this point it is sufficient to say that the record does not present any question of law for review. Upon the facts as they appear of record we must regard the decision of the trial court upon this point as final and conclusive. In the discussion of the case, therefore, we will assume that the negligence of the servant and the damage resulting therefrom have been determined against the defendant,

and that the question of the responsibility of the master therefor alone remains to be considered.

The facts bearing upon this question are in substance the following: The defendant is a farmer in Trumbull, and at the time of the injury, in September, 1891, and for some years prior thereto, had been accustomed twice a week to get manure for his farm from a brewery on North Washington avenue, in Bridgeport. This avenue and Main street intersect at a point called "Bull's Head," about a thousand feet south of the brewery. The avenue and Main street are connected by three cross streets, called, respectively, beginning with the one next north of Bull's Head, "Mulloy's Lane," "Grand Street," and "Commercial Street." The brewery is nearly opposite the point where Mulloy's lane enters the avenue. In December, 1890, the defendant hired the servant in question, whose name is Blackwell, as a farm laborer. Soon thereafter the defendant, for the purpose of getting a load of manure, and of showing Blackwell the place to procure it in the future, drove with him from the farm to the brewery, passing down Main street to Grand, through Grand to North Washington avenue, and thence southerly to the brewery. After getting a load they returned through Grand street to Main, and thence northerly home. Neither at that time nor on any subsequent occasion did the defendant give any special directions or instructions as to what particular route Blackwell should follow in going to or returning from the brewery with manure, although he supposed Blackwell took the same route followed on the first occasion above mentioned. In fact, Blackwell went or returned sometimes by way of Mulloy's lane, and sometimes by way of Grand or Commercial street, and the defendant never at any time made any inquiries as to what route he took. On the day of the injury the defendant told Blackwell to go to the brewery after a load of manure, and to spread it on a designated lot on the farm. These were all the directions given to him. The defendant did not know that he intended to go to any other place. Pursuant thereto, Blackwell, with the wagon and two horses of the defendant, went to the brewery, and procured a load of manure. After so doing, instead of returning to Main street through the lane or Grand or Commercial street, and going thence northerly towards Trumbull, as usual, Blackwell drove southerly down the avenue to Bull's Head, and thence into Main street, and thence northerly in the direction of home till he came to a certain shoemaker's shop on Main street, southerly of Mulloy's lane. There he got off his wagon, leaving his team for about five minutes, and went into the shoemaker's shop. Blackwell's purpose and object in so doing was to see the shoemaker about soling or mending

the shoes belonging to and then worn by him. While he was in the shop, the team started at a slow trotting gait up Main street, till it came opposite the plaintiff's market, where the wheels of the defendant's wagon caught in the left rear wheel of the plaintiff's wagon, upsetting the same, and causing the injuries to the plaintiff and his property referred to in the complaint. Blackwell was employed by the month, and the carting of the manure was within the ordinary scope of his employment as a servant of the defendant, and he was in the service of the defendant at the time of the accident.

Just here it may be well to call attention to two points in the finding, and to settle its interpretation with reference to them. After stating that Blackwell drove around to the shoemaker's shop, and there left his team and went into the shop, the court, as we have seen, adds that "Blackwell's purpose and object in so doing was to see the shoemaker about soling or mending his shoes." Now, whether the phrase "in so doing" refers to the entire conduct of Blackwell from the time he left the brewery till the horses ran away, or only to his act in leaving them and going into the shoemaker's shop, is perhaps not free from doubt. We will assume, however, in accordance with what seems to be the claim of the defendant, that the phrase in question refers to the entire conduct. Again, the finding is that Blackwell "was in the service of the defendant at the time of the accident." This may mean simply that at the time of the accident his term of service had not expired, and that he had not been discharged, or it may mean that in making the detour he was, and continued to be, in the execution of the master's business, within the scope of his employment. We shall, for the purposes of the discussion, assume that the former meaning is the correct one.

Whether, then, upon the facts found, the master is responsible for the negligence of the servant, is the important question. The general rule of law applicable in this class of cases is accurately and comprehensively stated in *Stone v. Hills*, 45 Conn. 47, as follows: "For all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible; for acts which are not within these conditions the servant alone is responsible." Of these "conditions" of liability, the one under which the present case seems to fall, if it falls under any of them, is the one for acts done "in the execution of the master's business within the scope of his employment." This rule or "condition" of liability

is in itself simple and intelligible enough, but, in determining whether any particular case falls within it or not, difficult and troublesome questions may arise. "The cases which have arisen upon this subject have from the earliest times been productive of much astute and interesting discussion in courts of law, and eminent judges have differed widely in their decisions. It has always been a matter of extreme difficulty to apply the law to the ever-varying facts and circumstances which present themselves." *Rayner v. Mitchell*, 2 C. P. Div. 357. In reality, however, the difficulty here spoken of arises in ascertaining whether the act was done in the execution of the master's business within the scope of his employment, which, as we shall see, is ordinarily a question of fact, and not in applying the rule when that fact has been ascertained. This fact once determined, the rule can be easily applied, but the rule cannot at all aid in the determination of the fact. The rule tells us that the master's liability depends upon whether the acts were done in the execution of his business within the scope of his employment, but it does not help us to determine whether they were or not so done.

In like manner the general rule of construction is that the intent of the parties shall prevail. This tells us what to do when the intent has been ascertained, but affords no aid in a particular case in ascertaining what the intent is. Whether, then, the act of a servant, for which it is sought in a particular case to hold the master responsible, was done in the execution of the master's business within the scope of the employment, or not, must, from the nature of things, in most cases be a question of fact, to be determined as such by the jury or other trier, because no general rule of law has been, or probably can be, laid down, the application of which will determine the matter in all cases. Sometimes, however, this question is determined by the court as a matter of law. But in by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has been generally held to be one of fact and not of law. In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be

left to the jury or other trier of such questions. Thus, in *Phelon v. Stiles*, 43 Conn. 426, the deviation by the servant from the strict course of his duty was so slight that this court, as matter of law, held the master liable, while in *Stone v. Hills*, 45 Conn. 44, the deviation was so marked and unusual that it refused to hold the master responsible. On the other hand, where a servant, contrary to his duty, and solely for a purpose of his own, drove his master's horse and cart a quarter of a mile out of the way, the question whether in and while so doing he was in the execution of his master's business, within the scope of his employment, was left to the jury as a question of fact. *Whatman v. Pearson*, L. R. 3 O. P. 422. "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome." *Pol. Torts*, side p. 71. In the following cases, among many others, this question was decided as one of fact: *Kimball v. Cushman*, 103 Mass. 194; *Redding v. Railroad Co.*, 3 S. C. 1; *Rounds v. Railroad Co.*, 64 N. Y. 129; *Cormack v. Digby*, 9 Ir. Com. Law, 557; *Burns v. Poulson*, L. R. 8 O. P. 563.

In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. "Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but where there is not merely deviation, but a total departure, from the course of the master's business, so that the servant may be said to be 'on a frolic of his own,' the master is no longer answerable for the servant's conduct." *Pol. Torts*, side p. 76. In the case of *Joel v. Morison*, 6 Car. & P. 501, the jury were told that if the servant, with his master's horse and cart, made a detour in order to call upon a friend, or if, when driving on his master's business, he went out of his way against his master's implied commands, the master remains liable for the servant's negligence while extra viam; but that "if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." If the servant, in going extra viam, is really engaged in the execution of the master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own. Thus, in *Patten v. Rea*, 2 C. B. (N. S.) 606, the servant started out on business of the master, and also to see a doctor on his own account. While on his way to see the doctor he negligently drove against a horse and killed it, and the master was held responsi-

ble. In *Sleath v. Wilson*, 9 Car. & P. 607, the master was held liable for the negligent act of his servant, who, after having set his master down, drove around to deliver a parcel of his own, and did not drive directly where he had been ordered to go. See the case, also, of *Cormack v. Digby*, supra, upon this point. In *Storey v. Ashton*, L. R. 4 Q. B. 476, Chief Justice Cockburn says: "I think that if a driver, while acting in his master's business, were to make a slight deviation to carry some business of his own into effect, in such a case the master might be liable, and that the question would be one of degree as regards the extent of the deviation. * * * I am far from saying if the servant, when going on his master's business, took a somewhat longer road, that owing to the deviation he would cease to be in the employment of the master, so as to divest the latter of all responsibility. In such cases it is a question of degree as to how far the deviation could be considered as a separate journey." In *Whatman v. Pearson*, supra, the servant, with the horse and cart of the master, contrary to express orders, went a quarter of a mile out of his way purely for a purpose of his own, and the master was held responsible. In *Mitchell v. Crassweller*, 13 C. B. 237, Maule, J., said: "The master is liable even though the servant, in the performance of his duty, is guilty of a deviation, or a failure to perform it in the strictest and most convenient manner." In some of its aspects the case of *Quinn v. Power*, 87 N. Y. 535, is somewhat similar to the case at bar. There a boatman at a certain town on the Hudson river applied to the pilot in charge of a ferry boat, asking to be put on board of a canal boat then in midstream. The pilot, without compensation, and apparently out of mere "good nature," agreed to do so. Similar acts had occasionally been done before, but without the knowledge or express authority of the master. To reach the canal boat the pilot diverged from his regular course, and while so out of his course, through the negligence of those in charge of the ferry boat, a collision with a canal boat occurred. In behalf of the master it was urged that his servants, when the collision occurred, were not acting in his business or within the scope of their employment, but in the execution of an independent purpose of their own, not connected with the master's business; but upon this point the court said: "We do not concur in this view of the transaction. At most, it appears to us a case where the servant, while acting in the master's business and within the scope of his employment, deviated from the line of his duty to his master, and disobeyed his instructions. When this ferry boat left the dock at Athens it started for its terminus at Hudson. It took freight and passengers to transfer across the river. Servants and boat, as the latter moved out into the river, were doing the

master's business, and acting in the line of duty and of employment. There was a usual track or route by which the boat crossed. It may even have been selected and dictated by the owner. In deviating from it the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting passengers from Athens to Hudson because they did not follow the usual route, or pursued another, or even a forbidden, track. They were still doing their employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river, they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment, although pursuing it in a way and manner to subserve also such purpose. When they took this passenger to the tow, and in so doing deviated from the usual route, and stopped the boat midriver for that reason, they were still engaged in the master's business of transporting freight and passengers across the river. They were doing it in a mode and manner perhaps not authorized, and possibly in some sense to effect a purpose of their own, but none the less acting within the scope of their employment, and engaged in the master's business." Some of the above remarks are quite applicable to the case at bar. In making the detour, Blackwell was still in charge of his master's team, though on a roundabout way home, carting manure to his master's farm. That was his main purpose and object throughout the entire transaction. In the language of the case last cited, even if the motive was some purpose of his own, he was still about his usual employment, although pursuing it in a way and manner to subserve such purpose also.

Applying these principles to the case at bar, the question for the court below was whether or not Blackwell, for the time being, totally departed from the master's business, and set out upon a separate journey and business of his own. If the rule of law were that any deviation by the servant "to carry some business of his own into effect" was of itself such a departure, the above question would be one of law. But this, as we have seen, is not the rule of law. To decide the question in a case like the present, the trier must take into account, not only the mere fact of deviation, but its extent and nature relatively to time and place and circumstances, and all the other detailed facts which form a part of and truly characterize the deviation, including often the real intent and purpose of the servant in making it. Without spending more time upon this point, we think the above question is one of fact in the ordinary sense, and that the case at bar clearly falls within the class of cases where such question is strictly one of fact to be decided by the trier. As such, we

think the court below decided it. It is true that upon our interpretation of the finding the court below has not found formally and in terms that Blackwell, during the time of the detour, was in the execution of his master's business, and perhaps such interpretation does that court an injustice; but, however this may be, the court, in deciding as it did, necessarily found that Blackwell continued in the execution of the master's business all the time, and this is enough without so finding in terms. This court will not review such a finding upon the errors assigned. If, however, we should hold the question raised upon this point to be one of law, we have no hesitation in saying that the court below reached the correct conclusion on the facts found. In either point of view, then, there is no error.

The remaining question relates to the allowance of the amendment. The complaint alleged that the damage was done by the defendant, while the proof was that it was done by his servant. After the plaintiff rested, the defendant moved for a nonsuit on the ground of this variance, and the court permitted the plaintiff to amend his complaint in this respect. According to the record, the only objection made by the defendant was a general one to the allowance of the amendment, and the error assigned upon this point seems to relate wholly to the allowance of the amendment. Under the statute (section 1023) the court clearly had the discretionary power to allow the amendment, and the power, for aught that we can see, was very properly exercised. *Santo v. Maynard*, 57 Conn. 157, 17 Atl. 700. The real grievance of the defendant, however, upon this part of the case, as stated upon his brief, seems to be that he was not allowed time to demur to the amended complaint. Now, if we admit for argument's sake that the amended complaint was demurrable, there are two sufficient answers to this claim of the defendant. The first is that it is not fairly included in the assignments of error, and the second is that it nowhere appears that the defendant asked or offered to demur, or that his right to do so was questioned or denied by the court below. There is no error in the judgment appealed from. The other judges concurred.

(63 Conn. 495)

NORWALK GASLIGHT CO. v. BOROUGH OF NORWALK.

(Supreme Court of Errors of Connecticut. Dec. 15, 1893.)

BOROUGHS—CONSTRUCTION OF SEWERS—NEGLIGENCE—INDEPENDENT CONTRACTORS.

1. In an action by a gas company against a borough for injuries to plaintiff's pipes, caused by defendant's negligence in building sewers, defendant alleged specially that such construction was required by public necessity, and authorized by the state; that defendant had no knowledge of the location of plaintiff's pipes;

that it was discharging a duty, had the advice and superintendence of a competent engineer, etc. *Held* demurrable, as showing no excuse for negligence, if there were any, but merely facts tending to show that there was none, and not bettered by allegations that all acts done by defendant were necessary, and done with reasonable care.

2. Said special answer further alleged that all the work was done under contracts made under advice of competent counsel, and the acts complained of by plaintiff, if done, were done by the contractors, and not by or under defendant's procurement. *Held* that, since the defense of 'independent contractor' was not consistent with the rest of the answer, these allegations would be construed as of acts done by defendant showing the exercise of reasonable care, and, so construed, were demurrable.

3. A borough empowered its court of burgesses to construct a general system of sewers. The court let the work on contract, and delegated superintendence of details to its committee on sewerage. The borough engineer made the plans, and, under the contracts, had important superintending powers. A cave-in having occurred, which injured plaintiff gas company's pipes, the committee and engineer orally agreed with plaintiff that plaintiff should repair the damage, and protect against and repair like injuries that might occur in future at the borough's expense. Pending the work, the engineer reported the agreement, and the doing of work thereunder, at a regular meeting of the court of burgesses, plaintiff's superintendent being present, when no objection was made, but no formal action taken. *Held*, that plaintiff was, by said report and the burgesses' acquiescence, justified in doing work under the agreement, and the borough was estopped to deny its liability thereunder.

4. A contract let by a borough for building sewers allowed the burgesses to inspect the materials and work, to see that these fulfilled the specifications. The specifications provided that the work should be packed in by persons approved by the borough engineer, and no tunneling should be allowed, except on his permission; that if, in excavation, any obstruction were met, which said engineer thought should be avoided, the work should be measured, and the excavation filled in; that the work should be prosecuted at as many points as said engineer should, from time to time, determine; that plank foundations should be laid when the engineer thought them needed; that all work should be done according to the plan and directions of the engineer; that certain rock should be excavated with as little blasting as possible, under immediate supervision of the engineer; that laborers and tools objected to by the engineer should be removed; and that the contractor should be responsible for all damages to neighboring property, and at his own expense shore up, protect, and restore all improvements disturbed or injured. *Held* that, as against a gas company whose pipes were injured in the course of the work, the contractor was independent, and not the borough's servant.

5. Where the contractor is independent, and a properly competent person, the employer's right to control any part of his work is immaterial. It is only the employer's actual interference or assumption of control that will make him liable for injuries caused by the contractor's negligence.

6. The operation of blasting with dynamite is intrinsically dangerous; and in an action for injuries to gas pipes by excavations for sewers, in which such blasts were used, the court should so state to the jury, adding, however, that whether, under the facts in the case, the work contracted for called, in its natural and reasonable execution, for such operation as would obviously expose plaintiff's property to probable injury, is for them to determine; that, if so, the employer cannot excuse himself for injury

so occasioned, by any contract with another to do the work.

7. It is not enough, in employing an independent contractor, not to knowingly employ an incompetent one; but one must exercise due and reasonable care to select a competent and skillful person.

8. When the injuries are alleged to have been caused by defendant's negligence in constructing sewers, it is immaterial that the court charge that such construction was carried on under defendant's duty of maintaining and keeping in repair its streets, while in fact it was under a charter granted on defendant's petition to the legislature, since the degree of care required in either case would be exactly the same.

Appeal from superior court, Fairfield county; Thayer, Judge.

Action by the Norwalk Gaslight Company against the borough of Norwalk for damages for injuries to plaintiff's pipes and mains. Judgment for defendant. Plaintiff appeals. Reversed.

J. H. Perry and J. B. Hurlbutt, for appellant. L. Warner and S. Tweedy, for appellee.

FENN, J. The plaintiff's complaint, as amended, contains three counts: In the first it is alleged, in paragraph 1, that the plaintiff was, in 1856, granted a charter of incorporation, empowering it to manufacture and sell gas in the town and borough of Norwalk for lighting streets and other purposes, and to lay down its gas pipes and appurtenances in the streets of said town or borough, and that under its charter it did lay such pipes in such streets, and has ever since maintained them there, and conducted its said business for which it was chartered. In the second paragraph it is stated that about July 6, 1887, the defendant borough began the construction of a general sewer system for said borough in the streets of said borough, wherein lay the plaintiff's said pipes, substantially completing said construction about November, 1888. The third and fourth paragraphs of said count contain averments of the defendant's negligence in the performance of said work, in the excavation of earth, blasting of rocks, and filling of trenches, and damage to the plaintiff by the needless breaking and injury of its pipes, and the escape of gas therein contained, and in the storage tanks, resulting therefrom, and expense in repairing, restoring and relaying pipes, and in superintending its lines, during the defendant's work of construction, thereby caused. The second count is similar to the first, except that in the third paragraph it is averred that "it suited the convenience of said defendant, in constructing said sewer system, to excavate the streets of said borough in excessively wide trenches, and keep the same open unusual and unnecessary lengths of time, and in such excavating, in many places, the defendant blasted out wide trenches through ledges of rock, using therefor dynamite and

other high explosives, which blasting is an operation inherently dangerous and destructive to property, and demands of those engaging in it a high degree of care, skill, and prudence, duly to protect the property rights of others." In the third count, paragraphs 1 and 2 of the first count are adopted, and it is then averred that, "when constructing said sewers, the defendant, in consideration that the plaintiff would employ sufficient men and provide materials to secure the plaintiff's mains and pipes from injury which might result from the defendant's operations, and to repair said mains and pipes when broken or injured thereby, which injuries the defendant could and should provide against by exercising reasonable care in its said operations, agreed with the plaintiff, on demand, for a valuable consideration, to reimburse the plaintiff for all expense it might incur and labor it might expend for the proper security of its mains and pipes, and for the repair and restoration of the same when injured by the defendant as aforesaid. Pursuant to said agreement, the plaintiff performed work, incurred expense, and made disbursements to the amount of \$1,000.85, all of which was made necessary by the defendant's operations aforesaid." An itemized bill of particulars under this count was also filed. To the defense of denial to all the counts, the defendant added second defenses to the first and second counts, respectively, which contained the following allegations: That public convenience and necessity required the construction of said sewers, and that they were constructed under and by virtue of authority given to the defendant by the state; that, when such construction was commenced, neither the defendant nor any of its officers or agents knew or were able to ascertain the location of the gas pipes of the plaintiff, and were therefore unable to so locate and construct said sewers as to avoid the said gas pipes, and locate and construct said sewers where said gas pipes were not located; that it was necessary to locate and construct said sewers where they were located and constructed, and to construct them in the way and manner in which they were constructed; that the plaintiff knew the location of said sewers, and where they were to be constructed, before such construction was commenced, and made no objection to such location or construction; that the plaintiff might and should have taken up said gas pipes, and removed them to such places in said streets as were not used by the defendant in the construction of said sewers, and where they would not have been injured, yet the plaintiff neglected so to do, though thereto requested; that all the work done in the construction of said sewers "was done by contractors, who were acting under contracts which the defendant, by its proper officers, had before that time entered into under the advice of competent counsel, and the acts

complained of by the plaintiff, if done, were done by said contractors, and not by or under the direction or procurement of the defendant;" and that the defendant, in all it did in the location and construction of said sewers, acted by its proper officers, in the discharge of a duty to and for the benefit of the public; that its acts were necessary, were done with reasonable care, and without negligence on its part. To these defenses, which were alike, the plaintiff demurred on the ground, in substance, that none of these matters alleged constituted a defense to the defendant, or exempted it from liability for negligence in the construction of the work; such negligence being, as claimed by the plaintiff, the gist of its action. But the court overruled the demurrers, and thereupon the plaintiff answered over, alleging in its reply that the contractors engaged by the defendant to construct its sewers were at all times under the immediate direction of the defendant, particularly as to the manner of doing the work; that said contractors were engaged in behalf of the defendant to take care of the plaintiff's gas pipes, and preserve them from the injuries complained of, and that the acts complained of were done by the defendant, and under its direction and procurement, and were in law its acts. To this reply there was a rejoinder, in which it was admitted that the contractors employed by the defendant were under its direction, so far as to insure the performance by said contractors of the work on said sewers according to the requirements of the contracts, and no further. The case was tried to the jury, and resulted in a verdict for the defendant.

The plaintiff, in its appeal, assigns 24 reasons, which may, however, be considered under 3 heads: First, the alleged errors in overruling the demurrers to the second or special defenses to the first and second counts of the complaint; second, in excluding the evidence which was offered by the plaintiff in support of the third count of the complaint; third, in the charge of the court to the jury.

In reference to the first head, we are inclined to think that the court erred. The defenses, on their face, purport to be, and to have been filed as, full defenses to the first and second counts, respectively. In our judgment, they are not such. It will be seen, by reference to the first count of the complaint, that the gravamen or grievance complained of is, as the plaintiff insists, the negligence of the defendant in the work of construction. The allegations of the answer of public convenience and necessity, of authority from the state, of want of knowledge of location of the plaintiff's pipes, of the discharge of a duty, the advice and superintendence of a skillful and competent engineer, and the like, however important some of these things may be, as matters of

evidence, tending to show that no such negligence in fact existed, clearly constitute, severally or collectively, no excuse or justification for it, if it did exist. The allegations that all acts done by the defendant "were necessary to be done, and were done with reasonable care and without negligence on the defendant's part," cannot serve to make a special defense, otherwise bad, of validity, since they constitute, in effect, a mere denial of allegations of the plaintiff's complaint, and a mere repetition of the defense of denial already pleaded. And, finally, as to the allegations above referred to, that "all the work done in the construction of said sewers was done by contractors who were acting under contracts which the defendant, by its proper officers, had before that time entered into under the advice of competent counsel, and the acts complained of by the plaintiff, if done, were done by said contractors, and not by or under the direction or procurement of the defendant." This averment, if, as contended by the defendant, sufficient in itself to constitute a valid statement of a defense that the work in question was done by independent contractors, for whose acts the defendant was not liable, is certainly, if so understood, not only distinct from, but inconsistent with, the other paragraphs of the answer in which it is placed. It ought, rather, as we think, if possible, to be construed in connection with the rest of the answer, and as harmonizing with it; and, so understood, the allegations are of acts done by the defendant, making contracts under the advice of competent counsel, showing the exercise of reasonable care, and not of facts, the implied legal effect of which is to exempt the defendant from liability for the want of such care. Although this construction may not seem the most obvious, yet, since there is no direct averment that the contractors were independent either of the actual control, or of the right of control, of the defendant, and as there is an averment in the next consecutive paragraph of the same answer that acts and things in the construction of these sewers were done by the defendant under the advice of a superintendent employed by it to superintend the construction of the sewers, it is, as we think, all things considered, the most reasonable and fair construction to be made; and, as so construed, the demurrer to this paragraph, as insufficient to exempt the defendant from liability for injury occurring by reason of the negligence of such contractors, was well taken. It may be added that the plaintiff, in its demurrer to the second defense, as applied to the second count of the complaint, assigned the following additional reason of demurrer: "Because no contract or covenant between the defendant and any independent contractor, not the plaintiff, can relieve the defendant of liability for injuries done the plaintiff by such contractor, by his

negligence in the inherently dangerous operation of rock-blasting with dynamite, as alleged in the second count of the complaint,"—thereby presenting another question, which, as it will also arise and call for consideration in connection with the charge of the court, we will not now examine. Indeed, it is apparent from the record that the case was tried to the jury precisely as it would have been had the plaintiff not demurred; and the same questions of law arose upon the trial, and were passed upon by the court, in its charge to the jury, as were raised by the demurrer. It is therefore appropriate, and has seemed to us best, to review these questions, principally, in connection with the consideration of such charge. Before doing which, however, we will examine the questions based upon the action of the court in excluding evidence offered by the plaintiff in support of the third count of the complaint.

As bearing upon this subject, the finding states that, upon the trial, the plaintiff first offered evidence to prove, and claimed to have proved, that the defendant petitioned for, and obtained from the legislature of this state, authority to construct a general sewer system for the whole borough, which enactment was accepted by such borough in due and legal manner. That after such acceptance (and this was conceded) the borough passed votes providing that the cost of the system should be borne by the borough at large, and not by assessment of benefits, and directing the court of burgesses to begin the construction of such system at once, and making due appropriation for the work. That such sewers were constructed pursuant to a resolution of said court of burgesses. That at the same meeting of said court of burgesses at which the said sewer construction was resolved upon, as aforesaid, and undertaken, it was also "resolved, that the sewer committee be authorized to superintend and direct the details of the work authorized at this meeting." That the sewer committee referred to was a standing committee of the court of burgesses, and consisted of three of the six members of said court. That one of the officers of said borough was the borough surveyor,—a position occupied then, and ever since, by Charles N. Wood, a civil engineer. That he, under the direction of the court of burgesses, had prepared the said general sewer system, and that his duties were defined by the following by-law: "Chapter 13, § 1: The borough surveyor shall make all surveys, maps, plans, profiles, specifications and estimates necessary for the public works and street improvements of the borough, and superintend the execution of such works and improvements, and cause to be carried into effect all orders of the court of burgesses, in reference thereto, whenever such duty is not otherwise specially assigned by said court." That at the outset of this sewer construction the sides of an open

sewer trench, about 500 feet long and 10 feet deep, caved in, by reason of neglect to properly shore or brace the sides of the excavation, and broke down the plaintiff's gas pipe, in the solid earth, from 2 to 3 feet away from the trench. That thereupon the plaintiff claimed that the injury thus resulting to its gas pipe was due to negligence in the construction of the sewers. The finding then proceeds as follows: "Having offered evidence as aforesaid, the plaintiff then offered evidence to prove that the sewer committee, after some damage had been done to the plaintiff's pipes, authorized and directed the plaintiff to employ sufficient men, and provide materials, to secure the plaintiff's mains and pipes from any injury which might result from the defendant's operations, and to repair said mains and pipes, when broken or injured thereby, and agreed with the plaintiff to reimburse the plaintiff for all the expense it might so incur. To this evidence the defendant objected, and the court sustained the objection. The plaintiff then offered the same evidence in connection with other evidence tending to show that the plaintiff had acted upon the faith of said action of the sewer committee, and had performed the work contemplated by said arrangement, for the purpose of showing that the defendant had due notice that said work was performed for the borough upon a claim for reimbursement from the defendant, and of which the defendant had the full benefit, and upon the further offer by the plaintiff to show that no objection was ever made by the defendant to the rendering of said services or the furnishing of said materials. The defendant objected to the evidence thus offered, and the court sustained the objection. The plaintiff offered to show that the foregoing arrangement was also authorized by Charles N. Wood, the borough engineer, and that it was performed at his request, and with his knowledge and assent throughout. This evidence was claimed for the purpose of direct proof of the claim for reimbursement under the third count, and also for the purpose of thereby showing notice to the borough that said work was performed and materials furnished for the benefit of the borough, with notice to it, and without objection. The defendant objected to the evidence, and the court excluded it. The plaintiff offered to prove that Charles N. Wood, acting in his capacity as borough officer or agent, directed the plaintiff to perform the work of repairing its gas pipes broken in the course of construction of the sewers, as set out in the bill of particulars filed under the third count, upon the credit of and to be paid for by the borough; that he reported to the court of burgesses, at a regular meeting of the court, in the presence of the superintendent of the plaintiff company, that he had made such agreement; that the work was being performed under it; and that the individual members of the court of burgesses

then and there assented to it, though it was admitted that no formal vote was taken or recorded. This evidence was claimed for the purpose of showing notice to the borough of the work being done, and the claim and belief under which it was being done, and as a ratification and acceptance of the act of said Wood; and the plaintiff claimed that no vote or record evidence was necessary to bind the borough to pay for such services and material. The defendant objected to the evidence, and the court excluded it. No evidence was offered to show any vote or other action of the borough or court of burgesses authorizing or confirming the claimed action of the sewer committee and borough engineer aforesaid, and it was not claimed that there was any authority for said action, other than such as hereinbefore stated."

Were the foregoing rulings of the court, all of which were duly excepted to by the plaintiff, correct? It is true, as insisted by the defendant in its brief, that before the acts or declarations of either of these claimed agents, the borough engineer or sewer committee, could be received in evidence to bind the defendant by virtue of their agreement or promise, alone, their authority to make such a contract must have been shown, and neither their acts nor declarations were proof of such authority. It is also true, as it seems to us, that the preliminary evidence offered as hereinbefore stated, (the contract hereafter referred to had not then been laid in, nor would it have altered the case if it had been,) did not show such authority, either by virtue of their powers generally as public officers, or the votes and by-laws which gave them special authority. And it is further true that such powers as the court of burgesses of the defendant borough had, either of a legislative or discretionary nature, could be legitimately exercised only by the coming together of the members who composed it, and the expression of its purpose or will, embodied in a vote, in some distinct and definite form. But, notwithstanding all these considerations, we are of the opinion that this evidence, when offered in its entirety, should have been received, and submitted to the jury, as tending to prove the third count in the complaint; and this, as it appears to us, upon the plainest and most manifest principles of equity and good conscience. The preliminary evidence tended to show an adoption by the borough of a general system of sewerage, the cost of which was to be borne by the borough at large, and the investing by the borough of its court of burgesses with full power and authority in the matter of construction; that said court of burgesses authorized the sewer committee, being three of its own six members, to superintend and direct the details of the work, and that the borough surveyor or "engineer," as he has been styled, by virtue of a by-law of said borough, also possessed important powers, to be exercised in behalf of the borough; that at the outset

of the work of construction an injury occurred to the plaintiff's property, claimed to be due to negligence in such work. Upon this state of facts, and after such damage done to the plaintiff's property, that the sewer committee and borough engineer or surveyor should have undertaken to authorize the plaintiff to use competent means to protect its property from further injury which might result from the defendant's operations, and to reimburse the plaintiff for the expense which it might incur thereby, would find a natural and reasonable explanation upon the ground that in that way, at less expense than in any other, could the borough relieve itself from liability to the plaintiff for such damage resulting from its acts as it would be legally obligated to make compensation for. Such officers, clothed with such powers and charged with such duties, as we have seen, to be exercised and performed for and in behalf of the defendant borough, could scarcely have hesitated in arriving at the conclusion that under such circumstances the employment of the plaintiff would be an act which their principal would not fail to ratify and confirm. On the other hand, we think the plaintiff, under such circumstances, although bound to know the extent of the authority of the defendant's agents, would be justified in doing the work contemplated by the arrangement, for the borough, upon a claim for reimbursement from it, provided (as, we have seen, the plaintiff also offered to prove) a report was made, while the work was being performed, to the court of burgesses, at a regular meeting thereof, in the presence of the superintendent of the plaintiff company, that such agreement had been made, and that the work was then so being performed under it, and that the individual members of the board then and there assented to it. This was a matter in which the borough could speak only by its court of burgesses. Upon the facts offered to be proved, it would at least appear that no disapproval of the reported action of the officers of the borough was manifested by that body. The time to deny the authority of such agents to contract with the plaintiff in behalf of the borough for what they deemed to be for its interest was when the report of their action was made. Failure then to dissent, silence when it became a duty to speak, constituted assent. Retaining, then, the benefit of the contract, the borough must be held thereby to have ratified it, and to be estopped from afterwards denying its liability under the arrangement made with the plaintiff. *Perry v. Manufacturing Co.*, 37 Conn. 520, 534; *Railroad Co. v. Chatham*, 42 Conn. 465.

We have now to consider the errors alleged to exist in the charge of the court to the jury. As bearing upon the first of these, the record states that the defendant, after proper preliminary evidence, offered certain contracts for the purpose of showing that the acts of claimed negligence were not the acts

of the borough, but were acts of the contractors, for whose negligence the defendant borough was not liable. The plaintiff objected to the said contracts—First, as being no defense to its claim for damages to the property of the plaintiff caused by negligence in the building of the sewers; second, as no defense to such claim, so far as the damage was caused by negligence in blasting rock with dynamite, such blasting being an operation inherently dangerous; third, because, as a matter of construction, these contracts were not independent, and because the borough retained control over the work, and manner of doing the work, and had the right to direct how all parts of it should be done. It was agreed that the contracts might be formally laid in, and that the plaintiff should have the benefit of all these objections, and that the court would make its final ruling in the charge to the jury, with the same effect as though exceptions had been taken to the rulings of the court therein contained. The court charged the jury that the legal effect of the instrument was to create, as between the borough and the other parties signing, the relation of contractee and independent contractor. Was this a correct construction? One of the contracts, which are admitted to be substantially alike, is annexed as an exhibit to the finding, and we have examined it with much care. It is of very great length, covering 20 closely printed pages. It is therefore, of course, impracticable to give it here in full, nor is it essential, for a due presentation of the question presented. It is provided in it that the court of burgesses of the defendant borough is authorized by its engineer, or such other person or persons or in such other manner as it may deem proper, to inspect the materials to be furnished and the work to be done under the agreement, and to see that the same correspond with the specifications; and in the specifications it is prescribed, among other things, that "the work shall be backed in carefully, rammed and packed in and around the sewer, with proper tools, by trusty persons, approved by the engineer, and no tunneling will be allowed, except by written permission of the engineer. If, in excavating for any sewer or branch thereof, any water pipe, gas pipe, or other obstruction be met with, that, in the judgment of the engineer, should be avoided, then the party of the second part, [the contractors,] after the same has been measured by the engineer, shall immediately fill such excavation;" that the work shall be "prosecuted at and from as many different points in such part or parts of the avenues or streets on the line of the work as the engineer may from time to time, during the progress of the work, determine;" that plank foundations shall be laid when necessary, in the opinion of the engineer; that all work to complete drainage shall be done according to the plans, etc., and "in accordance with all the directions of the engineer of said sewer com-

mittee;" that, in "cases of rock blasting, the blast to be carefully covered with heavy timber, according to the ordinances of the court of burgesses relative to rock blasting, which shall be strictly observed," (meaning, the plaintiff insists, those thereafter to be passed, as evidence was offered to prove that none then existed;) that certain rock should be excavated "with as little blasting as possible, and under the immediate supervision and direction of the engineer or his assistant;" that, "if any person employed by the contractor on the work shall appear to the engineer to be incompetent or disorderly, he shall be discharged immediately, on the requisition of the engineer, and such person shall not again be employed upon them without permission of the engineer;" that "if any materials or implements shall be brought to the ground, which the engineer may deem to be of improper description, or improper to be used in the work, the same shall be removed forthwith." These provisions, and others of similar import, in the contract and specifications, certainly denote a high degree of power to be exercised in the supervision of the work, and to insure its performance by the contractor, reserved by the defendant borough to its agents acting in its behalf; and when coupled, as it is, with other provisions providing for the responsibility of the contractor "for all damages which may happen to neighboring properties, or in any way from neglect," at his own expense, to "shore up, protect, restore, and make good, as may be necessary, all buildings, walls, fences, or other properties which may be disturbed or injured during the progress of the work," fairly indicate that an intention existed on the part of the borough to reserve such control as, in the judgment of its advisers, was inconsistent with such immunity from liability as is now claimed in its behalf. But, on the whole, we are inclined to think that the weight of authority upon this question justifies us in holding that the reservations of control, being but partial, and existing in certain respects only, did not prevent the existence of the relation of contractee and independent contractor; that the general control over the work, as to the manner and method of its execution, the oversight and direction of the performance of the actual manual labor, especially in the particulars in the execution of which the plaintiff claims that the injury to its property was caused, notwithstanding the prescribed limitations, remained in the contractor; that the persons doing the work were his servants, not those of the defendant; and that these considerations relating to general control constitute the true test by which to determine whether the relation be that of employer and contractor, or that of master and servant. We think, therefore, the charge of the court, in this respect, was correct. *Corbin v. Mills*, 27 Conn. 274; *Wood, Mast. & Serv.* (2d Ed.) 594-615, and notes; 14 Amer. & Eng. Enc. Law, p. 841,

note 3, and cases; *Cooley, Torts*, (2d Ed.) p. 646, and cases cited.

The court further said to the jury that if the work was done by skilled and competent contractors, under the written contracts referred to, and the injury to the plaintiff's property occurred in consequence of the negligence of such contractors, or their workmen, the defendant would not be liable, provided it did not interfere with and assume control of, and actually control, said work, and the method and means of its performance, and provided the same could be done, by the ordinary means of performing such work, without necessarily injuring the plaintiff's property. Of this instruction the plaintiff also complains, insisting that the language used treats the right to control as immaterial, and as imposing no liability until exercised. It is indeed true, as the plaintiff says, that "it is not the fact of actual interference and control, but the right to interfere, which makes the difference between independent contractor and a servant or agent." But when, as we have held in this case, the relation is the former, it is then correct to say, as the court did, that the liability of the contractee, in such cases, arises from the fact of actual interference and control.

The plaintiff also complains of the further statement of the court to the jury excusing the defendant from liability for work done by independent contractors, provided the work could be done, by the ordinary means of performing such work, without necessarily injuring the plaintiff's property; and in connection with this the following language used by the court, and also complained of by the plaintiff, may be considered. The court said: "The plaintiff claims that the operation of blasting is inherently dangerous. The defendant claims that it is not. The question is one to be determined by the jury from all the facts in the case,—whether, under all the facts of the case, the operation of blasting with dynamite was intrinsically dangerous, no matter how skillfully performed." It is said that in making this last statement the court omitted to inform the jury what bearing such determination, when made, would have on the case. This appears to be true, at least so far as express language is concerned. Nor is the implication very clear. But let us inquire what is the correct doctrine to be applied in such cases. The principle appears to be well stated in *Cooley on Torts*, (2d Ed. §44,) as follows: "In general, it is entirely competent for one having any particular work to be performed to enter into an agreement with an independent contractor to take charge of and do the whole work, employing his own assistants, and being responsible only for the completion of the work as agreed. The exceptions to this statement are the following: He must not contract for that, the necessary or probable effect of

which would be to injure others, and he cannot by any contract relieve himself of duties resting upon him, as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and therefore an invasion of the right of others. Observing these rules, he may make contracts, under which the contractor, for the time being, becomes an independent principal, whose servants are exclusively his, and not those of the employer he contracts with. And the contractor is in no such sense the servant of his employer as to give the other rights against the employer growing out of the contractor's negligence." And Judge Cooley then quotes at length, in the text, the rules laid down by the late Chief Justice Seymour in an opinion prepared by him, as arbitrator, in the case of *Lawrence v. Shipman*, reported in the supplement to 39 Conn. 586. And we think that, notwithstanding the almost infinite discussion of the subject in treatises and reported cases, it has nowhere been better, if indeed as well, treated, as in that opinion, in which a continuing liability in the contractee is declared to exist in four cases, notwithstanding the employment of an independent contractor to do the work. The first and second of these cases are thus stated: "(1) If a contractor faithfully performs his contract, and a third person is injured by the contractor in the course of its due performance, or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury. (2) If I employ a contractor to do a job of work for me, which, in the progress of its execution, obviously exposes others to unusual peril, I ought, I think, to be responsible, upon the same principle as in the last case, for I cause acts to be done which naturally expose others to injury." The first of these cases only, in which the ground of liability is not the negligence either of the employer or of the contractor, since the injury is occasioned by the due performance or result of the work, was embraced by the court in its charge to the jury, because work "necessarily injuring the plaintiff's property" is equivalent to work which, "faithfully performed," causes injury "in the course of its due performance, or by its result." The second case should have been stated, instead of the first, and the jury instructed that the defendant would be liable for the negligence of the contractor, resulting in damage to the plaintiff's property, provided the work, in the progress of its execution, although it might have been performed without necessary injury, obviously and naturally exposed the plaintiff's property to probable injury or unusual peril; of course, in this case, resulting not from the adoption of the system or the location or plan of the sewers, but in the use of the ordinary and reasonably to be contemplated means or agencies for the proposed construction. We think, also, that the operation

of blasting with dynamite is "intrinsicly dangerous;" that the court should have taken judicial notice that it is so; and that the charge on this point was not correct, although it might have been, if it had been complete, and in such completeness it had stated to the jury that, while the operation of blasting with dynamite was intrinsicly dangerous, and should be so regarded, yet, whether, under all the facts in the case, the work contracted to be done for the construction of the sewers called, in its natural, ordinary, and reasonable execution, for such use of such intrinsicly dangerous agency and means as would have obviously exposed the plaintiff's property to probable injury therefrom, was for the jury to determine; that, if so, the defendant could not excuse itself from liability for injury so occasioned by reason of any contract with another to perform the work. It is as sound a rule of law as of morals that when, in the natural course of things, injurious consequences will arise to another from an act which I cause to be done, unless means are adopted by which such consequences may be prevented, I am bound to see to the doing of that which is within my power necessary to prevent the mischief. Failure so to do would be culpable negligence on my part. *Bower v. Peate*, 1 Q. B. Div. 321. Certain of the provisions, in the specifications, to which reference has been made, were apparently inserted in recognition of this principle. But in such cases it is not sufficient that the employer contracts with another to use the care to prevent harm which the hazardous nature of the stipulated work requires. He is bound, at his own peril, to see to it that such care is used; and he is responsible, as for his own negligence, if it is not.

The record before us discloses that the plaintiff, upon the trial, offered evidence to prove, and claimed to have proved, that those constructing the sewers were excused by the defendant from the stipulation in the contract to protect the plaintiff's gas pipes and mains, and that nobody was substituted to protect them, and that they were not in fact protected, except by the plaintiff, under its claimed agreement with the borough, as before stated. And the plaintiff assigns as one of its reasons of appeal the failure of the court to charge the jury as to the effect of excusing the contractors from such obligation. We need not, however, in view of what has already been said, touch upon this matter, except to say that such excuse, if true in fact, would be significant in connection with the alleged contract between the plaintiff and the defendant, as set up in the third count of the complaint.

The court also said to the jury: "If you find from the evidence that those contractors, or either of them, were unskillful and incompetent to perform the work assumed by them under the contract, and that the borough, knowing this, employed them to do the

work, the borough would be negligent in knowingly employing such a person to do the work, and would be responsible for any negligence of such a contractor, in the same manner that the contractor would be liable for his own negligence." We think this language imposed upon the borough a too limited measure of liability; that it would be liable, as stated, not only in consequence of negligence, which would certainly be most gross, in knowingly employing incompetent contractors, but also in failing to exercise due and reasonable care to select such as were skillful and competent; and in this respect, also, we think there was error.

The plaintiff claims, further, that the court, in substance, charged the jury that the construction of the sewer by the defendant was under its duty of maintaining and keeping its streets in repair, while it appeared that it was done under a charter granted by the legislature, upon a petition presented by the defendant, which charter was duly accepted by the defendant before it went into effect. It was said that the court therein erred in stating as a fact that which was not so, thereby creating for the defendant a larger immunity from liability than was justified. It seems to us that this criticism is not well founded, for, waiving the question whether the plaintiff correctly characterizes the charge of the court,—though it hardly seems to us that it does,—or whether, if so, such charge is correct, it is not pretended that the court did not accurately state the plaintiff's claim for damages, as being based upon the negligence of the defendant, as the plaintiff expressly claimed in that part of its case which related to the matter of pleading, which we have before considered, or that it erred in adding: "But the plaintiff, as you will understand, does not base its claim here upon any fault of the system, plan, or location adopted by the defendant. It says that, assuming that to be proper, the defendant negligently constructed the sewers, and by its negligence caused the damage, to recover which the action was brought." For such negligence, it was not intimated in the charge of the court, or claimed upon the trial, nor can it be claimed, that there is any difference in the degree of liability, where the work is conducted under a special privilege, or in the performance of a public and governmental duty. The immunity is no greater in the one case than in the other. The statement complained of, therefore, was, as bearing upon the issues presented, entirely immaterial and unimportant, and productive of no possible harm to the plaintiff.

Other minor objections to the charge were made by the plaintiff, but we think they are fairly covered by what has already been stated. At any rate, they do not seem to require further mention, only to say, in view of the possibility of the questions again arising upon another trial, that in all other respects, except as noticed, the charge appears to us

to be correct, and well adapted to the issues which were on trial. There is error, and a new trial is granted.

(63 Conn. 290)

Appeal of ROBINSON.

(Supreme Court of Errors of Connecticut. July 6, 1893.)

CONDITIONAL SALE—INSOLVENCY OF PURCHASER—RIGHTS OF SELLER—ALLOWANCE OF CLAIMS.

1. R. delivered possession to a firm of the stock in his store, and they gave him an instrument, agreeing to pay in installments, with a provision that on payment R. should sell and deliver the property to them, but that in the mean time they should have no title thereto, and that, failing to make the payments, they should return the property on demand, or so much as should not have been used in the business to be carried on by them. After having made certain payments, and used part of the property in the business, the firm made an assignment. The trustee in insolvency declined to take possession of the property, disclaimed title, and notified R. to remove it from insolvents' store. *Held*, that R., having given credit for the goods on hand, was entitled to have the balance of his claim allowed, the contract being a conditional sale, but giving insolvents no right on default to relieve themselves from further payment by offering to return the balance of the property, and the giving of credit by R. for the remnants of the goods not being an election to take them for the balance of the contract debt.

2. Though no part of a claim presented against an insolvent estate is due, still, it being fixed and certain, and bearing interest, it is a proper subject of allowance.

Appeal from superior court, Hartford county; Robinson, Judge.

George Robinson presented a claim against the insolvent estate of the Robinson Lead Company, a partnership, which was disallowed by the commissioners, and claimant appealed to the superior court, where judgment was rendered against him, and he again appeals. Reversed.

The claim grew out of a transaction by which Robinson delivered to the firm possession of the stock and merchandise in his store, and they executed and delivered to him an instrument acknowledging receipt of the property, and providing: "Which said property we receive and are to hold solely as the property of the said George Robinson, and for the use of said property we promise to pay to said George Robinson the sum of eight thousand dollars; said sum is to be paid in installments of such amounts, and at such times, as shall be convenient to the partners aforesaid, saving and with the condition that the whole or principal sum of eight thousand dollars shall be paid before the 1st day of January, 1896. Also that during and at some time of each year, beginning with January 1, 1890, and ending January 1, 1896, said parties shall pay to said George Robinson a sum of money equal in amount to five hundred dollars during the first of said years, and one thousand dollars during the second of said years, and a proportionate amount of the balance unpaid during each of the remaining

years of said term; also interest on the whole amount unpaid at the rate of six per centum annually, which said interest we agree to pay semiannually on the first secular days of July and January of each year of said term. All of the above-specified payments made by us to the said George Robinson for the use of the said property shall be indorsed upon this receipt, and when the sums so paid by us shall amount in the aggregate to the sum of eight thousand dollars, with interest added thereto on all unpaid balances from the date of this receipt at the rate of six per centum per annum, computed semiannually, then said George Robinson shall sell and deliver to us the property hereinbefore described; but until such payment is made by us in full we neither claim nor can we acquire any title whatsoever to the property herein described. And, failing to make said payments above mentioned, we also promise to return the above-named property on demand, or so much of the above-named property as shall not have been lawfully used by us in the regular prosecution of the business which we are to carry on at said location, together with any additional stock of merchandise which may have been obtained from other parties by us, or either of us, without costs to him, the said George Robinson. All accretions or additions to said stock and merchandise shall at all times belong to said George Robinson until the aforesaid amount is paid to him in full."

The claim presented by Robinson was in the following form:

Robinson Lead Co., to Geo. Robinson, Dr.	
To goods received under conditional contract of sale.....	\$8,000
Less cash paid upon contract.....	1,500
Balance	\$6,500
Less goods now said to be on hand.....	2,800
Balance of goods sold, as per contract price	\$3,700
Interest on \$6,500 from January 1, 1892, to time of assignment.	

T. M. Maltbie, for appellant. A. L. Shipman, for appellee.

BALDWIN, J. The rights of the parties depend on the effect of the instrument under which possession of the stock and merchandise in the appellant's store was received by the insolvents. Construed as a whole, it amounts substantially to a conditional sale, on credit, for \$8,000, by the terms of which the absolute title was not to pass to them until full performance of the obligation which they assumed, but by which they were invested with the power to transfer an absolute title to all or any part of the goods to third parties with whom they might deal in the ordinary course of their business as plumbers. The provision that upon a default in making the agreed payments they were to return the property with any accretions on demand, or so much of it as should not

have been "lawfully used" by them "in the regular prosecution" of the business which they were "to carry on at said location," necessarily implies a right to use all or any part of the property in the same manner as if they owned it, in the usual course of dealing at their store. They could thus transfer a greater title than they had; but they did so, not as owners, but under a power conferred by the owner. *Lewis v. McCabe*, 49 Conn. 141, 155. Had they thus worked up all the material, and sold off all the finished goods, prior to their insolvency, this would not have shortened the agreed term of credit. There was no relation of dependence between their sales and collections and the payments they were to make to the appellant. Had they made no sales, they would still have owed him the full \$8,000. It was an entire sale to them for an entire price. Their promise to return to him, on his demand, in case of their failure to make any of the agreed payments; so much of the property turned over to them as had not been used, with all accretions, was plainly inserted in the contract for his benefit, and not for theirs. It did not authorize them, because of their own default, to throw the remnants of the property back upon him, and by so doing escape payment for what they had used up or sold to others. *Appleton v. Library Corp.*, 58 Conn. 4, 8, 22 Atl. 681; *Appeal of Beach*, 58 Conn. 464, 475, 20 Atl. 475; *Crompton v. Beach*, 62 Conn. 25, 38, 25 Atl. 446.

The trustee in insolvency occupied no better position in this respect. The contract was one sanctioned by the laws of this state, and he had no greater rights under it than the insolvents had. He had, indeed, less. The power to use or sell, which the contract gave, was personal to the insolvents, and dependent on their continuance in the plumbing business. *Rogers v. Whitehouse*, 71 Me. 222; *Crawcour v. Salter*, 18 Oh. Div. 30. At the date of their assignment they were indebted to the appellant in the sum of \$6,500 only, having duly paid the first two installments of the contract price. They had an interest in the remaining goods, which was transmissible to their trustee in insolvency, and which his payment of \$6,500, in the installments agreed, would have converted into a perfect title. *Newhall v. Kingsbury*, 131 Mass. 445; *Appeal of Beach*, 58 Conn. 464, 473, 20 Atl. 475. He, finding, however, that the goods were worth less than the debt which rested upon them, declined to take possession, disclaimed title, and notified the appellant to remove them from the store occupied by the insolvents. By the credit of \$2,800, which it is found was about their value, given on this account in the claim presented by him to the commissioners, the appellant has, in effect, acknowledged that the goods have been restored to him, made the insolvents bailees of them for him, and agreed to a deduction

from his claim against the estate to the extent of \$2,800.

It is claimed by the trustee in insolvency that his disclaimer of title, coupled with his notice to the appellant to take the property away, and the subsequent action of the latter, have discharged the debt. Had all the property received by the insolvents under the contract remained in their possession at the time of their assignment, and had the appellant then taken possession of it again, whether on his own demand or on a disclaimer by the trustee, he would have thereby manifested an election to rescind the contract as to any acts to be thereafter performed. *Crompton v. Beach*, 62 Conn. 25, 35, 25 Atl. 446. But a considerable portion of this property had been sold or used up before the insolvency, and the contract furnished no rule of apportionment by which to ascertain the value of the use thus made of a part, and otherwise made of the rest, and to apply a credit therefor on the remaining debt. Nor did the appellant demand a return of the goods left on hand. The title had always been in him, and when the trustee renounced any claim to them the only interest not wholly in the appellant was that of the insolvents, which had become practically valueless by their assignment. The goods still remained in their possession, and the only act of reclamation on the part of the appellant is the credit given on the claim presented to the commissioners for "goods now said to be on hand, \$2,800." Under these circumstances we think he cannot be deemed to have elected to take these remnants of the stock and merchandise which he had sold in satisfaction of the contract debt.

In *Crompton v. Beach*, supra, the agreement of conditional sale provided that the vendor might resume possession in case of any default in payment of the purchase money, and that thereupon all payments theretofore made should be treated as rent, and any obligation to make future payments canceled; and we held that he could not, upon a total default, present a claim for the whole purchase money against the insolvent estate of the vendees, receive a dividend, and then replevy the property sold from the trustee in insolvency on a claim of title. In the case now before us both the contract and the acts of the parties under it were materially different. The trustee left in the hands of the insolvents a fund of \$2,800, in which they had an interest, but an interest which their insolvency had practically deprived of any value. Their obligation to complete their contract payments remained undischarged. By surrendering the property to the appellant, its rightful owner, and by his accepting it as a credit of \$2,800 on account, he virtually received a payment from them of that amount on their contract indebtedness, thereafter payable. It came from them, and not from

the estate. It came from them by relation as of the date of their assignment, as soon as the trustee decided not to claim the property. It had the same effect, therefore, as if immediately prior to the assignment they had, without fraud, anticipated their obligations by paying the appellant \$2,800. His claim against their estate was thereby correspondingly reduced, and, instead of being \$6,500, now amounted to but \$3,700. As such he presented it, and, while no part of it was yet payable, nevertheless, as the obligation was fixed and certain, and the debt drew interest from January 1, 1892, the account was a proper subject of allowance, and the form in which it was stated was substantially correct. *Bacon v. Thorp*, 27 Conn. 257, 261. The judgment of the superior court is reversed, and the cause remanded, with directions to enter judgment allowing the claim of the appellant in full as presented, for \$3,700, and interest on \$6,500 from January 1, 1892, to the date of the assignment in insolvency. The other judges concurred.

(63 Conn. 267)

GARDNER v. CITY OF NEW LONDON.
(Supreme Court of Errors of Connecticut. July 6, 1893.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—SUFFICIENCY OF NOTICE.

1. Under Gen. St. § 2673, providing that no action for an injury from a defective highway shall be maintained against any city unless written notice of the "time" of the occurrence of such injury shall be given the clerk of such city within 60 days thereafter, a mistake, in a notice, of three days as to the time of its occurrence, is fatal, even though the city was not misled.

2. In an action against a city for injuries caused by a defect in a highway, defendant, on a hearing in damages after default, may take advantage of any defect in the notice of the injury required to be given, under Gen. St. § 2673, as a condition precedent to the maintenance of the action.

Appeal from superior court, New London county; Fenn, Judge.

Action by Addison T. Gardner against the city of New London to recover for the loss of a horse, caused by a defect in a highway of defendant city. Defendant suffered a default, and the case was heard in damages. From a judgment for plaintiff for nominal damages only, he appeals. Affirmed.

A. P. Tanner and C. A. Gallup, for appellant. A. Brandegee and W. C. Noyes, for appellee.

TORRANCE, J. This is an action brought to recover damages for the loss of a horse, by reason of a defective highway in the city of New London. The accident happened on the 2d day of May, 1892, but the statutory notice thereof given to the defendant stated that it occurred on the 5th day of that month. The notice itself is not set out in the complaint, it being merely alleged there-

in that the injury occurred on a given day, and that due notice of the injury, of its nature, and of the time, place, and cause of its occurrence, was given to the defendant within the proper time. The case was defaulted, and heard in damages. Upon that hearing, without objection, the defendant offered, and the court received, in evidence a copy of the statutory notice. The court found that the injury occurred on the 2d day of May, 1892, was caused entirely by the negligence of the defendant, without any contributory negligence on the part of the plaintiff, and that the horse was worth \$400. It is further found, in substance, that the defendant was not in fact misled by the notice; that the defendant's street commissioner had his attention called to the injury on the day of its occurrence; and that the next day the defendant, through its officials, inspected the place of the accident, and made a memorandum of the date of its occurrence. No reason was shown why or how the date came to be misstated in the notice. Thereupon the plaintiff claimed, in substance—First, that the notice was a sufficient legal notice under the statute; and, second, if it was not, that after the defendant had suffered a default it could not take advantage of the defect in the notice, nor could the same be considered for the purpose of reducing damages to a nominal sum. The court, contrary to the plaintiff's claims, and solely on account of the defective notice, rendered judgment for the plaintiff for nominal damages.

The record presents for consideration two important questions: First, whether the notice was a sufficient legal notice under the statute; and, second, if not, whether, after the default, the defendant could take advantage of this, and have it considered on the question of damages. The answer to the first question depends entirely upon the construction of section 2673 of the General Statutes of this state, which reads as follows: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair; but no action for any such injury shall be maintained against any town, city, corporation, or borough, unless written notice of such injury, and of the nature and cause thereof, and of the time and place of its occurrence," shall be given in the manner therein prescribed. As first passed in 1874, the statute only required written notice of the injury, and of the time and place of its occurrence, but in 1883 it was amended so as to require notice of the nature and cause of the injury as well. Questions involving the legal sufficiency of notices given under this statute, both before and since it was amended, with reference to the statement of the injury, and of its cause and nature, and of the place of its occurrence, have been frequently before this court. See the cases of *Shaw v. City of Waterbury*, 46 Conn. 263; *Tuttle v. Town*

of Winchester, 50 Conn. 496; *Cloughessey v. City of Waterbury*, 51 Conn. 405; *Brown v. Town of Southbury*, 53 Conn. 212, 1 Atl. 819; *Bieslegel v. Town of Seymour*, 58 Conn. 43, 19 Atl. 372; *Lilly v. Town of Woodstock*, 59 Conn. 219, 22 Atl. 40. In two of these cases—*Shaw v. City of Waterbury* and *Lilly v. Town of Woodstock*—the statement in the notice of the time of the injury was involved to some extent, but the precise point made in the case at bar has not before been presented for determination. The statute in express terms requires the notice to be in writing, and prescribes the substance of what it shall contain. The requirements of the statute are formalities in a certain sense, but they are formalities, the observance of which is made essential, for it has been determined that the giving of the statutory notice is in the nature of a condition precedent to the right of the plaintiff to maintain his action. *Hoyle v. Town of Putnam*, 46 Conn. 61; *Fields v. Railroad Co.*, 54 Conn. 9, 4 Atl. 105; *Bieslegel v. Town of Seymour*, 58 Conn. 43, 19 Atl. 372. The statement of the time of the injury is in this way made essential, and the question made by the plaintiff is whether the notice must state the time truly and according to the fact. He contends that it need not do so, but may state that the injury occurred on one day, although in truth it occurred on another. We cannot assent to such a construction.

The legislature, in passing this statute, evidently regarded the precise identification of an accident or injury of this kind as a matter of some importance, for having at first, as we have seen, prescribed that the notice should contain only a statement of the injury, and of the time and place of its occurrence, it afterwards required it to contain a statement of the nature and cause of the injury; thus adding to its requirements for the apparent purpose of furnishing the party liable with such a notice of the event in permanent form as would render mistake and dispute almost impossible. Now, time is often an important element in the identification of a given transaction. For all practical purposes, an event which begins and ends on any given day is quite distinct from, and quite other than, an event which begins and ends on another day. Doubtless, an accident or injury might be with reasonable ease identified without a statement of the time, but the legislature, for reasons of its own, has seen fit to prescribe and make essential the statement of the time of the injury, and we cannot dispense with it by construction. To do so would be to repeal the statute, rather than to ascertain what it means. The statute, then, requires the time of the injury to be stated in the notice, and the natural and ordinary mode of stating the time of an event which begins and ends within the compass of a day, unless more particularity is required, is to state the day on which it occurred, together with the

month and year, in the common and ordinary manner, and this we think is what the legislature intended by the word "time," as used in the statute in question. This court has quite recently held that it is sufficient to thus state the day, and that the hour need not be stated. *Lilly v. Town of Woodstock*, 59 Conn. 219, 22 Atl. 40. But, if the law requires the day of the injury to be stated in a written notice, surely it must mean the true day. There can be only one time of the injury, and that is the one day on which it occurred. Notice of this time is to be put in permanent form, and handed to the party liable for his information and guidance. Upon that notice the party liable is entitled to rely. Now, if such notice need not set forth the true day of the injury, then it may set forth any other at the whim of the plaintiff, for, if the day of the injury is once departed from, we have no guide as to what other day shall be stated. The statement of the true day is not only deemed important to the party liable, for the purpose of identifying the injury, but also that he may know whether the notice has been given within the proper time. In cases of injury from ice and snow this becomes quite important, because the notice must be given within so short a time after the injury. Now, if the notice may set forth any day as the day of the injury, such a notice as to time is not only useless, but it is positively harmful and misleading. It not only gives no information as to the time of the injury, but it gives false information. It is hardly supposable that such a result could have been contemplated by the legislature. The true date must in nearly every case be well known to the plaintiff or to his friends or agents, or it can be easily ascertained, and it is no hardship to require him to state it truly in the notice.

But the plaintiff says, and truly, that a reasonable latitude of description is allowed in stating in the notice the other matters which it must contain, and he cites several cases in support of this statement. Thus, in *Tuttle v. Town of Winchester*, 50 Conn. 408, the court says: "It is obvious that in many cases exactness of statement as to the place cannot be expected. * * * In such cases, reasonable definiteness is all that can be expected or should be required. If the description of the place will enable the town, city, or borough, through its proper officers, to ascertain the place by the exercise of reasonable diligence for the purpose, it will be sufficient." In *Brown v. Town of Southbury*, 53 Conn. 212, 1 Atl. 819, in speaking of the notice of the "nature" of the injury, it is said that "a general description, which will reasonably apprise the selectmen of the general character of the injury, is all that is required;" and in *Lilly v. Town of Woodstock*, 59 Conn. 219, 22 Atl. 40, the court, with reference to the statement of the "cause" of the injury, held the notice to be

sufficient, and said: "The notice stated the place correctly, named the dangerous embankment as the cause, and thus gave the selectmen the opportunity to examine and procure evidence of the condition of the road at the time of the accident, which it was one object of the statute to afford them." Other cases might be cited to the same effect. The plaintiff argues that the same latitude as to the statement of the time of the injury ought to be allowed. But the reasons why such latitude of description is allowed in setting forth the cause and nature of the injury, and the place of its occurrence, have but little or no application as to the time. The place, cause, and nature of an accident are clearly susceptible of being stated with greatly varying degrees of completeness and accuracy. A full, accurate, and complete description of each in a strict sense is practically impossible, and so the law contents itself with less. If they are truly described with such a reasonable degree of certainty that ordinary men, in the exercise of ordinary intelligence, under the circumstances, can learn from the notice the nature of the injury, and be able to ascertain by the use of ordinary diligence the place where it occurred and the cause that occasioned it, that is enough. To require more would be to impose a burden on the plaintiff for no good purpose. Such a notice, it will be observed, even though it does not state the cause and nature of the injury, and the place of its occurrence, with all possible fullness and particularity, still does state these matters truly and in accordance with the facts, and thereby fully complies with the statute. Such a construction of the statute is thus seen to be a reasonable one, founded upon a practical necessity arising out of the very nature of things. It fully subverts the objects and purposes of the statute, and leads to no bad results. But, with reference to time, the case is quite otherwise. The time element in any transaction is always simple, and can be easily and definitely stated. If the true day is known, it is no more difficult to give that than it is to state the wrong day; and in most cases the true day is known to the plaintiff, or can be easily ascertained by the exercise of ordinary diligence. Besides, as we have seen, he is not required to state the precise minute or hour of the injury, and this is perhaps a reasonable latitude as to time, and all that can be allowed without defeating every conceivable purpose which the statement of the time was intended to subserve. To allow more—to allow the plaintiff to state that the injury occurred on a day other than the true one—is in effect to repeal the statute, rather than to construe it; for the statute requires the time to be stated, and this certainly cannot be done by stating a day on which the injury did not occur. For these reasons we think the notice in the case at bar was fatally defective. In view of the peremptory

language of the statute, it seems to us of no importance that the city was not in fact misled, or that it had full notice of the time from sources other than the notice. The plaintiff's right to maintain his action must be determined by the sufficiency of his notice, and not by the fact that the defendant obtained, from sources other than the notice, full knowledge of the time of the injury.

The next question is whether, after the default, the plaintiff could take advantage of the invalidity of the notice, offer evidence of such invalidity, and have it considered on the question of damages. The declaration alleged in substance and in proper form that the statutory notice had been given to the defendant. One of the plaintiff's claims is, in substance, that by suffering a default the defendant conclusively admitted that such notice was given, and that evidence of its invalidity, even if received without objection, ought not to have been considered by the court. This makes it necessary to consider very briefly what matters, in cases like the one at bar, under our practice, may be contested by the defendant upon a hearing in damages after a default or demurrer overruled, for the purpose of keeping the damages down to a nominal sum. As a general proposition, it must now be regarded as conclusively settled that a defendant in such a case, and for such a purpose, may contest his liability for any damages whatsoever; may show, if he can, that the plaintiff is entitled to nominal damages only, because in reality, and but for the default or demurrer, he is entitled to none; may offer evidence of any fact tending to prove such nonliability, as if no demurrer had been interposed or default had been suffered, although such fact, as the basis of a judgment for nominal damages, had been conclusively admitted. The following cases, among others that might be cited, support this proposition: *Havens v. Railroad Co.*, 28 Conn. 69; *Lamphear v. Buckingham*, 33 Conn. 237; *Daniels v. Town of Saybrook*, 34 Conn. 377; *Carey v. Day*, 36 Conn. 152; *Batchelder v. Bartholomew*, 44 Conn. 494; *Shepard v. New Haven & Northampton Co.*, 45 Conn. 54. For the purpose indicated, and after a default suffered or demurrer overruled, the defendant has been permitted to show that an assault by the servants of a railroad company was justifiable, and so was, in law, no assault, (*Havens v. Railroad Co.*, supra;) that the defendant was not guilty of negligence, and that the plaintiff was guilty of contributory negligence, (*Daniels v. Town of Saybrook*, supra;) that a highway was not in fact defective and out of repair, (*Taylor v. Town of Monroe*, 43 Conn. 36;) that the defendant in fact committed no trespass, either to the real or personal property of the plaintiff, (*Rose v. Gallup*, 33 Conn. 338;) that the injury happened through inevitable accident, (*Batchelder v. Bartholomew*, supra;) that a claimed trespass was in law no trespass, because the acts were done under a con-

tract with the plaintiff which amounted to a license, (*Merriam v. City of Meriden*, 43 Conn. 173;) that the wrong and injury proved were not the wrong and injury alleged in the complaint, (*Shepard v. New Haven & Northampton Co.*, supra.) In all these cases, evidence was received which went directly in denial of the defendant's liability for any damages whatsoever, and the defendant was not limited to evidence relevant merely upon the amount of injury or damage which the plaintiff had sustained.

The right of the defendant, upon a hearing in damages, to controvert for one purpose the liability which he has conclusively admitted for another, follows necessarily from the principles which underlie our practice in cases of this kind. Such an admission is a strictly limited one, made for a special and limited purpose, namely, as the basis of a judgment for nominal damages, and for that purpose it is conclusive. "The silent defendant having been subjected to a judgment for nominal damages, from which no proof can relieve him, the default has practically exhausted its effect upon the case; for, if the plaintiff is unwilling to accept this judgment, evidence is received on his part to raise the damages above, and on the part of the defendant to keep them down to, that immovable base of departure, the nominal point, precisely as if the general issue had been pleaded." *Batchelder v. Bartholomew*, supra. "If, in proving the extent to which he was in fault, the defendant prove he was not in fault at all, and that the injury occurred through the fault of the plaintiff, the plaintiff cannot complain. The evidence does not deprive him of his right to judgment; it merely shows that, as he is not in fact entitled to any damages, he can only have such as the law gives him by reason of the admissions on the record." *Lamphear v. Buckingham*, 33 Conn. 251. "It would seem to follow, as a necessary consequence, that if nominal damages, only, can be given without further proof, the defendant may contest his liability, so far as the plaintiff seeks by proof to enhance the damages beyond a nominal sum." *Rose v. Gallup*, 33 Conn. 346. "The defendants, by their omission to deny them, are held to have admitted the truth of all well-pleaded material allegations in the declaration, and the consequent right of the plaintiff to a judgment for a limited sum,—that is, for nominal damages and costs,—without the introduction of evidence. This is the extent of the advantage gained by the plaintiff from that omission. If he is not satisfied with nominal, and seeks greater, damages, he must proceed to prove the amount, and the declaration, so far forth as the increased amount is concerned, remains subject to the rules of pleading and evidence, and the proof must follow the allegations as closely as if the case stood upon the general issue." *Shepard v. New Haven & Northampton Co.*, 45 Conn. 58.

Read in the light of the decision in *Crane v. Transportation Line*, 48 Conn. 361, the cases cited and quoted from state the principle which underlies our practice in this class of cases correctly, and clearly show that the admission made by the defendant in the case at bar was a limited one, leaving the defendant at liberty to show, if it can, that the plaintiff is entitled to nominal damages only, because he is really, and but for the default, entitled to none. The evidence which was offered, received, and considered in the case at bar, as to the invalidity of the notice, went directly to show that the defendant was not liable at all for want of the statutory notice. If the defendant, notwithstanding a default, may show its nonliability because of the absence of negligence on its part, or the presence of contributory negligence on the part of the plaintiff, in order to keep the damages down to the nominal point, we see no good reason why, under the same circumstances and for a like purpose, it may not show its nonliability for the want of a statutory notice. Without the giving of such notice, as we have seen, the plaintiff's claim was a baseless one, and the defendant was not legally liable for any of the loss or damage sustained. Upon principle, as well as upon authority, we think the defendant was clearly entitled to offer evidence tending to show its nonliability for want of a notice, and to have such evidence considered, as was done by the court below.

What has already been said is perhaps a sufficient answer to the further claim of the plaintiff, to the effect that the default was a waiver of the defendant's right to insist upon the want of notice for any and all purposes. Whether the defendant could legally make such a waiver we need not discuss nor decide, for the record nowhere shows that it made or attempted to make it. A waiver is a matter of intention, outwardly manifested in some unequivocal manner. The waiver here insisted upon is claimed to arise wholly from the mere act of suffering a default, and as a legal consequence of it. But, as we have seen, the law of this state attaches no such consequence to such an act. After the default, the defendant could still insist upon the want of notice for the purpose of keeping the damages down to the nominal point. There is nothing upon the record which shows that it waived that right. For the reasons given, there is no error. The other judges concurred.

(63 Conn. 277)

TARRANT v. BACKUS et al.

(Supreme Court of Errors of Connecticut. July 6, 1893.)

WILLS—CONSTRUCTION—NATURE OF ESTATE—TRUSTEES—APPOINTMENT.

1. Testator, with the expressed purpose of giving his three sons "a current and continuous support" out of his estate, devised a part of the residue thereof in trust for them and

their heirs. The will further provided that, "if either of my said sons shall die before he has received one-third part of the principal and interest, then so much of said trust estate shall belong to the legal representatives of said deceased and their heirs as shall, with what has been received, amount to one-third of said trust estate, the intent hereby being that said trust estate shall be so distributed that each son shall receive one-third part thereof." *Held*, that each of the sons took a vested interest in fee in one-third part of the residue, and hence the bequest was not void, as being against the statute of perpetuities.

2. In such case, by "legal representatives" of the sons is meant their executors and administrators.

3. The validity of such bequest is not affected by a further provision in the will that the beneficiaries shall have no power to alienate their interest, as it was the manifest intention of testator that they should take an absolute interest, and not one conditional upon the validity of the restraint in alienation.

4. Upon the death of one of the sons without having received his share of the trust property, his legal representatives take an estate in the balance of such share discharged of the trust.

5. A will directed that, if either of the trustees named therein should refuse to execute the trust, or become incompetent, the court of probate, with the advice of the other trustee, should appoint some person to fill the vacancy. *Held*, that the direction, providing that the advice of "the other trustee" be taken in making an appointment related only to a vacancy in the original trustees, and that an appointment made after the resignation of both of the original trustees should be made solely by the probate court.

6. Upon the death of an appointed trustee, the vacancy should be filled, as it was the apparent intention of the testator that there should be two trustees.

Case reserved from superior court, New London county.

Action by Nicholas Tarrant, trustee, under the will of Joseph Backus, deceased, against Catherine E. Backus and others, for the construction of said will. Reserved, upon facts found, for the advice of the supreme court.

G. Greene, Jr., for the plaintiff. W. S. Allis, for defendants.

FENN, J. In this action the plaintiff seeks the advice of this court relative to the construction and validity of certain clauses and provisions in the last will of Joseph Backus, late of Norwich, who died in 1861, leaving surviving him six children, three daughters and three sons. By the fourth section of his will the testator gave to each of his daughters one-sixth of his residuary estate, and then provided as follows: "The remaining three-sixths part I give, devise, and bequeath to my friend John L. Devotion, of said Norwich, and to my son-in-law, Gilbert Osgood, and to their heirs, forever, so as to vest in them and their successors in said trust the full and absolute legal and equitable estate, to be by them, however, so held in trust only for the use and benefit equally of my three sons and their heirs, namely, Charles Alexander Backus, George Tyler Backus, and John Edward Backus; and from

time to time said trustees may pay out from the net income of said trust estate so much as they may think best for the comfortable support and wishes of my said three sons, but to neither of them at any time more than a third part of said income thus received; and said trustees may, if they deem it best, from time to time, and at any time, pay out and deliver over to either of my said three sons any portion of said principal trust estate, so that, however, neither of them shall receive more than in the whole one-third part thereof, the proportion of income thereafter to one who may thus receive of the principal estate to be proportionately diminished; and if either of said three children shall decease before me, or before he has received, under the provisions aforesaid, one-third part of the principal and interest of said trust estate, then so much of said trust estate shall be and belong to the legal representatives of said deceased and their heirs as shall, with what said deceased one shall have received, amount to one-third part of said trust estate, and its net income; and, upon the decease of all said three sons, said trustees shall pay and deliver over so much of said trust estate, if any, as shall then be and remain in their hands, to any or all the legal representatives of my said three sons as shall, according to the provisions aforesaid, be entitled to the same; the intent hereby being that said trust estate and its net income shall be so distributed that each son and his legal representatives after him shall together receive one-third part thereof. And, inasmuch as my intent in creating said trust estate is that my said sons may always have a current and continuous support, therefore I have vested the whole of said estate, principal and interest and income, in said trustees and their successors, to hold or distribute the same at their discretion in conformity with the provisions aforesaid, so that my said sons shall not be capable of alienating the same, nor of anticipating the income, nor possess any vested interest which may be by them conveyed. Therefore any instrument by them designed to convey or dispose of or assign any interest in said estate or its income shall be without efficiency, and void, while in trust as aforesaid; and said trustees and their successors shall at all times have power to sell and convey any or all of said trust estate during the continuance of the trust, and reinvest the avails in other personal estate, to be by them held, used, and finally disposed of as the estate so sold would have been if not sold."

Charles A. Backus, one of the sons named in the above section of the will, has died, leaving a widow and four children, having in his lifetime received payments of principal, but to an amount much less than one-third of the principal of said trust estate. The first question is in reference to the validity of the provision that, in the event of the

death of a child before receiving one-third part of the principal and income of the trust fund, "then so much of said trust estate shall be and belong to the legal representatives of said deceased and their heirs as shall, with what said deceased one shall have received, amount to one-third part of said trust estate and its net income." Whether by the term "legal representatives," as used in the fourth section, the testator meant "those who would take under the statute of distributions," as was held to be the case in *Farnam v. Farnam*, 53 Conn. 261, 2 Atl. 325, and 5 Atl. 682, or, as is ordinarily held, the executors and administrators of the deceased children, it must equally follow that, if a remainder over is limited to them as purchasers in the will, the same is void, as in manifest contravention of our statute of perpetuities. *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075; *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061; *Landers v. Dell*, 61 Conn. 189, 23 Atl. 1083. If, however, it is held that the sons of the testator took a vested interest, legal or equitable, in fee,—using the word "vested" in the sense of "transmissible,"—in the estate, the statute of perpetuities has no application, since in that case there is no remainder or executory devise. Ought we to so hold? In *Farnam v. Farnam*, 53 Conn. 278, 2 Atl. 325, and 5 Atl. 682, this court said: "That courts will incline, in doubtful cases, to construe a devise or legacy as vested rather than contingent, is a familiar and well-settled rule. In some instances courts seem to have gone so far as to say that they will, if possible, construe it as vested. It is enough for our present purpose to say that we ought to give this will that construction if its language will fairly admit of it." Adopting this declaration, let us scrutinize the language used in the will, to discover, as best we may, that controlling element,—the expressed intent of the testator.

A careful examination of the section in question, and indeed of the whole instrument, will disclose a manifest purpose on the part of the testator—First. To make a full disposition of his estate, and to avoid intestacy as to any portion of it, an intention which the law would indeed infer if possible in any case. *Warner v. Willard*, 54 Conn. 470, 9 Atl. 136; *Peckham v. Lego*, 57 Conn. 599, 19 Atl. 392. Second. In the disposition of the residuum, to deal equally with each of his six children, showing no partiality or preference to any. He gave to each of his three daughters, all of whom were married, and in whose judgment, or in that of their husbands, (one of whom he names as a trustee,) he appears to have reposed full confidence, one-sixth part of such residuum, absolutely and without restraint. To each of his three sons he appears to have been anxious to give an equal amount as absolutely, save as limited by such restraint upon anticipation or alienation as would, in his judgment, best effectuate his

expressed object in creating the trust estate that said sons might always "have a current and continuous support." To accomplish this purpose, he devised the title to trustees, to be by them held "in trust only for the use and benefit, equally, of my three sons and their heirs," apparently in that connection using the word "heirs" in the same sense in which he had just previously employed it in relation to the daughters' interests given "to them and their heirs forever," namely, as a word "of limitation, not of purchase." He then provided for the payment by the trustees, in their discretion, to each of the sons, of sums not to exceed the proportionate share of the net income, for "the comfortable support and wishes" of said sons; then for the payment, under like conditions, of the principal; and then for the disposition of principal or income, belonging to the share of any son, remaining undisposed of at the death, either in the lifetime of the testator or afterwards, of such son, declaring that the same should "be and belong to the legal representatives of said deceased, and their heirs, * * * the intent hereby being that said trust estate and its net income shall be so distributed that each son and his legal representatives after him shall together receive one-third part thereof." It will be noticed that not only do the provisions to which we have just referred, as also those which provide that conveyances by the sons, during the continuance of the trust, either of interest in the estate or of income, shall be without efficiency, and those by the trustees valid, indicate pretty clearly the purpose of the testator; but, in order that such purpose may by no possibility fail to be clearly apprehended, he twice makes express and specific declarations concerning his intent that each son, and his legal representatives after him, shall receive his proportionate one-third of the trust, or one-sixth of the residuary estate, and that there was a trust created instead of an outright gift made, in order to best insure a "current and continuous support" for each of the sons during their lives. There is here, therefore, manifestly no scheme to accumulate or even preserve an estate during the lives of his children, for distribution in fee among the descendants of such children. Indeed, in whatever sense the words "legal representatives" are construed, not only those not in being, or the immediate issue of those in being, at the death of the testator, might take under that designation, and hence the invalidity of any gift to them by reason of the statute of perpetuities, but also those might take beneficially in whom the testator could have had little interest, and appears to have manifested none,—those, also, whose taking as purchasers, if allowable, would have violated the very scheme for equality which the testator so expressly asserted. We think, therefore, that it is sufficiently clear, and ought to be held, that the intention of the testator was that each of his three sons should take a vest-

ed interest in fee in one-sixth of his residuary estate, an interest which, for its preservation, looking solely to the support and comfort of such children, the testator sought, whether effectually or otherwise, to render inalienable during the lives of his sons, by the intervention of trustees, and the other provisions made; but that he intended to leave such estate transmissible at death as the estate or interest of each deceased son, respectively, to "the legal representatives of said deceased and their heirs;" and that, when any property came to such representatives by payment from the trustees, the testator intended and expected that it would come to them, not as his gift to them, but as property belonging beneficially to the son of the testator, represented by them, they, as such representatives, receiving, at the death of the son, such balance, if any, as had not been paid to him in his lifetime by the trustees. If, now, to the term "legal representatives" we attach the ordinary meaning of executors and administrators, any other construction than the one above would impute to the testator the improbable intent to give to the unknown devisees of the sons an interest in his estate as purchasers which he has withheld from his children, thus preferring the uncertain objects of their bounty to the natural objects of his own. If it were necessary, in order to avoid this improbability, to construe the term "legal representatives" as meaning "next of kin," or those who would take under the statute of distributions, as is sometimes done, and was in the case of *Farnam v. Farnam*, supra, we should not hesitate to do so. But it is not necessary, since the improbability only arises upon a construction of the will which, upon other grounds stated, we think ought not to be given to it; and, construing the will as we have, the ordinary construction of the term "legal representatives" becomes confirmatory of such construction of the will. Nor do we see any reason why the term should not be so construed; that is, as meaning executors and administrators. There is nothing in the expressed general intent of the testator, in creating the trust estate, to which such construction is counter; and the restraint upon alienation and anticipation appears to have been inserted with direct reference to instruments designed to convey, dispose of, or assign interests in the estate or its income, which, operating in the lifetime of the son making such instruments, would thereby tend to destroy or impair the "current and continuous support" of such son for life. Indeed, the language used in that respect seems definite and certain,—the instruments of conveyance are to be void and without efficiency "while in trust as aforesaid;" that is to say, during the lifetime of the sons respectively. We, therefore, conclude that the testator did not intend to restrain the devisability of the respective interests of the sons, and that by the term "legal representatives" the ordinary

meaning of executors and administrators was intended.

Having thus determined the intention of the testator, we next inquire whether such intention is valid and can be effectuated. It is not our purpose to discuss the question, which has not been argued before us, whether, upon the assumption that, notwithstanding the restraints upon alienation and anticipation which the testator sought to impose upon the estates of his sons, such estates are valid, and vest an interest in them, the restraints themselves are also valid, wholly or in part. Such decision was not asked, and to volunteer it might do an injustice to interests unheard and indeed unrepresented before us. Our question is solely, on this branch of the case, whether the testator's intention to create a transmissible and absolute interest in the sons is effective, notwithstanding such attempted restraint. And this question may be considered as twofold,—First, whether, assuming that both intentions to give and to restrict cannot be carried out, the former or the latter should prevail; and, second, if the former, namely the intention to give, should be preferred, whether there is anything in the imposition of the restriction which in fact renders the gift ineffectual. In *Easterly v. Keney*, 36 Conn. 18, the court said: "If an equitable or legal interest in land is devised, and it becomes vested in the devisee, it is subject to all the incidents of ownership in his hands, and may be taken by creditors as freely as any other property of the debtor, although the testator may have strongly expressed his intent to the contrary. But the intent of a testator in this respect is an important consideration in a doubtful case in determining whether in fact an interest in land has been devised." That is to say, the question which, in reference to this case, we have to consider, is what the controlling intention of the testator was. It is said in *Litt. Ten. § 380*, (Co. Litt. 222b): "Also if a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because, when a man is enfeoffed of lands or tenements, he hath power to alien them to any person by the law; for, if such conditions should be good, then the condition shall oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." See, also, 1 Washb. Real Prop. p. 54; *Bank v. Davis*, 21 Pick. 43; *Gray*, Perp. §§ 119, 120. In all cases where the restraint is void, the interest is nevertheless recognized as valid. It would seem, therefore, that, in the case before us, whatever may be the effect of the restraint, it will not render the gift to which it is attached inoperative, provided it was the intention of the testator, in all events, to make the gift.

But, coming now to the other branch of the inquiry, if the intention to restrain the alienation of interest or anticipation of in-

come can only be deemed effectual by holding that no present interest in fee passed to or vested in the sons, ought it, in order to effectuate that intent, to be so held? It may forcibly be urged that this was the controlling intent in the testator's mind. It was the one which he expressly declared. In order to accomplish it, he went so far as to say that he gave the property to the trustees, "and to their heirs, forever," and "so as to vest in them and their successors in said trust the full and absolute legal and equitable estate." Nevertheless, this strong language, and other expressions which might be noticed, are as much opposed to the idea of an estate by executory devise in the legal representatives of the sons as to that of a present estate in fee in the sons themselves, and is limited, if not contradicted, by the other language used in relation to the trust upon which the property is to be held only; and the intent itself appears to have arisen solely from a desire to make the gift to or for the benefit of the sons as truly and as permanently serviceable and beneficial to them as possible. So that while it may be said that the main intent was to give the property to the sons, and that subordinate to that intent was another, to give it in such a way as to make it inalienable in their hands, it could hardly, on the other hand, be asserted that since the testator preferred, in order to accomplish that which he deemed to be for the best interests of his sons, that the property should be inalienable in their hands, he should also be held to have chosen, unless it could be made so, that they should take nothing from his bounty. It seems to us that we ought to hold that the testator's intention to give his sons a proportionate interest in fee in his estate was absolute, and not dependent or conditional upon the validity, which, indeed, probably he never doubted, of the restraints imposed by him upon alienation, and that such intention is valid. It was said by this court in *Austin v. Bristol*, 40 Conn. 132: "It is true that, in regard to the construction of wills, former cases, unless ad idem, are of small account, but in respect to clauses of frequent occurrence in wills, it is important that there should be uniformity of construction." Adopting this view as to the importance of uniformity, it will not be inappropriate to refer to some previous cases in this jurisdiction which seem directly to bear upon the question which we have considered. In *Leavitt v. Beirne*, 21 Conn. 1, a testator, possessed of a large estate, divided it equally among his children, subject to certain "provisions and conditions," one of which was stated thus: "All and every of the property given to my daughter, Mary D. Steenbergen, is for the exclusive use of her and her children, free from the debts and control of her husband; and, to secure the same to their unimpaired enjoyment, I hereby give the same to my sons, George P.

Beirne and Oliver Beirne, with full authority to apply the property as to them shall seem best, for their exclusive benefit during the life of my said daughter, and, after her decease, to divide the same equally among her children." The question was whether the property was so given beneficially to the daughter as to be subject to her control, and liable to be bound by her contracts; and, although the majority of the court held that it was not, the opinion proceeds upon the ground (thereby incurring the criticism of Gray, in his treatise upon Restraints upon Alienation) that, under the circumstances, the restraint would be valid, and fully assumes that the entire equitable and transmissible fee is in the daughter, as also does the dissenting opinion of Ellsworth, J., concurred in by Church, C. J. And in the case of *Watson v. Cleveland*, 21 Conn. 542, referring to this case of *Leavitt v. Beirne*, it was said that the testator "made his trustees, in a measure, conservators over his daughter and her family, and it was on this ground alone that this court decided that the trustees might withhold the funds, and refuse payment of her debts." In *Landon v. Moore*, 45 Conn. 422, a testator made the following bequest: "I give to my daughter, Mary Isabel, wife of Charles A. Moore, all my estate, both real and personal, to hold the same, to her and her heirs, to her sole and separate use, free from the interference and control of her husband; at her death, to go immediately to her children, if she have children at that time. It is my will and direction that, in case of her husband surviving her, he shall not have any use or improvement of the same, but that it be for her children." The question was whether the daughter took an estate in fee or a life estate, and it was held that she took in fee. In *Hughes v. Knowlton*, 37 Conn. 429, a testator devised real estate to be divided equally between two daughters, adding: "Meaning and intending that all the children that have been or may be born of their bodies shall become heirs to the same." It was held that the daughters took a fee. The court (Foster, J.) said, (p. 432:) "Heirs at law are not to be disinherited without a clear intention to do so, and that intention must be carried out by actually vesting the estate elsewhere." See, also, *McKenzie's Appeal*, 41 Conn. 607.

We are next asked whether, if the provision be valid, the "legal representatives" take an absolute estate, discharged of said trust, or whether the trust continues till the death of the last survivor of the testator's three sons? We think the legal representatives, the executor in case of a will, or the administrator in case of intestacy, in trust for the creditors, widow, and next of kin (following the requirements of the statute of distributions) of a deceased son, take derivatively from such son an absolute estate in the unexpended balance of the principal

and income of one-third of the trust estate, and that, as to such third, the trust determined at the death of such son. We not only see no purpose or object in longer continuing the trust in reference to such portion, but we so construe the language used by the testator that, upon the death of either of said three children, so much of said trust estate should be and belong to such legal representatives,—language with which, the after statement that, "upon the decease of all said three sons, said trustees shall pay and deliver over so much of said trust estate, if any, as shall then be and remain in their hands to any or all the legal representatives of my said three sons as shall, according to the provisions aforesaid, be entitled to the same," is not inconsistent, even if it be considered inapt.

In view of the conclusions which we have reached, it becomes unnecessary to answer some of the questions presented. One further, however, remains to be considered. The will also provides that should the trustees named, "or either of them, refuse to execute said trust, decease, or in any way become incompetent to execute it before the determination of the same, the court of probate for the district of Norwich, with the advice of the other trustee, is requested to appoint some suitable person in place of such deceased or incompetent one, and the question of incompetency shall be determined by said court and said other trustee." It appears by the record that both of the trustees originally named duly accepted the trust; that afterwards they severally resigned, and their places were filled; that one of the new trustees died and the other resigned, and that the present plaintiff was thereupon appointed, and is now the sole trustee. We are asked "whether the plaintiff has power, as sole trustee, to perform all the duties and execute all the powers given to the trustees in the will, or whether the appointment by the court of probate for the district of Norwich of a cotrustee is necessary. The answer to this question depends upon the intention of the testator. *Perry, Trusts*, §§ 286, 493. The testator placed special trust and confidence in the trustees named by him. One of them was his "friend;" the other, his son-in-law. He provided that they should not be required to give bonds. Neither this provision nor the personal confidence would extend to their successors. If either of them failed to accept or ceased to act, his place was to be filled, and the appointment was to be made upon the advice of the remaining trustee. The language of the will in reference to such advice is limited to a single instance,—that of the remaining one of the original trustees, concerning the appointment of a cotrustee. It does not extend to the trustee so appointed if in his turn he becomes sole. Nor do we see any reason to believe the testator intended that it should be so extended. We, however, per-

celve some grounds to think that the testator did desire that there should continue to be two trustees. His direction for the filling the vacancy in the first instance, and his use of the plural in every reference to their powers, is some indication of such intention. All the parties before us unite in the claim of such construction, and it seems reasonable, and cannot, at any rate in our opinion, be injurious, to give it.

The superior court is therefore advised—First, that the provision in the fourth section of the will in question that "if either of said three children shall de cease before he has received, under the provisions aforesaid, one-third part of the principal and interest of said trust estate, then so much of said trust shall be and belong to the legal representatives of said deceased and their heirs as shall, with what said deceased one shall have received, amount to one-third part of said trust estate, and its net income," is valid, because, by the terms of the will, it belongs to said legal representatives, by virtue of their right of representation of the deceased son of the testator; second, that the meaning of the expression "legal representatives," as used in the will, is the executors or administrators of the deceased son; third, that such legal representatives take an absolute estate, discharged of said trust, and that the trust as to their proportionate share does not continue till the death of the last survivor of the testator's said three sons; fourth, that the court of probate for the district of Norwich should appoint a cotrustee to act with the plaintiff. The other judges concurred.

(56 N. J. L. 71)

STATE (ALEXANDER et al., Prosecutors) v.
CITY OF ELIZABETH et al.

(Supreme Court of New Jersey. Jan. 6, 1894.)

CONSTITUTIONAL LAW—SPECIAL LAWS—LICENSING
AND REGULATING RACE COURSES — POWERS OF
MUNICIPAL CORPORATION.

1. The act of the legislature of this state entitled "An act concerning the maintaining of race courses in this state, and to provide for the licensing and regulating of the same," passed February 27, 1893, (P. L. 1893, p. 28,) is a special law, regulating the internal affairs of towns and counties, and also a special law granting to corporations, associations, or individuals exclusive privileges, immunities or franchises, and is therefore unconstitutional and void.

2. Municipal government is a creation of the statute, and the powers of municipal government may extend to almost every feature of regulation not inhibited by the constitution within the area over which it extends. Such powers then become matters regulating the internal affairs of such municipal governments.

3. This statute affords no proper and appropriate classification of race courses between those in use prior to January 1, 1893, and those set up after that date, as will support the application to each of a system of legislation so distinctive and different as the two methods of licensing provided by this act.

(Syllabus by the Court.)

Certiorari on the relation of James H. Alexander, Robert M. Moore, and Lebbeus B. Miller to review certain resolutions of the city council of the city of Elizabeth purporting to grant a license to the New Jersey Jockey Club to maintain a race course in said city. Resolutions set aside, and declared null and void.

Argued June term, 1893, before DEPUE, LIPPINCOTT, and ABBETT, JJ.

R. V. Lindabury, John R. Emery, and Joseph Cross, for prosecutors. Allan L. McDermott, Samuel Kallsch, Chauncey H. Beasley, and James A. Connelly, for defendants.

LIPPINCOTT, J. This writ brings into this court for review and adjudication certain resolutions of the city council of the city of Elizabeth, passed at a meeting of the city council on April 1, 1893, purporting to grant a license, or to be a license, to or for the New Jersey Jockey Club, to maintain a race course in said city, for running, racing, trotting, or pacing horses, mares, or geldings, for a purse, plate, stake, or other thing. On that day the New Jersey Jockey Club presented a petition to the city council of the city of Elizabeth requesting that a license be granted to them under and by virtue of the provisions of chapter 16, Laws 1893, to maintain a race course for racing, running, trotting, or pacing of horses, mares, or geldings, for a purse, plate, or other thing to be run, paced, or trotted for by such horses, mares, or geldings, on their grounds, in the city of Elizabeth, as named in said act. Upon the presentation of this petition, the city council adopted the following resolution: "Resolved, that the New Jersey Jockey Club is hereby licensed for a period of five years to maintain and use a race course in this city for the running, racing, trotting, or pacing of horses, mares, or geldings, for a purse, plate, stake, or other thing; the said race course being the one used by the New Jersey Jockey Club for such running, trotting, or pacing prior to the first day of January, eighteen hundred and ninety-three." In addition to this resolution there were some other resolutions adopted at such meeting, imposing conditions as to the management of such race course, and requiring the payment to the city of Elizabeth of the sum of \$5,000 for the privilege granted under and by virtue of the license, and also limiting the time in each year of racing on such race course to a period of 30 days in the fall and 30 days in the spring of each year during the continuance of the license. The adoption by the city council of those resolutions is attempted to be justified by the defendants under the provisions of an act of the legislature of this state, entitled "An act concerning the maintaining of race courses in this state, and to provide for the licensing and regulating of the same," passed February 27, 1893, (P. L. 1893, p. 28.) By the first section of this act it is provided

"that the board of chosen freeholders of any county in this state, or the board of aldermen, common council, township committee, or other body having general charge of the affairs of any city, township or municipal division of this state, in which there is situated and maintained a race course for the racing, running, trotting or pacing of horses, mares or geldings, for a purse, plate, or other thing to be run, paced or trotted for by such horses, mares, or geldings, shall have power and is hereby authorized to license the owners of such race course to maintain and use the same for any running, pacing or trotting of any horses, mares or geldings, for any purse or stake, plate or other thing; such license shall be for a period of not more than five years, and no license shall be granted for the maintenance or use of a race course within the corporate limits of any city having a population of more than one hundred thousand people according to the census last taken." By the third section it is provided "that it shall be unlawful for any person or incorporated body or association to maintain or use a race course in this state, for the racing, running, trotting or pacing of horses, mares or geldings, for a purse, plate or other thing, or to permit such running, racing, trotting or pacing upon any grounds owned or leased or controlled by such person or incorporated body or association, unless license for that purpose shall be granted as in this act provided. Any license granted under this act shall become void upon any breach of any condition upon which it shall be granted." By the fourth section it is provided "that it shall not be lawful for any person or incorporated body or association to maintain or use in this state, for the running, trotting or pacing of horses, mares or geldings, for a purse, plate or other thing to be run, paced or trotted for by such horses, mares or geldings, any race course which was not used for such running, trotting or pacing, prior to the first day of January, one thousand eight hundred and ninety-three, unless such person or incorporated body or association shall first file with the secretary of state a certified copy of a resolution adopted by three-fourths of the members of the board of chosen freeholders of the county in which such race course is proposed to be maintained, which resolution shall declare that the maintaining of such race course is a public necessity."

The question whether this act is one which regulates the internal affairs of towns and counties has been extensively discussed in the arguments and briefs of counsel in this cause, and it has been seriously contended by the defendants that this act is not within the meaning of the language of paragraph 11, § 7, art. 4, of the constitution of this state, referring to laws "regulating internal affairs of towns and counties."

It will be perceived by the first section of this act power to license is conferred upon

the boards of chosen freeholders, or the board of aldermen, common council, township committee, or other body having general charge of the affairs of any city, township, or municipal division of this state in which there is situated and maintained a race course of the character named in this section, and it also provides that no license shall be granted for the maintaining or use of a race course within the corporate limits of any city having a population of 100,000 people, according to the census last taken. The second section provides that these licenses shall be granted only upon certain expressed conditions, and the third section provides that it shall be unlawful for any person or incorporated body or association to maintain or use a race course of the character named in the act unless the license for that purpose shall have been granted as in the act provided, and that any license granted under this act shall become void upon the breach of any condition upon which it shall be granted. This act undoubtedly confers power upon the municipalities named in the first and fourth sections in a direction in which it has not been heretofore exercised. It may be that, primarily, racing within this state is not a question which concerns the internal affairs of towns or counties, but it cannot be well contended that a statute which confers power upon these municipalities to restrict, limit, or extend racing is a statute which does not demonstrably affect the internal affairs of such municipalities, within the meaning of the express inhibition of the constitution forbidding the enactment of a certain character of statutes regulating such affairs. The statute, on its face and by its express conditions, renders racing of a certain character unlawful unless the powers conferred on these municipalities are exercised to permit it. The third section of the act expressly declares that racing of the character mentioned in the act shall be unlawful unless it be legalized by a license which can only be granted by the governing body having general charge of the affairs of such municipalities, and certainly the statute in this respect is dealing with a question of municipal government, and whether it be one of police, revenue, or some other power of municipal government is quite immaterial. Municipal government is a creation of statute, and the powers of municipal government may extend to almost every feature of regulation not inhibited by the constitution within the area over which it extends. It becomes a matter of the internal regulation of the affairs of the municipality by force of the statute, and it cannot be claimed, so far as the statute is concerned, to be a question any longer of state policy, but a matter relating to the internal affairs of the municipality to which it applies. It becomes the power of the municipality. If the general subject-matter here, as contained in this statute, be one over which

the legislature has power and jurisdiction, then it cannot be contended, when its power is conferred upon any municipality, aside from the question of whether the statute be invalid or not, that such matter does not become the internal affair of such municipality. It may be superfluous to pursue this subject further, but on decided authority there can exist no question but that this statute is one regulating the internal affairs of towns and counties. In *Bingham v. Mayor, etc., of Camden*, 40 N. J. Law, 157, (in this court,) Justice Reed says: "The establishment of a municipality, whether by custom, royal charter, or legislative grant, carries with it certain incidental powers essential to its existence as a body politic. In addition to these incidental powers, others are granted, or the incidental powers regulated by express provision in their respective charters. All these matters which are the subject of control by the municipality incidentally, or which already exist, or may thereafter be conferred by grant, concern the internal affairs of the city. Any attempt to strip a city of any such power, or to confer upon it additional power, or to change the manner of exercising the power already existing, is a regulation of such internal affairs. The largest field for the municipal action is afforded in the exercise of the power to suppress nuisances, prevent disorders, preserve the health and safety of the citizens, by virtue of its right to invoke and administer the police power of the state. The control of the vending of spirituous liquors has been the subject of such regulation almost from the beginning of government." The cases of *Sutterly v. Court of Common Pleas*, 41 N. J. Law, 497; *Tiger v. Court of Common Pleas*, 42 N. J. Law, 632; *Hightstown v. Glenn*, 47 N. J. Law, 105-108; *Paul v. Gloucester Co.*, 50 N. J. Law, 609, 15 Atl. 272; *Pell v. City of Newark*, 40 N. J. Law, 550; *Richards v. Hammer*, 42 N. J. Law, 440, 44 N. J. Law, 667,—all illustrate and enlarge this principle. Here under this statute, the machinery provided to accomplish the purposes of this act is municipal. The board which exercises the power conferred by the act is a municipal board. The revenues derived by the resolutions of the city council of Elizabeth, resulting from the granting of this license, go into the city treasury. And, within the authority of the adjudicated cases in this state, this statute regulates the internal affairs of towns and counties by conferring upon them powers which before this time they did not possess, and placing within their control and regulation matters over which previously they exercised no control. These matters are such as affect the public welfare. Practices affecting the public are made lawful or unlawful by the exercise or nonexercise of a power conferred upon the municipal governing bodies. This power, then, becomes a part of the municipal government. This statute is

one which, so far as this case is concerned, clearly regulates the internal affairs of the city of Elizabeth. The contention here, then, on the part of the prosecutors, is that this statute is unconstitutional, in that it is a local or special law, contrary to paragraph 11, § 7, art. 4, of the amended constitution of this state, which provides that "the legislature shall not pass private, local, or special laws in any of the following enumerated cases: * * * Regulating the internal affairs of towns and counties; * * * granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." I think it requires but a cursory examination of this statute to conclude beyond question that it is affected by both these vices, and is upon these grounds unconstitutional, and therefore invalid.

There was much discussion upon the question whether the act was not invalid upon the ground that, by the first section thereof, it could have no operation in cities having a population of more than 100,000 people, according to the census last taken. This objection to this statute is not here either discussed or determined. By the first section of the act, power is conferred upon the governing body of any county, city, township, or other municipal division of this state, in which there was situated and maintained a race course of the sort therein named to grant a license to the owner of such race course to use and maintain such race course for any running, etc., in the manner therein characterized; but this power to thus license is, by the fourth section of the act, restricted to race courses used for such purposes prior to the 1st day of January, 1893. This fourth section prohibits any person or incorporated body or association from maintaining or using any race course for the running, trotting, or racing of horses, mares, or geldings, for a purse, plate, or other thing to be run, paced, or trotted for by such horses, mares, or geldings, which was not used for such purposes prior to January 1, 1893, unless such person or incorporated body or association shall obtain a resolution adopted by three-fourths of the members of the board of freeholders of the county in which such race course is proposed to be maintained, which resolution shall declare the maintaining of such race course is a public necessity, a certified copy of which resolution shall be filed with the secretary of state. It will be seen that a discrimination is at once made by this act in favor of localities, and race courses therein situated, maintained and used prior to the 1st day of January, 1893, and against race courses to be maintained and used after that time. In the former, and with respect to race courses therein, licenses may be granted by the governing bodies of the municipalities named in the first section of the act, without qualification or restriction; but with respect to the latter—i. e. race courses to be maintained and used after the 1st of January,

1893—a condition is imposed; that is, a resolution must be adopted by three-fourths of the chosen freeholders of the county, which shall declare the race course a public necessity. Besides the requirement that a race course proposed to be maintained and used after the 1st day of January, 1893, shall be licensed by a three-fourths vote of the board of chosen freeholders of the county, there is added the exceedingly onerous condition of a declaration on the part of the board of chosen freeholders that the race course proposed to be maintained is a public necessity. In passing upon the constitutionality of such discriminative restrictive acts, and the classifications thereby created, the substance of the legislative provision is regarded, giving only secondary consideration to the form in which it is expressed; and while, under the clause of the constitution just cited, objects may be classified for the purposes of legislation, such classification must be founded upon some natural or substantial difference, and such classification must include all the objects to which the legislation enacted for the particular class is appropriate or necessary. *Rutgers v. City of New Brunswick*, 42 N. J. Law, 51. The rule of law applicable is stated in the language of the chief justice in *Van Riper v. Parsons*, 40 N. J. Law, 1, as follows: "Within the sense of these prohibitory clauses of the constitution, a general law, as contradistinguished from one special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class."

* * * Interdicted local and special laws are those that rest on a false or deficient classification. Their vice is that they do not embrace all the class to which they are naturally related. They create preference; establish inequalities. They apply to persons, things, or places possessed of certain qualities or situations, and they exclude from their effect other persons, things or places which are not dissimilar in these respects." In *Richards v. Hammer*, 42 N. J. Law, 440, the chief justice again says: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of a classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded." And in the same case, in the court of errors and appeals, (44 N. J. Law, 667,) the chancellor declares that, "normally, there can be under our constitution no such thing as local or special legislation to regulate the internal affairs of municipalities, but all legislation to that end must be general, and applicable alike to all; nor can any departure from the rule be justified, except where, by reason of the existence of a substantial difference be-

tween municipalities, a general law would be inappropriate to some, while it would be appropriate to and desirable for others. There it would be warranted, not only by the necessities of the situation, but by a reasonable construction of the constitutional provision. In such a case the municipalities in which the peculiarity exists would constitute a class, and the legislation would in fact be general, because it would apply to all to which it would be appropriate. But distinctions which do not arise from substantial differences—differences so marked as to call for separate legislation—constitute no ground for supporting such legislation." *Long Branch v. Sloane*, 49 N. J. Law, 362, 8 Atl. 101; *Van Giesen v. Bloomfield*, 47 N. J. Law, 442, 2 Atl. 449; *Township of Lodi v. State*, 51 N. J. Law, 404, 18 Atl. 749. These rules have been continuously declared by the courts ever since the adoption of our amended constitution. In the latest case on the subject, in *State v. Borough of Somers Point*, 52 N. J. Law, 32-34, 28 Atl. 694, Mr. Justice Depue says: "As applied to legislation of this character, a law is 'special' or 'local,' as contradistinguished from 'general,' in the sense of the prohibitory clause in this paragraph of the constitution, which embraces less than the entire class of persons or places to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which such legislation is designed. A law which so particularizes, and by such means is restricted in its operation to persons or places which do not comprise all the objects which naturally belong to the class, is 'special' or 'local,' within the meaning of the constitutional interdict."

It has been inquired, upon what principle can a classification of race courses into those used and maintained before, and those used and maintained after, January 1, 1893, be sustained? What, in this view, is the substantial difference between them, which requires a different system of legislation applicable to each? Where are the characteristics sufficiently marked and important to make them distinct classes? I can perceive no such differences and no such characteristics; nor can I perceive any reasonable ground on which one class should require any different legislation from that which the other requires. To make a classification good, it must be founded upon differences and characteristics sufficiently marked and important to make them naturally a class by themselves. *Van Riper v. Parsons*, 40 N. J. Law, 123; *Anderson v. City of Trenton*, 42 N. J. Law, 486; *Tyler v. City of Plainfield*, 54 N. J. Law, 529, 24 Atl. 494. There are no qualities in race courses which are sufficiently marked and important to distinguish those in use prior to January 1, 1893, from those set up after that date. Legitimate classification rests on the quality of its members, not on the particular time when those qualities were acquired. *Pavonia Horse R. Co. v. Jer-*

sey City, 45 N. J. Law, 297; Pierson v. O'Connor, 54 N. J. Law, 36, 22 Atl. 1091; Stahl v. Inhabitants, 54 N. J. Law, 444, 24 Atl. 478. This statute affords no proper and appropriate classification of race courses which will support the application of a distinctive system of legislation applicable to each class, so distinctive and different as the two methods of licensing appearing in this act. The act is simply special legislation of the most palpable character, and plainly within the interdicting provision of the constitution against special laws regulating the internal affairs of towns and counties, and it must, upon this ground alone, be declared unconstitutional and invalid.

But there is still another obvious defect in this statute. It is not alone special in its character, but it also distinctly and substantially grants to certain corporations, associations, or individuals exclusive privileges, immunities, or franchises. It is clear that this act is a grant of an exclusive privilege to race courses used before January 1, 1898, to obtain a license without complying with the onerous conditions embraced in the fourth section of the act. Under the provisions of this latter section, the board of chosen freeholders, supposably exercising only public functions for public welfare, before they could exercise the power conferred upon them of granting a license to a race course, must declare, in any event, upon their judgment in behalf of the public, that the race course is a "public necessity." Now, it is manifest that this provision of the statute operates to create such a classification as not to confer upon all race courses alike the benefit which inures from the exercise of the powers under the first section of this act. The act creates and confers privileges upon one class of race courses, and grants to certain corporations, associations, and individuals privileges and immunities which can be rarely, if ever, conferred upon others under its provisions. The conditions imposed are not even similar. One class of race courses may be established without regard to conditions at all; another class can only be established by submitting to the imposition of a condition which may be either of difficult or impossible performance. One class is privileged to the point almost of monopoly, and the other class is discriminated against almost to the point of absolute prohibition; and this is a vice of statutory enactment declared against, and plainly interdicted by the provisions of the constitution against the passage of local or special laws granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise. In the case of Pierson v. O'Connor, 54 N. J. Law, 36, 22 Atl. 1091, where the act under review provided that "no person now holding an appointive position in any city or county of this state, and receiving a salary from such city or county, who is an honorably discharged Union soldier, etc., shall be

removed from such position, except for cause," Mr. Justice Knapp, speaking for this court, said: "This law is hopelessly void, because only those members of the designated body of men who held office at the time of the passage of the act are given the benefit of its provisions. The great body of this deserving class of our citizens is shut out from its benefits." So far as adjudicated authority can go, it would appear that an analogous point to the very one in this case under consideration has been settled in this court in the case of State v. Post, 26 Atl. 683, (decided at the November term, 1892;) and that case is so important in this relation that it may not be amiss to draw at length from it. In that case the act considered read as follows: "Any person or persons, citizens of this state, now using or occupying any grounds lying under the tide waters of this state, for the planting or cultivation of oysters thereon, said grounds not being natural clam grounds or natural oyster seed beds, and the same shall have been so used and occupied since January the first, one thousand eight hundred and eighty, shall be confirmed in their right to use such grounds for the purpose of planting and cultivating oysters, and the oysters planted and grown thereon shall be the personal property of the person or persons using or occupying the grounds aforesaid, provided the said grounds shall have been marked by proper stakes, buoys or suitable monuments during the time aforesaid and oysters shall have been actually planted upon the grounds so marked." This act made it a misdemeanor to take oysters from beds so used and marked without the permission of the occupant. Mr. Justice Van Syckel says: "The right to plant oysters on lands of the state for the sole use of the occupant is a privilege, and, inasmuch as it [the act] excludes all others from taking them, it is an exclusive privilege, which cannot be granted by special, local, or private laws. * * * The state may grant rights in some of the lands without disposing of all its possessions, but it cannot select individuals or corporations, as the objects of its bounty to the exclusion of other citizens of the state." In the opinion, establishing a principle which seems to be thoroughly applicable to the present case, Mr. Justice Van Syckel continues: "This act does not confer its benefits upon all the citizens of the state who may elect to accept them upon the terms prescribed by the lawmaker. It does not shield the property of all who now or hereafter occupy and plant, but is expressly restricted in its operation to those who have used and occupied from January 1, 1890, and who were in occupancy on the passage of the act in 1890. The law can never apply to any person other than those to whom it applied at the time of its enactment. Occupancy, claiming and staking grounds, constitutes the meritorious ground for the grant, and is the basis of the classification upon which a

law, to be valid, must be formed. The legislature, in order to increase the product of oysters, may declare that all who shall now or hereafter elect to plant and make oyster grounds shall be protected in the enjoyment of such property, but it cannot limit immunity to those who had planted and staked the ground at the passage of the act in 1890. That is the vice of this law. It does not embrace all of the class according to a legal basis of classification, and the adjudicated cases condemn it."

The court has not considered the other objections urged against the validity of this act. Both upon the ground that it is a special law regulating the internal affairs of towns and counties, and also upon the ground that it is a special law granting to certain corporations, associations, and individuals exclusive privileges, immunities, or franchises, it is held to be unconstitutional and invalid. Therefore the resolutions of the city council of the city of Elizabeth in this matter, and the license therein and thereby granted, are set aside, and declared to be null and void.

(56 N. J. L. 126)

STATE ex rel. MORRIS et al. v. WRIGHTSON, Clerk.

SAME v. O'CONNOR, Clerk, et al.

(Supreme Court of New Jersey. Nov. 9, 1893.)

STATE LEGISLATURE—ELECTIONS—CONSTITUTIONAL PROVISIONS—CONSTRUCTION—MANDAMUS TO CLERK—JURISDICTION—RIGHTS OF ELECTORS.

1. The question whether an act prescribes a constitutional method of electing members of the state legislature is not a political question which a court may not review.

2. Persons whose constitutional rights as electors are claimed to be infringed by an election law may maintain an action to test it.

3. Under Const. art. 4, § 3, providing that the general assembly shall be composed of members "elected by the legal voters of the counties respectively," who shall be apportioned "among the said counties" according to population; and article 4, § 1, par. 2, providing that no person shall be a member of the general assembly who is not an inhabitant "of the county for which he shall be chosen;" and article 2, par. 1, providing that every voter who has resided a certain time in the state and in the county where he claims his vote shall be entitled to vote for all officers elective by the people,—the members of the general assembly to which a county is entitled may not be assigned to districts to be elected by the inhabitants thereof, but are to be voted for by all the voters of the county.

4. Where the language of constitutional provisions leaves no doubt that they provide for election of members of the general assembly by vote of all the voters of a county, this construction cannot be affected by the fact that for years they have been acted on as though authorizing elections by subdivisions of counties.

5. An application for mandamus to clerks whose duty it is to give notices of election and prepare ballots, requiring them to provide for elections as required by the constitution, and not as prescribed by a statute, may be made before the time for election; and, it appearing that they intend to act according to the statute, the writ will be allowed.

Applications of Charles B. Morris and others for writs of mandamus to James T.

Wrightson, clerk of court, of Essex county, and William E. O'Connor, clerk of the city of Newark, and others, clerks of townships, etc., in said county, to conduct elections for members of the general assembly according to the constitutional provisions. Heard upon rule to show cause and depositions. Rule made absolute.

Argued at June term, 1893, before DEPUE, REED, and LIPPINCOTT, JJ.

Cortlandt Parker, Thomas N. McCarter, John R. Emery, and R. Wayne Parker, for relators. Allan L. McDermott and Frederic W. Stevens, for defendants.

DEPUE, J. The act of April 16, 1846, (Rev. St. 409,) entitled "An act to regulate elections," by its first section enacted that on the Tuesday next after the first Monday in November in each year they shall be held in each county to elect for such county such a number of persons to be members of the general assembly as such county shall be entitled to elect. The first act dividing counties into assembly districts was passed March 26, 1852, (P. L. 1852, p. 465.) This act was a supplement to the act to regulate elections. The second section of that act enacted that on the day mentioned in the act of 1846 in each succeeding year an election should be held in each of the said assembly districts for one member of the general assembly, who "shall be a resident of said district." In 1861, at the session of the legislature held next after the federal census of 1860, an act was passed which was also a supplement to the act regulating elections, forming the several counties into as many assembly districts as said counties were respectively entitled to members of assembly. P. L. 1861, p. 529. In 1871 a similar act was passed, with the title of "An act to reapportion the several assembly districts of the state of New Jersey." P. L. 1871, p. 45. By the general election law of 1876 the first section of the general election act of 1846 was amended by requiring an election to be held in the several election districts in each county to elect for such county such a number of persons to be members of the general assembly as such county shall be entitled to elect. Revision, p. 337. Supplements to the apportionment act of 1871 were passed March 4, 1878, (P. L. pp. 40, 542;) March 6, 1878, (P. L. p. 49;) March 12, 1878, (P. L. p. 81;) March 29, 1878, (P. L. p. 570;) April 3, 1878, (P. L. p. 263;) April 4, 1878, (P. L. p. 285;) April 4, 1878, (P. L. p. 287;) March 27, 1880, (P. L. p. 115.) Of these acts, all with the exception of the act of April 3, 1878, were alterations in several of the counties of the assembly districts established by the act of 1871, and the act of April 3, 1878, appears to be a general act redistricting all the assembly districts in this state. In 1881 a general act was passed apportioning members of the assembly to the several counties

in conformity with the federal census of 1880, and creating new assembly districts in each of the counties. P. L. 1881, p. 146. In 1891 another general act was passed, making a new apportionment of members of assembly among the several counties in conformity with the census of 1890, creating new assembly districts in each of the counties. P. L. 1891, p. 339. By several acts, passed respectively March 7, 1892, (P. L. p. 52,) March 23, 1892, (P. L. p. 190,) March 24, 1892, (P. L. p. 251,) which were supplements of the general act of 1891, alterations were made in the assembly districts of the counties of Mercer, Cumberland, and Burlington. None of this legislation after the act of 1852 contained an express provision for the election of one member of the assembly in each assembly district. But the second section of the act of 1852 has not been repealed, and that section expressly provided for the election of one member in each of the districts. The contention in behalf of the relators that, although assembly districts are established, there is no law in existence which purports to confer the right to elect members of the assembly otherwise than by the counties respectively, is without substance.

The question, therefore, arises directly in this proceeding whether the act of 1891 prescribed a constitutional method of electing members of the general assembly. The consideration arising in limine concerns the right and power of the judiciary to take cognizance of the subject. The contention of counsel in resisting the allowance of this writ is that the question is a political question, and not subject to judicial review. The constitution delegates to the legislative department of the government the function of providing for the election of members of the assembly in the manner and subject to the restrictions prescribed by the constitution. A statute in the performance of that function is the exercise of a legislative, and not a political, power; and the constitutionality of the act by which that legislative power is exercised is undoubtedly a subject of judicial inquiry. *State v. Cunningham*, (Wis.) 51 N. W. 725; *Parker v. State*, (Ind. Sup.) 32 N. E. 836. The prosecutors who apply for this writ are citizens and legal voters in the county of Essex. The gravamen of their complaint is that by the operation of the act of 1891 they are restricted in the exercise of the elective franchise in as full a manner as by the constitution they are entitled to enjoy it. The interest the relators have in the subject-matter of this controversy is sufficient to give them a standing in court to prosecute this writ. If the writ be allowed, its mandate will be directed not to members of the legislature, but to subordinate officers, whose duties in connection with elections are purely ministerial. Recent decisions have furnished weighty

precedents affirming the jurisdiction of the courts on the prosecution of citizens and voters over the constitutionality of acts of the legislature making apportionments for the election of its members. *State v. Cunningham*, supra; *Giddings v. Blacker*, (Mich.) 52 N. W. 944; *Parker v. State*, (Ind. Sup.) 32 N. E. 836. In *U. S. v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507, the court entertained jurisdiction to pass upon the validity of a rule of the house of representatives for determining the presence of a quorum to transact business. In *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, the same court entertained jurisdiction to consider whether a statute of the state of Michigan providing for the choice of presidential electors was in contravention of the constitution. In the argument counsel directly made the point that the controversy was not judicial, because whatever decision that court or any other court might make as to the validity of the state law was subject to review by other political officers and agencies. To this argument Chief Justice Fuller, in delivering the opinion of the court, responded in this language: "It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress. * * * The question of the validity of this act as presented to us by the record is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own." In *State v. Cunningham*, *Giddings v. Blacker*, and *McPherson v. Blacker* the writs prayed for were to go to the secretary of state, commanding him to perform the ministerial duty of giving notice that at the next general election electors would be chosen in a certain manner.

By statute the city and township clerks are to give public notice of the time and place and purpose of holding an election, (Revision, p. 338, § 9;) and by the ballot reform act of 1890 it is made the duty of the clerk of the county to receive nominations, and provide official ballots for the election of members of the assembly, (P. L. 1890, p. 361.) The prayer of the petitioners is for a mandamus directed to these officers in the alternative either to give notice, receive nominations, prepare ballots for the election of the number of members of the assembly apportioned to the county of Essex by the whole body of the legal voters of the county, or to receive nominations, prepare bal-

lots, and to give notice of an election of such members in accordance with the assembly districts created by the act of 1881. The map marked "Exhibit R, 12" shows the territorial location and extent of the assembly districts created by the act of 1891. The following table, compiled from the testimony, exhibits the population of these districts respectively, and also the number of voters polled in each district at the election of 1892, and the majority of the members elected in each district:

District. 1892.	Population.	Vote.	Majority.	
			Dem.	Rep.
First	18,616	3,881	521	
Second	14,897	3,684	810	
Third	11,849	3,209	587	
Fourth	17,746	4,662	596	
Fifth	27,481	6,750		1,884
Sixth	15,245	3,298	648	
Seventh	20,748	6,691	289	
Eighth	25,600	5,187	119	
Ninth	24,872	6,886		2,180
Tenth	28,172	6,454	751	
Eleventh	43,412	9,980		1,628
			3,771	5,097

In this construction of districts the eleventh district, with a population of 42,412, and 9,980 qualified voters, is allowed one member of assembly; and the third district, with a population of 11,849, and 3,209 voters, obtains an equal representation in the popular branch of the legislature. A qualified voter of the county of Essex who casts his ballot in the third district has by this act an effect given to it equal to the ballots of three qualified voters of the county cast in the eleventh district. The inequality in the apportionment of the population and qualified voters of the county among the districts by this act is conspicuous. By the census of 1880, Essex county was entitled to 10 members of assembly. The apportionment act of 1881 created 10 districts, having a population ranging from 18,683 to 21,253. The contention of the relators is that the apportionment among the several assembly districts by the act of 1881 was fair and reasonable, and that the apportionment by the act of 1891 is unjust and unreasonable, depriving the citizens of the county of the right of equal suffrage secured by the constitution. Hence the alternative prayer of the petitioners is that a writ issue for an election of ten members of the assembly in the districts formed by the act of 1881 and of one member by the county at large.

We find insuperable obstacles in the way of judicial action of the scope last mentioned. If the legislature, having made an apportionment of members among the counties in conformity with the constitution, has the additional power to create districts within the county for the election of members, its power in that respect is unfettered by constitutional limitation, and consequently beyond the control of the judicial department of the government. The legislature may create new coun-

ties. The creation of a new county adds an additional member to the state senate. The power of creating new counties may be resorted to for political or other purposes inconsistent with public welfare, and may be oppressive to taxpayers on whom the burden of supporting a county government may fall, and yet no one would entertain the thought that the remedy for such an unwise or oppressive act vested in the judiciary. The cases in which the courts have intervened to set aside acts of the legislature creating election districts have uniformly gone upon constitutional limitations which had been violated. I know of no precedent or principle that would authorize the court to overturn a law passed by the legislature within constitutional limitations, on the ground that it is unwise, impolitic, unjust, or oppressive, or even that it was procured by corrupt means. The remedy for legislation that is simply pernicious in its character is with the people. I concur in the views submitted by defendants' counsel in their brief that "the relators must show that the law they attack is a violation of constitutional limitations. The moment they step beyond that line of attack, they are on political ground, beyond the jurisdiction of the court." The issue presented by the record in this case is whether, under the government established by the constitution, the members of the general assembly apportioned among the several counties may be elected otherwise than by the qualified voters of the county at large. The constitutional provisions under consideration are contained in article 4, §§ 1-3, under the title of "Legislature," and article 2, under the title of "Right of Suffrage." Paragraph 1, § 1, art. 4, provides that "the legislative power shall be vested in a senate and general assembly." Section 2 provides that "the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties respectively, for three years." Section 3 provides that "the general assembly shall be composed of members annually elected by the legal voters of the counties respectively who shall be apportioned among the said counties as nearly as may be according to the number of their inhabitants. The present apportionment shall continue until the next census of the United States shall have been taken and an apportionment of members of the general assembly shall be made by the legislature at its first session after the next and every subsequent enumeration or census and when made shall remain unaltered until another enumeration shall have been taken; provided that each county shall at all times be entitled to one member, and the whole number of members shall never exceed sixty." Paragraph 2 of section 1 of article 4 provides that "no person shall be a member of the senate who shall not have attained the age of thirty years and have been a citizen and

inhabitant for four years, and of the county for which he shall be chosen one year next before his election; and no person shall be a member of the general assembly who shall not have attained the age of twenty one years, and have been a citizen and inhabitant of the state for two years, and of the county for which he shall be chosen one year next before his election." Article 2, in providing for the right of suffrage, provides that "every male citizen of the United States of the age of twenty one years who shall have been a resident of this state one year, and of the county in which he claims his vote five months next before his election, shall be entitled to vote for all officers that are now or hereafter may be elective by the people."

In construing these constitutional provisions, the form of government antecedent to the adoption of the constitution, the manner in which the legislative department was organized, and the mode of electing its members, are important adjuncts in ascertaining the intent of the framers of the constitution. By the instructions of Lord Cornbury and his commission, the instruments which in 1702 established a colonial government, the general assembly for the enacting of laws was constituted, consisting of 24 representatives, to be chosen in manner following: Two by the inhabitants and householders in each of the towns of Perth Amboy and Burlington; 10 by the freeholders of East Jersey; and 10 by the freeholders of West Jersey. The qualification of the representatives of these divisions was an estate of freehold in "the division for which he should be chosen;" and the general assembly was composed of persons "elected by the major part of the freeholders of the respective counties and places." *Leam. & S. 619-647*. By an act passed April 4, 1709, entitled "An act regulating the qualification of representatives to serve as general assembly in this province of New Jersey," two representatives were assigned to the towns of Perth Amboy, Burlington, and Salem, respectively, and two to each of the counties into which the colony was divided. This act provided that these representatives should be chosen "by the majority of voices or votes of the freeholders of each county," and that the "representatives for the counties aforesaid" should be freeholders in that division "for which he or they should be chosen." *Allinson, p. 6*. As new counties were created from time to time, each county was given two representatives, to be chosen by the county for representatives of the county. By the first constitution of this state, adopted July 3, 1776, the legislative department was divided into two bodies, a legislative council and a general assembly, the members of which were chosen annually, one member of the legislative council and three members of assembly being chosen by each county. The language of that con-

stitution is that "the counties shall severally choose one person to be a member of the legislative council," and "each county shall also choose three members of the assembly." The qualification prescribed for the members of both the legislative bodies were that the member of the legislative council should be, and have been for one whole year next before the election, "an inhabitant and freeholder in the county in which he is chosen," and that no person shall be entitled to a seat in the assembly unless he be, and have been for one whole year next before the election, an inhabitant "of the county he is to represent." The right of suffrage was provided for in these words: "All inhabitants of this colony, of full age who are worth fifty pounds, proclamation money clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives in council and assembly and also for all other public officers that shall be elected by the people of the county at large." The constitution of 1776 authorized the legislature to add to or diminish the number or proportion of the members of assembly for any county or counties, as it might judge equitable and proper, on the principles of more equal representation. From time to time acts were passed increasing or diminishing the number of members of assembly in several of the counties; but no effort was made to equalize representation on the basis of population until 1838, when an act was passed entitled "An act to provide for the equal and just representation of the several counties in this state in the general assembly," which enacted "that after the next and each subsequent census of this state that shall be taken in pursuance of any law or laws of the congress of the United States each county of this state shall be entitled to elect and send to the general assembly one member for every six thousand inhabitants which such county shall contain at the time of taking such census as near as may be; provided always that no county shall have a less number of representatives than such county is now by law entitled to elect and send to the general assembly." *P. L. 1838, p. 57*. This act was in force when the constitution of 1844 was adopted, and the apportionment of members among the counties therein contained was by the constitution continued until the federal census next thereafter should be taken.

In all the legislation on this subject during colonial times, and in the constitution of 1776 and the legislation thereafter antecedent to the convention which framed the present constitution, members of the popular branch of the legislature were regarded as representatives of the counties, chosen by the legal voters of the counties, and qualified for the office by qualification having relation to the counties for which they were

elected. In the convention of 1844 the inequality of representation in the legislature was made the ground of serious complaint. As the result of the deliberations of that body, the equal representation of the several counties in the senate was retained, and equality of representation in the general assembly was provided for by the apportionment of members among the counties according to population. A comparison of the language of the old constitution and the constitution framed by the convention indicates that the purpose of the members of the convention was a modification in some particulars, and not a radical change, in the composition and selection of members of the legislative department. The old constitution provided that "the county shall choose" the members of assembly; the new constitution provides that the members of the general assembly shall be elected "by the legal voters of the counties respectively." The old constitution provided that no person should be entitled to a seat in the assembly unless he be, and have been for one whole year next before the election, an inhabitant of "the county he is to represent;" the new constitution provides that no person shall be a member of the general assembly who shall not have been a citizen and inhabitant of the county for which he shall be chosen one year next before his election. In providing for the ratio of representation among the counties the method of apportionment adopted in the new constitution was in principle in conformity with the act of 1838, which regulated the subject under the old constitution. Between the old constitution, with the provisions of the act of 1838 ingrafted upon it, and the new constitution, there is a similarity of language and expression that indicates that the framers of the latter intended no change in the representative character of members of the general assembly or in the mode of their election. In recasting the section in the old constitution providing for the right of suffrage, the words "for representatives in council and assembly" were omitted. The new constitution having in the section relating specifically to the election of these officers expressly provided that senators and members of assembly should be elected "by the legal voters of the county," the omitted words were superfluous. And for the words, "for all other public officers that shall be elected by the people of the county at large," the new constitution substituted the expression, "shall be entitled to vote for all officers that now or hereafter may be elective by the people;" an expression which includes officers elected in townships, wards, and minor election districts as well as those officers who by force of constitutional prescriptions were made elective by the people, such as governor, senators, members of assembly, county clerks, surrogates, sheriffs, coroners, and justices of the peace, according as these

constitutional officers were by the constitution made elective by the people of the state or by the legal voters of the counties or by the people of the several townships. The problem the members of the constitutional convention were dealing with was the equalization of representation in the popular branch of the legislature. The old constitution permitted the legislature, in its discretion, to add to or diminish the number or proportion of members of the assembly for the several counties. This discretionary power in the legislature was discarded in the new constitution, and the apportionment of members among the counties in proportion to population was substituted. In a popular government, representation in proportion to population extending over the area of a state is practically equivalent to representation on the basis of the number of qualified voters. A computation on either basis would, in the main, reach nearly the same result. And it is inconceivable that the distinguished body of men who composed the constitutional convention should have contemplated an apportionment of members within the several counties by means of assembly districts not in proportion to population, or under any other restriction which should give to one qualified voter a voice in the election of members of the assembly equal to that of three, or any indefinite number of voters, who exercise their elective franchise at another voting place within the same county; for, as has been said, if the power to create these districts is possessed by the legislature, it is a power beyond constitutional restraints.

The provisions of the federal constitution regulating the choice of presidential electors and the election of members of congress are not apt precedents for the construction of the provisions of our constitution for the election of senators and members of assembly. Paragraph 2 of section 1 of article 2 of the federal constitution provides that each state shall appoint, in such manner as the legislature thereof may direct, a number of electors (to vote for president and vice president) equal to the whole number of senators and representatives in congress. The appointment of electors is left with the several states, to be exercised in such manner as the legislature may direct. Under this constitutional provision the legislatures of the several states have exclusive power to direct the manner in which presidential electors shall be appointed, whether by the legislature directly, or by popular vote in districts, or by general ticket. *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3. In delivering the opinion of the court in the case last cited Chief Justice Fuller said: "The constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective

franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." The provisions in the federal constitution for the election of members of congress are also expressed in general terms. Section 2 of article 1 provides that "the house of representatives shall be composed of members chosen every second year by the people of the several states and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." And by section 4 "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each state, by the legislature thereof, but the congress may at any time by a law make or alter such regulation except as to the places of choosing senators." In the absence of the interposition of congress, the manner of electing representatives in congress is committed to the state legislature, with no other restriction than with respect to the qualification of the electors. At the second session of the twenty-seventh congress an act was passed for the election of representatives in congress by districts. The debate upon the act was long and earnest. Two representatives of this state, Senator Miller, and Mr. Halsted in the house of representatives, participated in that debate. This discussion occurred in June, 1842. The constitutional convention assembled in May, 1844. The article of our constitution relating to the election of senators and members of the general assembly was reported by Ex-Governor Vroom, than whom no one was more familiar with public affairs, state and national. If the convention which framed our constitution intended to adopt a mode of electing members of assembly in conformity with the election of members of congress under the federal constitution, it is reasonable to assume that, with the discussions in congress at the session of 1842 fresh in the minds of its members, the provisions of our constitution on that subject would have been cast in language of similar import with the federal constitution; and it is a significant circumstance that the language of the federal constitution, which conferred discretionary power on congress, was avoided; the discretionary power possessed by the legislature under the old constitution was taken away, and a fixed rule was adopted that the members of the general assembly should be apportioned among the counties in proportion to population, and be elected by the legal voters of the counties respectively. Grouping together the phrases in which the intent of the constitution is expressed, I think its true construction is beyond controversy. Members of the general assembly are apportioned among the counties. The qualification for membership consists of citizenship of the county for which they shall

be chosen, and they are to be elected by the legal voters of the county. The right of suffrage is granted to residents of the county, and each qualified voter is secured by constitutional prescription the right to vote for all officers elective by the people. Members of the general assembly are by the constitutional regulation elective by the legal voters of the counties, and every qualified voter who has for the specified period of time been a resident of the county in which he claims his right to vote is secured the right to a voice in the election of all officers who, by the constitution or otherwise, are elective by the class of legal voters to which he belongs. The constituency by which members of the general assembly shall be elected is designated by the constitution, and the qualifications requisite for the right of suffrage are therein prescribed, and also the elective franchise which shall be enjoyed by each qualified voter. These constitutional provisions were self-executing, and also self-sustaining. *State v. Mayor, etc., of Newark*, 80 N. J. Law, 880-388; *Id.*, 40 N. J. Law, 558. Nothing was left for legislative action except the apportionment of members among the counties in a fixed ratio, and such regulations as were necessary for holding elections,—the canvassing of the votes, and the certification of the result. When the legislature has once made the apportionment of members to any county, the constituency by which the members so apportioned shall be elected, and the elective franchise of each of the legal voters by whom such members are elective, become subject to constitutional prescriptions which are beyond legislative control. The first apportionment act under the constitution apportioned the members among the counties without making any provision for the manner in which they should be elected. P. L. 1851, p. 289. The act was not imperfect. Without legislative action the mode of electing the members apportioned by the act among the counties was completely provided for by the constitution, which *ex proprio vigore* determines how members apportioned among the counties shall be elected.

Other constitutional provisions which provide for the election of other officers shed a light on the subject under consideration. Paragraph 7, § 2, art. 7, provides that coroners shall be elected by the people of their respective counties. Paragraph 1, § 7, art. 6, provides that there may be elected two, and not more than five, justices of the peace in each of the townships of the several counties, and in each of the wards in cities that vote in wards; the number of justices of the peace a township or ward may have being determined by its population. Paragraph 8, § 2, art. 7, provides that justices of the peace shall be elected by ballot at the annual town meetings of the townships and of the wards, and when elected they shall be commissioned for the county. In

these provisions, as in that providing for the election of members of assembly, the constitution prescribed the constituency by which coroners and justices of the peace shall be elected; and it could scarcely be contended with any plausibility that an act of the legislature for the election of coroners in election districts, or for the election of the number of justices of the peace a township or ward is entitled to have in a corresponding number of election precincts, would comply with the constitutional prescriptions. It will be observed, also, that throughout the constitution the constituency by which every constitutional officer shall be chosen is defined with precision.

After a careful examination and the most attentive consideration of the important questions presented in this case, with the aid of the learned argument and elaborate briefs of counsel, in my judgment the election of members of assembly in assembly districts is a plain departure from the method of electing these representatives prescribed by the constitution. Instead of the eleven members apportioned to the county being elected by the legal voters of the county, one member is elected in each assembly district by the legal voters of that district, arbitrarily created by the legislature. In the construction of statutes it is a cardinal rule, which applies as well to constitutional provisions, that when the law is in the affirmative that a thing shall be done by certain persons or in a certain manner, this affirmative matter contains a negative that it shall not be done by other persons or in another manner, upon the maxim "*expressio unius est exclusio alterius*." *Stradling v. Morgan*, 1 Plow. 206, 207; 9 Bac. Abr. 235; *Sedg. St. Const.* 30. Where the constitution prescribes the manner in which an officer shall be appointed or elected, the constitutional prescription is exclusive; and it is not competent for the legislature to provide any other mode of obtaining or holding the office. *Cooley*, *Const. Lim.* 78, note 3; *People v. Albertson*, 55 N. Y. 50, 56; *People v. Bull*, 46 N. Y. 57-63. The election of one member in one assembly district and one member in another district, and so on through the eleven districts into which the county is divided, is not the election of the members of the general assembly apportioned among the counties by the legal voters of the county. The constituency devised by the system of assembly districts is another and a different constituency from that prescribed by the constitution, and the qualified voters of the county are restricted in the exercise of the right of suffrage as fully as is guaranteed to them by the constitution. It seems to me that it cannot be affirmed on any defensible ground that a member of the assembly chosen by the voters of an election district within the county is, in the words of the constitution, "elected by the legal voters of the county." An act of the legislature pro-

viding that each qualified voter of the county should vote for only one of the members apportioned to the county would be plainly unconstitutional. The assembly district system differs only in form. It segregates the qualified voters of the county into classes, and allows each qualified voter of the class to vote for only one of the members apportioned to the county.

It is contended, in the first place, that the constitutionality of legislation for the election of members of the general assembly in assembly districts is *res adjudicata*. To sustain this contention, *Gardner v. Mayor*, etc., of Newark, 40 N. J. Law, 297, was cited. The proceeding in that case was an application for a mandamus to compel the mayor and common council of the city of Newark to divide the city into wards corresponding in number and boundaries with the assembly districts created by the act of April 5, 1878. The application was denied, on the ground that acts creating legislative districts were public acts, and did not go into operation until the July succeeding the time they were passed. The case was argued at June term, 1878, and prior to the date when the act of April 5, 1878, became effective. It appears by the brief of the counsel of the relator in that case that the power of the legislature to divide counties into assembly districts was not put in dispute. His contention was that this power could be exercised only at the time the apportionment of members among the counties was made,—that is, at the session next after the federal census,—and that the districts then formed must remain unaltered until the time arrived for the next apportionment. It was to the aspect in which the question was presented by counsel that the remarks of Mr. Justice Reed, with respect to the unfettered power of the legislature to direct the method in which members apportioned among the counties should be elected, were directed. The case was decided on other grounds. In June term, 1890, the constitutionality of the assembly districting acts was mooted before the court of errors and appeals in *Mortland v. Christian*, 52 N. J. Law, 521, 20 Atl. 673. In that case the proceeding was in quo warranto to test the defendants' title to the office of chosen freeholders under an election pursuant to an act of the legislature which provided for the election of chosen freeholders in assembly districts. In this case, as well as in *Gardner v. Mayor*, etc., of Newark, the constitutionality of acts creating assembly districts arose collaterally. The title of the defendant to the office under such an election was sustained. But Mr. Justice Garrison, in delivering the opinion of the court, used this language: "Referring to the suggestion made on the argument that the assembly districts, which by this act are referred to as the precincts for the election of freeholders, were not legal leg-

lative creations. inasmuch as the constitution contains no intimation but that members of assembly shall be chosen by the counties at large, it is sufficient to say that we are not now concerned with the legality of such subdivisions of counties. The act under review refers to these districts for the purpose of defining a territorial limit. Such precincts or assembly districts do exist, whether legally or not, and to each of these *de facto* districts a freeholder is assigned. Beyond this we need not at this time go." And the headnote prefixed to the case, prepared by the learned judge who delivered the opinion of the court, is as follows: "Quære, whether assembly districts may have any legal existence as political subdivisions of the county." *Gardner v. Mayor*, etc., of Newark, although decided 12 years before, was not referred to by the court. With this judicial action of the highest court in the state, we are not at liberty to treat this question as *res adjudicata*.

The contention, in the next place, is that the purpose and intent of these constitutional provisions have, by contemporaneous construction, long usage, and practical interpretation, become established, and at this day the subject is not open for discussion. For the first eight years after the new constitution was adopted—from the fall of 1844 to the fall of 1851, inclusive—the members of assembly were elected by the counties at large. This may be said to be the contemporaneous exposition of the constitution. The act of March, 1852, first created assembly districts. This act remained in force until after the census of 1860, when, by the act of 1861, a new apportionment among the counties was made, and to some extent a corresponding change in assembly districts. The districts created by the acts of 1852 and 1861, which continued to exist until 1871, conformed to county and the then existing township and ward lines. No criticism has been made upon the fairness and equality in population with which these districts were constructed. If the practical interpretation for the years from 1852 to 1870, inclusive, gave construction to the constitution, that construction will not sustain the act of 1891. The result of the districting in the county of Essex by that act has already been stated. The districts into which the county was divided are unequal in population, and the legal voters of the county are so adjusted in the several districts that of the eleven members apportioned to the county, eight members are elected by majorities aggregating 3,771 votes, and the other three by majorities aggregating 5,097 votes. The inequalities in other counties appear by Map A, on the part of the relators, conspicuous among which are those in the counties of Burlington and Camden, Burlington being divided into two districts, with the population, respectively, of 22,555 and 34,204; Camden into three districts, with the population,

respectively, of 61,510, 15,306, and 10,871. A new system of constructing assembly districts was introduced by the act of 1871, plainly for the furtherance of political purposes. Township, ward, and city lines were disregarded, and assembly districts were carved out within the counties without regard to population, and were so devised, by massing together the qualified voters of one political party, as to secure to the minority of qualified voters of the county an unjust advantage in the choice of members of the assembly, the members of that body representing counties being no longer "elected by the legal voters of the counties respectively." This was conspicuously, but not exclusively, the case in the county of Hudson. Exhibit No. 9, on the part of the defendants, discloses the result of the first election under that act; and the return of the votes in the second election district of that county illustrates the object that may be effectuated by the arbitrary establishment of districts that shall mass in one district a great body of the qualified voters of one political party. The "Horseshoe District" is as well known in this state as a synonym for (to use a subdued expression) unfair political methods as is the word "gerrymander" throughout the United States. At the legislative session of 1878 no less than seven different acts were passed altering assembly districts in the several counties. In 1881 a new apportionment was made, and new districts were created, some of which were remodeled in 1880. In 1891 there was a new apportionment among the counties, and new assembly districts were created; and in 1892 three acts were passed altering the districts in three counties. The maps and election returns made exhibits in this case show districts with areas of grotesque shapes, inequalities in population, and the massing in districts of the voters of one political party, to overcome the constitutional rights of the legal voters of the counties to equality in choice of representatives of the county in the general assembly. The maps and exhibits, which, by the written stipulation of counsel, are evidence in these cases, exhibit the capacity that lies in the assembly district system to enable the political party that happens to control the legislature to provide means for its continuance in power. Certain it is that if the legislative usage and practice beginning in 1871 and coming down to the present time has established a construction of the constitution that is now a finality, then it must be conceded that the legislative power and discretion in the premises are unqualified and unrestrained; and, to adopt the language of the brief of the defendants' counsel: "There is not any constitutional restriction upon the lawmaking power controlling or directing the subdivision of counties into assembly districts. The division may be fair or unfair, equal or unequal, proportionate or disproportionate, and

this court may not review the exercise of that power." How far contemporaneous exposition, long usage, and practical interpretation shall control in the construction of constitutional provisions is the vital question on this branch of the case. Contemporaneous construction and long usage, and especially the practical interpretation by the various departments of the government, are entitled to great weight in the construction of constitutional provisions. But it is only when the words of the constitution are of doubtful significance, or the meaning is obscure, that resort to extraneous aid is permissible. Mr. Justice Story, in his treatise on the Constitution, says: "Where its terms are plain, clear, and determinate they require no interpretation, and it should therefore be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil." And again: "Contemporary construction is properly resorted to, to illustrate and confirm the text, to explain a doubtful phrase, or to expound an obscure clause. * * * It can never abrogate the text; it can never narrow down its true limitations; it can never enlarge its natural boundaries." 1 Story, Const. §§ 405, 407.

The case most frequently cited to illustrate the effect of contemporaneous construction, long use, and practical interpretation in the construction of constitutional provisions is *Stuart v. Laird*, 1 Oranch, 299. Congress passed an act establishing circuit courts, and designated the justices of the supreme court to hold the circuits. The question before the court was whether congress possessed the power to assign justices of the supreme court to hold circuit courts, or whether the judges of these courts should be specially appointed as such, and have distinct commissions for that purpose. The only provisions of the federal constitution relating to the organizing of courts and the mode of appointment are those that provide that the judicial power of the United States should be vested in one supreme court, and such inferior courts as congress may from time to time ordain and establish, and that the power of appointing judges of the supreme court, and all other officers of the United States whose appointments were not therein otherwise provided for, should vest in the president by and with the advice and consent of the senate. The constitution had nowhere defined the duties of the justices of the supreme court, nor did it contain any express designation of the persons by whom the inferior courts established by congress should be held. The only other provision there was on the subject was that the judges both of the supreme and inferior courts should hold office during good behavior, and should receive a compensation which should not be diminished during their continuance in office. It being left undefined in the constitution by what judges these

courts should be held, the court considered the practical exposition by long practice and acquiescence to have fixed the construction of the constitution in a matter which the language of that instrument left in a state of uncertainty. *Rogers v. Goodwin*, 2 Mass. 475, is another case in the same line of decision. A statute passed in 1636 authorized the free-men of every town to dispose of their lands, and in the preamble of another statute, passed in 1753, it was recited that the proprietors of lands lying in common have power "to manage, dispose and divide the same in such way and manner as hath been or shall be concluded and agreed on by the major part of the interested." Under this authority the proprietors of the town made conveyance by deed to a stranger. The point relied on against the validity of this deed was that the proprietors had no authority to sell lands to a stranger. The conveyance was sustained on the legal ground that long and continued usage furnished a contemporaneous construction, which must prevail over the mere technical import of the words. It will be observed that the statute in question contained no provision with respect to the manner in which common lands should be disposed of. The act was silent on that subject. Neither of these cases is pertinent to the subject under discussion, for the constitutional provisions under consideration expressly provide that members of the assembly shall be elected by the legal voters of the county, and qualified voters resident in the county are declared to be entitled to vote for all officers elective by the people. Judge Cooley states the controlling principle in this language: "Where no ambiguity or doubt appears in the law, the same rule obtains here as in other cases,—that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers." And the same learned jurist, after citing *Stuart v. Laird*, *Rogers v. Goodwin*, and other cases of similar import, which the author says appear on first reading not to have observed proper limitations, concludes his observations in these words: "It is believed, however, that in each of these cases an examination of the constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period in violation of the constitutional prohibition without the

mischievous which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the constitution. We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed." Cooley, *Const. Lim.* 84, 85.

An examination of the cases in the supreme court of the United States will disclose the fact that long usage, contemporaneous construction, and practical interpretation have been resorted to in construing statutes and constitutional provisions only to ascertain the meaning of technical terms, or to confirm a construction deduced from the language of the instrument, or to explain a doubtful phrase or expound an obscure expression. *Calder v. Bull*, 3 Dall. 396; *U. S. v. Wilson*, 7 Pet. 150; *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264; *U. S. v. Dickson*, 15 Pet. 141-161; *Prigg v. Pennsylvania*, 16 Pet. 580-622; *Cooley v. Board of Wardens*, 12 How. 299-315; *Hahn v. U. S.*, 107 U. S. 402-406, 2 Sup. Ct. 494; *Lithographic Co. v. Sarony*, 111 U. S. 53-57, 4 Sup. Ct. 279; *Brown v. U. S.*, 113 U. S. 568-571, 5 Sup. Ct. 648; *McPherson v. Blacker*, 146 U. S. 1-26, 18 Sup. Ct. 3. In *U. S. v. Dickson*, Mr. Justice Story said: "The construction given by the treasury department to any law affecting its arrangements and concerns is certainly entitled to great respect. Still, however, if it is not in conformity to the true intent and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice. * * * It is not to be forgotten that ours is a government of laws, and not of men, and that the judicial department has imposed upon it by the constitution the solemn duty to interpret the laws in the last resort; and, however disagreeable that duty may be in cases where our judgment shall differ from that of other high functionaries, it is not our liberty to surrender or to waive it." These observations were made by a learned jurist with respect to the construction of statutes which are laws subject to alteration or repeal at any time in the discretion of the legislative department of the government. They apply with irresistible force to the fundamental instrument of government,—the constitution,—the supreme and irresistible power to make or unmake which (to quote the language of Chief Justice Marshall in *Cohens v. Virginia*) "resides only in the whole body of the people, and not in any subdivisions of them."

In this state the rule of construction is stated with accuracy and discrimination in *State v. Kelsey*, 44 N. J. Law, 1. The subject is discussed by the chief justice in his opinion, (page 22,) and Mr. Justice Magie in v.28A.no.2—5

his dissenting opinion, (page 47,) with a citation of authorities. The conclusion reached by the court is stated in the headnote as follows: "A statute of uncertain meaning, which has been enforced in a certain sense for a long series of years by the different departments of government, will be judicially construed in that sense." The majority of the court, finding the language of the statute broad enough to embrace the meaning contended for, permitted a practical construction of it to that effect for more than 50 years to prevail. The subject was again brought under judicial decision in *Engeman v. State*, 54 N. J. Law, 247, 23 Atl. 676. The question before the court in that instance was the constitutionality of an act of the legislature passed in 1855, making justices of the supreme court ex officio judges of the court of common pleas, orphans' court, and court of quarter sessions. *State v. Kelsey* was cited with approbation by Mr. Justice Van Syckel in delivering the opinion of the court. But it will be observed that the learned judge, on page 252, 54 N. J. Law, and page 677, 23 Atl., lays particular stress upon the fact that the constitution gave the legislature power to alter or abolish all these courts, as the public good might require; and that the power to alter or abolish seemed necessarily to imply and carry with it authority to change or modify the structure of the court, as well in the mode of appointment as in the number of judges. The learned judge therefore concluded that the power of the legislature over the controverted subject was unrestrained by the fundamental law. To such a condition of affairs *State v. Kelsey* was properly applied. Neither of these precedents can be invoked as justifying long usage or practical interpretation as controlling the construction of constitutional or statutory law, unless under the exceptional circumstances above mentioned. Nor are we without precedents directly affirming the domination of the constitution, notwithstanding long usage and practical construction to the contrary, and the most conclusive arguments ab inconvenienti. I refer to *Scott v. Sandford*, 19 How. 393, and *Hepburn v. Griswold*, 8 Wall. 603. In the first of these cases the federal court, in 1856, decided that the eighth section of an act of congress passed in 1820, and known as the "Missouri Compromise Act," which prohibited slavery in all that part of the territory ceded by France under the name of Louisiana, lying north of the line of 36 degrees and 30 minutes, not included within the limits of Missouri, was unconstitutional and void; notwithstanding the fact that the act was designed as a final settlement of the agitation of the slavery question, and a state had been admitted into the Union under its provisions, and that congress, from its first session down to the year 1848, had repeatedly exercised the power which was denied by that decision; and not

withstanding the doctrine of a practical construction, continued through a long series of years, was invoked by the dissentient judges. The keynote of that decision is expressed by the chief justice (page 426) in these words: "No one, we presume, supposes that any change in public opinion or feeling should induce the court to give to the words of the constitution a more liberal construction than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day." Whatever criticisms were made upon the result of this decision or its policy in the discussions that followed its promulgation, the soundness of the doctrine of the supremacy of the constitution whenever invoked, so forcibly expressed by the chief justice, has never been denied or impugned. In *Hepburn v. Griswold*, acts of congress passed in 1862 and 1863, making treasury notes of the United States a legal tender for debts, were in 1869 declared to be unconstitutional. This decision was subsequently overruled in the *Legal Tender Case*, 12 Wall. 457. But in both of these cases the court rested its opinion on the language in which the constitutional grant of power to congress was expressed. In the decision of the latter case, Mr. Justice Strong, in delivering the opinion of the court, refers to the situation of the country at the time these acts were passed, and the great business derangement, widespread distress, and rank injustice that would result if these acts were held to be invalid; but he adds: "The consequences of which we have spoken, serious as they are, must be accepted if there is a clear incompatibility between the constitution and the legal tender acts." The authority of congress to pass the acts in question was, in the opinion of the court, (pages 533, 534,) deduced from the last clause of the eighth section of the first article of the constitution granting the power to congress to make all laws which should be necessary and proper for carrying into execution the powers by the

constitution conferred upon congress. "The means or instrumentalities referred to in that clause, and authorized," it is said by the learned judge who prepared the opinion of the court, "are not enumerated or defined. They were left to the discretion of congress, subject only to the restrictions that they may be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to congress." Precedents of the same import are numerous in the federal and state courts. I have cited *Scott v. Sandford* and *Hepburn v. Griswold* for the reason that the interests involved in these cases gave these decisions a conspicuous place in the domain of constitutional law.

The constitution contains the permanent will of the people. It is paramount to the power of the legislature, and can be revoked or altered only by the power which created it. Popular government can be maintained only by upholding the constitution at all times and on all occasions as it was when it came from the hands of the people, by whose fiat it was established as the fundamental articles of government, to abide until altered by the authority which created it. To adopt the language of Chief Justice Bronson in *Oakley v. Aspinwall*, 3 N. Y. 568: "There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power; some evil to be avoided, or some good to be attained, by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. * * * One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." Within the domain of construction there is room for argument and discussion; nay, even for a divergency of opinion; but when the meaning of the constitution, interpreted by its letter and in its spirit, is ascertained, extraneous considerations are of no avail. In the process of construction, long usage and practical interpretation are entitled to great weight if the language be obscure or doubtful; but such extraneous considerations cannot be allowed "to abrogate the text," or "fritter away its obvious sense." I have already said that on a construction of the words of the constitutional provision regulating this subject, fortified by the policy and institutions which prevailed in this state prior to the framing of the constitution, and a comparison of other of its provisions, the constitutional mandate requires the election of members of the general assembly by the legal voters of the counties, respectively, and that the division of counties

into assembly districts, and the distribution of the members among these districts for the purpose of electing such members, are in conflict with the constitutional mandate. No one can examine the legislation on this subject from 1871 to the present time and contemplate the results without realizing the evils which have been fostered under this system. Relief from these wrongs through the ballot box cannot be assured if the majority in the legislature is elected by a minority of the legal voters of the state. Precedent has been followed by retaliation, to be repeated from time to time as supremacy in the legislature has passed from one political party to the other. For this condition of affairs the only remedy is by a return to constitutional methods. If it be that the election of members of the general assembly in districts furnishes a more perfect system of popular representation in the popular branch of the legislature, the change devolves upon the people who made, and who alone can alter, the constitutional method of electing these representatives; and it may be affirmed with considerable confidence that if such a power be conferred upon the legislature it will be accompanied with qualifications and conditions that will secure to each qualified voter equality in the election of representatives as nearly as may be.

The remaining question is whether these proceedings were prematurely instituted, the contention being that a demand and refusal to perform a duty is an essential prerequisite to an application for a mandamus in any case and under all circumstances. There is a distinction between duties of a public nature and duties of a private nature affecting only the rights of individuals. In the latter class of cases, demand and refusal are held to be necessary as a condition precedent to relief by mandamus; in the former class, the duty being of a public nature, there is not the same necessity for a literal demand and refusal. In such cases the law itself stands in lieu of a demand, and omission to perform the required duty is equivalent to a refusal. High, Mand. § 13. To postpone the commencement of these proceedings until the time preceding the annual elections, at which the county clerk and the clerks of the cities and townships of the county are required to perform the duties devolved upon them under the election laws, would effectually prevent their institution being ever practically of any avail. The testimony of the county clerk and of other election officers, taken under this rule, makes it apparent that these officials intend to conduct elections in the county under the act of 1891, until otherwise directed, so long as that act is unreppealed. Indeed, the presumption is not to be entertained that these officers would, on constitutional grounds, disregard the act of legislation conforming to precedents of upwards of 20 years' standing, unless the invalidity of

the act be first judicially determined. In *McPherson v. Blacker* the writ was allowed on the answer of the secretary of state denying that he had refused to give the notice of election required by the petition for the writ, but averring that he intended to give notices under the law the constitutionality of which was assailed, as will appear by the report of the case in 146 U. S. 3, 13 Sup. Ct. 3. The rule to show cause should be made absolute for a peremptory mandamus commanding that all future general elections for members of the general assembly in the county of Essex shall be so conducted that such members shall be voted for throughout the county as prayed for by the relators. To this extent the rule to show cause is made absolute, without costs.

REED and LIPPINCOTT, JJ., concur in this opinion.

(51 N. J. E. 272)

BOWEN v. LINCOLN BLDG. & LOAN ASS'N OF JERSEY CITY.

(Court of Errors and Appeals of New Jersey.
Dec. 5, 1893.)

BUILDING AND LOAN ASSOCIATIONS — CHARGING MEMBERS PREMIUM FOR LOAN — ENFORCING FINES.

1. A corporation organized under the building and loan association act (Revision, p. 92, and Supp. Revision, p. 69) may lawfully charge one of its members a premium for a loan made to him.

2. If the borrowing member agrees that the premium shall be deducted from the sum loaned, and the balance, only, be paid to him in cash, and that he will pay interest on the whole sum loaned, such agreement is valid.

3. Fines imposed by the association upon its members for defaults in payment of dues and interest cannot be collected by foreclosure of the mortgage given to secure payment of a sum borrowed, or of dues and interest, unless the parties have agreed that the fines may be so collected.

4. If the constitution and by-laws of the association provide for imposing fines on defaulting members as personal obligations only, then the fact that the constitution and by-laws are referred to in the bond or mortgage as being made part of it will not be sufficient to render the mortgage a security for payment of fines.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the Lincoln Building & Loan Association of Jersey City against Matthew Bowen, assignee, to foreclose a mortgage. There was a decree for complainant, and defendant appeals. Modified.

The following is the opinion of VAN FLEET, V. C., in the court below:

"That part of the contract which must be considered in deciding the questions raised in this case is expressed substantially in

these words: "The obligors shall well and truly pay to the complainant \$8,000, in the manner following: By the payment of dues of twenty-five cents per week, on the first and third Tuesdays of each month, on each of the forty shares of the fifth series of the capital stock of the association owned by the obligors, during the period of this loan, together with the interest on \$8,000, to be computed from the date thereof, at the rate of six per centum per annum, payable as follows: At the expiration of three months from the date thereof on the whole principal sum, and at the expiration of each succeeding three months on the amount of the principal found to be due at the beginning thereof, after deducting all previous payments made on account of the principal, being the amount of dues paid on the forty shares during said three months, as provided for by the constitution and by-laws of the association, which have been duly assented to by the obligors, and made a part thereof."

"My conclusions on the questions raised are:

"1. The complainant has a right to collect reasonable fines for nonpayment of dues. *Association v. Stephens*, 26 N. J. Eq. 351. I doubt whether the fine originally imposed was reasonable, but complainant has reduced it one-half. Such reduction I think makes it reasonable.

"2. The complainant has a right to recover fines for the nonpayment of dues as part of the debt secured by its mortgage. The constitution and by-laws of the association are, by express words, made a part of the contract, so that the rights and obligations of the parties in this respect stand, in point of law, precisely as they would have stood if that part of the constitution giving power to impose fines had been incorporated in the bond. The bond in *Union Bldg. Loan Ass'n v. Masonic Hall Ass'n*, 29 N. J. Eq. 389, 391, provided that the obligor should pay interest, 'together with all fines that may have been incurred under the provisions of the constitution;' and Chancellor Runyon held that the fines constituted a part of the debt secured by the mortgage. As in this case the constitution is made a part of the contract, the bond must be read as though it contained an express provision that fines imposed for the nonpayment of dues should be considered a part of the mortgagor's debt.

"3. The case just cited decides that fines incurred subsequently to the commencement of the suit to foreclose are recoverable. That decision is, in my judgment, clearly right, and it will be followed in this case.

"4. I am unable to see how that provision of the constitution which confers power to impose a fine for nonpayment of interest can be enforced in this case. This provision

first declares that a shareholder, for neglecting to pay his weekly dues as they become payable, shall, for each such neglect, pay a fine of five cents on each share of stock held by him, and then adds, 'and a like sum on interest due on each share borrowed on.' The important words are 'on interest due on each share.' Under the contract no interest could become due on each share, or on the money loaned on each share. The obligors made no contract to pay interest on several distinct loans, or to pay interest on the specific sum loaned on each share of stock they held; on the contrary, their obligation, as expressed on their bond, is to pay interest every three months, first on the whole sum of \$8,000, and then subsequently on such part thereof as shall not have been paid by the payment of the dues on their stock. A fine can only be imposed for a default in duty or obligation. As I understand the terms of the bond in this case, no default in the payment of interest, of the kind contemplated by the constitution, can occur under this bond. The fines for nonpayment of interest sought to be recovered in this case must be disallowed, for the reason that, under a contract like that which the obligors have made, no power to impose fines for nonpayment of interest is conferred by the constitution.

"5. The obligors in this case bid off a loan of \$8,000 at a premium of \$1,000. The complainant subsequently advanced \$7,000, and took a mortgage for \$8,000. Transacting the business in this way, it is claimed, made this mortgage usurious to the extent of \$1,000, or at least that no interest is recoverable on the \$1,000 agreed to be paid as premium. I understand the law of this state to be firmly settled the other way. The statute expressly authorizes all corporations like the complainant to take a premium for priority of loan, and declares that no premium so taken shall be deemed to be usurious. *Supp. Revision*, 70. In *Association v. Conover*, 14 N. J. Eq. 219, it appeared that a loan of \$2,000 was sold for a premium of 10 per centum, \$1,800 was advanced in cash, and a mortgage given for \$2,000. Chancellor Green held the transaction to be valid, and gave the complainant a decree for \$2,000, with all the arrearages of interest. This case, on this point, was approved on appeal by the court of errors and appeals in *Herbert v. Association*, 17 N. J. Eq. 497, 504, and was followed by the court in *Association v. Furey*, 47 N. J. Eq. 410, 20 Atl. 890. Mortgages given for the premium, as well as the money actually advanced, were held to be valid by Chancellor Williamson in *Association v. Vandervere*, 11 N. J. Eq. 382, and by Chancellor Runyon in *Association v. Brown*, 29 N. J. Eq. 121. These cases settle the question attempted to be raised finally, so far as this court is concerned. The \$1,-

000 agreed to be paid as a premium constitutes a part of the debt secured by the complainant's mortgage, and carries interest from the date of the mortgage.

"6. The remaining question is, is the complainant entitled to recover interest on such part of the money secured by the mortgage as was not passed over to the mortgagors at or before the delivery of the mortgage, and as was not retained by the mortgagee in hand idle? To illustrate: The mortgage was delivered September 3, 1891. \$1,015 of the \$8,000 was not passed over to the mortgagors until January 5, 1892,—more than four months after the delivery of the mortgage. In the mean time the \$1,015 was not in the treasury of the complainant, nor anywhere else. As between the parties during this interval, it had no existence; neither had it. I know of no principle of law or justice which will allow interest to be recovered under such a state of facts. To allow it to be recovered, we would have to treat a thing as a fact which we knew to be a fiction, and not a fact. On the \$7,000, interest will only be allowed from the time it was actually passed over."

The other facts fully appear in the following statement by DIXON, J.:

The bill in this case was filed to foreclose a mortgage on lands in Jersey City, securing a bond, of which, with an assignment of stock indorsed thereon, the following is a copy:

"Know all men by these presents, that we, Bertrand L. Clark, of Jersey City, county of Hudson and state of New Jersey, and John Z. Demarest, of Closter, county of Bergen, state of New Jersey, are held and firmly bound unto the Lincoln Building and Loan Association of Jersey City, a body corporate of the state of New Jersey, in the sum of sixteen thousand dollars, (\$16,000.00), lawful money of the United States of America, to be paid to the said association, its successors or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals. Dated the fourth day of August, one thousand eight hundred and ninety-one. The condition of the above obligation is such that if the above bounden, Bertrand L. Clark and John Z. Demarest, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the above-named association, its successors or assigns, the just and full sum of eight thousand dollars, (\$8,000.00,) in the manner following, viz.: By the payment of dues of twenty-five (25) cents per week, on the first and third Tuesday of each month, on each of the forty (40) shares of the fifth series of the capital stock of said association owned by said Clark and Demarest, and standing in their names on the books of

said association, and assigned to it as collateral security for the payment hereof, and on which this loan is based, during the period of this loan, together with interest on said sum of eight thousand dollars, (\$8,000.00,) to be computed from the date hereof, at the rate of six per cent. per annum, and payable as follows: At the expiration of three months from the date hereof, on the whole principal sum aforesaid, and, at the expiration of each succeeding three months, on the amount of said principal found to be due at the beginning thereof, after deducting all previous payments made on account of said principal, being the amount of dues paid on said forty (40) shares during said three months, as provided for by the constitution and by-laws of said association, which have been duly assented to by said obligors, and made a part hereof, without any fraud or other delay,—then the above obligation to be void; otherwise, to remain in full force and virtue: provided, however, that, when the funds of said association of said fifth series shall equal two hundred dollars per share over and above all liabilities of the association, no further payments shall be required hereon, except arrearages, if any, and thereupon a proper satisfaction piece for the cancellation hereof, and of the mortgage given to secure this bond, shall be duly executed and delivered to said obligors, their heirs, executors, administrators, or assigns, and said forty (40) shares shall thereupon, also, be canceled. And it is hereby expressly agreed that should any default be made in the payment of said interest, or any of said dues or installments on said shares, or of any part thereof, on any day whereon the same is made payable, as above expressed, or should any tax, assessment, water rent, or other municipal or governmental rate, charge, imposition, or lien, be hereafter imposed or acquired upon the premises described in the mortgage accompanying this bond, and become due and payable, and should the said interest, or any of said dues or installments on said shares, remain unpaid and in arrear for the space of six (6) months, or said tax, assessment, water rent, or other municipal or governmental rate, charge, imposition, or lien, or any or either of them, remain unpaid and in arrear for the space of three months, or should the said obligors refuse or neglect for ten (10) days after demand to produce and exhibit to the obligee the vouchers showing the payments of such tax, assessment, water rent, or other lien due and payable, then and from thenceforth, that is to say, after the lapse or expiration of either of the said periods, as the case may be, the aforesaid principal sum of eight thousand dollars, (\$8,000.00,) or the balance thereof remaining unpaid, with all arrearage of interest thereon, shall, at the option of the said association or its legal representatives,

become and be due and payable immediately thereafter, although the period first above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in any wise notwithstanding. Bertrand L. Clark. [L. S.] John Z. Demarest. [L. S.] Sealed and delivered in presence of William C. Cudlipp.

"For value received, we, Bertrand L. Clark and John Z. Demarest, the within-named obligors, do hereby assign, transfer, and set over unto the Lincoln Building and Loan Association of Jersey City the forty (40) shares of the fifth series of stock held by us in said association as collateral security for the payment of the debt mentioned in the within bond. And in case of default in payment of the dues, interest, cost of insurance, or taxes upon premises mortgaged to the association, or fines for nonpayment of same, we hereby authorize said association to make sale of said forty shares of stock at auction, at any general meeting thereafter, and in our names to make and execute a transfer of said forty shares of stock to the purchaser of same, applying the proceeds of said sale to payment of said loan. And, further, we do hereby elect to treat all past and future payments of dues on said stock as credits on the within bond and mortgage accompanying the same, and authorize and direct the officers of said association to so appropriate and credit the same. Witness our hands and seals this fourth day of August, A. D. 1891. Bertrand L. Clark. [L. S.] John Z. Demarest. [L. S.] Sealed and delivered in the presence of William C. Cudlipp.

"Certificate of Stock. Lincoln Building and Loan Association of Jersey City. Bertrand L. Clark and John Z. Demarest are entitled to forty shares of the fifth series of capital stock of the Lincoln Building and Loan Association of Jersey City, the par value of which is two hundred dollars, subject to the by-laws and constitution of the association. Not transferable, except on the books of the association. Thos. R. Lewis, Secretary. Arch. McArthur, Vice President."

The complainant is a corporation organized under "An act to encourage the establishment of mutual loan, homestead and building associations," approved April 9, 1875, (Revision, p. 92.) The eighth section of this act, as amended February 29, 1876, (Supp. Revision, p. 69,) provides for investing the funds of such associations in loans to the members, and declares that no premium given for priority of loan shall be deemed to be usurious. The case shows that Clark and Demarest, the obligors in above bond, were members of the association, holding 40 shares of stock therein, and that on August 4, 1891, they agreed to borrow of the association \$8,000, and to pay, for

obtaining such loan in advance of other members, a premium of \$1,000. In pursuance of such agreement, the association paid to Clark and Demarest \$7,000 in cash, and they gave to the association the bond and the assignment of stock above set out, and the mortgage in question. Subsequently, they failed to pay the dues and interest required by the condition of the bond, and after they had been in default for six months this suit was brought for the recovery of the balance of the \$8,000 and interest, and of fines imposed by the association, under its constitution and by-laws, for nonpayment of dues and interest. The defendant, Bowen, is the assignee of Clark and Demarest under the insolvent debtors' act.

James R. Bowen, for appellant. William C. Cudlipp, for appellee.

DIXON, J., (after stating the facts.) The first objection made by the appellant to the decree below is that interest was allowed to the complainant on the sum of \$8,000; the appellant insisting that, as only \$7,000 were advanced in cash, interest should be reckoned only on that principal. The answer to this contention is that, in effect, the sum of \$8,000 was paid to the obligors, and their contract calls for interest on that sum. Their agreement with the association was to borrow \$8,000 and to pay therefor a premium of \$1,000. By force of the statute, the agreement to pay a premium was made legal. *Association v. Marsh*, 29 N. J. Law, 225; *Association v. Brown*, 29 N. J. Eq. 121. If, in exact performance of its agreement, the association had paid \$8,000 to the obligors, and had received therefor the present bond, no question could have been raised as to the propriety of the stipulation for interest on the \$8,000; but the obligors would, besides, have owed the association the premium of \$1,000, and this debt they must at once have discharged by paying that sum to the association. Such a payment would not have affected the obligations of their bond, and would have left only \$7,000 in their hands. The payment by the association of \$7,000 cash, and its release of the borrowers from the duty of paying the premium, were an equivalent for the exact performance of their mutual obligations; and the validity of the stipulation in the bond for payment of interest on the \$8,000 is not impaired by such a change in the mere form of the transaction. *Association v. Conover*, 14 N. J. Eq. 219; on appeal, 17 N. J. Eq. 497, 504. Counsel for the defendant refers us to cases in other jurisdictions where it has been held that what is described as interest upon the premium cannot be collected. But we think it clear that, when the statute gives the parties a right to agree upon a premium for a loan

without restriction, they have a right to agree that the premium shall consist of a sum payable presently out of the amount loaned, or of a sum payable in the future, with interest meanwhile, or without interest, and that it is for the courts simply to give effect to their agreement. In the case now before us, the contemporaneous acts of the parties prove that the premium agreed upon was the difference between \$7,000 advanced at once by the association, and the sums due from the obligors under their bond. That premium can be secured to the association only by enforcing the bond according to its terms. This objection cannot prevail.

The next objection is to the allowance of fines as a part of the mortgage debt. It is not necessary for us to consider whether the association can lawfully impose fines upon its members for nonpayment of dues or interest. Assuming that it may, we are to decide whether such fines constitute part of the debt secured by the mortgage, and that must be determined by the agreement of the parties. On recurring to the bond, it will be seen that it provides for the payment of only dues and interest, or, in default thereof, of principal and interest. Similarly, the assignment of stock was made "as collateral security for the payment of the debt mentioned in the bond," and required the proceeds of sale to be applied to the "payment of said loan;" and, although this assignment made the nonpayment of fines one of the grounds for selling the stock, it pledged the stock only for the purpose above stated. It is plain that neither of these instruments provides for the payment of fines, in express terms. But it is claimed that such a provision is implied in that clause of the bond which refers to the constitution and by-laws of the association as being assented to by the obligors, and made part of the bond. A like clause appears in the mortgage. If the constitution and by-laws declared that fines should be collected out of the proceeds of sale of property pledged to secure a loan made to the member in default, then, perhaps, this clause would justify the decree now before us. But they do not. The first section, under the title "Fines," merely provides that shareholders shall pay fines for defaults. The second section, under the title "Transfer," declares that no share shall be transferred until the transferee shall have assumed all the obligations of the original shareholder. If this includes fines previously imposed, it shows that they are not to be paid out of the proceeds of sale of stock, but are to remain as merely personal debts of the shareholder. There can be found in the constitution and by-laws nothing evincing an intention to make fines a lien either on stock or on property mortgaged for loans. This reference in the bond and mortgage to the constitution and by-laws, when read with its context, can

be fairly interpreted only as applying to the mode in which the principal of the bond is to be satisfied by the payment of dues. Such is its apparent meaning, and it cannot be extended further, by construction, without holding that it embraces every possible duty of the obligors as members of the association. So broad a construction is unwarranted. We think there is nothing in the contract under which the payment of fines can be enforced, in the present suit. In this respect the case resembles *Association v. Stephens*, 28 N. J. Eq. 351, 354. The decree below should be modified by eliminating from it the amount allowed for fines.

(52 N. J. E. 58)

NATIONAL DOCKS & N. J. JUNCTION
CONNECTING RY. CO. v. PENNSYLVANIA R. CO. et al.

(Court of Chancery of New Jersey. Dec. 22, 1893.)

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—SEPARABLE CONTROVERSY—PLEADINGS.

1. On an application to remove a suit from a state court to the circuit court of the United States, the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the defendant claiming the right to remove can remove the suit as a matter of right.

2. The decision of a court of general jurisdiction, acting within the scope of its power, has inherent in it such conclusive force that it cannot be challenged collaterally; and such decision also conclusively binds all parties embraced in it, unless on objection made to such court itself, or in a course of direct appellate procedure.

3. To justify the removal of a suit from a state court to the circuit court of the United States on the ground of a separate controversy between citizens of different states, there must be a controversy which is wholly between the plaintiff and the defendant seeking to remove, and which is capable of being finally determined between them, and complete relief afforded, as to the separate cause of action, without the presence of others originally made parties to the suit.

4. On an application to remove, the allegations of the complainant's bill must be considered as confessed.

5. In deciding whether or not a separable controversy exists between the plaintiff and the defendant claiming the right to remove, the cause of action alleged in the plaintiff's pleading must be accepted as the only criterion of the decision; and if it is there alleged that the cause of action is joint, and if it appears that some of the defendants are citizens of the same state with the plaintiff, it must be held that the suit is not removable.

(Syllabus by the Court.)

Bill by the National Docks & New Jersey Junction Connecting Railway Company against the Pennsylvania Railroad Company and the United New Jersey Railroad & Canal Company. Heard on application by de-

defendants to remove the action to the United States circuit court. Application denied.

James B. Vredenburg and Joseph D. Bedle, for Pennsylvania Railroad Company. Charles L. Corbin and John R. Emery, for complainant.

VAN FLEET, V. C. The parties to this suit, both complainant and defendant, are railroad corporations. The complainant was organized under the general railroad law of this state, and is a citizen of this state. The Pennsylvania Railroad Company was created a corporation by the legislature of Pennsylvania, and is a citizen of that state; and the United New Jersey Railroad & Canal Company was created a corporation by the legislature of this state, and is a citizen of this state. Several years ago the United New Jersey Railroad & Canal Company leased its railroads and other property to the Pennsylvania Railroad Company for 999 years, subject to the payment of an annual rent of nearly \$2,000,000, with a right of re-entry in case the lessee made default in the payment of the rent reserved for 90 days, or failed to perform any other covenant of the lease. Recently, the complainant has acquired a right, against both defendants, to construct its railroad under and across the railroad of the defendants. For such right, it is alleged that just compensation has been made in a manner authorized by law. After just compensation had been made, the complainant attempted to construct the crossing, which it had acquired a right to construct, and thereupon both defendants, as it is alleged, by certain acts and omissions, prevented the complainant from constructing the crossing. This suit was then brought to obtain an injunction prohibiting the defendants from further preventing the construction of the crossing, and also, if necessary, for the appointment of a manager to regulate the use of the easement which is held by the parties in common. The Pennsylvania Railroad Company now claims the right to remove this suit to the circuit court of the United States on two grounds: First, because its determination involves the decision of a question arising under the constitution of the United States; and, second, because the suit embraces a controversy which is wholly between it and the complainant, and which can be fully determined, as between them, without the presence of the United New Jersey Railroad & Canal Company. To effect such removal, a petition and bond have been presented. The complainant denies, however, that the suit is removable, and insists that it has the right to have the suit proceed here precisely as though no effort to remove it had been made. The complainant has a right to have the question thus raised decided by

this court, for it is settled, by repeated decisions of the supreme court of the United States, that the state court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the defendant asking for removal can remove the suit as a matter of right. Removal Cases, 100 U. S. 457, 474; *Crehore v. Railway Co.*, 131 U. S. 240, 244, 9 Sup. Ct. 692; *Pennsylvania Co. v. Bender*, 148 U. S. 255, 258, 13 Sup. Ct. 591. The decision of this question, then, is a duty which this court cannot escape.

The way it is claimed that a question under the federal constitution arises between these parties is this: The complainant instituted proceedings to condemn a right for its railroad to cross that of the defendants. Commissioners were appointed, who made an award. Both parties appealed,—the complainant appealed, and both defendants also appealed. Pending the appeals the circuit court of the county of Hudson, in which the appeals were triable, on the application of the complainant, and against the protest of both defendants, ordered the plan of crossing to be amended, and on the trial of the appeals directed that the amended plan should be adopted as the basis on which compensation should be awarded. This action of the Hudson circuit court, it is contended, was not only without warrant of law, but constituted a violation of that provision of the federal constitution which ordains: "Nor shall any state deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Without stopping to discuss whether, if it were conceded that the decisions of the Hudson circuit court on the points in dispute were erroneous, such errors could, under any circumstances, be held to constitute a denial of the constitutional rights of the defendants, within the meaning of the provision above quoted, it is enough, for the purposes of this application, to say that, if this suit were removed, nothing can be more certain than that the circuit court of the United States could not, in this suit, review or reverse the action of the Hudson circuit court in the respects indicated, nor in any other, nor could it alter or modify, to the slightest extent, the judgment pronounced by that court. While the judgment recovered in the Hudson circuit court fixed finally and conclusively the sum which must be regarded as just compensation, so far as was necessary to give the complainant the right, on the payment of that sum, to appropriate the property or right condemned, this suit is in no sense a continuation of that suit, but is, in both its substance and form, a new, distinct, and independent action. This suit rests on principles, and was brought to obtain relief, which a court of law can neither administer nor grant. The judgment pro-

nounced by the Hudson circuit court is, as between these parties, a final and conclusive determination of all matters which were put in issue in the suit or proceeding in which it was pronounced, and so it must stand, and be treated and accepted everywhere, until it is set aside by the court which pronounced it, or is changed or reversed by a direct appellate proceeding. That such is the effect which the circuit court of the United States, and all other tribunals not possessing appellate jurisdiction, must give to this judgment, is a proposition that is not open to debate. It is recognized as a cardinal rule in all enlightened systems of jurisprudence. In the language of Mr. Justice Miller in *Harvey v. Tyler*, 2 Wall. 328, 342: "Whenever it appears that a court possessing judicial powers has rightfully obtained jurisdiction of a cause, all its subsequent proceedings are valid, however erroneous they may be, until they are reversed on error, or set aside by some direct proceeding for that purpose." And Chief Justice Beasley, in *McCahill v. Assurance Society*, 28 N. J. Eq. 531, 538, stated the same principle in these words: "The decision of a court of general jurisdiction, acting within the scope of its powers, has inherent in it such conclusive force that it cannot be challenged collaterally, and that such decision definitely binds all parties embraced in it, unless on objection made to such court itself, or in a direct course of appellate procedure." The same principle was laid down by Mr. Justice Grier in *Peck v. Jenness*, 7 How. 617, 624, and by Mr. Justice Davis in *Randall v. Howard*, 2 Black, 585, 589. A multitude of other decisions to the same effect might be cited. The circuit court of the United States for this district has already decided, in a suit between the Pennsylvania Railroad Company and the complainant, that it is not within its province, sitting as a court of equity, to act as a court of review, as respects alleged errors of a court of law, even if such errors were committed by the court of last resort of this state in deciding a federal question, for, in such a juncture of affairs, the only tribunal which has power to review the decision of the state court on such a question is the supreme court of the United States. *Pennsylvania R. Co. v. National Docks, etc., Ry. Co.*, 51 Fed. 858, 859. It is thus made plain, as I think, that the question the Pennsylvania Railroad claims has arisen between it and the complainant under the constitution is not involved in this suit, but is entirely outside of it, and for that reason cannot be agitated in this suit, either in this court or in the circuit court of the United States. If such a question has arisen at all between these parties, it arose on the trial of the appeals before the Hudson circuit court, and was there decided. If further litigation respecting it is desired, it can only be had,

according to the established principle, by the removal of the judgment embracing it, by a direct proceeding, to some tribunal having power to review the decisions of that court. Such power neither exists in this court, nor in the circuit court of the United States. By an act of congress approved August 13, 1888, amending the prior act of March 3, 1887, (1 Supp. Rev. St. p. 611,) the circuit courts of the United States are given original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds a specified value. The act also provides that when a suit shall have been commenced in any state court, of which the circuit courts of the United States are given original jurisdiction, the same may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being nonresidents of the state in which the suit was commenced. And then follows this provision: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants, actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." This provision constitutes the second ground on which the right of removal is based. It formed part of the act of March 3, 1875. The second clause of the second section of that act was expressed in precisely the same words. 18 Stat. pt. 3, p. 470. Their meaning has been settled by repeated decisions of the supreme court of the United States.

The claim of the Pennsylvania Railroad Company is that there is in this suit a separate and distinct controversy or cause of action between it and the complainant, which is capable of being finally determined as between them, and complete relief given, without the presence of the other defendant; in other words, that this suit is founded on a cause of action in which the United New Jersey Railroad & Canal Company has no interest whatever, but which is so entirely and exclusively between the Pennsylvania Railroad Company and the complainant that it may be properly and safely heard and determined, and full and complete justice done to every right and interest involved in the controversy, with them alone as the parties litigant before the court, and without the presence of any other person. To authorize the removal of this suit, this claim must be found to be true in all its essential parts, for the rule is well established, as was said by Chief Justice Waite in *Fraser v. Jennison*, 106 U. S. 191, 194, 1 Sup. Ct. 171, and repeated in *Ayres v. Wiswall*, 112 U. S. 187,

192, 5 Sup. Ct. 90, and also in *Railroad Co. v. Ide*, 114 U. S. 52, 55, 5 Sup. Ct. 735, that the provision above quoted only authorizes the removal of "suits where there exists a separate and distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of the other parties to the suit, as it has been begun." The same rule was laid down by Mr. Justice Gray in *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726, in this wise: "To justify a removal on the ground of a separate controversy between citizens of different states, there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them;' and, by the settled construction of this clause, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit." The supreme court of the United States has also repeatedly decided, as Mr. Justice Bradley declared in *Little v. Giles*, 118 U. S. 596, 600, 7 Sup. Ct. 32, "that a suit brought against several defendants, some of whom are citizens of the same state with the plaintiff, charging them all as joint contractors or joint trespassers, cannot be removed into the United States court by those who are citizens of another state, although they allege in their petition for removal that they are not jointly interested or liable with the other defendants, and that their controversy with the plaintiff is a separate one." The same rule must necessarily be applied to all wrongdoers who act in concert, whether they are called "joint trespassers," "tortfeasors," "disseisors," or by any other name. Where the wrong is joint, the remedy, to be complete and effectual, must be joint. These adjudications define with precision what controversies or causes of action are sufficiently distinct and separate to be subject to be removed from a local court to a federal court in cases where the defendant applying for removal is a citizen of a different state from that in which the plaintiff has his citizenship, although there may be other defendants to the suit who are citizens of the same state with the plaintiff. But how is the separable character of the controversy to be determined? To what source must the court go to ascertain whether or not the wrong or cause of action in respect to which the plaintiff seeks relief

or redress is so entirely and exclusively between the plaintiff and the defendant claiming the right to remove that it is capable of being finally determined, and full and complete justice done, on a trial between them alone, and without the presence of the other parties? There is no source to which the court can go to ascertain the wrong or cause of action which the plaintiff means to make the foundation of his suit, but his pleading, and it is now settled that on such applications as this the allegations of the complainant's bill must be considered as confessed. *Railroad Co. v. Grayson*, 119 U. S. 240, 244, 7 Sup. Ct. 190. This is the principle which controls the judgment of the supreme court of the United States in disposing of writs of error from orders remanding or refusing to remand, which is the final stage of such litigations; and it would therefore seem, necessarily, to follow that it must likewise control at the initial point of such litigations, as well as in all succeeding stages. And it is also firmly settled that, in deciding whether or not a separable controversy exists between the plaintiff and the defendant seeking to remove, the cause of action alleged in the plaintiff's pleading must be accepted as the only criterion of decision, and that if it is there alleged that the wrong was committed by all the defendants jointly, or that the cause of action is joint, the suit is not removable. The utterances of the supreme court of the United States on this point are clear and decisive. Mr. Justice Bradley, in *Little v. Giles*, 118 U. S. 596, 601, 7 Sup. Ct. 32, said: "A defendant has no right to say that an action shall be several, which a plaintiff elects to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to a final determination in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings." The rule, as thus stated, was repeated by Mr. Justice Gray in *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726. Mr. Justice Bradley also said, in substance, in *Little v. Giles*, 118 U. S. 602, 12 Sup. Ct. 726, that, where the cause of action is several as well as joint, the plaintiff may sue each defendant separately, or all jointly. It is for the plaintiff to elect which course to pursue, and if he elects to proceed against all jointly the defendants will not be permitted to object. And he then adds: "The fact that a judgment in the action may be rendered against a part of the defendants does not divide a joint action in tort into separate parts, any more than it does a joint action on contract." That this suit is the proper subject of equity cognizance is free from all doubt. The law is settled that one railroad corporation may acquire the right, by condemnation, to con-

struct a crossing for its road over that of another railroad corporation. On the acquisition of such right, the land, at the point of crossing, becomes subject to an easement in favor of both corporations. And the court of errors and appeals, speaking by Chancellor McGill, has declared that "if, in the use of this common easement, whether it be acquired under proceedings to condemn a crossing in a specified manner, or under proceedings to condemn a crossing generally, conflict should at any time arise between the companies, the interposition of equity may be invoked to secure to each the enjoyment of its privilege in a lawful manner." *National Docks, etc., R. Co. v. United Companies*, 53 N. J. Law, 217, 224, 21 Atl. 570. An essential part of the right which the complainant has acquired is the right to construct a crossing. Its road cannot cross that of the defendants until a crossing has been built. Hence, the work of construction constitutes a lawful and necessary use of the easement which it has acquired. Now, on looking into the complainant's bill, it appears that every wrongful act, which the complainant states as the foundation of its right to relief, and against which it asks for judicial protection, is charged to have been done by the defendants jointly, and the same is true of every wrongful omission alleged in the bill. All the wrongful acts and omissions set forth are alleged to have been done and omitted by the defendants, acting in concert, to effect a common purpose. There can be no doubt, therefore, that, if the complainant shall on the final hearing establish the case made by its bill, it will demonstrate that it is entitled to the same measure of relief against both defendants. But, in addition, the right which the complainant has acquired was acquired against both defendants. The primary object of this suit is to enforce that right against both defendants. The construction of the crossing, according to the plan on which compensation was awarded, will work a thorough and permanent change in a part of the demised premises. It will substitute an arched tunnel, constructed of masonry, for solid earth. The change may, as is manifest, very seriously affect the rights of the owner of the reversion, and cannot, therefore, according to well-established principles, be made by judicial process, except such owner is a party to the suit, and has an opportunity to be heard. And, even if such owner has done nothing in denial of the complainant's right, I regard as entirely clear that, in any suit or proceeding to enforce the complainant's right, such owner has an indisputable right to be present in court, as a party, in order to see that the process which issues directs that the crossing shall be constructed in substantial compliance with the plan on which compensation was awarded. Unless such owner is a party, any process

the court may issue, or any judgment it may pronounce, will be without force, as against him. Besides, the lease under which the Pennsylvania Railroad Company holds the demised premises is subject to both surrender and forfeiture. It may be that it is highly improbable that either event will ever occur, but they are both possible. There are other things besides insolvency which may lead to a forfeiture. The lessee may refuse to abide by the covenants of the lease for any reason which appears to be sufficient to its managers, or from mere caprice. The presence of a right of re-entry in the lease renders the lessor, in my judgment, in view of the character of the rights involved, and the nature of the relief asked, a necessary party to this suit. The suit, in my judgment, would have been fatally defective, in point of parties, if the lessor had been omitted. My conclusion is that the suit is not removable, and this court is therefore under no duty to surrender its jurisdiction.

(52 N. J. E. 178)

WHITE et al. v. THOMAS INFLATABLE TIRE CO. et al.

(Court of Chancery of New Jersey. Dec. 27, 1893.)

CORPORATIONS—VALIDITY OF CONTRACTS—VOTING TRUSTS.

The holder of certain patents agreed with seven capitalists to form a stock company, whose capital should be divided into 100,000 shares, of which 55,000 should be issued to him in payment for his patents to be assigned to the company, and 28,000 should be issued to the seven capitalists for cash to be advanced and used in exploiting the patents. The remaining 17,000 shares should be held in the treasury for sale. They further agreed that all of the 83,000 shares so to be issued, except enough to qualify directors, should be transferred to a trustee, to hold for 10 years, who should issue trust certificates to the holders, which should be assignable and transferable, and that the trustee should vote at elections of directors in such manner that the patentee should nominate and elect a minority of the directors, and the holders of the remainder of the stock should nominate and elect the majority. This being done, complainants purchased of the company the 17,000 shares of treasury stock, and certificates were duly issued to them therefor. They also purchased from the patentee trust certificates for over 50,000 shares, surrendered the same, and had new trust certificates issued to them. *Held*, that the trust agreement was void as against the complainants.

(Syllabus by the Court.)

Bill by Frank N. White and George R. Bidwell against the Thomas Inflatable Tire Company, H. W. Shelby, Amos W. Thomas, and John C. Sullivan for an injunction and other relief. Heard on pleadings and proofs in open court. Decree for complainants.

The other facts fully appear in the following statement by PITNEY, V. C.:

At the hearing the following facts appeared: At and prior to October 3, 1890, the defendant Amos W. Thomas was the owner of divers letters patent for the manufacture of inflatable tires for covering the wheels of road vehicles, and on that day entered into an agreement with seven residents of Philadelphia, two of whom were the defendants Shelbley and Sullivan, by which Thomas and his wife, who was interested with him in the patents, assigned and transferred them to Horn, one of the seven contracting parties, as trustee, to be held by him in trust for the benefit of all the parties, and subject to the directions of the other seven, including Thomas. The agreement provided that the parties should proceed to exploit the patents, and attempt to make them profitable, and that all profits made should be divided among them in the following proportions; that is, 55 eighty-third parts to Thomas, and 28 eighty-third parts to the seven subscribers. It was further provided that, if a majority of the subscribers should determine, a corporation should be formed for the purpose of carrying out the trust and the objects of the agreement, and the trustee should convey the patents to the corporation, and in such case Thomas should receive 55 per cent. of the stock of the corporation, and the other seven subscribers should receive 28 per cent. of the stock, such issue of stock to be in payment to Thomas for his stock, and to the other seven subscribers for the amount of money which they by the agreement advanced, or were to advance, and the remaining 17 per cent. of the stock of the company should be retained in the treasury to be sold as and when determined by the board of directors. It was further provided that the directors and officers of the corporation for the first year should consist of all the parties to the agreement, and that J. C. Sullivan should be president; Ellwood Horn, secretary and treasurer; and Amos W. Thomas, vice president; "and, for the mutual benefit of all concerned, all the parties hereto agree to put their stock into a voting trust for a period of ten years from the formation of said corporation. The trustee of said voting trust shall be hereafter chosen by mutual consent, and it shall be his duty to vote at all elections for directors of said company in such manner and for such persons as that a minority of one in said board of directors shall consist of such persons as said Thomas shall wish to be directors, and a majority of one in said board of directors shall consist of such persons as the remaining stockholders shall wish to be directors." On the 11th of October the seven subscribers to this agreement, not including Thomas, organized themselves into a corporation of the state of New Jersey to be known and designated as the Thomas Inflatable Tire Company, with a capital stock of \$500,000, divided into 100,000

shares of the par value of \$5 each, which, by the terms of the certificate, were divided among them equally. The object of the corporation was stated to be: "To make, purchase, and sell manufactured articles of any and all descriptions, especially bicycles and other vehicles; to acquire and dispose of rights to use the same; to buy and sell patents and patent rights; and to buy, sell, and hold the stocks or bonds of any corporations organized under the laws of any of the United States." This certificate was duly filed with the clerk of Camden county on the 13th of October, 1890, and on the same day in the secretary of state's office. On the 22d of October, 1890, the same parties entered into a further agreement by which they undertook to transfer all the capital stock of the Thomas Inflatable Tire Company owned by each of them, "except such as may be necessary to qualify the board of directors, to H. W. Shelbley, of Philadelphia, Pennsylvania, as trustee, in trust to pay to each of us the income, profits, or dividends accruing to the shares so transferred by us, to hold said shares in his own name as trustee." This transfer was made, and Shelbley issued trust certificates to each stockholder for the amount of his holding in pursuance of the last clause of the agreement of October 22, 1890. These certificates were negotiable and transferable in the same manner as the stock which they represented. Under this agreement, 83,000 shares of the stock were issued, and all except enough to qualify the directors were transferred to Shelbley as trustee. Of the shares issued, 55,000 were issued to Thomas, and 4,000 each to the other seven stockholders. Seventeen thousand of the 100,000 shares remained unissued, and were called "treasury stock." In the month of June, 1892, the complainants applied to the company to buy the 17,000 shares of unissued stock; and at a meeting of the directors, who were the parties to the voting trust agreement, it was resolved to issue the same for a price then agreed upon. The same were issued to complainant Bidwell, except five shares issued to complainant White. In July, 1892, Bidwell purchased of Thomas 53,000 of the trust certificate shares issued to him by Shelbley. A portion of the balance of those issued to Thomas, he had transferred to other parties; so that he had denuded himself of almost all the trust certificates, but retained a few shares of stock standing in his name to qualify him to act as director. The agreement giving the holders of the 28,000 shares the control of the company was not incorporated in any by-law, nor does it appear upon the face of the certificates of stock or of the trust certificates of stock issued. The negotiation for the purchase of the 17,000 shares of stock from the company was carried on by the complainant

White, and there was evidence tending to show that before he made the purchase he had notice of the substance of the trust-voting agreement, but this was denied by him. The time fixed for the annual election of directors was early in October, 1892, and on the 30th of September, 1892, this bill was filed, setting out the agreements by which the stock was issued in trust to Shelby; alleging that the same were void, as against public policy, and were revoked by the sale by Thomas of his trust certificates, and the issuing of the 17,000 shares of treasury stock to the complainants; and praying that the defendant Shelby might be restrained from voting at an election of directors on any shares of stock held by him according to the directions of the defendant Thomas, and that Thomas be restrained from nominating directors to be voted for by Shelby, and that the trust contained in the agreements may be declared to be terminated, the agreements canceled and set aside, and Shelby directed to transfer to the complainants the shares of stock held by him, represented by the trust certificates, and, in the alternate, that complainants, instead of Thomas, may be held entitled to nominate a minority of the directors to be voted for by Shelby. On the filing of this bill an injunction was issued accordingly. The Thomas Inflatable Tire Company, Shelby, and Sullivan answered jointly, admitting the facts set up in the bill, and alleging that the contracts were valid, and should be enforced, and further setting up that the complainants desired to get control of the company for an improper and unjustifiable purpose. The defendant Thomas answered by himself, setting up the same defense, and, by a cross bill, setting up that the fifty-odd thousand shares of trust certificates were obtained from him by the complainants by fraud, and asking that the sale be set aside. The cause was brought to hearing on these pleadings. No proof was offered in behalf of this allegation of the cross bill, or of improper motive on the part of complainants. The cause was heard upon the question of the validity of the trust-voting contracts as against the complainants.

Gray & Grey and Mr. Freedley, for complainants. C. A. Bergen, for defendant Thomas Inflatable Tire Co. Howard Carrow, for defendant Thomas. E. O. Mitchener, for defendants Shelby and Sullivan.

PITNEY, V. C., (after stating the facts.) The complainants advance three propositions: First, that the original contract by which a minority of stock was given the perpetual right to elect a majority of the directors, and thus control the affairs of the company, was contrary to public policy, and for that reason void; second, that, conceding the contract to be valid and binding between the

original parties so long as only 83 per cent. of the stock was issued, it nevertheless became nugatory and void as against the holders of the 17 per cent. of new stock as soon as that was issued; third, that in any view of the case the holders of the majority of the fifty-odd thousand shares of trust certificates once issued to Thomas have the right to dictate to the trustee the names of the four directors which, by the agreements, were to be nominated by Thomas. The last proposition was not seriously disputed by counsel for the defendants, as, indeed, I think it could not be. The agreements provided for trust certificates to be issued by the trustee, and they were made transferable on the books of the company by the trustee, and a provision was made for the issuing of new trust certificates in place of any assigned and surrendered. Trust certificates were issued accordingly, and of these nearly all those issued to Thomas have come to complainants' hands, and, with such possession and ownership, the right to nominate the directors. This point was distinctly ruled, after full discussion and consideration, in the cases of *Bostwick v. Chapman* and *Starbuck v. Trust Co.*, known as the "Shepaug Voting-Trust Cases," reported in 60 Conn. 576. See pages 580, 587, 24 Atl. 34, at pages 39, 40. There, as here, a large majority of the stock of a corporation was standing in the name of a trustee in pursuance of an agreement entered into by the original owners of the stock to the effect that the trustee should vote upon it as directed by three certain persons named. Trust certificates were issued, as here, which were negotiable, and a majority of them came into the hands of the complainants. Upon a bill filed in equity by them, the court enjoined the trustee from voting, except as directed by the holders of the trust certificates, and also that the stock should be distributed by the trustee among the holders of the trust certificates. In the course of its opinion the court uses this language, in which I fully concur: "It is the policy of our law that an untrammelled power to vote shall be incident to the ownership of the stock, and a contract by which the real owner's power is hampered by a provision therein that he shall vote just as somebody else dictates is objectionable. I think it against the policy of our law for a stockholder to contract that his stock shall be voted just as some one who has no beneficial interest or title in or to the stock directs, saving to himself simply the title, the right to dividends, and perhaps the right to cast the vote directed, willing or unwilling, whether it be for his interest, for the interest of other stockholders, or for the interest of the corporation, or otherwise. This I conceive to be against the policy of the law, whether the power so to vote be for five years or for all time. It is the policy of our law that ownership of stock shall com-

trol the property and the management of the corporation; and this cannot be accomplished, and this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation. And this is not entirely for the protection of the stockholder himself, but to compel a compliance with the duty which each stockholder owes his fellow stockholder, to so use such power and means as the law and his ownership of stock give him, that the general interest of stockholders shall be protected, and the general welfare of the corporation sustained, and its business conducted by its agents, managers, and officers, so far as may be; upon prudent and honest business principles, and with just as little temptation to and opportunity for fraud and the seeking of individual gains at the sacrifice of the general welfare as is possible. This, I take it, is the duty that one stockholder in a corporation owes to his fellow stockholders, and he cannot be allowed to disburden himself of it in this way. He may shirk it, perhaps, by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty. To this extent, at least, a stockholder stands in a fiduciary relation to his fellow stockholders." To the same effect is *Griffith v. Jewett*, 15 Wkly. Cin. Law Bul. 419, decided by the superior court of Cincinnati. There, as here, the holders of a majority of trust certificates, which, by the contract, were to be voted according to the directions of certain individuals, demanded of the trustee to vote as they should direct, and the court uses this language: "If such demand be not complied with, the party holding the entire beneficial interest in the stock cannot cast the vote thereof, while it may be voted upon by one having no interest in it or in the company; and so it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably vested in others. It seems clear that such a state of affairs would be intolerable, and is not contemplated by the law, the universal policy of which is that the control of stock companies shall be and remain with the owners of the stock. The right to vote is an incident of the ownership of stock, and cannot exist apart from it. The owners of these trust certificates are, in our opinion, the equitable owners of the shares of stock which they represent; and, being such, the incidental right to vote upon the stock necessarily pertains to them. They may permit the trustees, as holders of the legal title, to vote in their stead, if they choose, but when they elect to exercise the

power themselves the law will not permit the trustees to refuse it to them." The general principle is thus stated by Mr. Beach in his treatise on Corporations, (section 306:) "On general principles, the right to vote on stock cannot be separated from the ownership, in such sense that the elective franchise shall be in one man, and the entire beneficial interest in another, nor to any extent, unless the circumstances take the case out of the general rule. It matters not that the end is beneficial and the motive good, because it is not always possible to ascertain objects and motives, and, if such a severance were permissible, it might be abused." And see what was said in *Cone v. Russell*, 48 N. J. Eq. 208, at pages 212, 214, 21 Atl. 847. In the case in hand the beneficial ownership is in the holders of the trust certificates, and the trustee must vote as they direct.

As to the two other positions above stated:

The weakness of the first position lies in the fact that the voting trust was a part of the original contract between the original parties, and was made for a proper purpose, and for a good consideration. The consideration for it was the advancement of the cash by the seven promoters, and the substance of the agreement was that, while the seven should have the control of the management of the enterprise, the owner of the patent should have the majority of the profits, in the proportion of 55 to 28. So long as each retained his original interest, and no other rights intervened, I see no difficulty in holding such contract valid, and its enforcement proper and practicable. I see nothing in it contrary to public policy. The difficulty and weakness of defendants' position in regard to it arises out of the machinery adopted by the parties to carry through their scheme. They organized a stock company, with all its inherent characteristics, some of which have been stated above; and, although they put the stock issued to each in the name of the trustee to hold in trust for them, they still issued trust certificates to each, and made them assignable and transferable, and an inseparable incident of those certificates is that the trustee must vote as the cestui que trust, who is the real owner, shall direct. Now, to see how the scheme will work out in practice, let us suppose the seven promoters, or any of them, shall transfer their trust certificates, or any of them, to strangers, or shall disagree among themselves. How shall the votes be cast, and for what candidates? Whose direction shall the trustee take? And this suggests a still further and greater difficulty, and it is this: How shall the trustee distinguish between the different trust certificates after they have been once surrendered and new certificates issued? How can he know what certificates shall represent the parties of the one part to the contract in question, and which the

party of the other part? How shall he choose out of the different holders of trust certificates the proper persons to nominate the majority, and who to nominate the minority of the directors? For it seems clear enough that new certificates, when issued, are freed, in the hands of their holders, from any burden in equity which attached to them in the hands of the former owner. If the answer to these questions results in the destruction of the ingenious scheme of these gentlemen, such result will be owing to their desire to adopt the machinery of a stock company, and thereby avoid personal liability for their contracts. They must take the burdens with the benefits of such organization.

But I do not find it necessary to answer these questions, or to determine whether the transfer of certificates in this case has gone so far as of itself to end the contest, since I have come to the conclusion that the second position taken by the complainants is sound. The contracts in question were not made a part of the certificate of organization, or incorporated into the by-laws. Nor, in my judgment, did they or could they be fastened upon or in any wise affect the 17,000 shares of stock issued directly to the complainants: and I think this is so whether the complainants had or had not notice of these contracts, since they did not enter into or form part of the contract between the company and the complainants as holders of the new stock. As such holders, they were entitled to have the other shares of stock in the company stand upon an equal footing, and to have the affairs of the company managed by a board of directors elected according to law, by a majority of all the stockholders. Unless, as the holders of the new issue of stock, they had such right, they would be deprived of a valuable right belonging to their stock, viz. the right to combine with other stockholders to elect a majority of the directors. In fact, they would be deprived of all voice in the management of the company, and of the right which each stockholder has to the benefit of the fundamental and salutary rule that the best interests of the minority are found in a rule by the majority. In my judgment the issuing of this stock was a waiver and abandonment by the directors, who united in issuing it, of their rights under the contract in question. The futility of the notice of these contracts alleged to have been given to complainants before they subscribed for the 17,000 shares of stock will appear when we consider the effect of a transfer of them to new parties. Such new parties would not be charged with such notice, and their rights would be undisputed. Should relief be denied the complainants in the present action, it would be but a postponement of the time when this voting trust must end. I will advise a decree for complainants.

LEHIGH ZINC & IRON CO. v. NEW JERSEY ZINC & IRON CO.

(Court of Errors and Appeals of New Jersey.
Nov. 3, 1893.)

Concurring opinions of BEASLEY, C. J., and DEPUE, J.

For majority opinion, see 26 Atl. 920.

BEASLEY, C. J., (concurring.) In my opinion, upon the plaintiff's own showing, it should have been nonsuited. As I read the evidence, the defendant was, and for many years had been, in the undisturbed and unquestioned possession, claiming, bona fide, as owner of the mine from which the ores in dispute were taken, and the title to the ores depended entirely on the title to the mine. Under such a condition of things, I think an action of trover will not lie. On this ground I shall vote to reverse this judgment, expressing no opinion on any other of the questions raised.

(Dec. 7, 1893.)

DEPUE, J., (concurring.) I concur in the judgment of reversal, but not for the reasons assigned in the opinion of Mr. Justice DIXON. Both parties claim under Samuel Fowler. Neither claims title to the surface of the soil under which the ores are found. Fowler, by a deed dated March 10, 1848, conveyed to the Sussex Zinc & Copper Mining Company. This conveyance is the source of the plaintiff's title. Subsequently, Fowler, by a deed dated March 13, 1850, conveyed to James L. Curtis and Daniel Curtis, trustees, under whom the defendants make title. The description in Fowler's deed to the Sussex Company, of March 10, 1848, is as follows: "All the zinc, copper, lead, silver, and gold ores, and also all other metals or ores containing metals, except the metal or ore called 'franklinite' and iron ores, when it exists separate from the zinc, existing, found, or to be found on either tracts of land herein described, [one of these tracts being the tract known as "Mine Hill,"] together with full liberty to open, dig, get, and take up, work, mine, and dig all sorts of mines and mineral veins or vein of zinc, copper, lead, silver, gold, and all other ores and metals, excepting the franklinite and iron ores, as aforesaid. To have and to hold in fee simple, or in absolute ownership, all and every zinc, copper, lead, silver, gold, and other metals and ores, excepting the ore called 'franklinite,' where it exists in a separate and distinct state from the zinc, which shall be found or gotten from the premises described." The description in Fowler's deed to James L. and Daniel Curtis, of March 13, 1850, is as follows: "All the reserved iron ore called 'franklinite,' and all the other reserved ores and metals not granted or conveyed to the Sussex Company by deed executed by them, the said parties of the first part, on the 10th day of March, 1848." There

is no ambiguity or uncertainty in the description contained in the deed from Fowler to the Sussex Company that would justify resort to extraneous evidence. It was so held by Chancellor Green and by Mr. Justice Vredenburg in this court. *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 329; *New Jersey Zinc Co. v. Boston Franklinite Co.*, 15 N. J. Eq. 444-447. The extrinsic evidence that was received in that case was received for the purpose of aiding in the construction of the deed of March, 1852, from the Sussex Company to the New Jersey Company. 13 N. J. Eq. 341-344, 15 N. J. Eq. 438, 439. The parties to the deed in 1848 contemplated the existence of franklinite in this vein in combination with zinc, and the grantor, in framing the reservation, took the risk of that ore being "found or gotten" in a separate and distinct state from the zinc. By the deed of March 10, 1848, from Fowler to the Sussex Company, "all the metals, or ores containing metals," were conveyed to the Sussex Company, except the ore called "franklinite," where it exists in a separate and distinct state from the zinc. If in this vein the franklinite is always found in combination with the zinc, there is nothing there to which the exception can apply. Neither contemporaneous nor extrinsic evidence can be permitted to control the language of a written instrument expressed in plain and unambiguous terms. As applied to this deed, the evidence offered by the defendants was properly excluded.

Second. The plaintiff's title rests upon the deed of March, 1852, made by the Sussex Company to the New Jersey Company. The defendants do not claim title under the Sussex Company. Their contention is that, if the ore in question does not belong to them in virtue of the Curtis title, it is the property of the Sussex Company, and hence they say that they are not answerable to the plaintiff for taking it. By a decree of this court made in November, 1862, it was adjudged that the New Jersey Zinc Company acquired, by their deed of March 8, 1852, all the title the Sussex Company acquired from Fowler by his deed of March 10, 1848. *New Jersey Zinc Co. v. Boston Franklinite Co.*, 15 N. J. Eq. 418. If the record of that suit, with the decree therein, had been in evidence, it would have operated to vest in the plaintiff all the title that passed from Fowler under his deed of March 10, 1848. The plaintiff had the option to close all controversy on this part of the case by putting the record in evidence, or to rely upon the deed from the Sussex Company of March, 1852, as a conveyance, leaving the construction and legal effect of that deed to be determined at the trial. The latter course was pursued. The description in the deed from the Sussex Company to the New Jersey Company is as follows: "All the zinc and other ores, except franklinite and iron ores," found, or to be found, upon the described

premises. There is a marked difference between the language of the description of the thing granted, as contained in the Fowler deed to the Sussex Company, and the description of the thing granted by the Sussex Company in the deed of March, 1852. Under the deed from Fowler, the Sussex Company took all the ores in the vein except the ore called "franklinite," where it existed in a separate and distinct state from the zinc. By their deed to the New Jersey Company, the Sussex Company conveyed specifically the zinc and other ores in the vein, reserving franklinite and iron ores. Chancellor Green, in his opinion in the case already referred to, used this language: "The distinction in the effect, as well as in the terms, of the two deeds, is too clear to admit of controversy. In the one, the exception extends only to the franklinite and iron ores when it exists separate from the zinc; in the other, all the franklinite and iron ores are excepted. By the one, all the franklinite and iron ores found in mechanical combination with the zinc pass to the grantee; in the other, they do not." 13 N. J. Eq. 330. Further on in his opinion, the learned chancellor (speaking of the deed of 1852) said: "By 'zinc ores' was meant those veins or lodes in which the ore of zinc was the predominating ore, and by 'franklinite' not the pure mineral of that name, which was never found except in small and detached specimens, but those veins or lodes in which franklinite predominated, and which was known and designated as 'franklinite ore.'" It was with reference to this deed that the chancellor said that "the instrument must be construed according to the mind and intent of the parties at the time it was executed. * * * The question is not what is the scientific import of the terms, but in what sense the parties to the contract understood and used them." 13 N. J. Eq. 344. See, also, pages 341, 342. Mr. Justice Vredenburg, in this court, while he affirmed that there was no possible ambiguity in the exception in the words of grant in the deed of 1848, after reading the exception as defined and emphasized in the habendum, (15 N. J. Eq. 444-447,) justified the admission of extrinsic evidence in the construction of the deed of 1852 on the ground of ambiguity in its description. *Id.* 438, 439, 445. If the record and decree in the former suit had been in evidence, by settled legal principles the decree would have been conclusive, whether it were right or wrong, and would have operated to transfer to the New Jersey Company whatever title the Sussex Company retained in the premises under the deed of 1852, leaving the rights of these parties to be determined upon the force and effect of the deed of 1848. But neither this court nor these defendants are bound by the findings of facts or the legal rules expressed by the court in its opinion, unless they be embodied in a decree or judgment; and

I desire to record my dissent from that canon of construction that seems to have been adopted in this court, that the words "estate" and "premises," in the usual clause following the description of the thing granted, "together with," etc., will enlarge the extent of the grant as expressed in the descriptive words of grant.

Third. I think trover was the proper form of action. The ore in question had been taken by the defendants from this vein. It had been loaded on cars, and put in the course of transportation to the defendants' works in Pennsylvania. I also think trover would be the proper form of action under all circumstances. Chancellor Green held that a deed for a mine with mining privileges created an estate in the land for which ejectment would lie, and which was subject to dower. But it will be observed that in that case it was admitted on the record, and found as a fact by the court, that the ore throughout the entire vein was uniform in kind. I apprehend embarrassment, if not serious difficulty, in testing the title of these parties in an action of ejectment under our practice and procedure. Neither party has, by force of their title deeds, title to the entire product of the mine. The defendants have title to the franklinite in this vein where it exists in a separate and distinct state from the zinc, wherever in the vein it may be found or gotten. The plaintiffs are entitled to all the other ores. By the ejectment act the plaintiff is required to describe the premises with such certainty as will distinctly apprise the defendant of their description and situation, so that from such description possession thereof may be delivered; and the judgment recovered is made conclusive as to the right of possession and the title. Revision, 326-332. The burden of proof is on the plaintiff. In cases, as in the present case, where the party is not entitled to the entire product eo nomine of the mine, it may be difficult to prove the character of the contents of the entire vein; and it may be that after judgment recovered, which by statute is made conclusive as to title and right of possession, further explorations may disclose ores within the vein which of right belong to the other party. The precedents are numerous of actions of trover by the owner of lands for the conversion of things severed from the realty, which in their natural state were part of the realty itself, as timber, ores, etc. Some of the cases of that aspect are cited in the opinion of Mr. Justice DIXON. Many of these decisions were made by the English courts long anterior to the separation of the colonies from the mother country, and were part of the common law of England by which the courts of this state profess to be governed. I see no reason for discarding the common-law doctrine at this time. As already intimated, I find cogent reasons for adhering to it in cases circumstanced like the present.

v.28A.no.2-6

No embarrassments can arise by reason of the form of action. If the defendants have acquired title to the entire mass of ore in the vein by adverse possession, title by adverse possession may be set up with the same facility as title by grant or by bill of sale.

(52 N. J. E. 68)

DROST v. HALL et al.

(Court of Chancery of New Jersey. Dec. 29, 1893.)

ASSIGNMENT OF DOWER—WHO LIABLE FOR DOWER—EQUITABLE JURISDICTION.

1. No one can make an assignment of dower but the tenant of the freehold.

2. A writ of dower will not lie against a person holding a mere chattel interest in the land, or having an estate of less duration than the life of the dowress.

3. An action of dower can only be maintained against the owner of the land or the tenant of the freehold, for no other person has power to make a valid assignment of dower.

4. While courts of equity possess concurrent jurisdiction with courts of law in suits for dower, they govern themselves in the decision of cases involving no equitable right by precisely the same principles that would govern a court of law in deciding a like case.

(Syllabus by the Court.)

Bill by Harriet A. Drost against John Hall and others to recover dower. Heard on demurrer to bill. Demurrer sustained.

James Parker, for complainant. John W. Berkman, for defendants.

VAN FLEET, V. C. This is a suit for dower. The defendants deny by demurrer that the case made by the bill entitles the complainant to any decree against them. The material averments of the bill are that the complainant and Henry G. Drost intermarried in 1849. In 1850 Henry became the owner in fee of a tract of land in Middlesex county. In 1851 he conveyed part of it to one Miles Oakley. The complainant joined in the execution of the deed, but, as she was then an infant, less than 17 years of age, her right in the land did not pass. Henry died in 1881, (it is not stated whether he died testate or intestate,) and then it is alleged that the defendants all have, or claim to have, some interest in portions of the land, and that they deny that the complainant is entitled to dower in the land, and refuse to assign dower to her. It will be observed that it is not alleged that the defendants have any estate in the land, nor even that they have possession of it, but merely that they have or claim to have some interest in portions of it, without defining such interest, whether it is that of an owner, incumbrancer, tenant for years, or however otherwise it arose or was created. The defendants contend that an averment in this form does not show that they have any estate in the land, or that it is within their power to assign dower. It is certain that if it is not shown that they have such an es-

tate in the land as invests them with power to assign dower, no action can be maintained against them for not making an assignment. The law has long been settled that no one can make an assignment of dower but the tenant of the freehold, (1 Co. Litt. tit. "Dower," c. 5, §§ 39, 35a; *Ellicott v. Mosier*, 7 N. Y. 201, 205,) and it is also settled that a writ of dower unde nihil habet will not lie against a person holding a mere chattel interest in the land, or having an estate of less duration than the life of the dowress, (3 Com. Dig. p. 503, [G] 2; *Hurd v. Grant*, 3 Wend. 340; *Galbraith v. Green*, 13 Serg. & R. 85, 94; *Seaton v. Jamison*, 7 Watts, 533, 537.) The reason on which this rule rests, as stated by Mr. Park in his treatise on the Law of Dower, is, in substance, this: An assignment of dower being an act involving the interests of the persons entitled to the inheritance, no one is competent to assign dower but the tenant of the freehold. As no tenant of an inferior nature is capable of binding the rights of the freeholder in a real action, and consequently, as a judgment obtained on writ of dower, brought against a person having merely a chattel interest, would be voidable by the freeholder, the consistency of the law requires that such person should not bind the freeholder by assigning dower without action. A person having only a chattel interest is not intrusted with the defense of the inheritance. *Park, Dower*, 256, 11 Law Lib. 121. The reason of the rule was also stated by Chief Justice Ruggles in *Ellicott v. Mosier*, supra. He said, as the object of an action of dower is to obtain or compel an assignment of dower by the heir or owner, it can only be maintained against the owner or tenant of the freehold, for no other person can assign dower. The writ of dower was abolished in New York in 1830 by statute, and an action of ejectment given in its stead. The courts, in construing this statute, have held that a widow, in attempting to recover her dower by ejectment, must bring her action against the actual occupant of the land. *Sherwood v. Vanderburgh*, 2 Hill, 303, 307. But it has also been held that a judgment in favor of the widow and against the occupant will not bind the owner unless he has been made a party to the suit, and had an opportunity to make a defense. *Ellicott v. Mosier*, supra. Dower, when founded on a legal seisin, is a pure legal right; and, while courts of equity possess concurrent jurisdiction with courts of law for its enforcement, yet in cases where no equitable right is involved they determine the right set up by the widow by precisely the same principles which would govern the decision of a court of law in a like case. And if her right to dower is denied on legal grounds, equity will defer the final determination of her claim until her legal right has been established by a judgment at law. *Association v. Brinley*, 34 N. J. Eq. 438, 439. The bill wholly fails to show that the defendants have such an

estate in the land in which dower is claimed as invests them with power to assign dower, or makes it their duty to do so. For this reason I think the demurrer must be sustained, with costs.

(56 N. J. L. 244)

STATE (FLAUCHER, Prosecutor) v. CITY OF CAMDEN.

(Supreme Court of New Jersey. Dec. 20, 1893.)

INTOXICATING LIQUORS—ILLEGAL SALES—LICENSES ISSUED UNDER VOID ACT—STARE DECISIS.

1. In a proceeding under the ordinances of the excise board of the city of Camden against a person for selling spirituous liquors without a license, the defendant cannot defend under a license granted by the board of license commissioners for Camden county, organized under the act of 1891, p. 221.

2. The members of such board were not de facto officers. The act creating the offices was unconstitutional, and therefore as if it had never been passed. Where there is no office, there can be no officer, either de jure or de facto.

3. A decision of the supreme court is to be considered the law of the state until reversed by the court of errors, and all judges and inferior courts are bound to so accept it.

(Syllabus by the Court.)

Phillip Flaucher, having been convicted of selling intoxicating liquors unlawfully, prosecutes certiorari. Affirmed.

The other facts fully appear in the following statement by REED, J.:

This writ brings up a conviction of the prosecutor by Police Justice Paul, of the city of Camden, upon a complaint that the prosecutor sold malt and spirituous liquors within the city of Camden without a license first obtained for that purpose. Upon the hearing, the prosecutor admitted the sale of the liquor, as charged. He offered in evidence a license certificate issued by the county board of license commissioners of Camden county, organized under "An act to create county boards of license commissioners, and to define their powers and duties," approved March 20, 1891. This certificate, issued April 9, 1890, contained a grant of a license to sell liquors. The license does not expire until June 30, 1894. The justice convicted the prosecutor of selling without a license.

Argued November term, 1893, before DEPUE, VAN SYCKEL, and REED, JJ.

Alfred Hugg, for prosecutor. J. W. Morgan, for respondent.

REED, J., (after stating the facts.) The important question presented by the record sent up is whether the certificate granted to the prosecutor by the county board of license commissioners of Camden county should have been adjudged a valid, existing license. If it was such, it admittedly protected the prosecutor from prosecution for making sales of liquors, either spirituous or malt. The board which granted this license was itself created by an act approved March 20, 1891, (P. L. 1891, p. 221.) At the present term of the supreme court, in the case of *State v.*

Bradshaw, 27 Atl. 939, this act was adjudged to be unconstitutional. It was held to be an act, special and local, regulating the internal affairs of counties, and so radically inimical to the constitution. The case in which this decision was made was an information in the nature of a quo warranto to challenge the right of the commissioners appointed under the act, in Camden county, to hold such offices. In this posture of affairs, can a license granted by a board organized under color of the provisions of this act be invoked for any purpose? The counsel for the prosecutor takes the view that the license still shields the licensee from prosecution. He insists that, admitting the unconstitutionality of the act of March 20, 1891, the license is not void. His insistence is that the commissioners were de facto officers at the time the license was granted, and their act is therefore valid in respect to the public and third parties. *State v. Anderson*, 1 N. J. Law, 318; *State v. Tolan*, 33 N. J. Law, 195; *Clark v. Ennis*, 45 N. J. Law, 69; *Dugan v. Farrier*, 47 N. J. Law, 333, 1 Atl. 751. The radical unsoundness of this position is that, once admitting the unconstitutionality of the act of 1891, it follows that there could exist no legal board known as the "county board of license commissioners," and no such office as that of "License Commissioner." Where there is an office legally existing, and a person is appointed or elected to fill such office, his acts will be held valid as those of a de facto officer, although a statute has prescribed an unconstitutional method for the appointment or election of such officer. Where, however, the office itself is created by an unconstitutional statute, there can be no incumbent of such office, either de jure or de facto.

The leading case upon the question of what is essential to constitute a person a de facto officer is undoubtedly that of *State v. Carroll*, 38 Conn. 449. This case involved the validity of a conviction by the city courts of New Haven. The constitution provided that all judges should be elected by the general assembly. An act of the legislature authorized the clerk of a city court, in the absence of its judge, to appoint a justice of the peace to hold the court during his temporary absence or sickness. The clerk called in the justice of the peace before whom the case was tried. The point made was that the act of the legislature was unconstitutional, and gave the clerk no right to select a judge. In discussing the question whether this justice was to be viewed as a de facto judge, Chief Justice Butler reviewed exhaustively the cases upon this subject. He lays down the following definition of what may be regarded as the characteristics of such an official: "An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where

the duties of the officer were exercised—First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumes to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such." It is perceived that each of these four propositions assumes the existence of an office, the duties of which the incumbent assumes to perform. The fourth proposition, as is pointed out by Mr. Justice Field, in his opinion in the case of *Norton v. Shelby Co.*, 118 U. S. 435, 6 Sup. Ct. 1121, relates only to such unconstitutional statutes as provide for the election or appointment of an officer to fill an existing office. It has no reference to incumbents of offices purporting to be created by an unconstitutional act. That the existence of a legal office is essential to give validity to official acts is settled by many cases. It is the office which invalidates the acts of the incumbent. An act which lies beyond the scope of official power or duty is unofficial. So, all acts which are unsupported by the authority of a public agency are void, because there can be no agent when there is no agency. The duties and power must be created by law, else the public cannot be bound. When the power exists, then, for reasons of public policy, its exercise by agents who irregularly assume to act under it, under certain conditions, will be adopted as valid. The case in which this rule is most forcibly presented is that of *Norton v. Shelby Co.*, already mentioned. In this case, the legislature of Tennessee had passed an act creating the county commissioners of Shelby county, and vesting in them the powers and duties of the quarterly court of the county. They were authorized to subscribe stock in railroads, which the county court had been authorized to subscribe, and to issue bonds for the amount of such subscriptions. The county commissioners, under this act, issued bonds. After the issuance of these bonds, the statute by which these commissioners were created, and their duties defined, was declared, by the supreme court of Tennessee, to be unconstitutional. The court held that the power to tax for the purpose of the county could not, by any special or local law, be taken from the county court, and conferred upon local tribunals of

particular counties, composed of commissioners appointed by the governor. The question of the validity of these bonds afterwards came before the supreme court of the United States on a writ of error to the United States circuit court for the western district of Tennessee. Justice Field, in delivering the unanimous opinion of the United States supreme court in *Norton v. Shelby Co.*, said: "But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding upon the county. This contention is met by the fact that there cannot be any officer *de facto* or *de jure* if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. * * * Their [plaintiff's counsel] position is that a legislative act, although unconstitutional, may in terms create an office, and nothing further than the apparent existence is necessary to give validity to the acts of the assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The result was that the bonds issued by this unconstitutional board, before the unconstitutionality of the statute creating it had been declared by any court, were held to be void. The cases are reviewed by Mr. Justice Field, and his analysis displays the fact that in each instance the officer held to be *de facto* was the incumbent of a *de jure* office.

In addition to the cases cited by Mr. Justice Field may be mentioned the case of *Ex parte Snyder*, 64 Mo. 58. In this case a conviction by a criminal court was held to be void because the act establishing the court had never gone into effect. It was abrogated by the provisions of a new constitution, which was adopted before the legislative act creating the court by its provisions went into operation. The court, in its opinion, uses this language: "A quite extensive research has failed to discover an instance where an incumbent has been held an officer unless there was a legal office to fill." To the same effect are the cases of *In re Hinkle*, 31 Kan. 712, 3 Pac. 531, and *Town of Decorah v. Bullis*, 25 Iowa, 12. In the case of *Dugan v. Farrier*, 47 N. J. Law, 383, 1 Atl. 751, the second objection taken was that there was no such office as director of the board of chosen freeholders of Hudson county, and therefore the fact of one acting as such invalidated the acts of the board. The answer was, there is an office of director, although he is by law appointed by the board, instead of being

elected by the people, as the director was in that instance. The only case which I have found which gives countenance to the view that there can exist a *de facto* officer without a *de jure* office is that of *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289, also reported in 4 Amer. & Eng. Corp. Cas. 426. This point was decided by a majority of one, in a court consisting of five judges. The editor of the reports last mentioned, in a note to this case, cites a number of cases which he thinks strongly tend to support the doctrine laid down by the majority of the judges in *Burt v. Railroad Co.* I fail to find any among these cases which, in my judgment, supports the view that there can exist a *de facto* officer without the existence of a *de jure* office. *People v. Kane*, 23 Wend. 414, was a proceeding upon a quo warranto to try legal title. It does not touch the present topic, and, besides, it was overruled in *Clark v. People*, 28 Wend. 599. The case of *People v. Bangs*, 24 Ill. 184, was also a quo warranto proceeding to test the legal title of the incumbent. His *de facto* character was not involved.

The remaining cases may be ranged under different instances of *de facto* incumbents of existing offices: First. Where there is none or an irregular appointment and qualification, and the officer has performed the duties of the office. Thus, in *Sharp v. Thompson*, 100 Ill. 447, a deputy clerk who was verbally appointed, and who had not qualified, was acting as such officer, there being an existing office. Second. Where there was a regular appointment, but a failure to qualify. Thus, in *Re Kendall*, 85 N. Y. 302, certain commissioners in respect to municipal improvements failed to take the statutory oath, and went on to perform the duties of an existing office. Third. Where there is a premature appointment to an office before the office has come into being, but, after the office has come into existence, the officer executes its functions. Thus, in *Fowler v. Bebee*, 9 Mass. 231, a man was appointed and commissioned sheriff of the county of Hampden before the act creating the county of Hampden went into operation, but, after the act took effect, he went into possession of the office, and acted as such officer. These acts were held valid. In *Re Boyle*, 9 Wis. 264, a judge and clerk were elected before the law establishing a municipal court went into effect by publishing the act. The acts of these officers after the law took effect were held valid. Fourth. Where an officer holds over, and executes the functions of an office, after the expiration of his term. Thus, in *Brown v. Lunt*, 37 Me. 423, a certificate of acknowledgment of a deed made by a justice of the peace in the exercise of a power belonging to the office of justice of the peace, after his term had expired, was held good. In *Cocke v. Halsey*, 16 Pet. 71, the acts of a clerk *pro tempore* of a court, done in the absence of

the regular clerk, were held good, although the period of time for which the court had power to make such appointment had expired. In *Kreidler v. State*, 24 Ohio St. 22, a lieutenant of police was held to be a de facto officer in respect to acts done after the expiration of his term. In this case, however, the question was not directly involved, as the proceeding was a prosecution against the lieutenant for usurping the office under a statutory provision. The prosecution failed. In *Threadgill v. Railway Co.*, 73 N. C. 178, a summons issued by a clerk whose term had expired, but whose successor had not qualified, was held to be valid. In each of the cases thus mentioned, it is perceived that there existed an office de jure. The counsel for the prosecutor cites the case of *Leach v. People*, 122 Ill. 420, 12 N. E. 726. The facts of that case were these: The board of supervisors of Wayne county was composed of fifteen members, one elected from each town. By an unconstitutional act the county was divided into five districts, and the board was composed of five members, one elected from each district. The board, under the new statute, had exactly the same powers as the old board had. The new board issued bonds. It was held that the issuance of the bonds was the act of de facto officers. The court said: "After the passage of the act [the void act] there still remained the board of supervisors of Wayne county, the official body for the management of the county's affairs. * * * There was no rival board, but it was the sole acting board of supervisors of Wayne county. The real ground of complaint is that the office legally existing was illegally filled." A similar case is that of *Cole v. Black Water Falls*, 57 Wis. 111, 14 N. W. 906. Both cases hold that there must be a de jure office, to which the acts of those assuming official functions can be referred.

Whether, when the void act is swept away, there remains an office still subsisting, the functions of which were to be exercised by new officers, differently appointed, or whether the void act attempted to erect a new and distinct office, is a question which in some instances cannot be readily answered. This is apparent from a comparison of the two cases last mentioned, with *Town of Dakotah v. Bullus*, supra. The case of *Campbell v. Com.*, 96 Pa. St. 344, has been cited as an authority for the view that an officer can exist without an office. Two associate judges, not learned in the law, sat with the president judge in Fayette county, and participated in the trial and sentence of a person. They were elected and commissioned as associate judges. It was objected, against the validity of the conviction, that there was no power under the constitution to elect associate judges. It was held that they were officers de facto, and their de jure character could not be attacked except by quo warranto. The purport of this decision is that, whenever a portion of the

functions of government is conferred by law upon agents to be selected,—that is, whenever an office is created,—the powers thus delegated can in some instances be performed jointly by a greater or less number of agents than is provided for by law, so as to validate their acts as those of de facto officers. There was a delegation of power to the court, which power these men were irregularly exercising, and that delegation of official function supported their de facto official acts. The case of *Leach v. People*, supra, involves the same principle. I conclude, therefore, that an office created by an unconstitutional statute, can afford no support to the acts of the incumbents. The board of license commissioners was a new and distinct body, and, when its official existence is wiped out, there is no official support for the licenses granted by its incumbents.

I remark that, in my examination of this question, I have not overlooked the cases of *Steelman v. Vickers*, 51 N. J. Law, 180, 17 Atl. 153, and *Harvey v. Philbrick*, 49 N. J. Law, 374, 8 Atl. 122. These cases concern offices under municipalities alleged to be unconstitutional organized under general acts, and the official acts of officers assuming to perform the duties of such offices. In the first-mentioned case it was held that an attempt to oust an officer of a municipality from his office by the use of the writ of quo warranto, upon the ground that the corporation had no existence because of the unconstitutionality of this general act under which the corporation was incorporated, could not succeed. The ground of decision was that it was an indirect attack upon the de jure character of a de facto corporation, and that the legal existence of such corporation could only be brought in question by a proceeding against the corporation itself directly. The result of this decision is that a court has no right to question the de jure character of any de facto municipal corporation in any proceeding other than that of a quo warranto to test the legality of the franchise itself. In all collateral litigation, the existence of the corporation de jure is unquestionable. The decision in *Harvey v. Philbrick*, supra, holding that the official character of a treasurer of a borough commission could not be inquired into upon certiorari, was the logical sequence of the doctrine laid in the first-mentioned opinion.

The counsel for the prosecutor relies upon another point. This point receives its significance from the admitted fact that a writ of error has been issued out, to take the judgment in the case of *State v. Bradshaw* to the court of errors for review. It is insisted that a writ of error operates as a superseas, and so deprives the decision of this court, in that case, of any present force. But I am unable to perceive in what way the issuance of a writ of error in the case mentioned touches the matter now under discussion, for assuming, for present purposes, that

such a writ does operate as a supersedeas, I cannot perceive how it affects the force of the decision rendered in that case. The only effect of a supersedeas would be to stay the execution of the judgment of ouster, with such other incidental judgment as, under the quo warranto act, the supreme court has directed to be entered. No one is concerned with this question except the parties to that litigation, namely, the state on the one side, and the commissioners of Camden county upon the other. The judgment affects no one else besides these parties, as a judgment, nor would its execution in any way affect the licensee, who is a stranger to the quo warranto proceeding. The decision of the supreme court in this matter is effective, not by way of estoppel, but as a precedent. It involves the construction of a statute, and the construction given to the statute by this court, until reversed by the court of errors, is to be considered as the law of this state. So long as it stands unreversed, every court and judge must so accept it, whenever the same question again arises in any other proceeding. The notion that a deliberative opinion of the supreme court in one case could be disregarded in any other cause arising in the same court, and involving the same principle, or in any inferior court, would be opposed to all settled rules which control judicial conduct. The conclusion, therefore, is that the license held by the prosecutor is to be regarded as void. It afforded no defense to the prosecution, and the conviction must be affirmed.

(55 N. J. L. 628)

BOARD OF CHOSEN FREEHOLDERS OF MORRIS COUNTY v. HOUGH et ux.

(Courts of Errors and Appeals of New Jersey.
Dec. 14, 1893.)

**DEFECTIVE BRIDGES—LIABILITY OF COUNTY—NEG-
LIGENCE.**

1. This action lies against the board of chosen freeholders of Morris county under the supplement to "An act respecting bridges," approved March 15, 1860, (Revision, p. 86, § 9.)

2. It was the duty of the board of chosen freeholders of Morris county to rebuild the bridge in Union street, in the town of Dover, when the old bridge over the Rockaway river was broken down and became unfit for use.

3. That duty involved the furnishing of a safe and convenient access to said bridge, both as to its footways as well as its roadway.

4. That when, in the performance of that duty, they adopted a plan which contemplated the filling in of the sidewalks of Union street, either by the town of Dover or the adjacent property owners, so as to bring the sidewalks up to the wing or abutment walls of the bridge, and level with the top thereof, so as to leave the access to the footwalk of the bridge in a dangerous condition, it was their duty to place some barrier, or guard, light, or warning, at this dangerous point; that while they were preparing a permanent railing to place at this point, which would have rendered the approach entirely safe, it was their duty, when the danger became apparent by the construction of the raised sidewalk, to place some temporary barrier, light, or warning at this dangerous point,

until the permanent railing was placed in position.

5. That it was negligence on their part not to provide such a temporary barrier after they had notice of the dangerous condition of the access to the bridge at this point.

6. That the open and notorious continuance of this dangerous condition for over two weeks before the injury was sufficient to warrant the jury in charging the authorities with notice thereof, the same as if they had received actual notice thereof.

7. The negligence of the defendants did not arise from any actual knowledge or any affirmative act on their part, but from their omission of the duty of inspecting, and of the degree of diligence which might reasonably have been expected from them under all the circumstances of the case. They had full opportunity of knowledge, and that stands, for the purposes of this case, as actual knowledge; and the defendants are equally chargeable as if express notice had been given them.

Beasley, C. J., and Depue, Brown, and Smith, JJ., dissenting.

(Syllabus by the Court.)

Error to circuit court, Morris county; before Justice Magie.

Action by Edwin Hough and Martha Hough, his wife, against the board of chosen freeholders of the county of Morris, to recover for personal injuries sustained by the female plaintiff. There was judgment for plaintiffs, and defendant brings error. Affirmed.

J. S. Salmon and W. W. Outler, for plaintiff in error. J. H. Beecher, for defendants in error.

ABBETT, J. This is an action brought for the recovery of damages resulting from an injury received by Mrs. Martha Hough, one of the plaintiffs, and for which it is claimed that the board of chosen freeholders of Morris county is responsible. It includes—First, her claim; and, second, that of her husband. On October 26, 1891, Martha Hough was injured by falling from the abutment or wing wall of a bridge over the Rockaway river, in Union street, in the town of Dover. The accident occurred as she was passing along Union street. The street and the bridge connecting the same, both before and at the time of the injury, were used as a continuous public street and highway. The bridge was the connecting link across the Rockaway river. She was walking on the sidewalk on the easterly side of Union street on her way home, which necessarily led her across the bridge. The night was dark and rainy. She was unable to see for any distance, and, relying on the sidewalk as a safe access to the footway of the bridge, she proceeded along Union street, and walked off the wall at the place where the sidewalk of Union street abutted and joined the abutment or wing wall on the easterly side of the bridge. The sidewalk and the top of this wall were about on a level. There was no light, no barrier, no protection. The unguarded wall at the end of the sidewalk, in the condition it was on the night of the accident, was dangerous to pedestrians. The evidence shows

that this bridge was built to replace an old wooden truss bridge, that had broken down and was impassable. The defendants appointed a committee to rebuild the bridge, replacing it with a new iron structure, which was to be some sixteen feet wider than the old bridge, and over two feet higher. They also provided in their contracts for filling in with earth behind the abutments to make a safe and commodious roadway approach to the bridge. The bills for the work were from time to time reported by the committee, and ordered paid by the defendants. After the main structure had been practically completed, and about three weeks before the accident occurred, the chairman of the committee, under authority of the committee, ordered Foster Burch to measure the bridge as far as the line of the sidewalk, and to get a railing ready and put it on. He got it ready in his shop, and commenced drilling holes in the coping on top of the abutments or wing walls in which to fasten the railing, and this work was in progress when the accident occurred. It was finished a few days thereafter, and the bill therefor was paid by the board of chosen freeholders. This railing was about three to three and a half feet high, and was connected with the bridge posts which had theretofore been erected, and the railing extended across the sidewalk. The evidence shows that, when the new bridge was being built, it was intended to raise the grade of the street in approaching it. The abutments or wing walls having been raised about two feet or more above the old walls, it was necessary to raise the grade of the street so as to have a safe and convenient access to the new bridge, which was so much higher than the old one. If there had been no filling in after the bridge was finished, both the walls and the bridge resting thereon would have been over two feet above the grade of the street. In order to make the bridge useful to the public, it was necessary to make the approaches thereto conform to the new elevation. It is clear that the defendants, through their committee, contemplated, as part of this safe and convenient access, a railing along the wing walls of the bridge at the ends of the sidewalk. Without such a barrier it would not be safe when the sidewalks were filled up to the new grade, and it is evident that they so understood it when they entered into a contract with Burch for the erection of this iron railing. The sidewalk was raised, and the flagging put thereon, up to the wing walls, while the defendants, through their committee, were progressing with the work of putting up the railing. The drilling of the holes in which to insert the railing had been nearly completed at the time of the accident, and was finished, and the railing put up, shortly after it had occurred. The defendants, however, failed to put up, during the progress of this work, any barriers or lights by which the public would be warned of the danger existing at this point. It is clear that the

access, according to this contemplated plan, was a safe and convenient one. The old bridge was narrower than the new one, being only 20 feet wide. The new bridge is 36 feet wide, of which 24 feet in the center is designed for a roadway, and 6 feet on each side is raised some inches above the roadway, and is designed as a passageway for persons on foot. The new bridge stands in the middle of Union street, which is 66 feet wide. The new bridge, being higher than the old one, required some filling or grading,—some construction back of the abutments,—in order to afford a safe and convenient access thereto. This filling was done by the defendants back of the main structure of the bridge, and it raised the ground next to the bridge up to the level of the roadway thereof, and that level extended to the east post on the south end of the bridge. From that post the wall upon which the bridge rested continued on across the sidewalk. This wall was a part of the construction of the bridge. It had been done under contract, and it had been determined by the committee of defendants, on July 29th, that on the top of it a railing should be erected. On this last date the work already completed was examined and approved, and the bridge became a public work, constructed by a public corporation, and opened for public use. The bridge was not, however, at that date, entirely completed, so far as access to it from the easterly sidewalk of Union street was concerned. The plan adopted contemplated raising the sidewalk on each side of the bridge structure. It is evident that the committee did not contemplate the filling up of the sidewalk by the defendants. The filling was to be done either by the authorities of Dover, or by the owners of property on Union street. The committee's plan contemplated access to the footway of the bridge over this filling by others. The laying of flagging on this filling on the easterly side of Union street, between Blackwall street and the Rockaway river, was commenced on the 5th of October, 1891, and finished on the 10th of the same month. It ended at the abutment of the Union street bridge over the Rockaway river. It was laid up to the abutment wall of the bridge, and the surface of the top of the abutment wall was about on a level with the surface of the flagging. This sidewalk ran straight up until it came to this river wall, and then made a turn at a right angle, and went along the river wall about eight feet, until it came to the footway of the bridge. The filling up of the sidewalk, so as to lay the flags thereon, was going on during the building of the bridge, and it had all been completed, and the flags laid thereon, by the 10th of October,—18 days before the accident occurred. The work of preparing the railing and drilling the holes therefor was progressing at the same time, although the railing was not put up until after the accident. The access to the footway of the bridge was intended to be over this side-

walk when raised. From October 10th to October 26th, access to the footway of the bridge was left in a dangerous condition, without guard or warning, so that one walking on the easterly sidewalk of Union street towards the bridge was liable to walk directly over the wing wall or abutment, into the Rockaway river. The defendants neither put up any temporary barrier nor placed any light or warning of any kind at this dangerous point. They left it open and unguarded. The evidence shows that on the night in question, although it was so dark that it was impossible for any one walking along the sidewalk to cross the bridge to see the danger, they left it wholly unguarded. The case was left to the jury, and there was a verdict for the plaintiffs.

This case comes up on bill of exceptions.

The first exception was to the refusal to nonsuit on the ground that the plaintiffs had not established a legal cause of action against the defendants. Second, a general exception to that part of the charge of the judge which is as follows: "Now, gentlemen, was the plan designed for access to the footways of the bridge such as, either originally, or as modified on that day, contemplated the filling up of the sidewalk, and the construction of the footway thereon up to and across the wall, so as to reach and give convenient access to the footway of the bridge? Was that the plan in the contemplation of the committee who represented the defendants, and did they contemplate, not the filling up themselves, but to adopt the filling up of others? If not, gentlemen, then I am obliged to charge you the defendants were not responsible for the construction of what was not within their plan, provided the plan they did adopt furnished a safe and convenient access to the bridge. And it would be immaterial in this case whether it did or not, because it is not at all in question that the injury here happened, not because of the original access to the bridge provided by the freeholders, but because of the filling up of the sidewalk by others. But if the plan as originally made—on which question you may take into consideration the fact of their building the wall to that height—did contemplate the filling up of the sidewalks of the street in the manner, and with the effect, I have mentioned, or if the plan was so modified on July 29th as to include such filling up of the sidewalks on the street,—and on this question you may take into consideration the contract for the railing, which is of importance in the evidence,—then, gentlemen, since the duty of the defendants was to make a safe passage, if by their plan of access they adopted the filling of others, and a safe passage required a barrier or protection along the wall, then, gentlemen, it was the duty of the defendants to erect that barrier. Now, if you come to that conclusion, you must then determine whether there was a wrongful neglect of that duty.

It is evident that the circumstances were known to the committee, and, acting on the circumstances, they ordered the railing. They provided what would, when placed in position, be a barrier and protection, and there is no dispute in this case that it would be a safe barrier and protection. Now comes, gentlemen, the important and turning point in this case,—were they wrongfully neglectful in not furnishing some temporary barrier or protection pending the erection of the railing? If the plan, either as originally made or as modified, contemplated a sidewalk filled in, and a foot passage along the dangerous edge of this wall to the footway of the bridge, then, gentlemen, a duty devolved on the freeholders to take proper and reasonable precaution to have notice of that filling in, which they were to adopt as part of their plan, and to erect some temporary barrier until the railing which they had ordered should be erected." The exceptions to the refusals to charge otherwise than as charged are as follows: "(3) That there was no evidence that the defendants adopted any plan with reference to the filling up of said sidewalk that was to be carried out by any other person." "(5) That there was no evidence to show that the defendants had actual knowledge or notice that the approaches to the bridge had become in a dangerous condition by reason of the change of grade of Union street, or of the filling of the sidewalk, and that, therefore, if they were in a safe condition on the 29th day of July, when their work was completed, they would not be liable, unless actual notice of the change in the condition of the approach to the bridge had been given to defendants. (6) That the river or wing wall was not a part of the bridge or its approaches, which the defendants were required to keep in repair. (7) That if the defendants ordered a railing put up along the wing wall, which it was not their duty to order or erect, they would not be liable for any injury which may have occurred to the plaintiffs by reason of the railing not being erected at the time of the accident." There are three other requests to charge, being Nos. 1, 2, and 4, which are specifically stated hereafter.

An action for these injuries would not lie against the defendants at common law, but the supplement to "An act respecting bridges," approved March 15, 1860, (P. L. 1860, p. 285; Revision, p. 86, § 9,) provides that "in all cases where a township or the board of chosen freeholders of a county are chargeable by law with the erection, rebuilding or repair of any bridge or bridges, and the said township or board of chosen freeholders shall wrongfully neglect to erect, rebuild or repair the same, by reason whereof any person or persons shall receive injury or damage in his or their persons or property, he or they may bring his or their action of trespass on the case against said township or said board of chosen freeholders as the

case may be, and recover judgment against them to the extent of all such damage sustained as aforesaid, which said judgment shall be paid by the township or county as the case may be." This act has been held to be a remedial statute, and to be one that should be construed to give a remedy by action for all injuries to persons or property, where the municipal body is bound by law to build, rebuild, and repair a bridge, with a view to the safety of persons and property, and it shall neglect to perform the duty thus required of it, and damage shall result directly to those persons or that property. *Jernee v. Freeholders of Monmouth Co.*, 52 N. J. Law, 557, 21 Atl. 295. The liability under this act only arises in this case if the proofs establish—First, that the board of chosen freeholders were chargeable by law with the erection, rebuilding, or repair of the bridge in question; second, that the board wrongfully neglected to erect, rebuild, or repair the same; third, that the injury to Mrs. Hough was occasioned by such wrongful neglect. The board of chosen freeholders were clearly chargeable with the erection, rebuilding, and repair of the Union street bridge over the Rockaway river. *Freeholders of Sussex Co. v. Strader*, 18 N. J. Law, 108. This duty not only required the defendants to replace the structure across the stream with a new one, but it also required them to make the new bridge accessible at its ends. To make a complete passageway across the Rockaway river for the public, the defendants were bound to fill up at the ends of this bridge, so far as to make it a safe and convenient passageway for such persons as might be entitled to use the same. The duty to make and repair the highways at the ends thereof, so as to make the bridge accessible therefrom, was not only a statutory duty, but was a duty at common law. *Freeholders of Sussex Co. v. Strader*, 18 N. J. Law, 108; *Proprietors of Bridges v. Hoboken Land & Imp. Co.*, 13 N. J. Eq. 524. See, also, *Moreland v. Mitchell Co.*, 40 Iowa, 398. Whether the defendants neglected to perform this duty of replacing the old structure, and providing the public with a safe and convenient access thereto, was a question of fact for the jury upon the evidence. The question as to whether the injury to Mrs. Hough was occasioned by the wrongful neglect of the defendants was also a question for the jury. The board were bound by the action of its committee. *City of Burlington v. Dennison*, 42 N. J. Law, 167.

The verdict of the jury having settled all disputed questions of fact in favor of the plaintiffs, the judgment in this case should be affirmed, unless the trial judge erred in his rulings, as shown by proper exceptions allowed and sealed in this case. The first exception is to the refusal to nonsuit. This is defective because it does not show that the precise point on which a review is sought was made by counsel, and presented to the

mind of the trial judge, and decided by him. The only ground stated was that the plaintiffs had not established a legal cause of action against the defendants. If such an objection is sustained, it would impose upon the trial judge the necessity of considering every legal proposition that might arise in the case, and all the evidence therein, and, if he erred, the judgment would be reversed, although counsel had failed to state the grounds of objection, so that the court might fairly consider each of them as thus presented. Such a general objection is not framed with that particularity required by the rules laid down in *Associates of Jersey Co. v. Davison*, 29 N. J. Law, 418; *Packard v. Railway Co.*, 54 N. J. Law, 282, 23 Atl. 722. An example of proper particularity in stating the grounds relied upon as a motion for nonsuit will be found in *Railroad Co. v. Moore*, 24 N. J. Law, 825. The next exception is to the charge of the judge. This is clearly multifarious. It embraces several legal propositions, some of which are clearly unobjectionable, so far as the defendants are concerned. It cannot be upheld in toto. *Packard v. Railway Co.*, 54 N. J. Law, 282, 23 Atl. 722. The exception to the refusal to charge as stated in the third request cannot be sustained, because it assumes that there was no evidence on the point involved therein, whereas there was evidence in the case affecting this question. The exception to the fifth refusal to charge as requested cannot be sustained, because it assumes that the bridge was completed July 29th, when there was evidence from which it might be inferred that it was not entirely completed on that date, and because actual notice of the condition of the sidewalk thereafter was not necessary, as hereinafter stated. The exception to the sixth refusal to charge cannot be sustained, because it assumes, as matter of fact, that the river or wing walls were not part of the bridge. If they were,—and there was evidence upon that point,—the defendants would be bound to keep them in repair the same as any other part of the bridge. The exception to the seventh refusal to charge cannot be sustained, because it would, in effect, be instructing the jury that ordering a railing to be put up, which it was not their duty to put up, would relieve the defendants in this case, when the liability, if any, results from defendants' not putting up some temporary warning barrier or protection while the railing was in course of construction. The duty was not necessarily to put up a railing, but to furnish plaintiff a safe and convenient access to the footwalk of the bridge, which could have been done in various ways, other than by a railing. The charge of the judge fairly left this matter to the jury, if his view of the law is correct. The refusals to charge the first, second, and fourth propositions, however, involve a consideration of legal principles which, if the judge improperly refused to charge, would require the judgment in this

case to be reversed. These requests were as follows: "(1) That if the approaches to the bridge were safe and convenient when it was 'taken up' by the committee of the board of chosen freeholders having charge of the building of said bridge, on the 29th day of July, and they would have continued to be safe and convenient if they had not been changed by parties other than the defendants, and without their knowledge, the defendants would not be responsible for the injuries received by Mrs. Hough. (2) That unless the evidence showed that the defendants had actual knowledge of the way in which the sidewalk would be filled in, the extent of the filling, and the time when the filling would be done, they would not be responsible by reason of any plan which they may have contemplated, or which they may have supposed, might be adopted by the town of Dover, or by the owner of the adjoining property." "(4) That if the approach to the bridge, as made by defendants, was safe and convenient, though they may have contemplated a plan of filling of the sidewalk that might at some future time be adopted by the town of Dover, or by the owner of the adjoining land, and undertook to provide for such condition, they would not be responsible for the injury to Mrs. Hough, unless they had actual knowledge or notice that the work was to be done at once, or that the work was in progress, or had been completed."

In considering the questions presented, we may assume that if the duty of the defendants had been ended July 29th, when the main structure of the bridge had been finished, and the roadway of the street had been graded up to meet it, the defendants would not have been liable, because the work had been left in such a condition that the sidewalks of the street met the wing walls two to three feet below the top thereof, and it would have been impossible for plaintiff to have walked over the same. The difficulty with the defendants' case is, however, that the bridge and its approaches were not then finished, according to the plan contemplated by the defendants. They had then determined to erect a railing on the wing walls as a barrier or protection at the end of the sidewalks on Union street, as they would exist when filled up to meet the new grade of the street, rendered necessary by reason of the defendants' having raised the new bridge some two or three feet above the height of the old bridge and the old grade of the street. This contemplated filling had been completed some 16 days before the accident, and the danger existing was open and notorious during all that time; and the defendants were proceeding with the work of putting up the railing, which would have been a complete protection if it had been finished, but they allowed the dangerous condition to continue for these 16 days without any temporary barrier, light, or warning to give notice to pedestrians of this danger.

The question here presented is, were the defendants, with this opportunity of knowledge, and their failure during that period to see the existing danger and provide against it, guilty of a wrongful neglect, under the act of 1860, the same as if they had received actual notice of the condition of affairs and the danger, and had expressly refused to provide against the same? The court seems to have presented the case fully and fairly to the jury, and dealt most carefully with the rights and duties of the defendants under the evidence. An examination of the charge shows that the following propositions, among others, were laid down by the trial judge: "(1) That the liability of the defendants, if any, arose under the supplement to the bridge act of March 15, 1860, (Revision, p. 86,) on account of the wrongful neglect of the defendants to rebuild or repair Union street bridge, over the Rockaway river. That no liability existed in this case unless the proofs established—First, that the defendants were chargeable by law with the erection, rebuilding, or repairing of the bridge; second, that the defendants wrongfully neglected to erect, rebuild, or repair this bridge; and, third, that the injury to Mrs. Hough was occasioned by such wrongful neglect. (2) That it was the duty of the defendants to provide at each side of the Rockaway river, which it spans, a safe and convenient access to the bridge for passengers, by filling in or by some other mode, and that the same is part of the bridge construction. (3) That the new bridge, being some two feet higher than the old one, required some filling or grading,—some construction back of the abutment. (4) That although the bridge committee, on July 29th, examined and approved of the work done up to that time, and it then became a public work, constructed by a public corporation, and open for public use, it was still a question for the jury if it was then completed. (5) That whether it was then completed depended on what was the plan and design, either originally made, or as modified July 29th. (6) That it might be inferred that it was expected that the sidewalks on Union street, if ever laid, would be laid up to, and made to adjoin, the raised footways on the bridge. (7) That on July 29th the committee of defendants discussed the question of these sidewalks, and the necessity, if they were raised at some future time, to put a railing on the wall, and that thereupon the railing was ordered, and the bill therefor paid by the defendants. (8) That it was for the jury to say whether the plan designed for access to the footways of the bridge contemplated the filling up of the sidewalk and the construction of the footway thereon, to and along the wall, so as to reach and give convenient access to the footway of the bridge. (9) That if such plan did not contemplate the filling by others, which the defendants were to adopt,

that the defendants were not liable, because they were not responsible for the construction of what was not within their plan. (10) That it was immaterial in this case whether the original access to the bridge, as it existed on July 29th, furnished a safe and convenient access thereto, because the injury here happened, not because of the original access to the bridge provided by the freeholders, but because of the filling up of the sidewalk by others. (11) That if the plan the committee did adopt (including the filling of the sidewalks by others) required a barrier or protection along the wall to make a safe passage, that it was the duty of the defendants to erect that barrier. (12) That it was for the jury to say, if such a duty existed, whether there was a wrongful neglect of that duty. (13) That if defendants' plan contemplated a sidewalk filled in by others, and a footway along the dangerous edge of this wall to the footway of the bridge, a duty devolved on the freeholders to take proper and reasonable precaution to have notice of that filling in which they were to adopt as part of their plan, and to erect some temporary barrier until the railing which they had ordered should be erected. (14) That it was for the jury to say if defendants were wrongfully neglectful in not furnishing some temporary barrier or protection pending the erection of the railing."

The propositions laid down by the judge seem to have been entirely correct. I have already cited the cases showing that it was the duty of the defendants to make safe and convenient access for the public from the sidewalk to the footway of the bridge, and that it was the duty, even at common law, to make and repair the highways at the ends of the bridges, if necessary for this purpose. It has been held that it is not necessary that actual notice should have been given, or that persons liable for the keeping of a bridge in repair should have actual knowledge, of the dangerous condition of the access to the bridge. The rule laid down is that if, by the exercise of ordinary and due diligence and care, they would have had such knowledge, it is sufficient. In *Reed v. Northfield*, 13 Pick. 98, it is said "that the evidence of notice to the public of the dilapidation of the highway and bridge complained of was rightly left to the jury. It has often been held, in giving construction to this act, that notice to the town [the act required reasonable notice] of the defect of a highway may be inferred from its notoriety, and from its continuance for such a length of time as to lead to the presumption that the proper officers of the town did in fact know, or with proper vigilance and care might have known, the fact. This latter is sufficient, because this degree of care and vigilance they are bound to exercise; and therefore if, in point of fact, they do not know of such defect, when by ordinary and due vigilance and care they would have known it, they must be responsi-

ble, as if they had actual notice." See, also, 2 Beach, Pub. Corp. § 1523, tit. "Highway," and cases there cited; Mayor, etc., of New York v. Sheffield, 4 Wall. 189-196; District of Columbia v. Woodbury, 136 U. S. 463, 10 Sup. Ct. 990. Notice liability for defective highway. 9 Amer. & Eng. Enc. Law, pp. 401-407, tit. "Bridges—Action, Damages, Notice, Reasonable Care, Railings," and cases there cited; 2 Amer. & Eng. Enc. Law, pp. 558-562, and cases cited; *Howe v. City of Lowell*, 101 Mass. 100; *Donaldson v. City of Boston*, 16 Gray, 511. Originally, the question whether a municipality or its officers used reasonable diligence to discover a defect is for the jury. 2 Beach, Pub. Corp. § 1521, and cases cited. The open and notorious existence of an obstruction on a sidewalk for five days was considered as a sufficient time to charge the authorities with notice thereof. *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. 442. In this case the court says: "The negligence, if any, on the part of the city in the present case, does not arise from any affirmative act, but from an alleged omission to exercise proper care and supervision, and permitting the counter, unlawfully placed on the sidewalk by McLaughlin, to remain there after notice of the obstruction. * * * The city, however, was not responsible for the original wrong. Its culpability, if any, as we have said, consists in not interfering to cause the removal of the obstruction after due notice of its existence. It is not claimed that there was any actual notice of the obstruction as to the mayor or the legislative body, or any city official, unless notice to patrolmen was notice to the city. * * * The counter was placed on the sidewalk on Tuesday, and remained there until Saturday, the day of the accident; and it is not claimed that meanwhile any measures were taken by the authorities to have the obstruction removed. This lapse of time, together with the fact that Federal street was in a busy and frequented part of the city, made it, we think, under the authorities, a question for the jury whether the city authorities charged with the care of the public streets ought to have known of the obstruction, and to have caused its removal, before the accident. If the city authorities had no actual notice, nevertheless, if their ignorance resulted from the omission of the duty of inspection, and of the degree of diligence which might reasonably be expected under all the circumstances, the opportunity of knowledge stands for the purposes of the case as actual knowledge, and the city is equally chargeable as if express notice had been actually proven." See, also, *Mersey Docks v. Gibbs*, 11 H. L. Cas. 701. It is a question for the jury whether the county has been negligent in constructing an approach to a bridge. *Moreland v. Mitchell Co.*, 40 Iowa, 394. These approaches must be constructed so as to be reasonably safe for passengers by night or day, or action lies. Rail-

road Co. v. Boteler, 38 Md. 568. Also, see other cases cited in 2 Amer. & Eng. Enc. Law, pp. 560, 561, and see cases cited in note to section 759, 1 Beach, Pub. Corp. p. 771. It has been held that a county may, by adoption, make public a bridge constructed by individuals, and, when it is thus made public, the county becomes bound to keep it in repair. *State v. Board of Com'rs of Gibson Co.*, 80 Ind. 481. See, also, *Elliott, Roads & S.* (Ed. 1890,) p. 23, and cases there cited. The principles of this decision apply to the approaches, as well as to the main structure. Where a bridge, being part of a highway, is undergoing repair, it is the duty of the county making such repairs to provide proper safeguards against accident. See *Mullen v. Town of Rutland*, 55 Vt. 77, and principle laid down in 2 Beach, Pub. Corp. § 1514, and cases cited.

The most important point presented by the defendants against their liability in this case was their contention that the bridge and its approaches were completed on July 29th, and left in such condition that this accident could not have happened if third parties had not thereafter interfered with the then existing condition, and created the danger, as they claim, by raising the sidewalk on Union street to a level with the coping on the wing walls of the bridge. If we assume that the facts of the case warrant these conclusions, there would be no liability on the part of the defendants. The difficulty, however, with this contention, is that the jury have found a different state of facts upon evidence properly submitted to them. The bridge was not completed July 29th. The main structure and the roadway approaches were completed, but the access to the footways of the bridge had not been completed. The plan of the committee of the defendants contemplated a structure with a sidewalk filled in by others, protected by a railing erected by the defendants on the wing walls of the bridge. The defendants were in the performance of that duty when the plaintiff was injured. The neglect of the defendants consisted in not providing a temporary barrier after October 10th, when the sidewalk had been raised, and the danger became notoriously apparent. The existence of this danger for over two weeks charged them with notice, the same as if they had been directly notified of its existence. The judgment below should be affirmed.

BEASLEY, C. J., (dissenting.) The facts in this case, to which the law is to be applied, are few and undisputed. They are these: The board of freeholders, the plaintiff in error, erected a county bridge over the Rockaway river in the town of Dover, and, as the sidewalk of the street connecting with it extended beyond the width of the bridge, it became necessary to construct a wing wall at that point. Without such a protective contrivance, the sidewalk would have been

left in a highly dangerous condition, as the ground at the place to which it led, along the side of the bridge, fell away somewhat precipitously. Accordingly, the freeholders, at the time of constructing their bridge, put up a wing wall across the dangerous part of the sidewalk in question, which was confessedly an adequate safeguard as things then were. The bridge, including the sidewalk, had been built by contract, and having been examined by the building committee, and being deemed satisfactory, was approved and paid for. It a few days after this, a proposition was brought before the building committee to put an iron railing on the top of the wing wall above mentioned, and the witness who testified upon this subject, and who was one of the committee, and the only witness in this respect, thus narrated the transaction, viz: "Our committee—some of them—thought that we did not need any railing on it. I told them I thought we had better have one, because at some future time it might be graded, and it would be necessary. At that time it was not necessary." Under these circumstances, a railing was ordered. The mechanic they employed neglected to put it up for a few weeks, and in the interim the town of Dover or a landowner filled in the sidewalk in question to a level with the top of the wing wall. By this means, of course, the sidewalk was left without any safeguard at its terminus by the bridge, and the plaintiff, crossing the bridge by night, fell from the sidewalk down the steep already mentioned, and, being injured, brought the present action.

That the plaintiff is entitled to be indemnified for her damages by some one is certain, but the question is whether the plaintiff in error is that responsible person. My examination has led me to the conclusion that it is plain that this suit, as it is now laid, will not lie. Every ground upon which it is claimed it can be placed seems to me to be inconsistent with established legal principles. These freeholders are sued for their negligence, and the only remissness charged is that they neglected to see that the iron railing which they had ordered was immediately placed in position. But the fallacy of this proposition appears to me to be conspicuous, for it cannot be denied that, as the case was thus conditioned, these freeholders were not bound in law to put up any railing whatever. The freeholders had made the bridge and sidewalks perfectly safe, and, as long as that state of things continued, they could not be called upon to do anything further. To anticipate a change of the situation from the possible or probable action of the authorities of the town in the future, near or distant, and to provide for such change, was an undertaking entirely gratuitous on their part. Being a mere voluntary purpose, uncommunicated to and wholly unacted upon by any one else, it is incontestably plain that they imposed upon

themselves nothing that had even a semblance of a legal liability. It was a purpose that they could abandon at will, and consequently they could incur no legal liability by neglecting to perform it. In my opinion, this consideration alone negatives the responsibility of the plaintiff in error for the damages sustained by the defendants in error. I cannot think that it has ever been held, in any decision, that a person is responsible because he has merely refused or neglected to perform an act which he was under no legal obligation to perform. At the trial the justice who presided instructed the jury that a verdict against the county could rest but on a single ground. The charge left no doubt upon that subject. It will be remembered that the bridge and sidewalk were left by the plaintiff in error in a perfectly safe condition, and that the town raised the sidewalk so to occasion the danger that proved so disastrous to the plaintiff. The trial justice informed the jury that the officers of the county, as appeared from the evidence, had no information or knowledge of the action of the municipality in this respect. After adverting to the testimony that the freeholders had in view a probable change of the grade of the sidewalk by the action of the town in the future, he said: "Now, gentlemen, was the plan designed for access to the footways of the bridge such as, either originally, or as modified on that day, contemplated the filling up of the sidewalk and the construction of the footway thereon to and along the wall, so as to reach and give convenient access to the footway of the bridge? Was that plan in the contemplation of the committee who represented the defendants, and did they contemplate, not the filling up themselves, but to adopt the filling up of others? If not, gentlemen, then I am obliged to charge you the defendants were not responsible for the construction of what was not within their plan, provided the plan they did adopt furnished a safe and convenient access to the bridge; and it would be immaterial in this case whether it did or not, because it is not at all in question that the injury here happened, not because of the original access to the bridge provided by the freeholders, but because of the filling up of the sidewalks by others." It will be observed that the theory at the trial was that if the jury believed that it was within the contemplation of the freeholders that the sidewalks would eventually be filled up by the town authorities, and if, to provide for that eventuality, they ordered the railing in question to be put up, and if they were negligent in effecting such erection, then they would be liable for the injuries sustained by the defendants in error. I have altogether failed to see how the foregoing proposition can be brought to harmonize with legal principles that have always been regarded as indubitable. We have already seen that after the freeholders had

properly built their bridge, and had properly connected it with the roadbed and sidewalks, and had left these works in a safe condition, they had fully discharged their legal duty. They were under no obligation to provide at that time for any change of condition that might arise in the future from the action of other persons. It follows, of necessity, that the project of putting up a railing was an undertaking absolutely voluntary. These propositions are most assuredly not to be denied, and the inquiry therefore presses, when and how was this gratuitous purpose changed into a legal obligation? At the trial it was deemed that this metamorphosis took place in case this gratuitous project was part of the scheme adopted in building the bridge, but there seems to be no ground whatever for such an assumption. When these freeholders undertook to build this bridge, they assumed a legal obligation. When they resolved to construct this railing, they did not assume a legal obligation. How could the fact, therefore, that they contemplated doing both these things, transform the latter from a mere spontaneous intention into a compulsory duty? And yet the verdict in this case has no other foundation than the theory that such translation was effected; that, because these freeholders contemplated doing that which they were not bound in law to do, by the very fact of such contemplation they imposed upon themselves a legal duty to perform their gratuitous intention. It is to be observed, in this connection, that there is no pretense in the case that the municipal authorities had any knowledge that the freeholders contemplated building the railing in question, and in raising the sidewalk had acted on that supposition. There was nothing in the evidence to warrant such an inference, and the case was not submitted to the jury in that aspect. In fine, on this head, my conclusion is that when those agents of the county, in view of the probable filling up of the sidewalk in question in the future by the municipality, resolved to put up a railing on the wing wall referred to, they thereby assumed to do that which at the time they were not bound to do, and that consequently such voluntary assumption could be either abandoned or neglected with entire impunity.

Nor does it seem that the result would be changed if we were to assume that the project of the construction of the railing in question became a legal duty on the part of the plaintiff in error. Granting the existence of such duty, and that it was negligently performed, it does not follow that the county is responsible for this damage sustained by the defendant in error. Negligence, in legal contemplation, does not entail a liability for every possible consequence that may ensue from the fact of its existence, but only for its natural and probable consequences. On this subject, Mr. Addi-

son, in his work on Torts, (volume 1, p. 40,) thus formulates the rule, viz.: "If the wrong and the legal damage are not known by common experience to be usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and the damage are not sufficiently conjoined or 'concatenated,' as cause and effect, to support an action." Similarly, Baron Pollock, in one of his opinions, states the rule in these words, viz.: "I am inclined to consider the rule of law to be this: That a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur." In view of this rule,—and it is incontestable,—it appears to be plain that the present action is not maintainable. Assuming that the duty in question was neglected by these freeholders, still it is a non sequitur that the county is responsible for the hurt sustained by the defendant in error. The freeholders had left their work in a safe condition, and they therefore, plainly, were not the proximate cause of the accident that occurred. The municipality stood in that attitude, for it raised the sidewalk, and thereby made the place dangerous. But for the intervention of the authorities of the town, the mischief complained of would not have happened. The town, beyond all question, was the immediate *causa causans*, of the dangerous state of this street. The freeholders had left it in a safe condition, and these municipal authorities then put it into an unsafe condition, and the freeholders did nothing to lead to such conduct.

The inquiry therefore supervenes, how are the freeholders to be connected with this wrongdoing? Most assuredly, only on the ground that they were bound to infer that this street would be raised and left in a dangerous condition by the municipal agents, and consequently should have provided against such an occurrence. It will be observed that the question is not whether the elevation of the street should have been anticipated by the freeholders, but whether, as reasonable men, they should have anticipated that it would be done in such a manner as to convert it into a public nuisance, dangerous to every one who by night should use it. It is plain that the municipal authorities, in leaving one of the public thoroughfares in this grossly perilous state, committed an indictable offense; and, consequently, how can it be contended that the freeholders, as reasonable men, were bound to infer that such a crime would be committed? It would seem to be undeniable that it was the duty of the municipality, if it elevated its street in the manner described, to have given notice of its intention to the officers of the county, or, in the absence of such notification, to have provided a tempo-

rary safeguard against the danger itself had created. Was it in the natural sequence of affairs that it would neglect this duty, and thereby perpetrate a misdemeanor of a grave character? Such misconduct as this did not "follow in the ordinary course of events" from the neglect of duty on the part of the freeholders, (admitting such duty and such neglect existed,) nor could the freeholders have anticipated any such occurrence. Consequently, according to the legal rule already stated, no liability on the side of the county can result by reason of the injury to the defendant in error that forms the basis of this suit.

But again, on the admission that the plaintiff in error was legally bound to put up the railing in question, and that it was negligent in the performance of that duty, nevertheless this action will not lie, as it was not the proximate cause of the injury. It was not enough to show that this negligence was in a distant degree the cause of the damage to the plaintiff below, for, in order to validate this judgment, it must appear that it was the proximate cause. But this, it seems to me, incontestably was not the case, for no accident was possible but for the wrongful conduct of the municipal officials. The legal principle is thus stated by Mr. Justice Dixon, in the case of *Wiley v. Railroad Co.*, 44 N. J. Law, 251: "The rule of law," says the opinion, "requires that the damages chargeable to the wrongdoer must be shown to be the natural and proximate effects of his delinquency. The term 'natural' imports that they are such as might reasonably have been foreseen, and as occur in an ordinary state of things. The term 'proximate' indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the loss." The same principle is enunciated in *Cuff v. Railroad Co.*, 35 N. J. Law, 17, and in several other of our own decisions which it is not necessary to notice. In the present instance it is not observed upon what ground it can be said that the rule thus stated and established is not applicable. But for the intervention of the officers of the town in converting the sidewalk in question into a public nuisance, the misfortune of the defendant in error could not have occurred, and consequently, according to the rule just stated, the supposititious negligent of duty, by the plaintiff was not in legal theory, as it was not in fact, the proximate cause of the injury. How this objection to this suit is to be obviated or removed I confess that I am at a loss to conceive. In my opinion, the town of Dover was the party responsible alone for the harm sustained by the plaintiff in the action. In my judgment, an affirmance of this judgment must proceed on the adoption of one or more of the three following propositions, viz.: First, that the non-performance of a gratuitous intention may

per se lay the ground of an action at law; second, that a negligent person may be charged with damages that are not the "natural" effects of his delinquency; and, third, that such delinquency will, in law, be deemed the proximate cause of the ensuing loss, although such loss was directly caused by the intervention of a culpable and efficient agency. Entertaining these views, I shall vote to reverse the judgment contained in the record before us.

DEPUE, BROWN, and SMITH, JJ., concur.

(66 N. H. 151)

COLBURN v. TOWN OF GROTON.

(Supreme Court of New Hampshire. Grafton. March 15, 1890.)

DAMAGES—ACTION FOR PERSONAL INJURIES—EVIDENCE—QUESTION FOR COURT.

1. In an action for personal injuries caused by alleged defects in defendant's highway, the question whether defendant's payment of a claim presented it by one who was injured by the same accident as plaintiff was an admission of liability, or a mere purchase of peace, is a preliminary question of fact for the court.

2. In such case, evidence that travelers usually gave each other warning about the condition of the hill on which plaintiff was injured was properly excluded, as being mere hearsay evidence of opinions concerning the sufficiency of the road at the place of the accident.

Bingham, J., dissenting.

Exceptions from Grafton county; before Justice Lewis W. Clark.

Case by J. D. Colburn against the town of Groton for personal injuries sustained by reason of alleged defects in defendant's highway. There was a verdict for defendant, and plaintiff excepted. Judgment entered on the verdict.

Plaintiff offered to show that one Mrs. Estes was riding in a sleigh with him, and was also injured by the accident, and that defendant settled an action for damages by her by paying her claim. To the exclusion of this evidence, plaintiff excepted. The place of the accident was a hillside; the alleged cause being the sloping form of the hill, its icy condition, and its lack of a railing. Plaintiff offered to show by a witness that there was a custom among travelers in carriages to give warning at the top of the hill to avoid meeting travelers at the place where the accident occurred, and that witness and her husband had given and received such notice when approaching such place. This evidence was also excluded, and plaintiff excepted.

S. B. Page, for plaintiff. Fling & Chase, for defendant.

DOE, C. J. In a criminal case, when the defendant's confession is offered as evidence, it is necessary to inquire whether it was made under the influence of hope or fear, and for the purpose of gaining some benefit

or avoiding some harm connected with the criminal charge. If not made for that purpose, it is held to be voluntary, and is evidence. The purpose of the confession is a question of fact. This distinctly appears in *State v. Wentworth*, 37 N. H. 196, 218, 219, 220, and other cases in which the reported decisions contain a full examination of the evidence bearing on the question. In *State v. Howard*, 17 N. H. 171, 181-185, the court say: "We are by no means satisfied that judges, in their anxiety to preserve all the rights of the accused, have not gone further in excluding confessions than the principle required them to do. * * * The principle of admission and exclusion is well settled, and founded upon a most satisfactory basis. Confessions obtained by the hope of favor, or by fear of punishment are inadmissible. It is the hope of escape from temporal punishment which excludes, and the hope must be derived from the inducements. * * * The evidence is rejected because the inducements may have led to a false statement, and the confession is therefore not entitled to credit, and not because the public faith is pledged by means of the promise. * * * It is in the application of this principle that the difficulty lies; that is to say, in determining whether hopes have been held out, or fears excited, in the particular case. In the present instance the defendant was told that he had better tell the truth. It has been supposed that a party accused might, from such a declaration, understand that it would be better for him to confess himself guilty. * * * But why should any one so understand, if he was in fact innocent? * * * We do not intend to pass upon this question at this time. Our object is to show how slight, to say the most, is the probability that a declaration of this kind excites any hopes that should cast a suspicion upon the truth of the confession which follows it. * * * The hope here—assuming that hope was excited by the declaration of the magistrate that he had better tell the truth—must have been of the slightest possible character, and the circumstances which intervened between that time and the period when he made the confession which was admitted can leave no shadow of doubt whether the last confession was made through some lingering belief, arising from the declaration of the magistrate, that if he still continued to confess he might find favor. The evidence is very strong upon this point. * * * We have no hesitation in sustaining the ruling. If anything could have extinguished the faint glimmer of hope which might possibly have existed in the first instance, these circumstances must have been effectual for that purpose. In considering the probable reason for this last confession, we must not lay out of the case the other circumstances which intervened between that and the first." "The probable rea-

son for" a confession cannot be a question of law. "In the earlier cases there has been much conflict upon this subject, resulting in some degree from failing to recognize the question to be largely one of fact alone, to be determined upon a consideration of all the circumstances of the case, instead of which, some of the cases seem to have given to particular expressions a technical character, and to have excluded the confessions where, upon a consideration of all the circumstances, it would not have been found, as matter of fact, that the confessions were made under the influence of hope or fear held out by another. * * * Whether the confession * * * was voluntary or not is purely a question of fact,—as much so as the question whether a witness offered to testify was interested or not, or whether a witness was qualified to testify as an expert, or whether the loss of a paper has been shown, so as to allow the introduction of secondary evidence of its contents. In this and the like cases, the judge who tries the cause must decide, although in some instances he may submit the question of fact to the jury. In either case, whether the decision be by the judge alone, or it be also passed upon by the jury, no exception lies, so far as the question is one of fact. If, however, upon the evidence reported by the judge, it clearly appears that there was error in his finding upon the matter of fact, it may be corrected, as in other cases where a verdict is against evidence." *State v. Squires*, 48 N. H. 364, 369, 370.

When it is said that the admissibility of a confession is a "matter resting wholly in the discretion of the judge, upon all the circumstances of the case," (1 Greenl. Ev. § 219,) the meaning is not that he has arbitrary power, but that the question is one of fact. "Judicial discretion," in its technical legal sense, is the name of the decision of certain questions of fact by the court." *Darling v. Westmoreland*, 52 N. H. 401, 408. "Whether the confession made to Leavitt was made in consequence of inducement held out by Leavitt was a question of fact to be decided by the judges who presided at the trial; and their finding upon this question is a finality, as much as the verdict of a jury upon a question of fact." *State v. Pike*, 49 N. H. 399, 407. "The law is too well settled in this state to be considered an open question. We do not interfere with the verdict of a jury, to set it aside as against evidence, unless we are well satisfied that it has been procured through corruption, or manifest mistake in the consideration and application of the evidence, and that substantial justice has not been done." *Lisbon v. Bath*, 21 N. H. 319, 335; *Wendell v. Safford*, 12 N. H. 171, 178; *Gould v. White*, 26 N. H. 178, 188; *Clark v. Society*, 45 N. H. 331, 334; *Houston v. Clark*, 50 N. H. 479, 483; *Jewell v. Railroad Co.*, 55 N. H. 84, 95; *Fuller v. Bailey*, 58 N. H. 71; *Smith v. Richards*, 29 Conn. 232, 244;

Hamaker v. Eberley, 2 Bin. 506, 510; *Wilkinson v. Greely*, 1 Curt. 63; *McLanahan v. Insurance Co.*, 1 Pet. 170, 183; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31; *Shoemaker v. U. S.*, 147 U. S. 282, 305, 306, 13 Sup. Ct. 361. When a case is tried by the court, a motion to set aside the finding on the ground that it is against the evidence "stands upon the same footing as if there had been a verdict of the jury." *Burnham v. McQuesten*, 48 N. H. 446, 454. Whether the fact found by the court at the trial term is that the defendant is guilty, as in *Burnham v. McQuesten*, or that the defendant's confession was voluntary, as in *State v. Squires*, a motion for a new trial on the ground that the finding was against the evidence raises a question of fact to be decided by a court upon due consideration of the proof.

"The term 'admission' is usually applied to civil transactions, and to those matters of fact in criminal cases which do not involve criminal intent; the term 'confession' being generally restricted to acknowledgments of guilt. * * * The rules of evidence are in both cases the same. * * * A distinction is taken between the admission of particular facts and an offer of a sum of money to buy peace, for, as Lord Mansfield observed, it must be permitted to men to buy their peace without prejudice to them if the offer should not succeed; and such offers are made to stop litigation, without regard to the question whether anything is due or not. If, therefore, the defendant, being sued for £100, should offer the plaintiff £20, this is not admissible in evidence, for it is irrelevant to the issue. It neither admits nor ascertains any debt, and is no more than saying he would give £20 to be rid of the action. But, in order to exclude distinct admissions of facts, it must appear either that they were expressly made without prejudice, or at least that they were made under the faith of a pending treaty, and into which the party might have been led by a confidence of a compromise taking place. * * * It is the condition, tacit or express, that no advantage shall be taken of the admission, it being made with a view to, and in furtherance of, an amicable adjustment, that operates to exclude it. But if it is an independent admission of a fact, merely because it is a fact, it will be received." 1 Greenl. Ev. §§ 170, 192.

"An offer by a party to pay a sum of money by way of compromise of an existing controversy is not to be used as evidence against him. But an admission of particular facts, made during a treaty for a compromise, may be given in evidence as a confession. * * * The reason why a mere offer of money or other thing by way of compromise is not to be evidence against him who makes it, is very plain, and easily understood. Such an offer neither admits nor ascertains any debt, and is no more than saying that so much will be given to be rid

of the controversy." *Sanborn v. Neilson*, 4 N. H. 501, 508, 509. "A distinct admission of a fact during an attempt at compromise may be given in evidence, though an offer made for the purpose of effecting a settlement cannot be, and the reason for the distinction is very satisfactory." *Hamblett v. Hamblett*, 6 N. H. 333, 343. "The reason is that such admissions are in no way necessary to a treaty for a compromise, which is a mere attempt to buy a peace, and are supposed to be made like other admissions, and for some one of the various causes which induce them. But the law protects a party seeking to purchase his peace by denying to his adversary the benefit of any inferences, that might be derived from an attempt to do so, that the cause of action which he seeks to compromise has some foundation in truth." *Rideout v. Newton*, 17 N. H. 71, 73. That case was assumpsit on a note for \$50 purporting to be signed by the defendant and one L. The question was whether the note was signed by the defendant. Subject to exception, the plaintiff was allowed to prove the following facts: The defendant and L. had been connected in business to some extent. When the writ was served on the defendant, L. not being present, the plaintiff demanded payment of other claims which he had against L., amounting to some one or two hundred dollars. The defendant "asked a person present to advise him as to the propriety of compounding with the plaintiff for the whole, and was advised, if this note was a genuine one, to offer the plaintiff a sum to settle the whole, but, if the note was a forgery, not to pay a cent." The defendant offered \$25, and, on being told that was not enough, he offered \$50, and then \$75. The plaintiff's contention was, not that the mere offer of a sum in settlement was evidence of an admission that the defendant signed the note, but that, in view of the advice he asked and received, it was highly probable he made the offer because the note was genuine. "The defendant," say the court, "upon being advised to make an offer provided his signature to the note was genuine, but not otherwise, proceeds to make the offer. It is said that this offer may be shown, because it is highly probable, from the advice he received, that he would not have made it unless the signature was so. But * * * such a reason would extend to the admission of any other offer of compromise, because such offers are more apt to be made in cases in which the party making them is conscious that the cause of his adversary is well founded than in the opposite cases. The fact that he acted upon advice which he had sought may add a very little to the force of such an inference as is contended for, but too little, altogether, to make the case an exception to the highly salutary, well-defined, and established rule." For this reason the verdict was set aside.

When a defendant offers to pay a certain sum in settlement, his statement that he is too poor to pay more is not sufficient evidence of an intention to admit his liability. *Downer v. Button*, 26 N. H. 338, 344. *Perkins v. Railroad*, 44 N. H. 223, was an action for injuries received by a passenger in a collision on the defendants' road. The testimony of another passenger, who was injured in the same collision, that the defendants admitted their liability for injuries caused by the collision, was held competent on the ground (page 225) that "the liability to pay damages in consequence of the accident appears to have been the matter distinctly admitted to the witness, as stated by him in evidence." The decision is an application of the rule that a distinct admission of a fact is not rendered inadmissible by being made during a settlement. The preliminary question always is, not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission. It is a question, not of time or circumstances, but of intention. On that question the time and circumstances may be material evidence. "The rule is strictly held in this state that an offer to compromise is not to be shown, on account of the tendency such a practice would have to discourage the settlement of disputes. But it is at the same time held, with equal clearness, that any independent admission, though made in the course of negotiations for a compromise, may be shown." *Plummer v. Currier*, 52 N. H. 287, 296; *Harrington v. Lincoln*, 4 Gray, 563, 567; *Durgin v. Somers*, 117 Mass. 55, 61; *Draper v. Hatfield*, 124 Mass. 53, 56; *Evans v. Smith*, 5 T. B. Mon. 363. In *Sanborn v. Neilson*, 4 N. H. 501, before cited, the defendant's rejected offer, made during a negotiation for an adjustment of the plaintiff's claim, was held to be evidence, because it followed and was based upon the defendant's express admission of the alleged tort. Upon the testimony, the fact could be found that the offer was intended to include a repetition of the admission in an indirect form. This view is presented in the case put (page 509) as an illustration: "If A. sue B. for \$100, and B. offer to pay \$20, this offer shall not be received as evidence, because it may have been made merely for the sake of peace, where nothing was due. But in such a case, if B. admit expressly that \$20 are due, and offer to pay that sum, * * * both the admission and the offer are evidence." See *Snow v. Batchelder*, 8 Cush. 513, 516, 517. His offer is evidence when made for one purpose, and is not evidence when made for a different purpose. In both cases, his decisive intent is a fact to be found by weighing competent proof. "Before the statute making parties competent witnesses, the ordinary way to prove their intent or understanding was by circumstantial evidence.

But, now that the party himself is admitted to testify, there is no reason for confining his testimony to a variety of circumstances tending to show his purpose or understanding, when he knows, and can testify directly, what that purpose or understanding was." *Delano v. Goodwin*, 48 N. H. 203, 205; *Norris v. Morrill*, 40 N. H. 395, 401, 402; *Graves v. Graves*, 45 N. H. 323; *Hale v. Taylor*, Id. 405.

The questions of law and fact are the same, whether an admission is claimed to have been made by a payment or by a rejected offer. If a plaintiff and his horse and wagon were injured in a collision with a cart driven by the defendant, and the expense of repairing the wagon was paid by the defendant, whose subsequent offer to pay a certain sum for the injury of the horse was rejected, the question might arise whether the accepted payment and the rejected offer were evidence in an action for the plaintiff's personal injury. Payment, or an offer of payment, may be made to a plaintiff, or to another person having a claim so far like the plaintiff's that the defendant's admission of liability would be applicable to both. The payment or offer is evidence of his liability, when it is an admission of liability. When a pauper has been supported by a town, or the town has paid for his support, and the act was an admission of liability and not a purchase of peace, it is evidence of the fact which the town intended to admit. The legal principle applicable to a great variety of cases is that intent is the test. An offer of payment, whether accepted or rejected, is evidence, when the party making it understood it to be, and made it as, an admission of his liability. It is not evidence when he made it for the purpose of averting litigation, not intending to admit his liability. "If the object be to buy peace, it is plain such an offer carries with it no evidence of the justice of the demand; and it would have a tendency to prevent amicable adjustments, if such offers were to be used against the party making them." *Marsh v. Gold*, 2 Pick. 285, 290.

As his object could not be a matter of law, and he knows what it was, he may testify directly on that point. Confusion has arisen from reported cases in which the line between law and fact has not been clearly drawn. In *Abbott v. Andrews*, 130 Mass. 145, the question whether an offer of the plaintiff was an admission of a fact, or a mere effort to avoid controversy, was dealt with as a question of fact depending upon his purpose in making the offer, and the sense in which it was understood by both parties. But the result reached upon the examination of the evidence of purpose and understanding was not expressly stated to be a conclusion of fact.

In *Sanborn v. Neilson*, before cited, the alleged cause of action which the defendant had confessed was a criminal offense. The plea of "Not guilty" presented for trial the

question that would be presented by the same plea to an indictment for the same act. If a retracted or executed offer of compensation was induced by a fear of a criminal prosecution, and a hope of escaping or lessening the consequences, it would not be evidence in the criminal case. If induced by a fear of litigation and a hope of buying peace, without an intent to admit guilt, it would not be evidence in the civil case. There is no difference in the nature of the cases on which it could be held that the motive was a question of fact in one of them, and that the motive and intent were questions of law in the other.

When the evidence of intent is "conflicting, and the result doubtful," the question whether an offer of payment was an admission of liability may be submitted to the jury, with instructions that they are "to ascertain the meaning of the party making it, and * * * inquire and consider what were the views and intention of the defendant in making it; that if, viewing it in this way, they should find that" it "was intended by him as an admission of a fact, then it" is "to be considered by them as evidence; otherwise, they" will "lay it out of the case." *Bartlett v. Hoyt*, 33 N. H. 151, 154, 165, 166; *Field v. Tenney*, 47 N. H. 513, 515, 521; *Hall v. Brown*, 58 N. H. 93, 94, 98; *Carr v. Ashland*, 62 N. H. 665, 668. The same course may be taken with his payment of a claim like the plaintiff's, presented by a third person. *Eastman v. Manufacturing Co.*, 44 N. H. 143, 145, 154. The question that may be submitted to the jury is not a question of law, when it is decided by the court. If it is submitted to the jury, and they return a special verdict, finding the payment was or was not an admission of liability, the verdict on this point is set aside, when it is against the evidence. A finding of the same fact by the court is set aside for the same cause.

In *Coffin v. Plymouth*, 49 N. H. 173, the plaintiff, Mrs. Coffin, claimed damages of the town for a personal injury caused by the overturn of Mr. Clark's wagon, in which she was riding in a highway. Clark claimed damages of the town for the breakage of his wagon on the same occasion, spoke to the selectmen, or some of them, several times about it, and finally notified the chairman of the board that he should sue the town unless his claim was adjusted on or before a specified day. Thereupon, he was asked what was the least sum he would take to settle the matter, and he offered to take what he was obliged to pay for repairing the wagon, \$25, which the first selectman paid, protesting, at the time, that the town was not liable. Subject to exception, the payment of Clark's claim was received as an admission of liability. The whole of the reported decision on this subject is: "A majority of the court are of opinion that the evidence excepted to was properly admitted." No reason is given, and the only authority

cited is *Perkins v. Railroad*, 44 N. H. 223, which is not in point. In that case the ground of the decision was that liability was "distinctly admitted to the witness, as stated by him in evidence." In *Coffin v. Plymouth*, liability was distinctly denied. The validity of Clark's claim was a matter of opinion. However confident the defendants' belief that they were not liable, they might well act upon the assumption that the result of a trial was doubtful. Under the circumstances, the payment of a sum less than the irrecoverable expense of defending the threatened suit was conclusive evidence that the object of the payment was to buy a peace that would cost less than litigation. In the trial of Coffin's Case, there was no error of law, and the defendant's exception raised no question of law. The verdict could not be set aside without a motion based on an allegation that the finding of the court at the trial was in fact against the evidence. No such motion was made, and it does not appear that attention was called, at the law term, to the question of fact, which was the only question on which cause could be shown for a new trial. Whether the preliminary question of fact is decided by the judge, or submitted by him to the jury, "no exception lies, so far as the question is one of fact. If, however, upon the evidence reported by the judge, it clearly appears that there was error in his finding, or in the finding of the jury, upon the matter of fact, it may be corrected, as in other cases where a verdict is against the evidence." *State v. Squires*, 48 N. H. 364, 369, 370.

In *Grimes v. Keene*, 52 N. H. 330, 334, it is said that payment of a claim for damage caused by the same accident is an admission, more or less strong, that the highway, at the point in question, was defective, and the town in fault for its being so; that such an admission is necessarily to be implied from the acknowledgment and payment of the claim, for without the defect there could have been no claim. "If payment of a claim against the town by the selectmen is an admission of the liability of the town, an unqualified offer to pay must be equally so." *Gray v. Rollinsford*, 58 N. H. 253, 254. "The town have offered to pay him \$25. * * * But this is no proof that they owe him anything." *Sikes v. Hatfield*, 13 Gray, 347, 353. The amount paid or offered may be one of the circumstances to be weighed on the preliminary question, but the law does not make it the test. An entire claim may be paid to avoid a lawsuit, the payer intending to admit nothing but his desire for peace, the claimant understanding that nothing else is admitted, and both parties believing that the payer is not liable, or having no opinion on the subject. In such a case as *Coffin v. Plymouth*, a finding that the payment of an entire claim of \$25 was anything more than a purchase of peace would be against the evidence. The proposition that an admission of liability is necessarily to be implied from the payment

of a claim, or an offer to pay it, is contrary to the fact. "Compromise" generally signifies a settlement in which there is concession on both sides. Used in that sense, the word does not describe all cases in which peace is bought without an admission of liability; and is not an adequate statement of the law. In the present case the preliminary question of fact for the presiding justice at the trial was whether the defendants' payment of Mrs. Estes' claim in settlement of her suit was an admission of liability, or a mere purchase of peace. As it does not appear that a decision of that question of intent in favor of the defendant would be against the evidence, the exclusion of the payment is not a cause for a new trial.

In *Aldrich v. Monroe*, 60 N. H. 118, the plaintiff's omission of a usual precaution, of which he might be found to have had knowledge, was held to be evidence on the question whether he used reasonable care. In this case the warnings given by travelers, which the plaintiff offered to prove, were hearsay evidence of opinions concerning the sufficiency of the road at the place of the accident, and were rightly excluded. Judgment on the verdict.

CLARK, J., did not sit. BINGHAM, J., dissented. The others concurred.

(78 Md. 260)

CROCKER v. HOPPS.

(Court of Appeals of Maryland. Nov. 23, 1893.)

DECLARATION IN TROVER — SUFFICIENCY OF DESCRIPTION — EXCHANGE OF MORTGAGED PROPERTY — EFFECT — EQUITABLE DEFENSES.

1. A declaration in trover, alleging that defendant converted "three horses, three carriages, and one set of double harness," sufficiently describes the property.

2. Where mortgaged chattels are exchanged by the mortgagor for other chattels, the mortgagee acquires no title to the latter by virtue of his mortgage; Code, art. 21, § 40, providing that no personal property whereof the mortgagor shall remain in possession shall pass to any mortgagee unless by bill of sale or mortgage duly acknowledged.

3. A verbal agreement between the parties to a mortgage, made at the time of its execution, that after-acquired chattels should be subject to the mortgage, is not available as a defense to trover by the insolvent trustee of the mortgagor to recover such chattels from the mortgagee, since, if the agreement gave the mortgagee a lien on them, it is enforceable only in the insolvent court, where the entire property of an insolvent must be administered.

Appeal from court of common pleas.

Trover by Samuel G. Crocker, trustee in insolvency of Andrew J. Carle, against William Hopps, for the conversion of certain goods. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and ROBERTS, BRYAN, BRISCOE, McSHERRY, and FOWLER, JJ.

Wm. H. Cowan, for appellant. N. R. Gill & Son and Wm. S. Bryan, Jr., for appellee.

FOWLER, J. On the 18th of February, 1892, Andrew J. Carle made a chattel mortgage of certain personal property, consisting of horses, carriages, and harness, to the appellee, William Hopps. Subsequently, Carle became insolvent, and, having applied for the benefit of the insolvent law, the appellant, Samuel J. Crocker, was duly appointed permanent trustee; whereupon the appellee, claiming title under his chattel mortgage, took possession of the property sued for, subsequent, however, to the conveyance thereof to the appellant as insolvent trustee. The appellee, as mortgagee, proceeded to sell, not only the chattels specifically described in the mortgage, but certain others, which are not therein mentioned, but which he contends should be subject to the mortgage to the same extent as if they had been so mentioned and described. This is an action of trover brought against the appellee by the appellant, as insolvent trustee, for the wrongful and illegal conversion of the goods sued for. The narr. alleges that the defendant converted to his own use three horses, three carriages, and one set of double harness, of great value, etc. Some criticism was made of this declaration, based on a want of particularity and definiteness in the description of the chattels sued for, but we think, although it is very general in its terms, yet it is in substantial compliance with the form prescribed by Code, p. 1103, art. 75, subd. 31. The defendant pleaded—First, the general issue; second, that under his chattel mortgage the chattels therein mentioned and described were his property, and were traded and exchanged by the mortgagor for the chattels in the declaration mentioned, with the assent of the appellee and by his authority, and that default had been made in said mortgage, and that the appellant was, by the terms thereof, entitled to the chattels thereby secured at the time he took the chattels sued for; and, third, for defense on equitable grounds, that, when said chattel mortgage was made, it was agreed between the parties thereto that the mortgagor could sell or exchange the mortgaged chattels, or any of them, and, if so sold or exchanged, they should be replaced by others of like character and value, and that the latter should be subject to the mortgage lien in the same manner that the original chattels were; that the chattels sued for had been lawfully obtained by the mortgagor to replace those originally mortgaged; and that default was made before appellee seized the goods sued for. To these pleas, the appellee demurred. Strictly, this demurrer, as appears from the record, applies to all the pleas, but it is evident it was only intended to apply to the second and third pleas, and not to the general issue plea of non cul., which is, of course, a good plea in trover. Counsel, in their arguments, limited the demurrer to the second and third pleas, and we shall so

consider it. The court below overruled this demurrer, and at the close of the testimony the jury were instructed, at the request of the appellee, that under the pleading and evidence there was no legally sufficient evidence that the appellant was entitled to the goods sued for or any of them, or to the possession of said goods or any of them, and a verdict was directed for the defendant. From these rulings this appeal was taken, but, as they both involve the same question,—the validity of the pleas,—we shall proceed to consider them together.

The first plea is based upon the theory that because the appellee was in law, under his chattel mortgage, the owner of the chattels therein mentioned, he became entitled to the substituted or after-acquired chattels, in virtue of the legal effect of such chattel mortgage. But that such was not the legal effect of such a mortgage has been held more than once by this court. It has been the settled law in Maryland, since the case of *Hamilton v. Rogers*, 8 Md. 315, that even if the mortgage contain a provision by which substituted or after-acquired chattels are sought to be subjected to the mortgage lien, no title to, or right of possession of, such after-acquired chattels will pass to the mortgagee. And, in the case just cited, *Le Grand, C. J.*, after a very able review of the authorities, comes to the conclusion that the mortgagee would have no right of action against a judgment creditor of the mortgagor, who took in execution some of the after-acquired chattels, and this, too, as we have seen, where the mortgagee was claiming under a mortgage which contained an express provision extending the mortgage lien to the after-acquired chattels. The same view was expressed in *Rose v. Bevan*, 10 Md. 470; *Wilson v. Wilson*, 37 Md. 1; *Butler v. Rahm*, 46 Md. 548. Numerous authorities to the same effect elsewhere might be cited, but, the general doctrine being well settled here, the citation of other authorities would seem to be unnecessary. If, therefore, no title passed to the appellee under his mortgage, because the chattels sued for were acquired by the mortgagor after the date of the mortgage, it necessarily follows that the appellee cannot plead it or his supposed rights thereunder in justification of the seizure and sale of the chattels in question. Indeed, it would seem that such a defense as is set up in this plea is in direct conflict with the express language of section 40, art. 21, of the Code, which provides that "no personal property of any description whatever, whereof the vendor, mortgagor or donor shall remain in possession shall pass, alter or change, or any property therein be transferred to any purchaser, mortgagee or donee, unless by bill of sale or mortgage acknowledged and recorded. * * *" The mortgage then, being void as to the after-acquired chattels, the seizure and sale were wholly wrong and illegal. The case of *Oahoon v.*

Miers, 67 Md. 576, 11 Atl. 278, was cited as an authority to show that after-acquired chattels will pass by bill of sale or mortgage of personal property, but that case has no application here. It is based upon the familiar doctrine first adopted in this state in 1836 in the case of *Evans v. Merriken*, 8 Gill & J. 39, that "where personal property, animate in its nature, such as a female slave, is disposed of, the fate of the mother determines that of the child,—*partus sequitur ventrem*." *Hamilton v. Rogers*, supra. In *Cahoon v. Miers* it was held that, under a mortgage of domestic animals, title to their young or increase, born after the date of the mortgage, is in the mortgagee. These cases are not in conflict with the general doctrine laid down in *Hamilton v. Rogers*, supra, and the other cases before cited to the same effect, for neither in them, nor in the case we are considering, is the question of the ownership of progeny or the increase of domestic animals involved. Our conclusion is that the second plea is bad.

We will now briefly consider the validity of the third plea. The argument is that, by virtue of the agreements set forth in the plea, the after-acquired chattels became subject to the mortgage lien, which lien can be enforced in a court of equity; and that by reason of section 83, art. 75, of the Code, allowing defenses on equitable grounds, this equitable lien may be availed of as a defense in this action. Without stopping to point out some material differences between this case and the case cited (*Butler v. Rahm*, 46 Md. 541) for the purpose of showing that the appellee has an equitable lien under his mortgage, and assuming, without admitting, that he has such a lien as against the appellant, can he enforce it or rely upon it in this case? Clearly not; for whatever lien the appellee may have, except as mortgagee under a valid mortgage, he must enforce, if at all, in the insolvent court. Under our insolvent law, the appellant, as insolvent trustee, took all the property of the insolvent, whatever may be the liens upon it, and, after converting such property into money, the proceeds of sale are brought into the insolvent court for distribution among lien creditors and all other creditors, according to their legal precedence and priority, so that all the liens shall be settled by the tribunal to which the trustee owes obedience. *Bushman v. Hanna*, 72 Md. 1, 18 Atl. 962, and authorities there cited by *Robinson, C. J.*, who delivered the opinion of the court. Of course, if the appellee's mortgage had been good as to the after-acquired chattels, he could, under the act of 1888, c. 275, have properly proceeded after default, notwithstanding the mortgagor had been adjudicated an insolvent. It is apparent that if the defense on equitable grounds here set up in the third plea should prevail, the long-settled policy firmly established by many decisions of this court, requiring the entire property of the insolvent

to be administered and distributed in the insolvent court, would be practically nullified. It follows that the pleas demurred to were bad. The demurrer should have been sustained, and the defendant's prayer should have been rejected. Judgment reversed, with costs, and cause remanded.

(78 Md. 286)

COMMISSIONERS OF CALVERT COUNTY v. GANTT, Tax Collector.

(Court of Appeals of Maryland. Nov. 23, 1893.)

OVERPAYMENTS BY TAX COLLECTOR — ACTION TO RECOVER—EVIDENCE—REVIEW ON APPEAL.

1. In an action by a tax collector to recover from county commissioners alleged overpayments made by him, plaintiff testified that he turned over a certain amount of uncollected taxes to his successor in office. *Held*, that the commissioners could show by the successor that plaintiff did not turn over to him collectible tax bills to the amount to which he testified.

2. The refusal of the trial court to permit a witness to answer a proper and pertinent question is reversible error, though it does not appear what the answer would have been, and the party asking the question did not state the object of the evidence.

Appeal from circuit court, Prince George's county.

Action by Francis Gantt, a tax collector, against the county commissioners of Calvert county, to recover an excess in overpayments to defendants. Judgment for plaintiff. Defendants appeal. Reversed.

Argued before *ROBINSON, C. J.*, and *BRYAN, FOWLER, PAGE*, and *McSHERRY, JJ.*

John B. Gray, C. O. Magruder, and *Jos. S. Wilson*, for appellants. *Daniel R. Magruder* and *James W. Owens*, for appellee.

ROBINSON, C. J. This is an action of assumpsit brought by the plaintiff to recover money alleged to be due to him by the defendants, the county commissioners of Calvert county. *Charles G. Spicknell* was, it appears, appointed collector of taxes for the third district of Calvert county for the years 1886 and 1887, and, having been elected county commissioner, the plaintiff was appointed by the circuit court trustee to complete his collections. The plaintiff was also appointed by the commissioners collector of taxes for the years 1888 and 1889, and upon his being elected a member of the legislature, in 1889, *John F. Ireland* was appointed by the circuit court trustee to complete his collections, and to complete the collection of taxes in his hands as trustee of *Spicknell*. The plaintiff testified that at the time of the appointment of *Ireland*, trustee, the plaintiff was owing to the county commissioners, on account of uncollected taxes, the following sums: For the year 1886, the sum of \$1,766.70; for the year 1887, the sum of \$2,326.44; for the year 1888, the sum of \$2,832.66; and for the year 1889, the sum

of \$5,266.06. He further testified that he turned over to Ireland, trustee, the following uncollected balances: \$674.70 for the year 1886, and \$1,407.86 for the year 1887, and \$2,772.47 for the year 1888, and \$6,868.63 for the year 1889. He then proved sundry other credits to which he claimed to be entitled, and these credits, and the uncollected taxes turned over to Ireland, trustee, it is claimed, exceeded the amount due by the plaintiff to the defendants on account of taxes in his hands as collector and as trustee of Spicknell, and this suit is brought to recover this alleged excess in overpayments by the plaintiff to the defendants.

Now, the defendants, having proved by Ireland, trustee, that he had settled in full with the defendants for all taxes in his hands for collection, and had their receipt for the same, proposed to ask the witness Ireland the following question: "Mr. Gantt, the plaintiff, has stated that he turned over to you, for the year 1886, the sum of \$674.70; for the year 1887, the sum of \$1,407.86; for the year 1888, the sum of \$2,772.47; for the year 1889, the sum of \$6,868.63,—as balances in his hands for collection. State if collectible tax bills for said amounts were turned over to you." And upon objection being made by the plaintiff the court refused to allow the witness to answer the question. The question is, it seems to us, a proper and pertinent question, and we do not see on what grounds the objection to it can be sustained. The plaintiff himself had testified that, as collector and as trustee of Spicknell, he had turned over to the witness, as trustee, uncollected taxes for these years amounting in the aggregate to a sum exceeding, say, \$12,000, and it was for these uncollected taxes thus turned over to the witness that the plaintiff sought to charge the defendants. And, such being the case, the defendants had the right, beyond all question, to prove by the witness that the plaintiff had not in fact turned over to him collectible tax bills; that is to say, tax bills which the witness could collect, amounting to the sum testified by the plaintiff. It may have been that some of the tax bills which were turned over to the witness had in fact been paid to the plaintiff, or that some of them were against insolvents, the payment of which could not be enforced, or that some of them were barred by the statute of limitations, and that the persons against whom they were charged had pleaded the statute as a bar to the collection. Be that as it may, it was competent for the witness to prove that part of the taxes turned over to him, and for which the plaintiff sought to charge the defendants, were not in fact tax bills which the witness could collect. This is not an action to recover taxes against persons as charged upon the tax books, and the evidence was offered merely for the purpose of proving that part of the taxes turned over to the witness, and for which the plain-

tiff claimed as credits against the defendants, were taxes which could not be collected; and for this purpose the evidence was, we think, admissible.

But then it is argued that, if there was error in not allowing the witness to answer, the judgment ought not to be reversed, because the defendants did not state the object for which the evidence was offered, nor does it appear from the record what would have been the answer of the witness. Now, if the question was in itself proper and pertinent, it was quite unnecessary for the defendants to state the purpose for which it was offered. The record does not, it is true, show what would have been the answer to the question; and this the record could not show, for the reason that the witness was not allowed to answer the question. In *Lawson v. Price*, 45 Md. 123; *Turnpike Co. v. Crouther*, 63 Md. 558, 1 Atl. 279; *Baltimore & Y. Turnpike Co. v. State*, 63 Md. 578, 1 Atl. 285,—and other like cases relied on by the appellee,—the court, against the objection of the other side, allowed the witness to answer the question, but the exception taken to the ruling of the court did not contain or set out the answer or evidence of the witness, and it was held that the court could not reverse the judgment, unless it appeared that some injury had been done to the party excepting to the ruling of the court. "For aught that appears," said the court in these cases, "the answer of the witness may have been wholly unimportant or immaterial." But in this case the exception is to the ruling of the court in refusing to allow the witness to answer the question; and as the question was in every sense, it seems to us, a proper question, the judgment must be reversed. We do not see, however, how the defendants were injured by the ruling in the second exception. The witness had already testified that he had paid to the commissioners the taxes collected by him, and it was quite unnecessary to prove the same fact again by the same witness. Judgment reversed, and new trial awarded.

(63 Conn. 415)

ROWLAND v. PHILADELPHIA & B. R. CO.

(Supreme Court of Errors of Connecticut. Dec. 13, 1893.)

ACTIONS BY EXECUTORS—DAMAGES—EVIDENCE— DECLARATIONS—EXPERT TESTIMONY.

1. Where plaintiff in an action for personal injuries dies after a judgment by default, and before the hearing in damages, and his executor enters to prosecute, the action becomes an action by the executor, and a written statement by deceased as to his injuries is admissible under Gen. St. § 1094, making the memoranda and declarations of deceased persons competent evidence in actions by or against their representatives.

2. The fact that the statement was prepared and given to counsel by deceased for the purpose of making a claim on defendant for the injuries does not render it inadmissible.

3. The statement, however, is not admissible where the deceased has given his deposition in the suit, and it has been used.

4. In an action for personal injuries, statements made by plaintiff to a physician as to an internal injury six months after the accident, and after the injury has healed, are inadmissible.

5. In an action for personal injuries, a physician upon whom plaintiff called after the suit was brought, for the purpose of giving information as to his injuries, which would enable him to testify as an expert at the trial, cannot testify as to plaintiff's statements.

6. Where the only objection to a written statement offered in evidence as the declaration of a deceased person was to the paper as a whole, the question whether matters of opinion contained therein were admissible will not be considered.

Appeal from superior court, Hartford county; Robinson, Judge.

Action by one Rowland against the Philadelphia & Baltimore Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Action for personal injuries received by the plaintiff while a passenger on the defendant's railroad, in consequence of a collision of cars, brought to the superior court in Hartford county, and after a default, before Robinson, J. Pending the suit, and before the hearing, the plaintiff died, and the executor of his will entered to prosecute. Judgment was recovered for \$5,000 damages, from which this appeal was taken by the defendant, on account of certain rulings as to the admission of evidence, which was stated in the opinion.

E. D. Robbins, for appellant. H. C. Robinson, for appellee.

BALDWIN, J. The injuries for which this action was brought were received by means of a railroad accident, which happened April 9, 1892. On May 9th the plaintiff, who was a physician, made and signed, for the use of his counsel, a written statement of the nature and causes of the accident and the character of his injuries. He prepared it to enable them to present a proper claim for compensation to the defendant. On October 4th the suit was brought, and on October 8th he consulted a physician, Dr. Curtis, of Hartford, professionally. After the defendant had suffered a default, the plaintiff's deposition was taken for use in evidence, and a few weeks later he died. The executor of his will entered to prosecute, and, upon the hearing in damages, offered the deposition in evidence. After it had been introduced, he offered the statement of May 9th. The defendant objected to its admission because the plaintiff had given his deposition in the cause, and also because it was "evidently prepared for the purposes of a claim for the injuries of Dr. Rowland;" but the objection was overruled, and the paper admitted. This memorandum, among other things, stated that by the collision of the train in which the plaintiff was, with the wreck of another train, he

was thrown against the arm of a seat, suffered a "nervous shock," and "broke two of my ribs in the left side, which at my age (61) is a very serious matter;" and that his disabilities from said injuries are "permanent." Gen. St. § 1094, provides that, "in actions by or against the representatives of deceased persons, the entries, memoranda, and declarations of the deceased, relevant to the matter in issue, may be received as evidence." This statute, so far as it applies to written statements, was passed two years after the act of 1848, by which parties and interested witnesses were allowed to testify in any cause. That act had been found to give "living parties a very great advantage over representatives of the dead," and, to obviate this evil, the statute in question was enacted. *Bissell v. Beckwith*, 32 Conn. 516. The present suit, at the time of the hearing in damages, was an action by the representatives of a deceased person, and, although it only became such after the interlocutory judgment of default, we think that is fully within the reason and meaning of the statute. That the paper was prepared and given to counsel for the purpose of making a claim on the defendant constituted no valid objection to its admission. *Bissell v. Beckwith*, supra. Whether those of its statements which set forth mere matters of opinion were admissible it is unnecessary to inquire, since the only objections taken went to the paper as a whole. One of these objections, however, presents a novel and important question. It is that as the plaintiff, by his deposition, had already been a witness on the hearing, the statute did not apply, because the reason for its application in ordinary cases did not exist in this. The act of 1848, by removing the common-law disqualification of interest, brought two important witnesses—the plaintiff and defendant—into the trial of almost every suit. Two years of practice under its provisions convinced the legislature that, when the accident of death had withdrawn one of these witnesses, the testimony of the other gave him, as a party, an undue advantage. The act of 1850 was intended to restore, so far as might be, the footing of equality between him and the representatives of the decedent which had existed at common law. It could not have been intended to discriminate against the surviving party. In cases where the testimony of the decedent is actually given, in ordinary course, whether by deposition, or, as might happen, should he die during the progress of the trial, by his oral examination in court, there would be a discrimination in favor of his representatives, were they allowed to fortify his evidence by introducing any written entries or memoranda which he might have made, whether before or after he took the position of a witness. They could only be admissible if "relevant to the matter in issue," and all matters so relevant would presumably be,

and certainly should have been, covered by his deposition or oral testimony. The cardinal rule that "the best evidence of which the case, in its nature, is susceptible, must be produced, requires that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had." 1 Greenl. Ev. § 82. In the present case the plaintiff had given his testimony in the ordinary course of justice. He could not, had he lived, have supplemented it by proof of his own memoranda relating to the same matters, made out of court, and without the sanction of an oath or the test of cross-examination. In our opinion, his representatives have no greater right. While we view the statute as embracing suits to which, at the time of trial, the representatives of a decedent are parties, although they may have become such by his death after the commencement of the action, it could never have been intended to allow them to make use, first, of his deposition covering the entire case, and then of his unsworn statements, in his own favor, as to the same subject-matter.

Dr. Curtis was a witness for the executor on the trial, and testified to certain statements made to him by Dr. Rowland in a professional consultation, shortly after the suit was brought in regard to his symptoms and sufferings. In the course of his examination he was asked, with reference to the injuries received by Dr. Rowland: "Did he give any statement to you about the condition of his ribs?" To this the answer was: "Yes, sir; he stated his ribs were broken at the time; that they had healed." Objection was made to the reception of this testimony on the ground that it related to a narrative of a past occurrence, but the objection was overruled, and an exception taken. It does not appear from the record that Dr. Curtis was consulted with a view to medical or surgical treatment, and it does appear that he was not consulted until six months after the plaintiff's injuries were received, and a few days after the suit was brought. If the plaintiff called on Dr. Curtis in order to give such information as would enable him to testify as an expert at the trial, the testimony in question would be clearly inadmissible, (*Darrigan v. Railroad Co.*, 52 Conn. 285, 309;) and, if he consulted him with a view to obtaining medical treatment, the introduction of the plaintiff's statement as to the nature of an internal injury, received six months before, which had since been healed, would, in our opinion, have been no less objectionable, (1 Greenl. Ev. § 102; *Lush v. McDaniel*, 13 Ired. 485.) The testimony was not offered or received under Gen. St. § 1094, as the declaration of a decedent, whose representatives were parties to the action, and we have not, therefore, thus far, considered it in that light. It is enough, with reference to that statute, to remark that the deposition of the plaintiff had already put the court in possession

of his account of the cause and character of the injuries which he received. His oral declaration can certainly stand on no higher ground than his written memoranda, and, for the reasons previously given, we think that the statute did not make the plaintiff's statements, given out of court, and not under oath, as to the extent and nature of his injuries, evidence against the defendant.

The complaint, after stating the fact of the collision, alleged that the plaintiff was thereby "greatly and permanently injured in his constitution and nervous system, two of his ribs were broken, and he suffered a severe shock and consequent prostration, and he was in other respects greatly hurt and bruised." The default left the burden of proving substantial damages on the plaintiff, and he could prove them only as they were alleged. *Shepard v. New Haven & Northampton Co.*, 45 Conn. 54, 58. It was therefore important to show the fracture of his ribs. The memoranda and declarations in question, if admissible, tended to show this, and the error in admitting them was therefore material, notwithstanding it is found that the immediate cause of death was an aneurism of the aorta, produced by the violence of the shock of the collision. If the shock was shown to be violent enough to break two of his ribs, it is the more probable that it was sufficient to produce the aneurism. There is error in the judgment appealed from, and a new trial is ordered. The other judges concurred.

(53 Conn. 198)

SKIFF et al. v. STODDARD.

(Supreme Court of Errors of Connecticut.

June 7, 1893.)

BROKERS—MARGIN CONTRACTS—PLEDGE.

1. A customer buying stock on margin has the rights of a pledgor in such stock; but, if the broker sell the stock without first substituting for it other like stock, the pledge is at an end, and does not revive as to stock afterwards acquired by the broker. Per *Torrance, J.*, dissenting.

2. Where a broker buys stocks for his customers, dealing on margin, through a firm in New York, in whose hands the stocks remain, being carried by them for and in the name of the broker, the latter's customers cannot be considered as the owners and pledgors of the stocks until the broker has actually set apart and appropriated his own stocks to each customer. Per *Torrance, J.*, dissenting.

3. A broker's margin contract is not an executed sale, but an executory contract to deliver stock on payment of the purchase money. The general title of the stocks he buys on customers' orders remains in him, and does not pass to the customer, so as to leave the broker a mere pledgee. Per *Carpenter, J.*, dissenting.

For majority opinion see 26 Atl. 874.

TORRANCE, J. I agree with the majority of the court in holding as follows: (1) That the contract in question, when carried out according to its terms and as contemplated by the parties, resulted in the relation of

pledgor and pledgee between Bunnell & Scranton and the plaintiffs as to all stock purchased for the plaintiffs under and according to the contract. (2) That upon the facts found by the committee any original stock in fact so purchased for any customer might be repledged by Bunnell & Scranton for their own debt. (3) That upon such facts also such original stock might be sold or otherwise finally disposed of by Bunnell & Scranton for their own purposes at any time, provided that at or before such sale or final disposition they actually and in fact substituted for such original stock an equal number of shares of the same kind of stock. (4) That a like disposition might be made by Bunnell & Scranton of any such substituted stock upon a like substitution at or before such disposition, and so on ad infinitum. (5) That such stock actually substituted by Bunnell & Scranton for the stock so disposed of, immediately on such substitution and sale being made, became the property of the customer, subject to the pledge. (6) That in all instances where any of the plaintiffs can show that either the original stock purchased for them according to the contract, or that which was substituted for it in the aforesaid manner, was in the possession of Bunnell & Scranton, or their agents or pledgees, at the time of the assignment, such plaintiffs are entitled to redeem their property. To this extent I agree with the majority opinion. With what that opinion seems to me to hold expressly or by implication upon certain other points I do not agree.

In the first place, it seems to hold that the broker may at any time sell the original stock purchased for a customer, without first actually substituting in place of it other like stock; and may afterwards, at any time before the termination of the contract, substitute after-acquired stock with equal effect for all concerned. This seems to me to be inconsistent with the legal conception of a pledge. In cases where, prior to the sale of such pledged stock, other stock is in fact substituted, the parties may be regarded, upon such a state of facts as is found by the committee, as consenting to such sale and substitution, and thus in effect giving and receiving the substituted stock in pledge. But where no such substitution is made in fact the case is entirely different. In such a case it can hardly be supposed that the customer has consented to let his stock be sold, and take his chances of having other stock substituted for it at some indefinite time in the future at the caprice of the broker. A sale made without first substituting other stock is a wrongful conversion, and ought to be so held.

In the next place, suppose a broker, without in fact substituting other stock therefor, sells the original stock purchased and being carried for a customer, at a time either when the broker himself owns stock of the same kind, or has none, but, subsequently to the

sale, acquires it. The opinion seems to hold that in such cases the lien of pledge in favor of the customer attaches to the stock then owned by the broker, or which he may subsequently acquire, without any act of substitution, and without any intent to substitute on his part. It seems to me that in all cases of sale of the original stock by the broker for his own purposes, some unequivocal act of the broker manifesting and carrying out an intent to substitute other stock in place of that sold should be required, and, where this cannot be shown to have been done before such sale, no lien of pledge in favor of the customer attaches to the stock of the broker then on hand, and certainly not to any which he subsequently acquires.

Lastly, the opinion seems to hold that, under the circumstances disclosed by the record, when the New York brokers purchased the stocks for Bunnell & Scranton which were in the possession of the New York brokers at the time of the assignment, such stock, upon its purchase by the New York brokers, became the property of the customers, pledged to Bunnell & Scranton, and by them subpledged to the New York brokers. This, it seems to me, is not so. When purchased by the New York brokers it was the property of Bunnell & Scranton, bought for them as their own by their own agents, and not for the customer through any agent of his. The New York brokers and the customer were strangers. Undoubtedly Bunnell & Scranton bought the stock in order to fill the customer's order eventually, and would not have purchased but for that order; but I think the stock so purchased from first to last was the stock of Bunnell & Scranton alone, until they by some act set it aside and appropriated it to some customer. I agree, however, that the act of Bunnell & Scranton in crediting the customer with a certain number of shares of a given stock may be regarded as such an act. This was done, however, only on the purchase of the original stock, and not on the purchase of most of the stocks which the plaintiffs now claim. If at the time of the assignment the New York brokers were carrying certain stocks for Bunnell & Scranton which the latter had not thus actually set apart or appropriated to their customers, then I hold that the customers had no property in such stocks. I do not think the facts found warrant the conclusion that any such substitution was in fact made in the case of most of the stocks now claimed by the plaintiffs. The mere fact that a broker, at and after a sale of the original stock purchased for a customer, has, and at all times retains in his possession or within his control, sufficient stock of the kind sold to fill his customer's order at any time, and that he owned or controlled it in order to be ready to fill such order, will not of itself give the customer any property in such stock so held or controlled.

The majority opinion divides the plaintiffs into five classes with reference to their power or ability to identify their property. Classes 1 and 2 are, I think, entitled to redeem the property pledged. In those cases it is of necessity shown that the stock is either that which was originally purchased for the customer, or that which had been in fact lawfully substituted for it. In regard to the other three classes, I think they are not entitled to redeem, because the existence of a pledge is not shown.

I have thus briefly indicated, without arguing at length, the points wherein I dissent from the opinion of the majority of the court.

CARPENTER, J., (dissenting.) From August 14, 1890, to November 24th of the same year, the plaintiff Paul C. Skiff ordered Bunnell & Scranton to purchase for him 500 shares of the stock of the Western Union Telegraph Company. The last of these orders was as follows: "New Haven, Conn., November 24, 1890. Banking House of Bunnell & Scranton. Please buy for my account and risk one hundred shares of the stock of the Western Union Telegraph Company; order good until countermanded. It is agreed that Bunnell & Scranton have the right to dispose of, without notice, all stocks, bonds, petroleum, and grain purchased or sold on margin, whenever said margin is reduced to two per cent. Paul C. Skiff." It is conceded that the other orders given by this plaintiff and the other plaintiffs were in the same form, being printed blanks, filled out with dates and amounts, and signed by the respective parties. These instruments are to be interpreted in the light of the usual course of business in this state and in the state of New York, especially in the New York Stock Exchange. The actual transactions under orders so given varied somewhat, but the order is so worded as to be equally applicable to whichever of the two more usual forms the transaction might assume,—a purchase of stock by the customer in his own name as an investment, or "a dealing in margins." These two transactions are described in the finding as follows: "If the customer desired the delivery of the certificate or other proper evidence of title to the property ordered to be purchased, such certificate or evidence of title of such security or property was obtained by the firm, and delivered to him upon payment to them of the purchase price and commissions. If the transaction was to be upon margin, then the customer giving such order was required to place and keep with the firm cash or securities equal to a stipulated per cent. of the par value of the securities or property ordered by such customer to be bought, which deposit was called a 'margin.' When stocks were ordered to be purchased upon margin, the certificate or other evidence of title of the property thus ordered to be purchased was not delivered to the customer,

but was held and made use of as hereinafter set out. It was understood between the customer and Bunnell & Scranton that the certificates of the property should not be delivered to the customer until the price thereof, with interest thereon and commissions, was paid. It was also understood that Bunnell & Scranton might, under certain circumstances, sell the securities thus carried to protect themselves from loss. Subject to such right it was agreed that the brokers would carry the property for the customer, at the risk of such customer, and that they would sell the same forthwith, upon the order of the customer, and account to him for the proceeds; or, upon payment in full of the purchase price of the property, and all sums due for interest and commissions, that they would deliver to the customer a certificate or other proper evidence of title to the property. This is the usual agreement between brokers and their customers when stock is dealt in upon a margin."

We all agree that the plaintiffs, with possibly one or two exceptions, were dealers in stocks upon margins, as distinguished from purchasers of stocks as investments; in other words, were stock speculators. It is also agreed that whatever the plaintiffs recover will be paid from the assets of the insolvent firm before a dividend is paid to the creditors generally, and that to that extent they will be made preferred creditors. This is contrary to the statute, and can only be justified upon the theory that the plaintiffs own the stocks in which they dealt, and which were in the hands of New York brokers, and controlled by Bunnell & Scranton at the time of the assignment. All these stocks were then subject to liens in favor of the brokers holding them, Prince & Whitely and W. S. Lawson & Co., which liens must first be paid, leaving but a small margin for the plaintiffs.

If the plaintiffs were not the general owners of these stocks, they could not be pledgors; if they were not pledgors, there were no pledges; and if there were no pledges, the plaintiffs have no case. That must be conceded. I now propose to show that the relation of pledgor and pledgee did not exist between these parties. I will speak only of Skiff's case, as his is a fair sample of all the others. When and how did he acquire a title? Certainly not by his contract, for it is conceded that by the custom of the business, in view of which the contract was made, and which thereby became a part of it, he could have no title to the stock until he paid the purchase price in full; and that payment has never been made. Only a small margin was paid to the brokers to protect them from loss, and they, at the time of the assignment, held the general title, legal and equitable. Their dominion over it was absolute, except as they were bound to sell when directed by Skiff, and

they might sell under certain conditions without his direction. All that Skiff owned was a right to pay the purchase money, and then, and not before, to have the title vested in himself. A right to acquire a title is not per se a title. A right to purchase a thing in futuro is not a purchase in praesenti. These principles are elementary, and will not be denied. As they are undeniable, and applicable to the case, they demonstrate the nonexistence of a pledge.

But I propose to pursue this subject a little further. What necessity is there for a pledge? The parties were capable of contracting for themselves, and they did contract for themselves. Bunnell & Scranton stipulated for such security as they desired; a security which gave them not only the possessory title, but the legal and equitable title as well. Why not leave the parties where they left themselves? Why not enforce the contract which they made, instead of imputing to them a contract which they did not make, and attempting to enforce that? Why substitute for the executory contract, which the parties in fact made, an executed contract, which they did not make? Or, if that is stating it too strongly, why treat a contract which is executed only in part, and remains partly executory, as though it was completely executed? I am aware that the courts of New York have taken that view of similar transactions. Following those cases, certain text writers have taken the same view. Massachusetts, on the other hand, repudiates the fiction that the customer becomes a pledgor and the broker a pledgee. The question has not heretofore been decided in this state, and until the announcement of this decision we were at liberty to decide it upon principle. The leading case in New York, which seems to be the foundation of all the other cases, is *Markham v. Jaudon*, 41 N. Y. 235. The reasoning of the court is as follows: "The plaintiff calls upon the defendants, who are brokers, to purchase for him certain shares of railroad stock, and furnishes them with \$1,000 for that purpose, agreeing to pay interest on the advances they shall make in the purchase, and commissions. The defendants make the purchase, having themselves advanced ninety per cent. of the purchase money. They bring to the plaintiff the certificates of the stock thus purchased by him and for him, and deliver them to him as the owner thereof. He thereupon hands them back to the defendants, to hold as security for their advance on the purchase, with interest and commissions. If these precise forms had been observed, no one would deny that the redelivery of the certificates would have constituted a strict formal pledge. In my opinion, the transaction, as it took place, amounted to the same thing. To have delivered the certificates to the plaintiff, and that the plaintiff should then have returned them to the defendants, to

be held by them as security for advances in their purchases, would leave the parties in precisely the same situation as if the defendants had retained them for that purpose; the form of a delivery to the plaintiff, and a redelivery by him to the defendants, being waived by agreement of the parties." There is one significant thing noticeable in this reasoning. There is a distinct recognition of the necessity of a title in the purchaser; that is, that a title in him is essential to a pledge by him. And that need is supplied by a supposed delivery of the certificates of title to him by the brokers, and that recognition is immediately followed by a declaration that the delivery was immaterial; that after the delivery and redelivery of the certificates of title the parties were left "in precisely the same situation as if the defendants had retained them for that purpose." And this reasoning seems to lie at the foundation of the subsequent cases. It does not bear examination. Prior to the supposed delivery the customer had no title, and the delivery was for the very purpose of clothing him with one. It did that, and much more. It converted an executory contract into an executed one,—an option to buy into a sale; and the purchase price, which the customer was at liberty to pay and take the stock or not, as he pleased, into an absolute debt. It not only wrought an entire change in the relation of the parties to the purchase money and the thing purchased, but also in the nature of the security. That was changed from a clear title, with an almost absolute dominion over it, into a possessory title, with a limited right to sell. I do not say that the security was impaired, but it certainly was not improved. It will not do to say that the observance of such forms is a mere formality, a mere idle ceremony. It was not a matter of form, but a matter of substance. I do not mean to criticise the decision, but I do say that the reasoning by which it is attempted to sustain it does not commend itself to my judgment as being sound. I think the decision would have been better sustained by calling the transaction what it was in fact,—a contract to deliver stock on receiving the purchase money. Characterizing it as a pledge is a misnomer, and is misleading. It is like reasoning from false premises, which can hardly fail to lead astray.

If the view I have taken of this case is the correct one it should be decisive against the plaintiffs; but, if not, then there are other considerations that should be noticed. I have thus far assumed that Bunnell & Scranton in fact purchased the stocks ordered by the several plaintiffs. But they did not. The finding shows that substantially all the plaintiffs' orders were executed by Prince & Whitely, or by W. S. Lawson & Co., upon the order of Bunnell & Scranton. Neither of these firms had any business relations with

any of the plaintiffs, all their transactions being with Bunnell & Scranton. Most, if not all, the stocks controlled by Bunnell & Scranton at the time of their failure were in the hands of one or the other of these two firms. If I understand the scope of the decision, it holds that each plaintiff sustains the relation of pledgor to the stock ordered by him and purchased either by Prince & Whitely or by Lawson & Co., those brokers being the pledgees. But how or when that relation came into existence I must confess my inability to understand. It certainly arose from no contract, express or implied, between the parties, for they are strangers to each other. Skiff ordered Bunnell & Scranton to purchase on his account 100 shares of Western Union. Bunnell & Scranton ordered Prince & Whitely to purchase the stock for them in their own name. They did so. Bunnell & Scranton thereupon notified Skiff that they had executed his order. Now, I can understand that Bunnell & Scranton have a claim on Prince & Whitely for that amount of that kind of stock, whether by virtue of the express contract or a constructive pledge is immaterial, and that Skiff has a claim on Bunnell & Scranton for the stock he ordered; but how Skiff can have any direct claim on Prince & Whitely, or can be regarded as the owner of the stock which they purchased in their own names on account of Bunnell & Scranton, is beyond my comprehension. The bare statement of the proposition seems to me to demonstrate its absurdity. If it is proper for the court to assume that Prince & Whitely delivered the stock to Bunnell & Scranton, and thereupon took a redelivery of it in pledge, will the court make the further assumption that Bunnell & Scranton delivered it to Skiff, and that Skiff directly or indirectly pledged it to Prince & Whitely? Clearly it is only by some such process that the relation of pledgor and pledgee can be established between Skiff and Prince & Whitely. Will it be said that Bunnell & Scranton are the pledgors, and that Skiff, by virtue of his contract with them, has an equitable claim on the pledge? But that severs the connection between Skiff and the pledge, and relegates him to the simple relation of a contractor with Bunnell & Scranton. Prior to the assignment, Bunnell & Scranton had a right to redeem the pledge, and avail themselves of the value of the equity. But Skiff had no lien on that. Why not, if he had any claim to the pledge before? By the assignment the equity became assets in the hands of the assignee. What is there to distinguish that from other assets, and give notice to creditors and others interested of Skiff's claim? Courts will not undertake to protect and enforce such vague and shadowy claims, especially where they are secret, and not likely to be known by those who have a right to know of them.

Take another illustration. From August 14 to November 24, 1890, Paul C. Skiff

ordered Bunnell & Scranton to purchase on his account 500 shares of Western Union, which were purchased by Prince & Whitely. At the time of the assignment Bunnell & Scranton were carrying for Skiff 500 shares of that stock, and 50 shares for one Merrill. At that time Prince & Whitely were carrying 50 shares of the stock only for Bunnell & Scranton, and Lawson & Co. were carrying for them 350 shares. Bunnell & Scranton also had 100 shares of the same stock, which were pledged to the New Haven Orphan Asylum. Thus they had 500 shares only, and their customers called for 550 shares. The finding does not show what disposition was made of the other 50. By what rule can the court apportion the 500 shares between Skiff and Merrill? True, they have shrewdly agreed between themselves that they will take the stock, and make the apportionment, without troubling the court; But that does not remove the legal difficulty. Parties coming into court for relief in matters of this kind should be able not only to show definitely the nature and character of their title, but also to point out with reasonable certainty the precise thing to which they claim title. If neither the subject-matter nor the title can be ascertained, it tends strongly to show that they have no case.

Another thing is noticeable. Prince & Whitely purchased all the stock ordered by Skiff. At the time of the failure they had 50 shares only, and Lawson & Co. had 350 shares. Now, assuming that Skiff was pledgor of the stock purchased by Prince & Whitely, what has become of that pledge? The finding does not even show what has become of the stock; only that it is gone. There can be no presumption that that in the hands of Lawson & Co. is a part of it. Is there any difficulty in sustaining that pledge? In *Markham v. Jaudon* it was held that a sale of the thing pledged without notice to the pledgor was a conversion for which the pledgee was liable in damages. It is not claimed that any notice of the sale was given to Skiff. That sale must have been either a conversion or an appropriation of the thing pledged. In either case the pledge, as such, is gone, and cannot now be enforced. Neither does the finding show under what circumstances or for whom the stock held by Lawson & Co. was purchased. Will it be claimed that a pledge by Skiff attached to that stock? If so, was it the former pledge transferred, or a new pledge created? And how was the transfer effected, or the new pledge created? Answers to these questions would be interesting. If Skiff has a pledgor's claim to that stock, it is possible that the party for whom it was purchased has one also. How are these conflicting claims to be adjusted? It is unnecessary to pursue this subject further. For other complications which exist, and difficulties which will necessarily be encountered in applying the decision to the

facts of the case, it is sufficient to refer to the majority opinion.

I again refer to the case of *Markham v. Jaudon*. As before stated, that was a case between the original parties. It was an action against the brokers whom the plaintiff had employed to purchase the stock, and who had actually purchased it, and had sold it without notice to the plaintiff. The action was not to redeem the supposed pledge, but to recover damages for a conversion of it. Of course, the pledgee had violated his contract, and the pledge had ceased to exist. There was no attempt to follow the stock. It was assumed that the claim was purely personal. It was held that the brokers were liable. In reaching a conclusion the court not only likened the transaction to a pledge, but declared that the legal relation of the parties was that of pledgor and pledgee. As I have before remarked, in that case it mattered not whether it was called a pledge or simply a contract. The liability and the extent of the liability were the same, and the immediate parties to the contract were alone affected. In this case other parties are or may be affected. Among these are the New York brokers who purchased the stock upon the order of *Bunnell & Scranton*, persons to whom any of the stock was sold or repledged, and all the creditors of *Bunnell & Scranton*. That case may be an authority in a suit between the customer and the broker to whom the order was given, and who actually purchased the stock, although for reasons hereinbefore given I do not think it expedient to follow it. Beyond those limits it is not an authority for the plaintiffs, but, on the contrary, it seems to be against them. It will be observed that, inasmuch as the stock had passed into the hands of persons who were neither parties nor privies to the supposed contract of pledge, the theory was of no practical importance to the case; indeed, it was not in the case at all until brought in, unnecessarily, as I think, in the reasoning of the court. Thus far, aside from the illustration in the reasoning, the real case, and the logic of its facts, were decidedly unfavorable to the plaintiffs. The strength of precedents lies in the facts of the case, and in the application of the law to the facts, rather than in the illustrations used in the arguments. Calling the transaction a pledge is in the nature of an obiter dictum in respect to a matter of fact, and not of law; a dictum, unfortunately, which is not quite true in fact. Such dicta are entitled to but little weight.

There is another feature of that case which is worthy of notice. It is this: The court held that evidence that the sale of the stock which constituted the conversion was in harmony with the custom of brokers, and was in the usual course of the business, was inadmissible, on the ground that it was contrary to the well-settled rules of law. The

rules of law referred to seem to be the law relating to pledges, the principal one of which is that a pledgee may not sell the thing in pledge except upon a judicial sale, or upon giving notice to the pledgor of the time and place of sale. It seems to me that the argument should have been turned around. Instead of holding that the rule of law relating to pledges was a sufficient reason for excluding evidence of a custom, the existence of the custom should have been regarded as a convincing reason why the transaction should not have been called a pledge. The argument is vastly stronger in that direction than in the other. This case, however, is not complicated with any question of evidence. The fact as to the existence of such a custom, and the further fact that it was followed by the supposed pledgees, are in the case, and they should have had their legitimate effect in completely destroying the pledge theory. My view of the case is that, while *Markham v. Jaudon* and the cases which follow it, and also some text writers, may be authorities for holding that a broker purchasing stock and the customer who ordered it may sustain to each other the relation of pledgee and pledgor, yet that it is so inconsistent with sound principle, and, if followed to its logical results, might be so disastrous in its consequences, that it ought not to be followed, even to that extent. But, if followed to that extent, we ought to follow the principal case in the real point decided,—that a sale or a subpledge is a conversion of the thing pledged, which destroys the pledge, so that the pledgor's remedy is not a redemption, but an action for damages. But these authorities are not in point for any one of the following propositions: (1) That these plaintiffs, or any one of them, are pledgors to *Prince & Whitely* or *W. S. Lawson & Co.* (2) That a pledge to a broker who purchased the stock to secure him for advances made for the purchase attaches to any property subsequently purchased. (3) That such a pledge attaches to any property purchased for the customer by other brokers. (4) That where there are several customers dealing with the same broker, buying the same kind of stock, and at the time of the failure he had not sufficient stock to answer the demands of all the customers, the customers have a joint pledge, or a pledge as tenants in common, on whatever stock remains. (5) That when the identity of the stock cannot be traced, still, if it can be shown that the broker actually received its value in money, the pledgor may redeem the money by paying the charges against it, and take the balance. (6) That where money, stocks, or other property have been consumed, destroyed, or so mingled with other property of the same kind as to be incapable of identification or recognition, still they are capable of sustaining a pledge. It seems to me that the decision virtually affirms the soundness

of all or most of these propositions. While, on the other hand, if the contract is simply construed according to its plain terms, and the manifest intention of the parties, as gathered from the custom of brokers and the acts of the parties, no such inferences are possible. When a contract is general in its terms, and somewhat indefinite as to its purpose, what the parties actually did under it, if not inconsistent with its terms, affords the most satisfactory indication of their real intention. If we apply that test, we can have no doubt as to the real nature of the transaction. Bunnell & Scranton agreed to purchase on Skiff's account and risk 500 shares of the stock of the Western Union Telegraph Company, and Skiff agreed to furnish them with 10 per cent. of the par value of the stock. The brokers agreed to hold the stock at the pleasure of Skiff, provided Skiff paid the interest on their advances and their commissions, and also kept the margin good. Skiff promised to pay interest and commissions, and to keep the margin good; and, if he failed to do so, he agreed that the brokers might sell the stock, and thus protect themselves from loss. The brokers also agreed to sell the stock when directed by Skiff, or deliver to him the certificates upon his paying the balance of the purchase price with interest and commissions. These agreements were performed on both sides, except that the brokers did not hold the stock, but disposed of it, intending to replace it with other stock of the same kind, so as to be able to sell or deliver it when requested. That was regarded as a substantial compliance with the terms of the agreement. Thus matters stood at the time of the failure. This interpretation meets fully all the requirements of the contract and the demands of the situation, and effectuates the real intention of the parties. That intention clearly was, not to buy stocks, but to speculate. Speculators should receive their just legal rights, and nothing more; especially should they receive no favors at the expense of innocent third parties.

One illustration more. Suppose that Bunnell & Scranton and Skiff, at the commencement of their dealings, had agreed that Skiff should be the owner of all the stock purchased, either by Bunnell & Scranton or by other brokers upon their order, and that that stock should be regarded as pledged to the broker purchasing it to secure his advances; that the pledge should follow that stock into whosoever hands it should go so long as it could be traced; that if that stock should be disposed of, and other stock of the same kind acquired in its place, the pledge should be deemed to be transferred to the newly-acquired stock; that if at any time the stock held by the broker should be insufficient to meet the demands of all the customers, it should be deemed that there was a joint pledge by all, covering the stock held by the

broker, and that each might redeem a proportional part of it; and in short, if the stock could not be traced, and the proceeds could, that the pledge, with a corresponding right of redemption, should be deemed to attach to the proceeds.—Is this court prepared to sanction and enforce such a contract? Objectionable as such an express contract would be, it is still more objectionable to impute such a contract to the parties by construction, and then enforce it.

In the case of *Mrs. Trowbridge* I agree with the majority.

The view I have taken of this case does not require that the case of *Ingraham v. Taylor*, 58 Conn. 503, 20 Atl. 601, should be overruled. I think that case interpreted the contract as it was understood by the parties. If, in that respect, this decision had followed that case, the two cases would not have been inconsistent

(63 Conn. 176)

STATE ex rel. RYLANDS v. PINKERMAN,
Captain of Police.

(Supreme Court of Errors of Connecticut.
June 5, 1893.)

MUNICIPAL CORPORATIONS — CITY OF BRIDGEPORT
—POLICE COMMISSIONERS—APPOINTMENT TO FILL
VACANCY—TERM OF APPOINTEE—BOARD OF ALDERMEN
—CALL OF MEETING—PROCEEDINGS—
VOTE BY MAYOR—LEGALITY—CHIEF OF POLICE
—ABOLISHING OFFICE BY ORDINANCE—ABATE-
MENT OF APPEAL.

1. The charter of the city of Bridgeport (10 Priv. Laws, p. 510) provides that each of the four police commissioners shall hold his office for two years, and until his successor is appointed and qualified, and on the expiration of the terms of office of each their successors shall be appointed for the term of two years next succeeding, and until their successors have qualified; that the mayor shall appoint such commissioners, so as to divide the board equally between the two leading political parties; and that, whenever any vacancy occurs, it shall be filled in the manner provided for the appointment of members. *Held*, that a member appointed to fill a vacancy in the board could hold such office only to the end of the unexpired term, and not for two years from his appointment.

2. The charter of the city of Bridgeport provides that the mayor, board of aldermen, and board of councilmen shall constitute the common council, and that the mayor shall preside at the meetings of the board of aldermen, and "have a casting vote only in case of a tie." *Held*, that in case of a tie vote in the board of aldermen on the question of considering a nomination made by the mayor, or on the confirmation of a nomination made by him of a commissioner of police, the mayor could give the casting vote.

3. The rules of order of a board of aldermen provided that all differences of opinion in regard to modes of proceeding not otherwise provided for should be "governed by parliamentary practice, as set forth in Cushing's Law and Practice of Legislative Assemblies." That work states it as the common rule that no member of a legislative assembly shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest, but that an interest of the latter description only exists when it is immediate, particular, and distinct from the public inter-

est. *Held*, that an alderman, who was also a commissioner of police, could vote against the confirmation of one nominated to succeed him as commissioner.

4. The charter of the city of Bridgeport gives the aldermen present at any meeting of the board, if less than a quorum, power to require the mayor to issue a warrant to arrest and bring in the absent members. *Held* that, where less than a quorum met pursuant to a call of the mayor for a meeting, and a majority of those present remained continuously in the aldermanic chamber for nearly two days, to keep the meeting alive, while an effort was being made to arrest and bring in the absent members, the meeting was legally continued to the end of such time, and business then transacted by a quorum was legal and valid.

5. The fact that the warrant of arrest for such absent members stated that the meeting was originally called for 8 o'clock, when it was in fact called for 7½ o'clock, did not impair the validity of the warrant, or affect the legality of the proceedings, since such error could mislead no one.

6. Neither the charter of the city of Bridgeport, nor the General Statutes of the state, make such mention of the office of chief of police as amounts to a declaration that an office of that name must necessarily exist in such city, and the office of chief of police of such city was created by ordinance. *Held*, that such office could be abolished, and the duties thereof be devolved on the incumbent of some other office, by ordinance.

7. The board of police commissioners of such city removed the chief of police at a meeting attended by a former member, whose successor had been appointed and qualified. In quo warranto proceedings by the officer thus removed against the person performing the duties of his office, the superior court found facts which showed that such former member was not then a de facto commissioner. He voted for such removal, and without his vote the removal could not have been made. *Held*, that the removal of the chief of police was a nullity.

8. If the notice of such meeting of the board was not given to all the legal members, such removal was void, even if such former member was a de facto commissioner.

9. In the quo warranto proceedings, defendant, who was captain of police, appealed from a judgment in favor of relator, and the latter filed a plea in abatement of the appeal, alleging that he had been put in possession of the office, and that defendant, since the appeal, had made no claim to the office; but it appeared that he recovered such possession through the removal of defendant from the office of captain of police pending such appeal, and on charges of insubordination preferred by relator; that such insubordination consisted of acts similar to those on which the original quo warranto proceedings were based; and that the decree of removal was also based in part on the ground that prosecution of the appeal, and of an action of mandamus brought or promoted by defendant to reinstate him in office, interfered with the harmonious working of the police force. *Held*, that the plea in abatement must be overruled.

Carpenter, J., dissenting.

Information in the nature of quo warranto by the state of Connecticut, on the relation of John Rylanda, against John P. Pinkerman, captain of police of the city of Bridgeport, to obtain possession of the office of chief of police of such city, to which relator claims to be entitled, and which he alleges is usurped by defendant. From a judgment for relator, defendant appealed. Relator filed

a plea in abatement of the appeal, and to dismiss. Overruled. Judgment reversed.

In his answer, defendant alleged that relator had been removed from such office by the board of police commissioners, and that the exercise of the duties thereof had been committed to him, as captain of police, pursuant to the ordinances of such city, he being the officer next in rank; that the office of chief of police of such city was abolished by an ordinance passed September 23, 1891; and that he was lawfully exercising the duties of such office under the provisions of such ordinance. The court sustained a demurrer to that part of the plea setting up such ordinance, and relator filed a replication to the other allegations of such answer, in which he set up in detail the constitution and action of the board of police commissioners, and alleged various irregularities which it was claimed rendered his removal illegal and void. Defendant pleaded in rejoinder facts which he claimed showed that such board was legally constituted, and that its proceedings in such removal were regular and legal. A sur rejoinder and rebutter were also filed. After the appeal was perfected, the relator filed a plea in abatement of such appeal, alleging as grounds therefor that, since such appeal was perfected, defendant was removed for cause from his office of captain of police by the board of police commissioners of such city, and a successor appointed, who is discharging the duties of such office; that since his removal defendant has not exercised any of the duties of such office, or interfered with relator's exercise of his duties as chief of police; and that he is in full and undisturbed possession of such office. To such plea, defendant filed a replication, to the effect that he was removed because of his exercise of the duties of chief of police after relator's removal as such officer, and because he disobeyed relator's orders, and that the charges on which he was removed were made by relator after the appeal in this case was taken. He also alleged that the order of removal stated one ground thereof to be that defendant had, since the decision of the trial court, been keeping alive the litigation against relator, and threatened to continue it notwithstanding such decision was against defendant's claim to such office; that the litigation referred to is this appeal, and a mandamus proceeding in which defendant was relator, instituted after his removal as captain of police, to reinstate himself in such office, the trial of which was continued to await the decision of the supreme court in this case.

H. Stoddard and J. B. Klein, for appellant. D. Davenport and S. Judson, Jr., for appellee.

BALDWIN, J. The plea in abatement which has been interposed by the state goes upon the ground that the further prosecution

of this appeal would simply invite the court to decide questions that are no longer of any practical importance, since the relator is now in full and undisturbed possession of the office which was the occasion of the action. It appears, however, that he has recovered such possession by reason of the removal of the defendant from his office of captain of police, and that this removal was made pending the appeal, and upon charges of insubordination preferred by the relator. The insubordination consisted of acts similar to those upon which the original quo warranto proceedings were based, and the decree of removal is also placed in part upon the ground that the prosecution of this appeal, and of an action of mandamus brought or promoted by the defendant to reinstate him in office, interferes with the harmonious working of the police force.

An appellee can maintain a plea in abatement of this kind only on the ground that the inquiry whether the judgment appealed from was right or wrong has become immaterial. But if the judgment of ouster was wrong, to dismiss the appeal, at the instance of the appellee, because the appellant has been removed from office for prosecuting the appeal, and the appellee reinstated, would be to allow the relator to take advantage, if not of his own wrong, at least of the error of the court, to defeat the remedy provided by law for the redress of such an error. The appellant did not voluntarily withdraw from the contest over the office claimed by the relator. He was forced out of it by a sentence of removal, procured by the relator, and based upon an assumption of the validity of the judgment appealed from, and the consequent misconduct of the appellant in endeavoring to obtain its reversal. The appellant's reply to the plea in abatement summarizes the appellee's contention, not unfairly, by the statement that "the defendant, Pinkerman, was dismissed on Rylands' charges because he appealed his case against Rylands to this court, and now Rylands asks that this appeal to this court be dismissed because Pinkerman has been dismissed from office because he took the appeal." It is true that the state is, in form, the appellee, and that the pleadings do not show that the state took any part in the proceedings which have resulted in the dismissal of the appellant from office. But in informations of this nature the relator is the substantial complainant, and conducts the cause. The only brief filed in this case for the appellee is entitled "brief for relator," and states that execution was issued "in favor of the relator," on the judgment of ouster rendered by the superior court. The state has no interest, except that the rightful incumbent of the office in controversy, if such an office exists, should exercise its functions, and we do not think the acts of either of the claimants should be allowed to prejudice the right of the other to a final determination of the question of title.

The matter in difference is not a mere bill of costs in a contest over a position in a private corporation, as in *State v. Tudor*, 5 Day, 320. The powers of one of our largest municipal corporations as to a subject vitally affecting its peace and order are the subject of controversy, and in our opinion the appellant has a right to require us to review a judgment by an execution issued under which he was ousted from the exercise of the functions of chief of police before he was dismissed from the office of captain of police. These positions are of a class in which the state, and the whole people of the state, have a deep and immediate concern. Whoever holds one of them holds it as a trust from the state, resting, not on contract with the city, but on an appointment made by the city under a power conferred on it by the state. *Farrell v. City of Bridgeport*, 45 Conn. 181, 195. We think the reply to the plea in abatement and motion to dismiss is sufficient, and that they must be overruled.

The appeal presents two main questions,—that as to the validity of the removal of the relator from the office of chief of police in June, 1891, and that as to the effect of the ordinance of September, 1891, relating to the abolition of that office, which went into effect a month before the information was filed. The present charter of the city of Bridgeport was passed in 1887. 10 Priv. Laws, p. 510. It contains the following provisions as to the constitution and administration of the police department: "Sec. 50. There shall continue to be a board of police commissioners, of fire commissioners, and park commissioners, each of which shall consist of four electors of said city, and each commissioner shall hold his office for the term of two years, and until his successor is appointed and qualified, and on the expiration of the terms of office of each of the present commissioners their successors shall be appointed for the term of two years next succeeding, and until their successors shall be appointed and qualified. The mayor of said city shall, by and with the advice and consent of the board of aldermen of said city, appoint the members of the several boards of police commissioners, of fire commissioners and park commissioners, and the appointment of the members of the said several boards of commissioners as aforesaid shall be made in such manner as to divide the membership of each of said boards equally between the two leading political parties for the time being, and whenever any vacancy shall occur in any of said several boards of commissioners it shall be filled in the manner provided aforesaid for the appointment of members. The mayor of said city, by and with the advice and consent of two thirds of the members of the board of aldermen, may remove any member of either of said boards of commissioners for cause. The members of either of said boards of

commissioners now in office shall retain their positions during the term for which they were elected, subject to removal in the manner hereinbefore set forth. The mayor of the city shall, ex officio, be a member of said several boards of commissioners, but shall have no vote in any of their proceedings except in case of a tie vote. He shall preside at all meetings of said boards at which he is present, and at all meetings of said boards three members, exclusive of the mayor, shall constitute a quorum, and the concurrence of three of them shall be necessary for the transaction of business. The commissioners of said several boards, before entering upon the discharge of their duties, shall be sworn to a faithful performance thereof. Each of said boards shall appoint a clerk, whose duty it shall be to keep, in books provided for that purpose, true records of the doings of said boards respectively." "Sec. 58. The police commissioners of said city of Bridgeport shall have the sole power of appointment and removal of officers and members of the police department of said city; and it shall be the duty of the said board of police commissioners to appoint suitable persons to fill the offices of said police department, and other suitable persons as members of said police department, and to suspend, remove or expel any officer or member from office or membership in said department whenever, in the judgment of said commissioners, such suspension, removal or expulsion shall be for the best interests of the city; and whenever any person shall be appointed an officer or member of said police department, or whenever any officer or member of said police department shall be suspended, removed, or expelled from his office or membership in said department, it shall be the duty of the said board of police commissioners to give a written notice, within a reasonable time, to the city clerk of said city, of such appointment, suspension, removal or expulsion. The present police force of said city shall hold their respective offices, unless previously suspended, removed, or expelled, until others are appointed in their stead; and every officer or member of said police department shall hold his office and membership in said department until removed or expelled by said board of police commissioners for cause, of which said board of police commissioners shall be the sole judges. Nothing contained in this section shall be so construed as to prevent the common council of said city of Bridgeport from increasing or reducing the members of the police force of said city, or creating new offices in said police department; and in case the common council of said city shall vote to reduce the police force of said city, the board of police commissioners shall remove a sufficient number of the officers and members of said police force to conform to the vote of said common council.

v.28A.no.2-8

Sec. 59. The common council of said city shall have power to pass an ordinance or ordinances relative to the proper regulation of the police department, and relative to whatever further control of said department the said common council may deem proper to place in the hands of said board of police commissioners." By section 24 the common council was also authorized "to make, alter and repeal orders and ordinances, not inconsistent with the provisions of the charter, which shall be valid and operative within the limits of said city," relative to a number of specified matters, and among others "to the city police, * * * to the filling of vacancies which may occur in the common council, or in any office appertaining to said city for the unexpired term, not otherwise provided for in this act;" and to the duties of all officers of the city "not expressly defined by the provisions of this act." General power was also given to make and repeal ordinances "relative to all other subjects that shall be deemed necessary and proper for the protection and preservation of the health, property and lives of the citizens," and "to constitute and appoint all necessary and proper committees and officers, under such names and appellations as they may deem appropriate," and to "invest them with the power and authority necessary and proper to carry into full effect all the orders and ordinances of said common council." Section 62 provides that bail bonds and recognizances in the city court may be taken "by the chief of police or acting chief of police of said city," and that each member of the police department shall have "power, by the permission of the chief of said department, to pursue and arrest with process, in any part of this state, persons charged with any criminal act committed in said city." Section 63 provides that "the chief of said police department shall have power, subject to the control of the board of police commissioners of said city, to suppress all tumults," enter houses of ill fame, and raise the posse of the city to aid him in the exercise of his authority. The common council adopted, before the present controversy arose, an ordinance relative to the police department. Section 1 of this ordinance declares that "the board of police commissioners shall have the general management and control of the police department," and may make rules for its government, consistent with the laws of the state and ordinances of the city. Section 6 provides that "the regular police force of this city shall consist of a chief of police, captain, lieutenant, first and second sergeant, and not less than ten nor more than twenty-eight patrolmen." Section 9 provides that "the chief of police, subject to the control of the mayor and police commissioners, shall have the control and management of the subordinate officers and members of the police department, and

they shall obey his orders. He shall also have charge of the station houses and the custody of all persons committed to or confined therein. He shall also keep a record of the officers and members of the police force and of their doings. He shall also keep an accurate monthly pay roll of the police force, in which he shall designate the date and period of service of each member of the force, and the several amounts due them respectively for that month, and when payment is made, shall take the receipt, on such pay roll, of each member for the amount paid him; and such pay roll thus kept and receipted shall thereupon be lodged by him with the city auditor to be kept on file. In the absence of the chief of police, or when from any cause he shall be unable to act, the captain shall take his place and perform his duties, and in the absence or inability to act of both the chief and captain, the lieutenant shall discharge the duties of chief of police." The relator was duly appointed and qualified as chief of police in January, 1890. In December, 1890, the four police commissioners severally resigned their positions, and shortly afterwards the vacancies were duly filled by the appointment of Messrs. Beardsley, Bogart, Grant, and Rishor. In February, 1891, the mayor appointed David Walsh to fill a vacancy occasioned by the death of Mr. Beardsley, to hold office for the unexpired term. The form in which this appointment was made raises an important question in the case, the defendant contending that, though purporting to be for the unexpired term, it was, in law, by force of the charter provisions above quoted, an appointment for a full term of two years. Underlying this question there is also obviously another, namely, what was the length of the term for which Mr. Beardsley was originally appointed? If it was for the unexpired portion of the term of his predecessor, Mr. Grant, it terminated in April, 1891; but, if it was for a full term of two years, it would not come to an end until December, 1892, and Mr. Walsh, even if his appointment were restricted to the limit placed upon it by the form of his nomination, would remain in office until that date, as would also the two others appointed in December, 1890,—Messrs. Bogart and Grant,—while Mr. Rishor, whose nomination was not sent in until January, 1891, would hold office until January, 1893.

The terms for which Messrs. Grant and Spencer, who had been replaced by Messrs. Beardsley and Bogart, were originally appointed expired in April, 1891, and the mayor then nominated M. L. Reynolds to succeed Mr. Walsh, and E. H. Sperry to succeed Mr. Bogart. When the nominations were presented, upon motion of Mr. Walsh, who was a member of the board of aldermen, the board voted to lay them upon the table until the last meeting in March, 1892. At

the next meeting of the board the mayor sent in a message disapproving this action, and a motion "to sustain the veto" resulted in a tie vote. The mayor then voted for the motion, and declared it carried. By the city charter (section 7) he is empowered to "preside at the meetings of the board of aldermen, and shall have a casting vote only in case of a tie." It is sufficient to remark, with reference to the proceeding last mentioned, that as the charter only provides for the approval or disapproval by the mayor of measures which have passed both of the boards constituting, with him, the common council, his message of disapproval was without any legal effect.

The mayor, who had power to convene the common council at any time, subsequently called a meeting of the board of councilmen for May 18th, and a meeting of the board of aldermen at half past 7 o'clock on May 20th, each call specifying the object of the meeting as follows. "For the purpose of electing a liquor and dog agent, also a public pound keeper, and transacting any other business proper to be done at said meeting." The city ordinances provided that the common council, at special meetings, might act upon any matter mentioned in the call, "and do any other business proper to be done at any regular meeting." By the charter (section 7) the board of aldermen and the board of councilmen are "two separate bodies," holding (section 26) separate meetings. On May 20th, at half past 7, the mayor and all the aldermen were at the city hall, six of the latter, including Mr. Walsh, being in the chamber where the meeting was to be held, and the rest of the board, also numbering six, being in an adjoining room in conference with the mayor. Seven aldermen were necessary, under the charter, to constitute a quorum, and the six who were in the aldermanic chamber, and who had come there for the purpose of participating in the meeting, after waiting until 10 minutes past 8 without being joined by the others, agreed to leave the hall and the city, in order to prevent any action at the meeting with reference to the appointment of police commissioners. They then drove together to an adjoining town, and were thereafter in hiding, in various parts of the state, until noon on May 22d. Five minutes after they had left the city hall, the mayor and the six aldermen who had been with him entered the aldermanic chamber, and the meeting was called to order. The charter (section 7) gave those present at any meeting of the board, if less than a quorum, power to require the mayor to issue a warrant to arrest and bring in the absent members. Such a warrant was thereupon issued, and from that time until noon of May 22d the mayor and the six remaining aldermen, or a majority of them, were continuously in or about the aldermanic chamber for the purpose of keeping

the meeting alive. At noon on May 22d the six absentees voluntarily returned to the city, and, the warrant being read to them, entered the chamber with the officer, and took their seats. The mayor and the six other aldermen were present, and the meeting was called to order. After some miscellaneous business, in which all participated, the mayor presented in writing the nominations of Messrs. Reynolds and Sperry as police commissioners. Objection was made to their presentation, which resulted in a tie, whereupon the mayor gave a casting vote, and declared them in order. Votes confirming the appointments were then had and declared in the same manner, by the casting vote of the mayor. A dog and liquor agent was then elected, and a good deal of other business transacted, in which all present took part. Messrs. Reynolds and Sperry were soon afterwards sworn in and qualified as police commissioners, and Mr. Sperry's predecessor surrendered to him his badge of office, and made no further claim to the position. Mr. Walsh, however, as whose successor Mr. Reynolds had been nominated, refused to recognize him as such, and continued to claim to be a police commissioner, performing some of the acts properly appertaining to that position, while Mr. Reynolds performed others. Mr. Walsh was still recognized as a commissioner by Messrs. Grant and Rishor and by the clerk of the board. Mr. Reynolds was recognized as a commissioner by the mayor and the relator, as chief of police. Each also had recognition and support from friends and partisans in and out of the common council. The mayor called a meeting of the board of police commissioners for organization on May 30, 1891, at the city hall, on notice to Messrs. Grant, Rishor, Reynolds, and Sperry, but it was attended only by himself and Messrs. Reynolds and Sperry. No business could be transacted, under section 50 of the charter, without the concurrence of three commissioners. Meetings of the rival board were held at the house of one of its members, on notice to the mayor and Messrs. Grant, Rishor, Walsh, and Bogart, at which Messrs. Grant, Rishor, and Walsh attended, with the clerk, and business was transacted. At one of these meetings held on June 11, 1891, a vote was passed purporting to remove the relator, for cause, from the office of chief of police. He had been summoned to appear and answer the charges against him, and had paid no attention to the summons.

It is evident that he was not removed from office, unless Mr. Walsh can be counted as one of the three commissioners whose concurrence was necessary. If his appointment, in February, 1891, to fill the unexpired term of Mr. Beardsley, amounted in law to an appointment for a full term of two years, or if Mr. Beardsley's term was one of that length, he was rightfully a member of the board in June. But we are of

opinion that complete effect can be given to the provisions of the charter only by construing it as confining appointments to fill vacancies to appointments for the residue of the unexpired term. The evident intent of section 50 is to secure to the city at all times, so far as possible, the services of commissioners, half of whom have had the benefit of at least a year's experience in office, and to divide the membership of each half equally between the leading political parties. *Parmater v. State*, 102 Ind. 90, 93, 3 N. E. 382. Such a board had existed in Bridgeport since 1868. The charter of that year provided for the election of two commissioners to serve for one year, and two for two years, and for the annual election thereafter of two to serve for two years, and secured a nonpartisan character to the board by allowing no one to vote for more than two out of the four, and requiring the election of deputy commissioners to replace each elected commissioner in case of a vacancy. From that time until the resignation of the entire board, in December, 1890, its membership had been annually renewed by the appointment of two commissioners for a term of two years, each belonging to a different political party from the other. Were the contention of the defendant well founded, the successors of the four commissioners who resigned in December, 1890, should have been, and in law were, appointed each for a two-years term, thus totally and forever frustrating the carefully devised scheme of alternating succession which had been followed for 20 years. It was therefore incumbent upon the mayor in April, 1891, to send in nominations for two commissioners to succeed Messrs. Walsh and Bogart. He did so, and we must next inquire whether they were properly confirmed by the board of aldermen.

In our opinion the meeting of that board on May 20th was legally convened, was called to order within a reasonable time from the hour appointed, and was legally continued until May 22d. *School Dist. v. Blakeslee*, 13 Conn. 227. The provisions of the charter for bringing in absent members contemplated such a contingency as in fact occurred on that occasion, and it was unnecessary for the members in attendance to remain actually in their seats in the aldermanic chamber during the hours or days which elapsed before the absentees returned. The warrant of arrest issued by the mayor, described the hour at which the meeting was originally called as 8 o'clock, which was, in fact, half past 7, but the error could mislead no one, and did not impair the validity of the instrument. It is immaterial whether the nominations for police commissioners were taken from the table at this meeting in a manner pursuant to the rules of the board, or whether they were entertained as new business. The board had power to suspend or disregard its rules of order by the vote of a majority; and

to vote on the consideration of the nominations, in effect, suspended all rules inconsistent with such a vote. *Cush. Parl. Law*, §§ 794, 1478; *Bennett v. City of New Bedford*, 110 Mass. 433, 438; *State v. Chapman*, 44 Conn. 595; *Hough v. City of Bridgeport*, 57 Conn. 290, 295, 18 Atl. 102. Section 24 of the charter declares that "the mayor, board of aldermen, and board of councilmen of said city, shall constitute and be a body known and denominated the common council of the city of Bridgeport." Section 7, as previously quoted, provides that the mayor shall preside at the meetings of the board of aldermen, "and shall have a casting vote only in case of a tie." There is no limitation of this casting vote to any particular kind or class of business. A tie is more likely to occur upon questions involving political considerations, and arises most often as to the creation of offices or appointments to office. This the legislature may be presumed to have had in mind when this section was adopted, and we see no reason for adopting a narrow construction of a provision plainly adapted to the prevention of "deadlocks," which are never more injurious to good government than when the result of a contest which keeps an office vacant that the public interests require to be filled, or prolongs an official term beyond the period contemplated by law. *Carroll v. Wall*, 35 Kan. 36, 10 Pac. 1. If the board of aldermen should be equally divided upon the passage of an ordinance recommended by the mayor in his annual message, it would not be doubted that he could break the tie. We perceive no greater reason for refusing him a casting vote when he has proposed, not a measure of legislation, but a candidate for office.

The tie was created by the vote of Ald. Walsh, which was cast against the confirmation of Mr. Reynolds as his successor in the office of police commissioner. By the rules of order of the board of aldermen, all differences of opinion in regard to modes of proceeding, not otherwise provided for, were to be "governed by parliamentary practice, as set forth in Cushing's Law and Practice of Legislative Assemblies." In that work it is stated (sections 1784, 1789, 1844) to be the common parliamentary rule that no member of a legislative assembly shall vote on any question involving his own character or conduct, his right as a member, or his pecuniary interest; but that an interest of the latter description only exists when it is immediate, particular, and distinct from the public interest; and that (section 1837) the reception of such a vote after the declaration of the result by the presiding officer can only be remedied by formal action of the house in passing a motion for its disallowance. The right of a member of a legislative body to vote on a question involving his right to the seat he holds in it is a very different one from that which arises on a question as to his tenure of some other office. This distinc-

tion was strongly emphasized in the discussions arising upon a motion made in the senate of the United States, in 1866, to disallow Senator Stockton's vote upon a resolution declaring him entitled to retain his seat. Senator Foster, then the president of the senate, a distinguished parliamentarian, and afterwards a member of this court, took the ground that the chair had no power to exclude the vote, but that the senate could. During the debate, Senator Sherman, of Ohio, while advocating the motion, in view of Mr. Stockton's peculiar relation to the subject of the resolution for which he had voted, stated that he had himself, on one occasion, as a representative, determined that should his vote, as such, be necessary to secure his own election to another position, for which he had been placed in nomination, his duty to his constituents would require him to give it; and similar views were expressed by Senators Trumbull, of Illinois, and Reverdy Johnson, of Maryland. *Cong. Globe*, 1st Sess. 39th Cong. 1602, 1630, 1643, 1647; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 235. It is our opinion that Ald. Walsh had the right to vote against the confirmation of Mr. Reynolds as his successor in the office of police commissioner, and that, even had it been otherwise, his vote, when once given and counted by the mayor in his declaration of the result, could only be rejected by the action of the board of aldermen.

In regard to the notice given of the objects of the meeting, it is enough to say that, with respect to such a body, the specification of certain objects does not exclude action upon any others which are within the range of its general powers. *Whitney v. City of New Haven*, 58 Conn. 450, 460, 20 Atl. 666.

It follows that Messrs. Walsh and Bogart ceased to be rightful police commissioners upon the qualification of their successors in May, 1891. The removal of the relator from office in June, 1891, by the so-called "board of police commissioners," constituted of Messrs. Grant, Rishor, and Walsh, was therefore a nullity, unless Mr. Walsh was a de facto commissioner. Against such a claim the finding of the superior court is decisive. It is that at no time between May 21 and September 23, 1891, did he have the reputation of being such a commissioner, nor were his acts and authority as a pretended commissioner generally recognized or acquiesced in, nor was he an incumbent of that office under such apparent circumstances of reputation or color as would have led men to suppose that he was a legal commissioner, nor did he exercise the duties of that office under such circumstances of continuance, reputation, acquiescence, or otherwise, as reasonably to authorize the presumption that he was such a commissioner, or as were calculated to induce people, without inquiry, to submit to or invoke his action. The want of notice to either of the rightful commissioners ap-

pointed in May, of the meetings of the pretended board of commissioners, would also be a fatal objection to the validity of the sentence of removal, even had Mr. Walsh been a de facto commissioner. It follows that the relator continued to be chief of police until September, 1891.

Upon September 22d, 1891, an ordinance was adopted by the common council, which reads as follows: "Be it ordained by the common council of the city of Bridgeport: Section 1. That the office of chief of police be and the same is hereby abolished. Sec. 2. That section 6 of chapter 17, being 'An ordinance relative to the police department,' be and the same is hereby amended by striking out the words 'chief of police' in the second line thereof. Sec. 3. That section 9 of said chapter 17, being 'An ordinance relative to the police department,' be and the same is hereby amended by adding thereto the following: 'If at any time the office of said chief of police be abolished or ceases to exist, then said captain of police shall be vested with all the powers and responsibilities, and shall perform all the duties, formerly exercised by or imposed upon said chief of police by the statutes of the state, the charter and ordinances of the city of Bridgeport, and the rules of the police department of said city.' Sec. 4. All ordinances and parts thereof now in force and inconsistent with any part of this ordinance are hereby repealed." It is obvious that this ordinance was inartificially drawn, but its general purpose is unmistakable. It was designed to abolish the office of chief of police, to amend certain of the ordinances in such a way as to secure the devolution of the functions of the office upon the captain of police, and to repeal all provisions of the ordinances which were inconsistent with the accomplishment of these objects. If this ordinance is to be construed as a mere attempt to remove the incumbent of an office, and appoint another to exercise its functions, it would be void. *Farrell v. City of Bridgeport*, 45 Conn. 191, 193. The removal of a chief of police is, by section 58 of the city charter, a matter within the sole jurisdiction of the board of police commissioners. But we are not to presume an improper motive. If the ordinance can be supported as a legitimate exercise by the common council of its authority to make and repeal ordinances with respect to the police, and to the proper regulation of the police department, it is our duty to give it such a construction as will make it operative, and consistent with the charter. *School Dist. v. Merrills*, 12 Conn. 437, 439; *Bartlett v. Kinsley*, 15 Conn. 327, 331; *Beach, Pub. Corp.* §§ 516, 517. In the case of *State v. Baldwin*, 45 Conn. 134, we held that an act abolishing by one section the board of county commissioners of New Haven county, and by the next section creating a board of commissioners for New Haven county, with the same functions as

those of the board which was abolished, was self-destructive, and that there was never a moment when the office of county commissioner for New Haven county was not in continued existence. But in the case before us, after the abolition of an office comes, not the creation of a similar one, but the devolution of its functions, or of some of them, on the incumbent of another office. An ordinance, above quoted, already existed, which provided (section 9) that when, from any cause, the chief of police should be unable to act, the captain should take his place and perform his duties. The framers of the new ordinance were apparently in doubt whether that section would cover the case of the abolition of the office of chief of police, and therefore sought to amend it by making an express provision for that contingency. It was a contingency no longer, for the first and second sections had completed the work of abolition, and their intent would have been better expressed had the amendment of section 9 thrown the powers and duties of the chief of police upon the captain of police, not if the office of the latter should be abolished, but as soon as the ordinance took effect by which it was abolished. That this was the purpose in view seems to us apparent upon a comparison of its different sections, and we think the language used justifies and requires such a construction as will give this purpose effect. *Whitlock v. West*, 26 Conn. 406, 414. The office of chief of police was one which had been created in 1874 by the ordinance, section 9 of which was thus amended. By section 6 of that ordinance it was provided that "the regular police force of said city shall consist of a chief of police, captain, lieutenant, first and second sergeant, and not less than ten nor more than twenty patrolmen." Out of this section the ordinance of 1891 struck the words "chief of police." This amendment was a return to the scheme of organization for the police force contained in an earlier ordinance adopted in 1872, in which the chief officer of the department was styled "captain of police." Prior to 1872 the officers of the department, under an ordinance adopted in 1869, had been a chief of police, a captain, and two sergeants. An office created by ordinance may be abolished by ordinance. *Butler v. Pennsylvania*, 10 How. 402, 416; *State v. Douglas*, 28 Wis. 428. Neither the city charter nor the General Statutes of the state appears to us to contain any such mention of an office of chief of police as to amount to a declaration that an office by that name must necessarily exist in Bridgeport. Gen. St. § 1646, after providing that incorrigible offenders, if released from the state's prison on parol, may be recommitted by order of the directors of the prison, makes it "the duty of all chiefs of police and marshals of cities and towns, and the sheriffs of counties, and of all police officers and constables," to execute any such order. Section

2998 provides that "the chief of police of any city" may license junk shops in such city. Section 3000 contains a similar provision as to licensing pawnbrokers, and section 3001 gives power to examine the books and premises of pawnbrokers in any city to "the chief of police of said city or any person by him designated." Section 3106 gives authority to enter and inspect the premises of licensed liquor dealers to "the county commissioners, sheriff of the county, and any deputy sheriff by him specially authorized, the chief of police of any city, or any policeman by him specially authorized." Section 3007 empowers "selectmen in towns and the chief officer of police in cities" to license itinerant medical practitioners. We find nothing in any of these general laws which requires any particular city to maintain an officer known by the special designation of "chief of police." As well might it be contended that section 1646 requires our cities or towns to maintain officers of police to be known as "marshals." The General Statutes undoubtedly contemplate the existence of some one official in each city who shall be the head of its police force, or in the language of section 3007, "the chief officer of police;" but as to whether he shall be called "inspector," or by any other name, is left to be determined by the municipal charter or ordinances under which the office may be created. Opinion of the Justices, 117 Mass. 603. The reference to "the chief of police" and "the chief of said police department" in sections 62 and 63 of the Bridgeport charter, already mentioned, seems to us to impose no obligation on the common council to adopt either of these terms for the title of the chief officer of police. The state has dealt with his functions, not his name. An ordinance which deprived the police department of any head would be contrary to the intent of the charter. Had the ordinance now in question abolished, not only the office of chief of police, but also those of captain and lieutenant, and omitted to intrust the powers of chief to any other officer, it would have been void. Had it assumed to remove the incumbent of the office of chief of police while leaving the office itself still in existence, it would have been void. *Samis v. King*, 40 Conn. 298, 309. But whether the powers and duties properly belonging to the head of the department were by the ordinance, as adopted, transferred to the captain of police from motives of economy, or to terminate an unseemly and long-continued wrangle over official appointments, or to secure any other possible end in the interests of good government, it is enough that they were transferred, and that such transfer was within the jurisdiction of the common council.

There was error in sustaining the demurrer to the fourth paragraph of the amended plea, and for that cause the judgment appealed from is reversed, and the cause re-

manded for further proceedings in conformity to this opinion respecting the matters alleged in said paragraph.

TORRANCE, FENN, and ROBINSON, JJ., concurred. CARPENTER, J., dissented.

(189 Pa. St. 435)

FERGUSON v. CITY OF PITTSBURGH
et al.

(Supreme Court of Pennsylvania. Jan. 2, 1894.)

DELINQUENT TAXES — PENDENCY OF APPEAL — DELINQUENT TAX COLLECTOR.

1. Though Act April 19, 1889, provides that an appeal from the assessor's valuation of land to the court of common pleas shall not prevent the collection of taxes, yet failure of the city to make any demand for the taxes during the pendency of the appeal is a waiver of its right to treat them as delinquent; and on the final determination of the appeal in the taxpayer's favor the city cannot collect the penalty for delinquency, in addition to the amount found due from him.

2. The office of collector of delinquent taxes in cities of the second class, created by Act March 22, 1877, which provided for the appointment of such collector by the city treasurer, was not abolished by Act March 15, 1878, which authorized the select and common councils in joint convention to elect some suitable person to discharge the duties thereof.

Appeal from court of common pleas, Allegheny county; Edwin H. Stowe, Judge.

Bill by E. M. Ferguson against the city of Pittsburgh and William R. Ford, collector of delinquent taxes and water rates, to restrain defendants from collecting a penalty for delinquent taxes from plaintiff. From a judgment in defendants' favor, plaintiff appeals. Reversed.

The opinion of the court below (Edwin H. Stowe, P. J.) is as follows:

"The bill in this case, after setting out the taxes assessed against plaintiff, and the amount determined upon on appeals to this court, alleges that in accordance with the decree of the court the taxes due by plaintiff to the city are as follows:

March installment, 1893.....	\$1,801 30
Sept. " 1892.....	1,301 30
March " 1893.....	1,026 96
	<hr/>
	\$3,629 56

—Thus showing the same to be delinquent under the act of assembly; and avers that plaintiff, on the 19th of July, 1893, tendered the said amount to the chief clerk of the city treasurer, and also to William R. Ford, collector of delinquent taxes and water rents of the city, and that those officers refused to receive said amount in full for the taxes of 1892 and the March installment of 1893; that said collector of delinquent taxes demanded that plaintiff pay, in addition to the sum of \$3,629.56, a penalty of five per cent. thereon, to wit, \$181.47, and refused to receipt to plaintiff for his taxes on said property for 1892 and the March installment of 1893 until said five per cent. penalty was

paid. The plaintiff then says that he is advised and believes that neither the collector of delinquent taxes and water rents nor the city of Pittsburgh has any legal right or authority to impose, levy, and demand from him the said penalty or percentage of five per centum in addition to or upon his taxes for 1892 and the March installment of 1893. He further sets out in his bill that the office of collector of delinquent taxes, etc., for the city of Pittsburgh, was, by the act of March 15, 1878, abolished, and ceased to exist, together with the powers, duties, functions, and compensation of said office and its incumbent; and that the councils of said city were by said act authorized to erect and establish an office for the collection of delinquent taxes and water rents, and to elect some suitable person to discharge the duties thereof for such term, and with such compensation as they might by ordinance direct; and that on 25th September, 1882, the councils of the city passed an ordinance as follows, entitled 'An ordinance providing for the appointment of a collector of delinquent taxes and water rents.' * * * Plaintiff then declares that he is advised and believes that in pursuance and by virtue of said ordinance the defendant claims the right to recover from him the said penalty of five per centum; and also that he is advised and believes that said ordinance, so far as it is sought to charge him with said penalty, 'is without any valid authority in law, illegal and void.' He also alleges that defendants threaten and propose to advertise the said taxes and penalty for the year 1892 as delinquent, and to take steps to collect and file liens for all of said taxes and penalty, and threaten to levy on and sell the personal and real property of the plaintiff; and prays that the defendants may be severally restrained and enjoined therefrom, and that William R. Ford, collector of delinquent taxes, be decreed and required to receipt in full for said taxes upon payment thereof without said penalty. It will be seen that the only question raised by the bill is the right of the collector of delinquent taxes, etc., to impose and demand the five per cent. allowed by the ordinance as compensation for his services as such officer.

"No attack is made upon the rights of the defendant Ford to exercise the duties of the office as provided by law. Indeed, his right to do so is impliedly admitted by the prayers of the bill asking that he be compelled to receipt for the taxes upon payment thereof to him. There is no doubt that equity has a right to enjoin defendants from collecting the tax, or any portion of it, or the so-called 'penalty' only, if the same is sought to be collected without legal authority. But has not the collector a legal right to demand and collect said five per cent., the so-called penalty? The act of March 22, 1877, gave the city treasurer of cities of the second class authority to appoint a collector of de-

linquent taxes and water rents, and then provides that the compensation of such collector shall be ten per centum on the amount collected and paid into the city treasury, which said ten per centum shall be added to said delinquent taxes and water rents as penalty for nonpayment at the time therein prescribed, etc. The act of March 15, 1878, is entitled 'A supplement to an act in relation to cities of the second class, providing for the levy, collection, and disbursement of taxes and water rents,' approved March 22, 1877, and, *inter alia*, 'authorizing the advertisement of delinquent taxes, rates and levies, and changing the method of selecting the collector of outstanding or delinquent taxes and water rents.' Section 3 of this act reads as follows: 'Statement of all delinquent taxes, rates and levies, etc., shall be advertised in five daily papers once a week in each paper for two successive weeks previous to the filing of the liens in the office of the prothonotary, the costs to be paid from the treasury, and the collector shall add the amount of the expenses of such advertising to the amount of taxes, rates and levies filed as liens, and the expenses of such advertising are hereby made part of such liens.' Section 5 repeals so much of the act of March 22, 1877, as provides that the city treasurer shall appoint a collector of delinquent taxes, and abolishes the office of delinquent tax collector as it then existed under said act, allowing the incumbent to continue to collect taxes, etc., until the end of the term for which he was appointed; and the common councils were then authorized at 'that date,' (the expiration of the term of the then collector,) or so soon thereafter as they may deem expedient, to erect and establish an office for the collection of such delinquent taxes and water rents, with such other functions pertaining thereto as they may deem expedient, and in joint convention to elect some suitable person to discharge the duties thereof for such term and with such compensation as they may by ordinance direct.

"The ordinance before recited was passed in assumed pursuance of this foregoing act of assembly, so far as the only question raised by the bill is concerned, to wit, the right of the collector to exact the five per centum penalty. It is now alleged by the plaintiff that this ordinance is void, because the title is defective, for the reason that it gives no notice of an intention to inflict a penalty on a delinquent taxpayer. The title to the ordinance is, (as above stated,) 'An ordinance for the appointment of a collector of delinquent taxes.' It is claimed by the plaintiff that the correct rule to be applied as a test to the validity of an act or ordinance or any part of it, under its title, is, does the title to the act or ordinance embrace but a single subject, and are the provisions upon that subject or upon matters properly connected with it? And such seems to us

to be a correct construction of the law on this subject. But is not the compensation of a public officer, and the means by which it shall be paid, properly connected with the office? Does not the title to this ordinance fairly give notice of the subject of it, so as reasonably to lead to an inquiry into the body of the bill? I think both propositions must be answered in the affirmative. Compensation is a matter properly connected with the establishment of the office of delinquent tax collector, and the title would reasonably lead to the inquiry, how is he to be paid? Public officials are not supposed nowadays to work for nothing. It is said in *Allegheny County Home's Case*, 77 Pa. St. 77: 'The people, in this amendment, never intended that the title should be a complete index to its contents. The intention was to require that the real purpose of the bill should not be disguised or covered by the general words "and for other purposes," which was formerly so common, but should be fairly stated; and it must be a clear case to justify a court in pronouncing an act, or any part of it, void on this ground.' A very cursory glance at the statutes enacted since the amendment to the constitution will show that, if the stringent rule contended for in this case by plaintiff is to be applied, a very large portion of the acts of assembly are unconstitutional. Finding nothing in the ordinance which we think renders the provisions complained of invalid, we must look further, and see whether the councils had the legal right to pass the ordinance imposing the expenses or 'penalty,' so called, upon the delinquent taxpayer. Undoubtedly the legislature could vest councils with such power. Has it done so? The answer to this question must be found in the acts of assembly themselves. The act of March 22, 1877, to which the act of March 15, 1878, is a supplement, provides that 'the compensation of such collector shall be ten per centum on the amount collected and paid into the city treasury, which said ten per centum shall be added to said delinquent taxes and water rents as penalty for non-payment at the time herein prescribed.' The act of March 15, 1878, abolished the office created by that act, and provided for the creation of a new one of the same name and powers by another authority; but the act of 1877 is repealed no further than is necessary to give effect to the act of 1878, and only so far as is plainly inconsistent therewith. For what are considered 'delinquent taxes' we must look to the act of 1877, as well as for the duty of the treasurer in regard to such taxes, and also the general duties of the tax collector, and the source whence the compensation of the collector is to be derived, and that is specifically directed to be from a per centum of the amount collected and paid into the city treasury, which shall be added to said delinquent taxes and water rents as a penalty for nonpayment. It is, in my opinion,

clear that the above clause of the act of 1877 is still in force, except so far as the amount of the percentage is changed by ordinance under authority of the act of 1878. Bill dismissed, at plaintiff's cost."

Hall & Willson, for appellant. William C. Moreland, City Atty., and Rob't S. Frazer, for appellees.

DEAN, J. In January, 1892, the board of assessors of the city of Pittsburgh made the triennial assessment of the property subject to taxation for city purposes, classifying it, under the provisions of Act May 5, 1876, as (1) built-up property; (2) rural property; (3) exclusively agricultural property. Appellant's property was classified as rural, its valuation fixed at \$232,359, and assessed at a rate two-thirds of the full valuation, making the tax to be paid by him, \$6,706.06. This appellant, under the authority conferred by the act of April 19, 1889, on the 16th of April, 1892, appealed from both classification and valuation made by the board of assessors to the court of common pleas. Final decree in the appeal was not had until June 23, 1893, when the court decided the assessment of appellant's property illegal, and reduced the amount of taxes charged against him from \$6,706.06 to \$3,076.50. The act of 1889, under which the proceedings in the appeal were had, directs that the court, after hearing and proofs, shall "make such orders and decrees touching the matter complained of, as to the judges of said court may seem just and equitable, having due regard to the valuation and assessment made of other real estate in such county—or city; the costs of the appeal and hearing to be apportioned or paid as the court may direct. Provided, however, that the said appeal shall not prevent the collection of the taxes complained of, but in case the same shall be reduced, then the excess shall be returned to the person or persons who shall have paid the same." The appellant immediately tendered to the collector of the tax \$3,029.56, the amount adjudged to be owing, but the collector demanded 5 per cent. additional, as the penalty for the delinquency resulting from the litigation. Payment of the penalty was refused, and thereupon the collector threatened summary collection of both tax and penalty by advertisement and seizure of appellant's property. Appellant then filed this bill, averring: (1) That he was not delinquent; therefore the penalty was illegally charged against him. (2) That the office of collector of delinquent taxes had by law been abolished, and the powers and functions thereof no longer existed. (3) That the ordinance of councils appointing the collector, in so far as it also imposed a penalty on delinquent taxpayers, is unauthorized, because it contains more than one subject, and one of them is not expressed in the title; and praying for an injunction to restrain the collector,

which was awarded, pending hearing. On final hearing, however, the court dismissed the bill, and from that decree comes this appeal.

The appellant presses in argument the three objections already noticed, the overruling of which by the court below constitutes his assignments of error. We are not furnished with a copy of the decree on the appeal from the assessment, nor the reasons for it. We only know there was a reduction of about one-half the taxes assessed against the appellant. So far as appears, no attempt was made to collect the taxes beyond the assessment of them; then the appeal was taken. The act says: "The said appeal shall not prevent the collection of the taxes complained of, but in case the same shall be reduced, then the excess shall be returned to the person or persons who shall have paid the same." The city made no demand from appellant; gave no notice of an intention to add the penalty for the delay about to result from the appeal; apparently acquiesced in the taxpayer's retention of the money in the interval between appeal and judgment. Under the proviso to the act, "the said appeal shall not prevent the collection of the taxes," we must assume the city voluntarily decided to await the event of judgment on the appeal before treating the taxpayer as delinquent. As soon as that was determined, appellant promptly tendered the amount owing by him, and could not then be in default. To say the taxpayer is delinquent merely because without demand he does not pay over more than \$6,000 of his money, when he believes he does not owe more than \$3,000, and it afterwards turns out, by judicial decree, he was in the right, it seems to us is a misapplication of the term "delinquent." Clearly, by the inaction of the city, its demand was held in abeyance until the adjudication on the appeal; and during this interval there was no such delinquency as warranted the imposition of the penalty imposed by the act. It is not necessary in this issue to attempt a definition of the exact extent of legislative power in the imposition of penalties. They could be imposed in cases of capacious or wholly groundless litigation. But the legislature could not authorize confiscation of property under the color of taxation, and then impose a heavy penalty for resorting to the courts, whereby to legally resist payment. The eleventh section of article 1 of the Declaration of Rights would forbid this. But a taxpayer might, and perhaps often would, without any meritorious objection to the assessment, grasp at the delay incident to litigation as a means of postponing his day of contribution to the public burden, and thereby become clearly delinquent. Delinquency is only another name for gross neglect to perform a lawful obligation or willful default, either of which is a proper subject for penalties. As the legislature could have granted the city the taxing power

without providing any appeal from the assessment, it could certainly say such appeal should not prevent the collection of the taxes. The harshness of this act is not in declaring the appeal shall not prevent collection, but in the indiscriminate imposition of the penalty, and the failure to provide for complete restitution. It may be highly inconvenient to the municipality to await the end of litigation for the taxes necessary to carry on the government, and perhaps it is to the interest of good government to enforce prompt payment of contested assessments, but it is also to the interest of good government to afford prompt redress to the wronged taxpayer. Giving literal effect to the words of the proviso of the act of 1889, a penalty is imposed upon the complaining taxpayer, no matter how flagrantly unlawful may be the demand upon him, if the attempt to collect be resisted by appeal. Take the case in hand. The act directs the taxes complained of may be collected, notwithstanding the appeal; but, if they be reduced, then the excess shall be returned to him. If, on the day Ferguson took his appeal, he had paid the \$6,706.06 assessed, there could have been no claim by the collector for the penalty, \$181.47, for the delinquency on the \$3,629.56 afterwards adjudged to be owing; but if, on the 16th of April, 1892, the day he took the appeal, he had paid the \$6,706.06 demanded, the city would have had \$3,076.50 of his money for over 14 months. As the act makes no provision for the payment of interest, he would have lost this, which, at 6 per cent., is \$215. Then there is no provision made for the prompt return of the excess. In the mean time the city has disbursed it. Repayment may not be convenient. The taxpayer has at most a legal demand, enforceable by suit against the city, as in case of any other liability. So, whether the taxpayer pays before or after litigation, if appellees' contentions be sustained, he pays a penalty for resorting to legal proceedings to resist an unlawful exaction. We think this indiscriminate imposition of the penalty contended for upon the willfully delinquent, and also upon the one who honestly exercises his lawful right of appeal from the unconscionable assessment, calls for amendment.

As to the second objection, that the office of collector of delinquent taxes was abolished, and its functions wholly dispensed with, by the act of 1878, we concur with the learned judge of the court below, for the reasons given by him, in holding that the act of 1877 was repealed only in those particulars wherein it is inconsistent with the act of 1878. The two acts must be read together, and thus read they provide that (1) at the end of the term of the collector appointed by the treasurer under the act of 1877 the office of collector of delinquent taxes shall be abolished; (2) select and common councils are authorized to create and estab-

lish an office for the collection of delinquent taxes and water rents; (3) in joint convention they are empowered to elect a suitable person to the office, and fix his compensation by ordinance. Under this authority, by ordinance of 25th of September, 1882, councils performed all the duties enjoined by the act of 1878 with reference to the establishing of the office of collector of delinquent taxes.

Having already seen that by the inaction of the city in this case under the legislation, both state and municipal, the appellant was not delinquent, it benefits no one to discuss and pass upon his third objection,—that the ordinance is not constitutional, because containing more than one subject. If the case turned upon it, our duty to decide it would be clear; but, in view of our opinion on the first question, this last one is wholly immaterial to this appellant.

It is ordered that the bill be reinstated, and that William R. Ford, collector, be, and hereby is, enjoined from collecting said penalty of 5 per cent. on payment to him by said El. M. Ferguson of said \$3,629.56, amount on his appeal from assessment, adjudged to be owing by him; and, further, that appellees pay the costs of this appeal, and the costs in the court below.

(158 Pa. St. 78)

MERRIMAN v. PHILLIPSBURG BOROUGH.

(Supreme Court of Pennsylvania. Oct. 30, 1893.)

BOROUGH—UNGUARDED BRIDGE—CONTRIBUTORY NEGLIGENCE.

Plaintiff, with her sister, carrying a lantern, went, in the evening, along a road in defendant borough, which led over a bridge. The road was 50 feet wide, and the bridge less than 17, so that one had to leave the sidewalk to cross the bridge. There was no guard rail on the abutments or the bridge. Plaintiff was following her sister, who knew the road better, but, not turning enough to the middle of the road, fell over the abutment. *Held*, that though plaintiff had several times crossed by daylight, and knew that there was no guard rail, her contributory negligence was a question for the jury, and not ground for a nonsuit.

Appeal from court of common pleas, Beaver county.

Action by Jennie Merriman against the borough of Phillipsburg for damages for personal injuries. From a judgment of nonsuit, plaintiff appeals. Reversed.

The facts appear in the opinion of the presiding judge below, as follows: "The plaintiff, a vigorous and intelligent woman, about thirty years old, was injured on the evening of January 11, 1890, after dark, by falling from a bridge in the defendant borough. The bridge was sixteen feet long, sixteen feet eight inches wide, and was elevated five or six feet—possibly more—above the bottom of the little run which it spanned. It had no side rails. The street, whereof it formed a part, was in a sparsely-settled part of the

borough, and, as the plaintiff says in her testimony, was 'just a country road.' On the evening mentioned, the plaintiff and her younger sister, Mazie, provided with a kerosene oil lamp started from their home in the borough, about two minutes' walk from the bridge, to visit another sister, living in the thickly-populated part of the town. The night was quite dark. Both of them had been over the bridge before; the younger sister very frequently, the plaintiff less often. It was their only practicable way to the stores and post office. The plaintiff had known the bridge for a considerable time, and, within a comparatively short time before the accident, had made about five trips to town in daylight, thus crossing and recrossing it ten times. She further admits that she knew, from her own observation, that it was not protected by guard rails. The failure of the borough to furnish such protection is the negligence complained of. Although, as has been stated, both ladies were at least tolerably familiar with the bridge, neither of them gave it a thought until the younger of the two was half-way across it, and the plaintiff was in the act of taking the step which precipitated her to the bed of the run below. Just at that moment, Mazie called to the plaintiff, 'Be careful, Jennie, of the bridge.' The warning came too late, as the plaintiff was then falling or about to fall. A rain had swelled the run so that its murmuring could be heard by any one approaching the bridge. At the trial it was not, and could not be seriously contended, that any one provided with a lamp and at all acquainted with the bridge, could not have safely crossed it every hour and minute in the night, by exercising ordinary care. The plaintiff knew the exact location and condition of the bridge, and that she must necessarily cross it in a couple of minutes after beginning her walk. She and her sister took a lamp to guide their footsteps, but seemingly made no use of it. At least they did not employ it to protect themselves from danger. The younger sister, who was intrusted with it, said, in reply to a question asked by counsel, "I didn't pay much attention to the light." The plaintiff substantially admits that the passage of the bridge did not occupy her mind in the least. All she thought of was the muddy condition of the road. She concedes, in effect, that she knew the unprotected condition of the structure, that she approached it without any more care or precaution than she exercised elsewhere on the highway, and that she had under her control an artificial light, which, if used with a little care and thought, would have enabled her to cross the bridge in safety. How, then, can it be said that she was guilty of no contributory negligence without asserting, at the same time, that both her knowledge of the peril and her means of avoiding it could be properly disregarded and ignored? Had we not learned, from her own evidence, precisely how and why the accident occurred,

the presumption that she had exercised due care and forethought might be invoked in her favor. As it is, however, it has no place in the case. It must be remembered that the bridge indicated the traveled way, and was fully as wide as the traveled part of the average country road. It was the plaintiff's duty to make some conscious effort to get safely on and over the bridge. Instead of doing this she went forward blindly and recklessly. To say that she did not think will not do. If a dangerous pitfall is at my very door, and I know of its existence, I have notice of its character. If, for want of thought, I fall into it, and am injured, why should I be permitted to say I did not contribute to the unfortunate result? Can one who neglects to stop, look, and listen, before crossing a railroad track excuse the omission by saying, "I forgot?" The whole matter may be thus summed up: If the bridge were not dangerous, the borough is not liable. If it were dangerous, the plaintiff, knowing its condition, was bound to use a little more care in approaching it than would be required of her elsewhere on the road. This, her own evidence shows, she did not do. Hence, she contributed to her own injury."

John M. Buchanan, Lewis W. Reed, and Wm. A. McConnell, for appellant. W. J. Mellon, for appellee.

STERRETT, O. J. In this case the controlling questions were defendant's negligence and the alleged contributory negligence of the plaintiff. As to the former, there appears to have been no room for doubt. The testimony discloses the grossest carelessness on the part of the borough authorities in maintaining a dangerous pitfall within the lines of the street, which the judicious expenditure of a few dollars could have obviated. *Corballs v. Newberry Tp.*, 132 Pa. St. 9, 19 Atl. 44. If those whose duty it is to keep public highways in a reasonably safe condition for public use were properly dealt with and adequately punished for their negligence, there would be fewer nuisances and mantraps maintained in public streets and highways. There was some evidence of contributory negligence, but the question is whether the fact was so clearly established as to justify the court in refusing to take off the judgment of nonsuit. An examination of the testimony has satisfied us that it was not. Whether the plaintiff was or was not guilty of negligence which contributed to the injury of which she complains must be inferred from all the facts and circumstances disclosed by the testimony. Such inferences of fact are for the jury, and not for the court. In *Borough of Easton v. Neff*, 102 Pa. St. 474,—a case in some respects not unlike the one before us,—Mr. Justice Clark said: "There was evidence in the cause, some of it inferential in character, tending to show contributory negligence, and this was for the

jury. In the use of a public highway in general, ordinary care is undoubtedly the rule. * * * Negligence is defined, however, as the absence of care, according to the circumstances. In this case, the plaintiff was quite familiar with the crossing. She had passed over it often, on her way to and from church. She says she knew it to be a place of danger. She was old, and could not see well. The injury was received at night, and the night was dark. Did she exercise a proper measure of care? She was bound to use such care as a prudent person would have used under such circumstances. * * * For this reason the question of contributory negligence was peculiarly for the clear and free exercise of the judgment of the jury, under proper instructions from the court." So, in this case, we think the question of contributory negligence was not for the court, but exclusively for the jury. It was their special province to ascertain the facts, and draw from the testimony such inferences of fact as to them it appeared to warrant. On this point, all the facts and circumstances attending the injury should be fully considered. Judgment reversed and a procedendo awarded.

(159 Pa. St. 20)

IN RE MOREWOOD AVE.

Appeal of CHAMBERS.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—HOW ESTIMATED.

1. Act May 16, 1891, authorizes a city to petition for viewers to assess damages and expenses on the property benefited by street improvements, who shall personally inspect the improvements and the properties "in the neighborhood" supposed to be damaged or benefited thereby, and determine the total damages and costs of such improvements, which shall be ratably assessed on the properties benefited. *Held*, that this act did not authorize an assessment for grading, paving, and curbing a street on properties not situate on the street improved.

2. The act of May 16th, providing for the completion of street improvements and an assessment for their cost, contemplates that the assessment be made on a quantum meruit; and an assessment based on the contract price of the work, as shown by the city books, without even a finding that the contract price was a fair one, is erroneous.

Appeal from court of common pleas, Allegheny county.

Petition of the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the damages, costs, and expenses on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. Mrs. Alexander Chambers, whose property was assessed for benefits from the improvement, appeals. Reversed.

The following is the report of viewers:

"To the Honorable the Judges of the said Court: The undersigned, who were appointed by your honorable court as viewers in the above matter, respectfully report that having been first duly sworn or affirmed, as provided by law, they fixed a day and hour and place when and where they would hear all parties in interest, of which meeting they gave due and timely notice by advertisements and handbills, as required by law; copies thereof being hereto attached, and made part of this report. That they visited and personally inspected the improvement, and personally inspected the properties in the neighborhood supposed to be damaged or benefited. That at the time and place fixed they heard all parties appearing before them, and adjourned from time to time, and gave a full hearing to all parties interested upon all questions and claims before them, and proceeded to ascertain and determine the total damages, costs, and expenses of the improvement, and to assess the same fairly and ratably upon the properties specially benefited thereby. That the improvement is the grading, paving, and curbing of Barton street, now Morewood avenue, and was made from Fifth avenue to Forbes street, Twenty-Second ward. That, having completed their work, they gave notice by advertisement, as required by law, copy of which is hereto attached and made part hereof, that their report was ready, and that, upon the day in said notice or advertisement named, they would present the same to court for approval, and in the mean time their report would remain at the place in said notice or advertisement named, for inspection and exception. That, exceptions having been in the mean time filed to said report, the said viewers gave a full hearing thereon to the exceptants, and all parties claiming a right to be heard, and after such hearing, and upon due consideration, found no reason, in justice or equity, to modify the same. That said viewers thereupon fixed the 13th day of July, A. D. 1892, as the one upon which their report would be filed, and gave notice thereof to all parties in interest. The damages, costs, and expenses of the improvement, the properties in the neighborhood peculiarly benefited by said improvement, and the name or names of the owner or reputed owner of each parcel, the amount of damages allowed in each case, and the amount of benefits assessed against each property, and what amount of damages, costs, and expenses are not assessed upon property peculiarly benefited thereby, we find and report as follows, namely:

"We find the total amount of damages, costs, and expenses of the improvement to be \$34,456.22. The damages allowed by us are fully set forth as follows:

Mary A. Forse.....	\$ 800 00	
Olivia C. Warren.....	2,000 00	
		\$2,800 00

"Chief of department of public works, statement of cost:

36,906 cubic yards		
grading, @ 0.50.....	\$18,483 00	
3,401 square yards paving, @ 3.35.....	11,393 35	
2,025 lineal feet curbing, @ 0.87.....	1,761 75	
Extra work, as per voucher	18 12	
		\$34,456 22

"For the payment of all the damages, costs, and expenses of the improvement, we have made and report the following assessment of benefits upon and against the properties we find peculiarly benefited by the same, to wit, \$13,359.49."

Dalzell, Scott & Gordon, for appellant.
William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. In this case the one question which overshadows and dominates all others is whether it is competent to assess the cost of grading, paving, and curbing a part of one street in a city upon properties not situate upon the street to be improved, but being within "the neighborhood" of the improvement. The authority for such an assessment is claimed to be found in the law of May 16, 1891, (P. L. p. 71.) It is not at all clear that the legislature ever intended to confer such a power by the act in question. The first clause of the third section, which authorizes the presentation of a petition for viewers, directs that the petition shall ask for the appointment of viewers to assess damages and expenses, etc., "and to fairly and ratably assess the said damages, cost, and expenses upon the property benefited and to make report thereof to the court." An appointment under such a petition would, of course, only authorize the assessment of benefits upon the properties abutting the improvement. The fifth clause of the first section provides that "the viewers shall visit the improvement and personally inspect the same, and also visit and inspect the properties in the neighborhood supposed to be damaged or benefited thereby." As the properties along the line of the improvement are assessable for the cost of the improvement, and no purpose is expressed to assess for benefits any other kinds of properties than such as are to have their damages assessed, and as these latter can only be properties along the line of improvement, the inference would be that the location of both classes of properties would be the same; and when the expression "in the neighborhood" designates the locality of the properties to be visited, whether for damages or benefits, the expression being common to both, the conclusion seems to be inevitable that only such properties, so far as locality is concerned, can be assessed for benefits as are entitled to have damages assessed. In the second paragraph of the fifth clause the proceedings of the viewers

are prescribed thus: "They shall ascertain and determine the total damages, and costs, and expenses of such improvement and these damages, costs, and expenses, they shall fairly and ratably, assess upon the properties benefited but not in any case to exceed the benefit peculiarly resulting from such improvement." The foregoing is the mandatory language of the act, which specifically directs what property is to be assessed for benefits, and it contains nothing indicating that properties away from the line of the improvement are to be assessed for benefits. The act, further, in the same clause of the same section, directs: "If property peculiarly benefited to the full amount of damages, costs and expenses cannot be found, the viewers shall find the excess of damages, costs, and expenses. They shall thereupon prepare a report, together with a plan of the properties damaged and benefited, and their report shall set forth what the improvement is, whether it be a sewer or grading, paving, macadamizing, or other improvement of a street, lane, or alley, the place and places where it was made, the damages, costs, and expenses of the improvement, the properties in the neighborhood benefited peculiarly by said improvement, and the name or names of the owner or reputed owner of each parcel, the amount of damages allowed in each case, and the amount of benefits assessed against each property, and what amount, if any, of damages, costs, and expenses are not assessed upon property peculiarly benefited thereby." Here, again, no distinction is made, as to locality, between the properties which are to have their damages assessed and those which are to be assessed for benefits; and, as the one class can only be those which are situated along the line of the improvement, the natural inference is that the other class must have the same locality. Besides this, there is nothing, either in the immediate text or the context of the act, which indicates that the legislature intended to make any distinction between the two classes of property, and especially to make so wide a departure from the long-existing law of the commonwealth as to require that properties situated away from the line of the improvement should be compelled to pay, not only for all the improvements on their own streets, but also for improvements made on other streets, or at remote points on their own streets. If the legislature had any such intention, they could very easily have said so in language which could not be mistaken. They cannot be held to have done so by mere doubtful implication from the use of a word which may just as well mean only the properties along the line of the improvement as properties entirely away from it. The words "in the neighborhood" are just as applicable to the properties along the line of the improvement as to properties away from it. As the consequences of the interpretation asked for by

the appellee would be so extremely onerous and oppressive, and so destructive of all property values, we will not adopt such a construction by the means of a mere implication. Nothing but a clearly-expressed legislative intent to the effect contended for will induce us to declare such a construction of this statute.

Even were we disposed to take such a view of the act in question, we would be antagonizing a long line of our own decisions, extending back for more than 20 years, in which we have refused, steadily and persistently, to permit, even where the legislature has distinctly authorized it, properties abutting directly along the line of a street improvement to be assessed for a second improvement, although they did receive the immediate benefits of such second improvement. We have repeatedly held such legislation to be in violation of the constitution, and therefore void. A brief review of these authorities will be instructive, and they will illustrate how we have advanced, rather than receded, from the doctrine first announced in *Hammitt v. Philadelphia*, 65 Pa. St. 146:

In that case, an act of assembly passed March 23, 1866, (P. L. 299,) authorized and required the city of Philadelphia to occupy Broad street for its entire length, and to pave the street in such manner as the councils should think best, and authorized the city to enact ordinances requiring the cost of the improvement to be paid by the owners of property abutting on the street. The defendant, being an owner of property on the street, refused to pay his assessment. The city sued him for the amount, and recovered judgment in the court below, which was reversed by this court. Mr. Justice Sharswood, delivering the opinion, and conceding the right of the legislature to grant to municipal corporations the power of assessing the cost of local improvements upon the properties benefited, held that, where an owner's property had been once assessed for the cost of an improvement, it could not be again assessed for a second improvement of the same character, and that any law granting such a right to the municipality was unconstitutional and void. He said: "There is no case to be found in the state, nor, as I believe, after very thorough research, in any other,—with limitations in the constitution, or without them,—in which it has been held that the legislature, by virtue merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. * * * In truth, it matters not whether an assessment upon an individual or a class of individuals for a general and not a mere local purpose be regarded as an act of confiscation, a judicial sentence or rescript, or a taking of private property for public use without compensation. In any aspect, it transcends the power of the legislature and

is void. * * * Whenever a local assessment upon an individual is not grounded upon and measured by the extent of his particular benefit, it is, pro tanto, a taking of his private property for public use without any provision for compensation. * * *

The original paving of a street brings the property bounding upon it into the market as building lots. Before that it is a road, not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. * * *

But when a street is once opened and paved, thus assimilated with the rest of the city, and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. * * * Local assessments can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed or appears to be for general public benefit." The fundamental idea of the foregoing decision was that local assessments could only be made for improvements which conferred peculiar local benefits, upon a property which adjoined the improvement, and even then it could not be made after the property had once before been subjected to such an assessment.

In the Case of Washington Ave., 69 Pa. St. 352, an attempt was made, under an act of assembly, to impose the cost of grading and macadamizing a street extending several miles into the county from Pittsburgh, by a special tax of six dollars per acre on property within half a mile of the street on parts specified; four dollars an acre, etc., within half a mile on other parts; three dollars, etc., within three-quarters of a mile on other parts. Mr. Justice Agnew, in the course of the opinion, said: "This case presents a new question upon the power of taxation,—the authority of the legislature to compel the owners of farm lands lying within one mile on each side of a public highway to pay for grading, macadamizing, and improving it by an assessment upon their lands by the acre. * * * Washington avenue is but seven miles in length, passing through six townships and part of a seventh; but if this mode of taxation to grade, macadamize, and improve it can be maintained, the legislature, on the same principle, can make a turnpike, a canal, a railroad, or any other highway across the state, and compel the owners of lands within one or any number of fixed miles to pay for it, and can assess the cost per acre, not only at six dollars, four dollars, and three dollars per acre, as in this law, but at sixty, forty, thirty, or any number of dollars necessary to build a highway. If this be legitimate taxation, it has no bounds.

* * * Whether we view this avenue as a macadamized highway seven miles long or three hundred, the result is the same to those along its route. To charge its cost upon the farms lying within one mile on each side at a fixed sum per acre is so obviously onerous and unreasonable, and leads to such a destruction of private right, and such unfairness of imposition for the advantage of the public at large, and of individuals who pay nothing, that it cannot, on any fair principle of reasoning, be said to be a valuation according to benefits. In other words, it cannot, with any degree of truth, be pronounced to be a proper substitute for a just and impartial valuation of benefits." In a previous part of the opinion, Judge Agnew had reasoned upon the subject of the assessment for benefits, and had reached and expressed the conclusion that where it was made upon the property abutting on the improvement, so that benefits were directly conferred in the way of an enhanced value of the property, it was justifiable. He had said: "So long, therefore, as a law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation, when exercised for proper objects. It is on this ground only that assessment according to the frontage of property on a public street to pay for its opening, grading, and paving is to be justified. As a practical result, in cities and large towns, the per foot front mode of assessment reaches a just and equal apportionment in most cases. Hence, this mode has been deemed a reasonable exercise of the taxing power in such places, with a view to taxation according to the benefits received. But it is an admitted substitute, only because, practically, it arrives, as nearly as human judgment can ordinarily reach, at a reasonable and just apportionment of the benefits on the abutting properties."

These rather extended citations from the opinion in the foregoing case have been made for the purpose of illustrating two propositions: (1) That we refused to permit any assessment upon properties not abutting on the improvement; and (2) that, in justifying any assessment for benefits, it must be confined to the particular properties which do in fact abut directly upon the line of the improvement. That is, that no assessment for benefits can be at all justified, in a legal sense, except upon those properties which do in point of fact adjoin directly upon the improvement, whatever it may be, and especially for grading and paving, and that the moment any other method is adopted, so as to take in properties which are not upon the line of the improvement, the taxation by way of assessment for benefits becomes special taxation for a general purpose, in which all other persons are as much interested as the person assessed. The Washington Ave.

Case is the only one to be found in the Reports of our own decisions—with one apparent exception, which will be noticed hereafter—in which an attempt was made to impose the cost of the improvement upon property not on the line of the improvement. The reasoning of the opinion is entirely applicable to the case at bar, though it can be greatly strengthened by additional considerations which have arisen since that time, (1871,) and by numerous decisions which this court has made since then. Some of these will now be noticed. Let it be premised, however, that the whole subject is one of modern origin. Formerly, it was held by the best lawyers and judges that, as streets and roads are public highways for the use of all the citizens of the commonwealth, their improvement was a matter of public concern, for which no one individual could be especially taxed, either directly or by way of assessment. The older authorities are collected in the opinion of Justice Sharswood in the Hammett Case, and they go back, in the state of New York, to about 1830, and commence in our own state a few years later, when, in 1834, in the case of *McMasters v. Com.*, 3 Watts, 202, the constitutionality of an act of our legislature passed April 7, 1832, was challenged because it authorized an assessment for benefits. But our principal and more important decisions begin with *Hammett v. Philadelphia*, and in those of more recent occurrence a variety of questions have arisen which fully test the true character and the limitations of the doctrine much more fully and precisely than any of the older cases.

The case called *Extension of Hancock St.*, 18 Pa. St. 26, was decided in 1851, and is the one authority relied upon by the appellee, in the present contention, in support of the proposition that the assessment for benefits may be made upon property not on the line of the improvement. It is the apparently exceptional case referred to above. The act in question was passed on April 6, 1850, (P. L. 388.) Under four of its sections the extension of Hancock street, including Irwin's alley, was authorized, and the viewers were directed to "ascertain and determine what lots in the vicinity of the said extension will probably be benefited by the opening of said street, and to divide and apportion on equitable principles the amount that each shall separately contribute to defray the damages incurred." It is impossible to tell whether the legislature intended that properties away from the line of the extended street were to be assessed or not, as the words, "in the vicinity of said extension," would certainly apply to all properties along the extension; but it is certain that no exception filed raised the question whether, as to any properties which were not on the line of the extension, there was a right of assessment. nor was that subject argued

by counsel or discussed in the opinion. There was a question raised as to whether certain lots which had been assessed were in the vicinity of the extension, and the court held that under so general an expression as that they would not review the decision of the viewers that the particular lots in question were in the vicinity. The opinion also expresses the idea that the opening of Hancock street would be the extension of Wood street, and therefore the location of lots on Wood street would be in the vicinity, and that it would be the same thing as to say that "Wood street is in the vicinity of Wood street." But the constitutional question whether the act would be void as to lots located away from the line of the improvement was neither argued by counsel nor discussed or decided by the court. Even if the case had decided that lots away from the line of the improvement could be assessed for benefits, it would have to be regarded as practically overruled by the later case of *Washington Ave.*, supra, in which that question was met, and decided the other way. All of our later decisions are in accord with *Washington Avenue*. Thus, in the case of *Sawmill Run Bridge*, 85 Pa. St. 163, an attempt was made to collect the cost of building a bridge over Sawmill run, within the city of Pittsburgh, by means of assessments for benefits on properties situate on streets in the neighborhood of the bridge. But this court refused to sanction such assessments, and reversed the court below for allowing it to be done. Mr. Justice Woodward, delivering the opinion, said: "Can this be called a local improvement, especially benefiting particular individuals, and for which they should be compelled to pay? Sawmill run crosses a public highway of the city. The bridge over it was built in the line of this highway, in which every inhabitant of Pittsburgh may have some interest, and every citizen of Allegheny county and of the commonwealth is entitled to assert some right. In such an improvement, surely, no citizen can have exclusively private right, and he can scarcely have any definable private interest. The bridge was constructed to serve an apparent and essential public purpose, and to impose the cost of it on individuals selected out of the mass of the community, on any conceivable rule that viewers could adopt, would be the placing of public burdens on private shoulders. * * * It would seem impossible, in the very nature of the case, that anything like even approximate accuracy or equality could have been attained in such an assessment. * * * Unlike a sewer, and unlike a highway in front of a merchant's store or a tradesman's shop, a peculiar local advantage derived from the bridge would have to be conjectured by the viewers, and the extent of that advantage would be the subject of a second guess. The uniform rates fixed

for all varieties and classes of properties on the line of the same street must have been necessarily unequal, and therefore essentially unjust. The construction of a street or a sewer improves all the lots along its line in the same way, and to the same proportionate extent. The erection of a bridge increases the facilities for travel, which may materially and immediately improve the business of a broker, a butcher, the proprietor of a hotel, or the keeper of a livery stable, without affecting in any possible way either the business or the property of many classes of mechanics, laborers, and men of business. The difficulties and embarrassments inherently involved in the application to such a subject of the statutory provisions regarding sewers and streets would seem to be insuperable." The foregoing remarks are strictly applicable to the case at bar. The property of this appellant is not situate on the line of Barton street, a part of which is the subject of the improvement, but on the line of Forbes street, which runs in an opposite direction, crossing Barton street at right angles. While the grading, paving, and curbing of the part of Barton street between Fifth avenue and Forbes street is, no doubt, a benefit to the properties abutting upon this improvement, and is certainly a public benefit to all travelers passing over the street, it is no special or peculiar benefit to the properties on other streets. The advantage, if any, which they have in consequence of the improvement, is only the same general and public advantage which is enjoyed by all citizens of the commonwealth passing over the improved street. But for that kind of advantage or benefit, of course, no assessment can be made. Any supposed private advantage or benefit to properties on other streets is necessarily only conjectural and imaginary, and cannot be the subject of an assessment. The owners of such properties have nothing but a right of passage over the improvement, precisely the same as all other citizens have. These remarks apply with the same force to all of the other appellants whose properties are on streets other than the one improved.

In Appeal of Protestant Orphan Asylum, 111 Pa. St. 135, 3 Atl. 217, Mr. Justice Gordon said: "We can readily understand why the cost of constructing and maintaining a sewer, which is designed for the drainage of a particular street or locality, and which is essentially necessary for the health, comfort, and convenience of the inhabitants dwelling along such street or in such locality, should be assessed upon the property of the district thus benefited, for the improvement as well as the use is local, and the benefit to the public is but secondary. So with a sidewalk, without which a house in a town or city cannot be said to be finished, and though the public has the right of way over it, the greater benefit results to the

property itself. But when we come to a street or other highway, which is primarily designed, not for the use or welfare of the inhabitants of any particular locality, but for the public at large, the case is very different. It then becomes utterly unjust to charge the cost of what is purely a public improvement, designed exclusively for the general welfare, upon the property of a few individuals, who, however they may be incidentally benefited, have neither been consulted, nor their profit nor convenience regarded. Under such circumstances, we cannot agree to proceed a single step beyond what is warranted by the case of *Hammett v. Philadelphia*. There is some show of reason why the original cost of grading and paving a street in a populous municipality should be charged upon the adjacent property, for it receives from the improvement some benefit of a local character, but when this is done it has fully paid for all its local advantages, and it cannot thereafter be charged for maintenance and repairs." The foregoing case arose under an act passed in 1871 for the purpose of avoiding the effect of the decision in *Hammett v. Philadelphia*. The act authorized the city councils of Pittsburgh, whenever they desired to repave or regrade a street, and the cost of the original grading and paving was paid by the property holders, to have viewers report whether the improvement was of general or local benefit, and, if it was partly or in the whole local, they should designate the district to be benefited, and the proportion to be paid by the district benefited. We held that "this involved a principle of taxation that we refused to acknowledge in the Cases of *Washington Ave.* and the *Sawmill Run Bridge*," and that "it is utterly vicious, and can be sustained by no authority." The improvement in question was a repaving of Tenth street, and under the act of 1871, if any part of the benefit was local, the cost was to be defrayed by an assessment upon such properties as the viewers might determine to be benefited within a given district benefited, which also was to be prescribed by the viewers. Here is what was said of it in the opinion by Mr. Justice Gordon: "That any part of a municipality should be arbitrarily set apart by a board of viewers, and specially taxed for an improvement which, like Tenth street, belongs to the whole of it, is a proposition involving so gross a perversion of constitutional right that it will not bear discussion. The fourteenth section then provides that this 'local assessment' shall be apportioned among the property of the district designated in proportion to the benefits supposed to be conferred by the proposed improvement upon the said property. Here we have another step in the direction of arbitrary and unconstitutional taxation. The viewers, without any fixed rule, but according to their own notions as to what the property owner ought to pay,

are to apportion the tax as they may think proper. * * * Now, the class of property dealt with by the act of 1871 is real estate, but the taxation is not uniform within the city of Pittsburgh, the taxing authority, but local and special; some property being burthened with the whole cost of the repairs necessary for this public highway, and the rest wholly exempted." These remarks are entirely pertinent to the facts of this case. The improvement is a grading and paving of a portion of a public street. The street belongs to the whole city, and is a part of its system of streets established for the convenience and for the use of all the citizens, and of all other citizens of the commonwealth. This and several of the other appellants have no private interest in the street itself, or in its use. They have only the same public interest in the use that all other citizens have. Their properties do not adjoin or abut upon the improved portion, or upon any other portion, of the street. Upon what principle, then, can they be called upon to pay a special or local tax for its improvement, except upon the theory which was so emphatically condemned and repudiated in the opinion last quoted? That it was authorized by an act of assembly goes for nothing, because such acts are contrary to the constitution and void, as we there decided. That they are in the neighborhood of the improvement, and are therefore supposed to be benefited, and were so found by the viewers, is of no consequence, since the same consideration was entirely rejected in the cases cited, and upon the soundest principles.

It is scarcely necessary to cite further authorities, yet they exist in abundance: In *Alcorn v. City of Philadelphia*, 112 Pa. St. 494, 4 Atl. 185, it was said by Mr. Justice Trunkley: "It has been settled that 'assessments on property peculiarly benefited by local improvements are constitutional;' that the original paving of a street in a city is a local improvement almost exclusively peculiar to the adjoining properties; that, when a street is once opened and paved, all the particular benefits to the locality derived from the improvement have been received and enjoyed, and thereafter the repairing of the street must be done by the municipality.

* * * The owner shall not be charged for repairing, repaving, or an improvement of the street, after it has been duly paved or macadamized, but he is liable in the first instance for the original improvement." In *Williamsport City v. Beck*, 128 Pa. St. 147, 18 Atl. 329, we went one step further, and held that the cost of repaving a street could not be charged upon an abutting owner, even where the city had paid for the cost of the original paving, upon the principle that the repair is a public duty for the general benefit. We have since applied the same ruling in several other cases. In *Allegheny City v. Western Pa. R. Co.*, 138 Pa. St. 375, 21 Atl. 763, Mr. Chief Justice Paxson

said: "The constitutionality of assessments for street improvements can be sustained only upon the ground that the property assessed is benefited by the improvement. This is the doctrine of all the authorities. * * * We are dealing with the question of special local taxation; of the right of municipal authorities to levy a tax upon A. which it does not impose upon B., for the reason that it has done something by which the property of A. has been specially benefited to the amount of the tax. In the absence of any such benefit, in a case where we can declare, as a matter of law, no such benefit can arise, the legislature is powerless to impose such a burden. It would not be a tax, in any proper sense of the term. It would be in the nature of a forced loan, and would practically amount to confiscation." In *Pittsburgh's Petition*, 138 Pa. St. 401, 21 Atl. 757, 759, 761, our Brother Williams, on page 434, 138 Pa. St., and page 762, 21 Atl., said: "The assessment of benefits is an exercise of the taxing power. The tax is defensible on the ground that it rests on an actual benefit conferred upon the particular piece or pieces of property on which it is levied. It is a local tax resting on a local benefit. * * * An assessment levied in order to cover all the cost of a given improvement, without regard to the actual benefits conferred by it, is simply confiscation. * * * The benefits to be assessed are simply such as are peculiar to the property assessed. A mere general increase in the value of property in that part of the city is not enough. It must relate to the increase that is peculiar to the property liable to assessment, and is due simply to the improvement proposed."

All of the foregoing considerations have controlling force in this case. If there is any advance in the general value of property,—a fact which is neither found nor proved,—that is a benefit which is common to all the neighboring property, and is not peculiar to any one piece, and that kind of benefit cannot be assessed. But a very slight process of reasoning will demonstrate the very great injustice and oppression of this species of taxation. The exceptions allege that the property of the appellant has already been assessed for the grading and paving done in front of the appellant's property; and if another assessment for grading and paving in front of some other person's property, either on the same or some other street, is allowed, it will be in contravention of the whole current of decisions, from *Hammett's Case* to the present time. Even the abutting owner cannot be assessed twice where the improvement is directly in front of his property. How, then, can he be assessed twice when the improvement is not in front of his property? What a mockery of justice it would be to load up an owner with one assessment after another because the improvement is in front of some other

person's property somewhere in the neighborhood, on the same street, on several other streets, on all the streets which may be in fact, or which a jury of viewers may say are, in the neighborhood. If this thing may be done once more than upon the original occasion, it may be done any number of times more. To-day the improvement is upon a part of one street "in the neighborhood." To-morrow it may be upon another part of the same street, or it may be upon another street which is also "in the neighborhood." How long will a citizen's property continue to be his, if it may be appropriated time and again in this ruthless and despotic manner? The writer is most earnestly impressed with the conviction that such a doctrine cannot be tolerated for a single moment; that it would be destructive of all values of municipal property; that it is utterly subversive of every element of fairness or justice or common right; that it has never been sustained by a solitary decision of this or any other court of last resort; that it is in violation of the fundamental principle that taxation must "be uniform upon the same class of subjects within the territorial limits of the authority levying the tax;" that it means the appropriation of the private property of a few individuals to discharge a public burden, and that it is in fatal hostility with a long line of our own decisions, which declare in the most emphatic language that the private property of citizens shall not be subjected more than once to assessment for benefits for a street improvement, even when the improvement is immediately in front of the property. As we have repeatedly decided, the doctrine of assessment for benefits to pay for public improvements can only be defended upon the ground that the benefits are local, and essentially peculiar to the very property assessed, and then it can only be done once. This can only be the case when the property assessed abuts directly upon the line of the improvement. Having their own burdens to bear in this respect, the owners cannot be subjected to the discharge of similar burdens upon other properties, whether situate on the same street or in the same neighborhood. Said Agnew, J., in the Washington Ave. Case, speaking of the Hammett Case: "The majority opinion in that case did not then, and this opinion does not now, dispute the long-recognized power of local taxation for local improvements according to the benefits conferred; but they meet and dispute departures from that power, which, if recognized, will land in the overthrow of the right of private property. Laws which cast the burthens of the public on a few individuals, no matter what the pretense, or how seeming their analogy to constitutional enactments, are in their essence despotic and tyrannical, and it becomes the judiciary to stand firmly by the fundamental law in defense of those general, great, and essential

principles of liberty and free government, for the establishment and perpetuation of which the constitution itself was ordained." The report of the viewers is obnoxious to the decisions of this court in the cases of Travers' Appeal, 152 Pa. St. 129, 25 Atl. 528, and Willson's Appeal, 152 Pa. St. 136, 25 Atl. 530. The defect in this report is precisely the same as in those, and it is apparent on the face of the report. While it is true that specific exceptions on this very ground do not appear to have been filed before the viewers, yet the first assignment of error raises the question of the validity of the decree; and as any defect which appears on the record, and is fatal in its character, will sustain such an assignment, we think the question is sufficiently before us. The decree of the court below is reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

MITCHELL, J., (concurring.) I concur in this judgment on the construction of the act of May 16, 1891; but, as the constitutional question upon the power of the legislature does not necessarily arise, I prefer not to advance any opinion upon it.

(159 Pa. St. 39)

In re MOREWOOD AVE.

Appeal of FERGUSON.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MUNICIPAL CORPORATIONS—ASSESSMENT FOR PUBLIC IMPROVEMENTS—REPORT OF VIEWERS—CONFIRMATION.

1. Act May 16, 1891, providing for the completion of unauthorized street improvements, and assessment for their cost, contemplates that assessments be made on the basis of a quantum meruit; and an assessment based on the contract price of the work, as shown by the city books, without even a finding that the contract price was a fair one, is erroneous.

2. Act May 16, 1891, provides that viewers appointed to assess the cost of street improvements on the property benefited shall give notice of the day on which they shall file their report, and, if exceptions are filed with them, they must name another and subsequent day for filing their report, and that exceptions may be filed in court 20 days after that day. *Held*, that the filing of such report by viewers on the first day named by them in their notice, regardless of the fact that exceptions had been filed thereto, was without authority of law, and that it was error to confirm such report.

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expense of grading, paving, and curbing Barton street, from Fifth avenue to Forbes street, and assess the costs, damages, and expense on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. Walton Ferguson,

whose property was assessed for benefits from the improvement, appeals. Reversed.

The following are the assignments of error: "(1) The court below erred in making the following decree: 'And now, to wit, October 22, 1892, this cause having come on to be heard upon various exceptions filed to the report of the board of viewers, and after argument thereon by counsel, and upon due consideration thereof, the court overrule and dismiss all the exceptions, and hereby confirm the report of the said board of viewers absolutely, and order and direct the prothonotary to certify a copy of the report and this order to the treasurer of the city of Pittsburgh, to be by him proceeded in according to law. By the Court.' (2) The court erred in not setting aside the report of the board of viewers. (3) The court erred in not sustaining the first exception of Walton Ferguson, to wit: 'That the said report of the board of viewers is not filed in accordance with the requirements of the act of assembly under which the said board claims to act, in so far as clause 7 of section 1 of the act of May 16, 1891, (P. L. 73,) requires that where exceptions are filed to the report of the board of viewers with the said board, they shall fix some subsequent day for the filing of their report,—that is, subsequent to the day originally fixed,—whereas, in this case, the exceptant avers that the said report was filed in this court on the same day as that originally fixed and advertised, without reference to the exceptions filed before the said board both by exceptant and other parties in interest.' (4) The court erred in overruling without investigation the second supplementary exception of Walton Ferguson, which is as follows: 'The said viewers have assessed the properties abutting on the said street exorbitant prices for the improvement, as follows: \$3.35 per square yard for the asphaltum; 50c. per cubic yard for the grading; 87c. per lineal foot for the curbing,—whereas, the same could have been furnished readily, and done, at \$2.90 per square yard for asphalt paving; 35c. per cubic yard for grading; and, if amount realized from sale of dirt were deducted, it could have been done for from ten to fifteen cents per cubic yard for grading. As for curbing, 70c. or 75c. would have been a reasonable and fair charge per lineal foot.' (5) The court erred in dismissing the plaintiff's petition for an opportunity to prove by testimony that the cost of the work assessed upon plaintiff was in excess of its actual value."

John Wilson, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. As the property of the appellant in this case abuts upon the line of

the improvement, it is subject to an assessment for benefits. The validity of the report of the viewers may be considered under the first assignment of error; and as the decisions of this court in *Travers' Appeal*, 152 Pa. St. 129, 25 Atl. 528, and *Wilson's Appeal*, 152 Pa. St. 136, 25 Atl. 530, are fatal to the report as the basis of any decree, the first assignment must be sustained. The second assignment must be sustained for the same reason. We think, also, that the third assignment must be sustained. In this case, exceptions were filed with the viewers before their report was presented to the court. The seventh clause of the first section of the act of 1891 (P. L. 73)¹ provides that "on the day named, if no exceptions are filed, or, if exceptions are filed, then upon a subsequent day to be named by them, said viewers shall file their report in the proper court of common pleas, and thereupon said court shall approve the same nisi, and within twenty days thereafter any person in interest may file exceptions to any part or the whole of said report." It will be seen that the language is specific and mandatory. If exceptions are filed with the viewers, they must name another and subsequent day for filing their report in court, and the parties have 20 days after that time to file their exceptions in court. The viewers did none of this, but proceeded to file their report on the first day named by them in their notice, to wit, July 13, 1892. The report was therefore filed without authority of law, and the appellant was deprived of the time which the statute gave him for filing exceptions in court. In the case of *Western Pennsylvania R. Co. v. City of Allegheny*, 92 Pa. St. 100, we held that a city can create a valid municipal lien for improving a street only when the improvement is made in pursuance of law, and the mode by statute or ordinance is strictly followed. We made the same ruling in *Hershberger v. City of Pittsburgh*, 115 Pa. St. 78, 8 Atl. 381, and we held that the property owner could only be made subject to a lien for the improvement when the power conferred on the municipal authorities has been legally exercised. We sustain the first, second, and third assignments of error, and dismiss the fourth and fifth. The decree of the court below is reversed, the report of the viewers is set aside, at the cost of the appellee, and the record is remitted for further proceedings.

¹ Act May 16, 1891, provides that viewers appointed to determine the cost of improving a street, and to assess such costs on the property benefited, shall give notice of the day on which they shall file their report, and, if exceptions are filed with them, they must name another and subsequent day for filing their report in court, and that exceptions may be filed in court 20 days after that day.

(159 Pa. 20)

In re MOREWOOD AVE.**Appeal of CHILDS.**

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the costs, damages, and expenses on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. Mrs. L. V. Childs, whose property was assessed for benefits from the improvement, appeals. Reversed.

Dalzell, Scott & Gordon, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. This appellant was an owner of property on Barton street, but not along the line of the improvement between Fifth avenue and Forbes street. The reasons stated in the opinion in Appeal of Chambers, 28 Atl. 123, are as applicable in this case as in that; and therefore the decree of the court below is reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

(159 Pa. 20)

In re MOREWOOD AVE.**Appeal of ADAMS.**

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the costs, damages, and expenses on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. Emma V. Adams, whose property was assessed for benefits from the improvement, appeals. Reversed.

Dalzell, Scott & Gordon, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. For the reasons stated in the opinion just filed in Appeal of Chambers, 28 Atl. 123, the decree of the court below is reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

(159 Pa. 20)

In re MOREWOOD AVE.**Appeal of MCGINLEY.**

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the costs, damages, and expenses on the property benefited, and to make report thereof to the

court. Viewers were appointed, and their report confirmed. John R. McGinley, whose property was assessed for benefits from the improvement, appeals. Reversed.

Dalzell, Scott & Gordon, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. For the reasons stated in the opinion just filed in Appeal of Chambers, 28 Atl. 123, the decree of the court below is reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

(159 Pa. 20)

In re MOREWOOD AVE.**Appeal of ABBOTT.**

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the costs, damages, and expenses on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. W. L. Abbott, whose property was assessed for benefits from the improvement, appeals. Reversed.

Dalzell, Scott & Gordon, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. This appellant was an owner of property on Barton street, but not along the line of the improvement between Fifth avenue and Forbes street. The reasons stated in the opinion in Appeal of Chambers, 28 Atl. 123, are as applicable in this case as in that; and therefore the decree of the court below is reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

(159 Pa. St. 20)

In re MOREWOOD AVE.**Appeal of FERGUSON.**

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the damages, costs, and expenses on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. E. M. Ferguson, whose property was assessed for benefits from the improvement, appeals. Reversed.

John Wilson, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

GREEN, J. This appellant is an owner of property on Barton street, but not along the line of the improvement between Fifth avenue and Forbes street. The reasons stated in the opinion in Appeal of Chambers, 28 Atl. 123, are as applicable in this case as in that; and therefore the decree of the court below is

reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

In re MOREWOOD AVE.

Appeal of SCHOONMAKER.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to determine the costs, damages, and expenses of grading, paving, and curbing Barton street from Fifth avenue to Forbes street, and to assess the costs, damages, and expenses on the property benefited, and to make report thereof to the court. Viewers were appointed, and their report confirmed. J. M. Schoonmaker, whose property was assessed for benefits from the improvement, appeals. Reversed.

Dalzell, Scott & Gordon, for appellant. William C. Moreland and Thomas D. Car-nahan, for appellee.

GREEN, J. This appellant is an owner of property on Barton street, but not along the line of the improvement between Fifth avenue and Forbes street. The reasons stated in the opinion in the Appeal of Chambers, 28 Atl. 123, are as applicable in this case as in that; and therefore the decree of the court below is reversed, and the petition of the city, and all proceedings thereunder, are dismissed and set aside, at the cost of the city.

(159 Pa. St. 153)

POWERS v. BLACK et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

REAL-ESTATE BROKERS—FRAUD—CONSTRUCTIVE TRUSTS—ACCOUNTING.

1. Defendant brokers, being authorized by plaintiff to sell land for \$2,000, intrusted the matter to G., an employee, who persuaded one S. to take the land for \$2,300, promising that defendants would raise the money for him. Defendants failed to raise the money, whereupon S. begged G. to find some one to take the contract off his hands, and save him the \$100 already paid plaintiff. Defendants having then disposed of part of the land to the amount of \$600, H., an employee of defendants, with knowledge of the facts, agreed to take over the contract, S. to take another part of the land for \$600, counting in his \$100 paid. These two sales, for \$600 each, amounted to half of the land. Plaintiff, not knowing that H. was an employee of defendants, gave him a deed, and received from him \$2,300, less \$200 commissions to defendants. H. later sold the rest of the land for \$2,100. *Held*, that defendants and H. were guilty of a legal fraud on plaintiff, and must, as trustees, account to him for the profits realized.

2. In such case defendants could not retain the commission charged on the colorable sale to H., nor charge commissions on the actual sales made.

3. The fact that H. had a partner in the speculation, who furnished half the funds and took half the profits, but whose name was not in the deeds, and who was not a party to the suit, would not affect H.'s and defendants' liability to account to plaintiff on the whole transaction.

4. Since defendants and H. were not guilty of actual and intentional fraud, they

should be charged only with money actually received, and the actual value of property taken in exchange, and credited with all proper disbursements on account of the land.

Appeal from court of common pleas, Allegheny county.

Action by Charles L. Powers against David P. Black, Milton I. Baird, and J. Ledlie Gloninger, trading as Black & Baird, and Galen C. Hartman, for an accounting. Accounting decreed, and money judgment thereon rendered for plaintiff.

The facts found and law declared below are set forth in the court's opinion, as follows: "The defendants Black & Baird were in 1890, and are still, engaged in the business of real-estate brokers. About the 1st of April, 1890, Mr. Powers applied to them to place a mortgage upon his property for \$1,000. Mr. Baird informed him that this would be difficult to do, but that they might be able to sell it. He, according to writing dated April 1, 1890, authorized them to sell the property as a whole for \$2,000, or in lots, at an average of \$150. They placed the matter in the hands of one of their employees, G. G. Smith, who procured as a purchaser one W. E. Strong. On the 23d of June, 1890, Black & Baird, as agents of Powers, signed a receipt for \$100, as part of purchase money for the whole tract, to be conveyed to Wm. E. Strong on or before August 23, 1890, for \$2,300, 'all cash.' The sale was so reported to Powers. The agreement of purchase by Strong was not absolute, but was on condition that Black & Baird would procure for him \$1,500 upon mortgage of this property and \$800 upon mortgage of other property owned by him, and they accordingly took from him, on the same day, an order to place these mortgages. This they were unable to do. On July 19, 1890, Black & Baird, through G. G. Smith, received from Wm. Peterman \$25 on account of a sale of two of these lots for the price of \$600,—\$125 on delivery from W. E. Strong of the deed, August 21, 1891, and \$475, with interest, January 1, 1891, to be secured by bond and mortgage. The plaintiff was not informed of the condition upon which the sale to Strong was made, nor of the sale made on Strong's account to Peterman. He was told that Strong was unable to comply with his agreement, but that they would try to procure another purchaser; and was, about the middle of August, told that a sale had been made to Wm. Hartman, upon the same terms as that to Strong. The fact was that Hartman was employed in the office of Black & Baird, having charge of their mortgage department. He had no charge of the sales, but had access to their sales books, and undoubtedly had full knowledge of the transactions in reference to Powers' property, having taken part in the attempts to place a mortgage on it for Strong. When it was ascertained that Strong could not comply with his contract, an arrangement was made by which Strong should

transfer his agreement for purchase to Hartman, his agreement with Peterman for the sale of two lots, and that Strong should buy ten lots for the sum of \$600, all of which was done about August 21, 1890. The deed was then prepared, and presented to Powers for execution. It was executed in presence of Mr. Gloninger, one of the firm of Black & Baird, who attested it, and took the acknowledgment. Powers was not informed of the arrangement between Strong and Hartman. There was no real dispute as to the facts thus stated. Powers claimed that he was not aware of the relation between Black & Baird and Hartman. Of this there was some dispute, but the master found the fact in his favor, and was justified by the evidence in so finding. There were some matters of fact in dispute, but they have no special bearing upon the case. The master, in an elaborate and well-considered opinion, found that the sale to Hartman, under the circumstances, constituted a legal fraud as against Powers, and therefore the sale was voidable by him. In this opinion we fully concur. It is fully sustained by the reasoning and authorities cited by the master. We do not think it necessary to restate the reasons given by the master, or cite additional authorities. Black & Baird certainly failed in their duty to their client. Even if the sum of \$2,000, mentioned in the authority to sell, was a fixed price, and not the minimum price, as alleged by Powers, it would have been their duty, as his agents, to procure the highest obtainable price, and, being authorized to sell for cash, their right to make a conditional contract without his knowledge was doubtful. But when that arrangement failed, and a new purchaser was presented, the circumstances were materially changed. They had arranged for the sale of about half the property for \$1,200, leaving the most valuable part unsold. They could not, in justice to him, make a sale upon the same terms, without first informing him of the changed conditions. Having the opportunity to sell this part at the price offered, he might have preferred to hold the rest. If, under these circumstances, they had procured a conveyance to a stranger, it would have been in disregard of their duty. Being made to one of their own employees, who had knowledge of the business, it was in clear violation of the rights of the owner, and voidable by him. They must therefore be held as trustees, and, having united in the wrongful act, must answer jointly. If the property remained in the control of the parties, or either of them, the appropriate remedy would be a reconveyance. But it appears that it has all been conveyed to innocent parties, and the only remedy is an account of the proceeds or value. The master, therefore, proceeded to state an account. Defendants have filed no exception as to his right to state an account, and it is therefore not necessary to inquire as to his power to

state an account at this stage of the proceedings, and under his present appointment, especially as it is deemed necessary to refer the matter to him to restate it under exceptions filed to the account as stated. The master does not find that the defendants are guilty of actual fraud in the transaction. On the contrary, the evidence shows that Black & Baird received nothing out of the proceeds except commissions, and had no other interest unless it was to have the \$100 paid by Strong, which, under their agreement with him, they might have been compelled to refund, and which they had paid to Powers, and might not have been able to recover from him. It is probable the parties acted under the mistaken idea, expressed by Mr. Baird, that, if they secured to the owner the price which he was willing to accept, it did not matter to whom the sale was made; that, if they chose, they could take the title to themselves, and reap all the increase made by resale. However this may be, there was no sufficient evidence of actual fraud, and we are of opinion that none was intended. The measure of liability in such case would be the value of the property when disposed of by defendants, and, in absence of fraud or lax faith in sales, this would be ascertained by actual proceeds. *Greenwoods' Appeal*, 92 Pa. St. 181; *Dilworth's Appeal*, 103 Pa. St. 92. The defendants should therefore be charged with money actually received, and credited with all proper disbursement on account of the property. As a portion of the property was disposed of in trade, the price would be the actual value of the property received in exchange. As to this, the consideration in the deed would be *prima facie*, but not conclusive."

That part of the master's second report which deals with Mr. S. H. McKee is as follows: "At the time that Hartman obtained the assignment from Strong, one S. H. McKee acquired an equal interest in the Powers property with Hartman. The deed from Powers was taken in Hartman's name alone, as a matter of convenience. Powers had no knowledge of McKee's interest. McKee paid to Hartman one-half of the purchase money, and has received one-half the profits. McKee was not and is not in any way connected with Black & Baird. The respondent claims credit for the one-half of the profits paid to and received by McKee. McKee is not a party to this bill, and, of course, could not be affected by any finding or decree made thereunder. The respondents are held as trustees, on account of their wrongful acts,—on account of their obtaining a deed from the complainant by means of suppressing facts within their knowledge which they, as complainant's agents, were bound in equity and good faith to disclose to their principal. Had the respondents, using the same bad faith towards their principal, obtained a deed to McKee, because, perhaps, he was a friend of theirs, and they desired

to assist him towards making some money, had McKee been acting honestly in the transaction, and realized for himself all of the profits, would the respondents' liability to Powers have been any the less? Would it be an answer for them to say, "True, we deceived you, by which you lost a large amount of money, but we have not got it?" Could they be generous towards McKee before they were just to Powers? Their duty was to Powers, and for their failure in this duty they are held liable. The master is of the opinion that respondents cannot shelter themselves behind McKee."

A. M. Brown, A. B. Reid, and A. V. D. Watterson, for appellants Black & Baird. A. W. Duff, for appellant Galen C. Hartman. Chas. L. Powers, for appellee.

PER CURIAM. Both reports of the learned master, considered with special reference to the exceptions thereto recited in the first 12, together with the fourteenth to sixteenth specifications, inclusive, have satisfied us that neither of said 15 exceptions should have been sustained, and hence there was no error in overruling them and entering the final decree. In view of the established facts, there was no error in decreeing, as complained of in the thirteenth specification, "that in the purchase and sale of the complainant's real estate by Galen C. Hartman, one of the respondents, as alleged in the bill, and as found by the master, the said Galen C. Hartman and his correspondents, Black & Baird, were trustees of the complainant, and, as such, are accountable to him." The reference to a master to take and state an account of the dealings and transactions of and between the parties, etc., was a necessary result of the trust relation; and on the coming in of the account, to which there were no valid exceptions, the final decree complained of in the seventeenth specification was rightly entered. The questions involved were fully considered and correctly disposed of by the learned master and court below. In view of this, further discussion of them is unnecessary. Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

(158 Pa. St. 545)

BARHIGHT v. TAMMANY.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MALICIOUS PROSECUTION — BURDEN OF PROOF — PROBABLE CAUSE—ADVICE OF COUNSEL.

1. Where one accused of a crime is discharged by the examining magistrate, and sues the prosecutor for malicious prosecution, the burden of proving probable cause is on defendant.

2. That advice of counsel may constitute a defense in an action for malicious prosecution, defendant must show that he honestly followed advice given on an honest and full presentation of the facts as he understood them.

Appeal from court of common pleas, Luzerne county.

Action by Lucinda Barhight against Charles W. Tammany for malicious prosecution. Judgment for plaintiff. Defendant appeals. Affirmed.

G. L. Halsey, for appellant. Q. A. Gates, for appellee.

MCCOLLUM, J. On the 30th of December, 1889, Charles W. Tammany, appellant, made an information before an alderman of the city of Wilkes Barre, in which he charged Lucinda Barhight, appellee, with the larceny of certain property belonging to him, to wit, "one cupboard, and about twenty-five yards of carpet, of the value of about thirty dollars." A warrant was issued, on which the appellee was arrested, and brought before the magistrate, the same day. As the appellant was not present, the hearing was postponed, and the appellee committed to the county prison, where she was detained three days, when she was again brought before the magistrate, and, as appears by this record, was "discharged for want of sufficient evidence." The appellee then brought this action against the appellant for malicious prosecution, and recovered a judgment against him in the court below for \$100, from which he appealed.

It is not necessary, in this opinion, to refer in detail to the evidence introduced by the appellee to sustain her averment that the prosecution against her was instituted by the appellant maliciously and without probable cause, or to make a like reference to the evidence submitted by him in answer to it. All the specifications of error are founded on the instructions to the jury, and if these were adapted to the evidence in the case, and in accord with the well-settled principles which govern actions of this character, the judgment must be affirmed. The instructions in relation to the burden of proof were in harmony with these principles, and such as were demanded by the evidence. The proceedings before the magistrate cast upon the appellant the burden of showing probable cause for charging the appellee with the crime of larceny, and what was said in reference to this burden by the learned judge of the court below in his general charge, and his answers to the points submitted to him, was directly in line with the decisions of this court. When one accused of crime has been discharged by the examining magistrate, and brings an action for malicious prosecution against the prosecutor, the burden of proving probable cause is on the defendant. *Smith v. Ege*, 52 Pa. St. 419; *Orr v. Seller*, 1 Penny. 445; *Bernar v. Dunlap*, 94 Pa. St. 320. There is no substantial ground for the complaint that the charge was inadequate. The principles governing the action were clearly and correctly stated in it. But the evidence submitted by the appellee showed that the prosecution was

malicious and without probable cause, while the evidence submitted by the appellant showed the existence of probable cause, and the absence of malice on his part. This conflicting testimony was for the consideration of the jury, and what the learned judge said in reference to it amounted to an instruction that, if the facts were as claimed by the appellee, the verdict should be in her favor, and, if they were as claimed by the appellant, it should be against her. This instruction was quite as intelligible to the jury as if the learned judge had said that the testimony on the part of the appellant showed that there was probable cause for, and no malice in, the prosecution, or that the testimony on the part of the appellee showed that there was malice in it, and a want of probable cause for it.

The instruction in relation to the advice of counsel was a lucid statement of the law upon the subject. It was for the jury to determine from the evidence whether the appellant had, in good faith, laid before his professional adviser all the facts within his knowledge in respect to the alleged appropriation of his property by the appellee, and whether, in prosecuting her for it, he honestly followed advice founded upon information so communicated by him. It was not for the court, upon the evidence in this case, to say that he had done so. Advice so sought, received, and acted upon constitutes a defense to an action for malicious prosecution. It is available when the plaintiff has made a prima facie showing of a concurrence of malice and want of probable cause in the prosecution, but it is an affirmative defense, and it lies on the party who sets it up to establish it by his own or other testimony. Any evasion or concealment by the prosecutor in his statement of the case to his counsel, or any failure on his part to make a full disclosure of all the facts, within his knowledge, concerning it, will deprive him of the protection which advice founded upon an honest, fair, and full presentation of the case affords. An incomplete and unfair statement warrants an inference that the advice was sought as "a mere cover for the prosecution," and an opinion based on such statement is an unsatisfactory reply to evidence of malice and want of probable cause. The legal advice which constitutes a defense to an action for malicious prosecution must rest on an honest and full presentation to counsel of all the facts within the knowledge of the prosecutor, or which he has reasonable ground for believing he is able to prove. In this case the appellant testified that the advice was obtained on his statement that the appellee had his property, and denied having it. His counsel testified that the appellant gave him to understand that she had fraudulently taken it, and that his advice to prosecute for larceny was based on the theory that she had stealthily possessed herself of the property,

and denied possession of it. The undisputed evidence was that the appellee bought the property of her daughter, and openly took possession of it. In view of this evidence, and the further fact that the conduct of the appellant was at least consistent with a purpose on his part to use criminal process against the appellee as a means of compelling payment of the alleged balance due from her daughter on the so-called "lease," it was certainly pertinent for the jury to inquire whether the advice was obtained upon a truthful and fair statement of the facts as he understood them. The specifications of error are overruled. Judgment affirmed.

(159 Pa. St. 201)

WHITE v. SCHOOL DIST. OF BRADDOCK BOROUGH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

BUILDING CONTRACT—DELAY IN PERFORMANCE—LIABILITY—DAMAGES.

1. Where plaintiff failed to erect a school-house in a specified time as agreed, defendant's measure of damages is the amount specified in the building contract for each day's delay.

2. Plaintiff made every reasonable effort to perform a building contract in the required time, but failed to do so in some minor particulars. Defendant took possession of the building when completed, and used it for the intended purpose, for which it was adequate. *Held*, that plaintiff could recover the contract price, less compensation to defendant for the minor imperfections and omissions.

3. Plaintiff was not liable for delay in the completion of the building where it was due to the fact that defendant's architect either changed the plans and specifications, or failed to furnish necessary lines and levels; but was liable where the delay resulted from the condemnation of materials which he furnished, and on which the architect was required to pass under the contract.

Appeal from court of common pleas, Allegheny county.

Assumpsit by D. M. White against the school district of the borough of Braddock for the erection of a school building. From a judgment entered on a verdict for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

A. B. Stevenson and S. Harvey Thompson, for appellant. D. F. Patterson and Boyd Crumrine, for appellee.

PER CURIAM. An examination of the record in this case with reference to the questions presented for our consideration has failed to convince us that either of the specifications of error should be sustained. Plaintiff's right to recover depended on questions of fact, which appear to have been properly submitted to the jury, and found in his favor. The main questions were whether he substantially performed his contract with defendant within the time and in the manner

required by the terms thereof. Was there a failure by him to perform in either of these respects, and, if so, was it due to his own neglect or default, or to the neglect, default, or improper interference of the architect? If the jury found there was a failure to perform within the time required, and the delay was chargeable to plaintiff himself, they were instructed, as requested in defendant's second point, that the measure of damages was the \$25 per day specified in the contract. If they found that, notwithstanding an honest effort on his part to perform his contract, he failed to do so in some minor particulars, and the building was accepted by the defendant in that condition, they were instructed to allow such reasonable deductions as would adequately compensate for such deficiencies in workmanship and materials. On this subject the learned trial judge, in affirming plaintiff's seventh point, charged thus: "If the jury find, under all the evidence, that the plaintiff made every effort reasonable, in good faith, to perform his contract fully and within the period given him to perform it, and that the building was completed and taken possession of and used for its intended purpose, and adequately serves said purpose, then the plaintiff is entitled to recover the balance of the contract price, together with the amount admitted to be due for the additional work, less such deductions as will compensate the defendant for any minor imperfections and omissions; and if the jury also find that such imperfections and omissions and the delay were chargeable to the action of the defendant's architect, and not to the fault of the plaintiff, then no deduction should be allowed on account of them." In same connection he further said: "You must bear in mind, however, as to the element of delay, that it must be chargeable to the action of the architect. If he failed to furnish the lines and levels, or to do any other act which he was required to do under the contract, or if he made such changes in the plans and specifications as to cause delay, the plaintiff would not be answerable for such delay; but if the delay resulted from the condemnation, with reasonable promptness, of material which the architect, under the contract, was required to pass upon, and the necessity of procuring other material, such delay would not be chargeable to the architect." These instructions, as further explained and enforced in other portions of the charge, were not only warranted by the testimony, but they were full and adequate. The remaining specifications, in which reference is made to that provision of the contract which requires the lines and levels to be furnished on or before the 15th of July, 1891, do not require discussion. Neither of them is sustained. The case was carefully and accurately tried, and there appears to be no sufficient reason for disturbing the judgment. Judgment affirmed.

(156 Pa. St. 231)

In re COLEMAN'S ESTATE.

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

COLLATERAL INHERITANCE TAX—PROPERTY SUBJECT TO—ASSESSMENT.

1. Where the will of a nonresident testator directs the executor to sell the residue of the real estate, convert the same into money, and pay certain legacies to collaterals, the fund for distribution, arising from the sale of testator's land in Pennsylvania, follows the situs of testator's domicile, and is not subject to a collateral inheritance tax in Pennsylvania.

2. The assessment of the land of a nonresident testator, as land, for a collateral inheritance tax, was void, where testator willed only the proceeds of a sale of such land to collaterals.

Appeal from orphans' court, Allegheny county.

First and partial accounting by the Safe-Deposit & Trust Company, as ancillary administrator c. t. a. of Julia C. Coleman, deceased. Certiorari by the commonwealth to review the decree of the orphans' court that the funds in the hands of the accountant for distribution are not liable for a collateral inheritance tax. Affirmed.

Julia C. Coleman died domiciled in the state of New York, leaving a will, in which she directed her executors "to sell and convey all the rest, residue, and remainder" of her real estate, and convert the same into money, and apply the proceeds arising therefrom towards the payment of certain legacies given to collaterals. Included in this residue is real estate situated in this commonwealth, part of which these accountants have sold under said power, and the proceeds are here for distribution. Between the dates of Julia C. Coleman's death and this sale, the register made an appraisal of the land for the purpose of collateral inheritance tax, and from that appraisal no appeal has been taken. The register now claims the tax out of this fund, and the accountant denies its liability, because the legatees "acquire nothing more under the will than a right to receive a sum of money out of the proceeds of sale; a mere chose in action; a claim of strictly personal character."

The following are, respectively, the opinion and decree of the orphans' court, and the assignments of error:

"Opinion: The solution of the question involved in this case turns mainly upon the application of the maxim that the situs of personal property follows the domicile of the owner. It was said in *Small's Estate*, 151 Pa. St. 1, 25 Atl. 23, that, as a general rule, intangible personal property of a nonresident, such as bonds, mortgages, and other choses in action, is governed, as to its situs, by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under the Acts of 1887, because not situated in this state.

Some species of personal property, it is true, when used in carrying on business, or for other particular purposes, may have an actual, as distinct from a legal situs, but the local character of the use takes it out of the operation of the rule. And of this Small's Estate is itself a striking illustration. Not only was the 'thing' given employed in a business which was by its nature localized, but the manifest intent of the testator was that it should remain in this state. The bequest was specifically of testator's interest, including 'all the property, real and personal, notes, stocks, bonds, and accounts,' in a limited partnership organized under the laws, and having its principal place of business in this state. The value of the property depended largely upon its continuance here. There was no reason for its conversion and transmission to the testator's domicile, and it was given to the surviving partners as such in specie. The facts plainly made an exception to the general rule. The actual situs was here, and liability to the tax followed. It is urged upon behalf of the commonwealth that this case rules the present. But the facts differ in material respects. The gift here was of an interest in a fund whose distribution belonged to the domicile of the donor. It was said in *Re Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132, that the collateral inheritance tax was not a succession, but a direct tax upon the 'thing' given in the hands of the donees. What was the 'thing' given to these legatees? The answer is in *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492, in which it was held that, where a testator domiciled in this state orders land situated without to be sold to pay pecuniary legacies, these legacies will pass to the legatees as money, subject to the domiciliary law, and, consequently, to the collateral inheritance tax. 'Under all the decisions it cannot be questioned,' said the court, 'that the third clause of [sale under the] will operated a conversion of the residuary real estate into personalty, efficacious from the moment of testator's death. * * * Had there been a mere direction to sell, as was the case in *Drayton's Appeal*, 61 Pa. St. 172, we should have felt bound to hold there was no conversion, and that, as the land was situated in another state, it would not be subject to collateral inheritance tax.' The facts here are precisely similar, and should work the same result. The thing given was not land, but an interest in its proceeds. If bonds, notes, stocks, and mortgages be intangible personal property, surely this is. The administration here being ancillary, the legatees have no status. Local debts and expenses having been paid, it is the sole duty of the administrator to transmit the balance to the domicile for administration. The collateral tax is imposed only on what remains for distribution after all the expenses of administration, debts, and rightful claims of third parties, domestic as well as foreign,

have been paid or provided for; it is only the net balance that is liable. How, then, is it possible to impose a tax on this fund when it has never been ascertained judicially how much, or whether any of it, will go to the collateral legatees? Who can tell how much of the fund may be successfully claimed by creditors and others as against the legatees? The court of the domicile is the only tribunal that can determine how much will ultimately go to them. *Orcutt's Appeal*, 97 Pa. St. 179. Suppose the whole of the fund should be required for the payment of claims of domiciliary creditors; a tax imposed here now would be upon a class not within the purview of our law, and unjust. Suppose the legatees should be entitled to receive only part of the fund upon which the tax is imposed here; the expense of recovering the excess would be a burden. So, too, the imposition of a tax here would result in the hardship of a double tax. It is apparent, therefore, that the imposition of a tax on the fund here would not only be unwarranted by the act of 1887, but would work injustice to these beneficial parties. But, in addition to these reasons, there is a question of public policy involved which is worthy of consideration. The rule that personal property follows the domicile of the owner is internationally recognized and observed, as being founded in convenience, (2 Williams, Ex'rs, 1515,) and a disregard of it here may react to the prejudice of our own citizens. The gift to these collaterals, being, then, manifestly an interest in intangible personal property, is governed by the domiciliary law, and consequently cannot be taxed for collateral inheritance in this state. *Miller v. Com.*, supra. It has been suggested that a result from the rule here indicated will lead foreign testators to order the sale of their lands located here with a view to avoid liability for payment of collateral inheritance tax. But *Miller v. Com.*, supra, will obviously have the same effect on testators domiciled here, and the one class will practically equalize the other, and the state lose nothing. It also follows logically that the assessment of the land owned by the testator as land, by the register, was without authority of law. It was not given to these collaterals, and the assessment was therefore void.

"Decree: And now, to wit, December 15, 1892, this matter came on for hearing, audit, and distribution at this term, and testimony taken; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the fund in hands of accountant, viz. \$5,908.07 cash, be paid in accordance with the schedule of distribution hereto attached and made part hereof, unless an appeal be taken herefrom within twenty days."

Assignments of error: "(1) The court erred in holding that the lands of testatrix in Pennsylvania were not subject to collateral in-

heritance tax. (2) The court erred in not holding that the lands having been duly appraised and tax assessed, and no appeal taken within thirty days, the liability to tax became fixed and conclusive. (3) The court erred in not distributing to the commonwealth the amount of collateral tax assessed, with interest thereon, from death of decedent, at twelve per cent."

W. U. Hensel, Atty. Gen., and R. B. Petty, for the Commonwealth. Lazear & Orr and H. A. Miller, for appellees.

PER CURIAM. We have fully considered this case with special reference to the several specifications relied on by the appellant, and are satisfied that there is no error in the decree, or in the legal conclusions upon which it is based. All that can be profitably said on the questions involved will be found in the clear and convincing opinion of the learned judge of the orphans' court. For reasons therein given, the decree should be affirmed.

Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

(159 Pa. St. 267)

GSCHWEND v. BOROUGH OF MILLVALE.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

ACTION AGAINST BOROUGH—DEFECTIVE SIDEWALK.

In an action against a borough for personal injuries, where there was evidence that defendant was negligent in permitting a dangerous hole to remain in a sidewalk, into which plaintiff accidentally stepped in the nighttime, the court properly refused to direct judgment for defendant.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action by Charles Gschwend against the borough of Millvale for personal injuries received from a defective sidewalk. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Jackson, for appellant. James Bredin, for appellee.

PER CURIAM. The only subjects of complaint in this case are the answers of the learned trial judge refusing defendant's sixth and seventh points, viz: (a) "There is no sufficient proof that the injuries complained of * * * were caused by the negligence of the defendant;" and, (b) "under all the evidence, * * * the verdict should be for the defendant." In view of the testimony tending to prove that the borough authorities were guilty of negligence, in that they permitted to remain, in the public sidewalk, a dangerous depression or "hole," into which the plaintiff, in the nighttime, accidentally stepped, and thereby sustained a severe and probably permanent injury, it would have been error to have withdrawn

the case from the jury by affirming either of said points. Without undertaking to summarize the testimony showing the dangerous condition of said sidewalk, particularly in the nighttime, the nature and extent of plaintiff's injury, etc., it was clearly sufficient to carry the case to the jury on the main questions of defendant's alleged negligence and plaintiff's resultant damages. Upon all the testimony, and with full and adequate instructions as to the duty of the defendant as well as the plaintiff himself, the case was fairly submitted to the jury, and, in the absence of any apparent error to the prejudice of the defendant, the judgment entered on the verdict should not be disturbed. Judgment affirmed.

(153 Pa. St. 645)

In re RALSTON'S ESTATE.

Appeal of JOHNSTON.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

RES JUDICATA—EXECUTORS—ACCEPTANCE OF OFFICE.

1. Where the court of common pleas, on discharging a rule granted to a creditor of an estate to show cause why a judgment in favor of another creditor against the administrator of the estate should not be opened, holds that there is nothing to justify a finding of fraud or collusion, this point is res judicata on proceedings in the orphans' court to distribute the estate.

2. Where one named as executor in a will does nothing in regard to the estate, but, together with the other sons of testator, pays his funeral expenses from their own funds, and remains inactive till cited in to show cause why letters of administration should not be issued, when he renounces, he will not be held to have accepted, or to be charged with any of the duties of, the office of the executor, and may therefore, like any one else, purchase a claim against the estate, and have it allowed.

Appeal from orphans' court, Armstrong county.

Proceedings for the settlement of the estate of John Ralston, deceased. From a decree of the orphans' court overruling exceptions of John Johnston to the report of the auditor distributing the estate, and allowing a judgment in favor of John Blaney, to the use of William Ralston, Johnston appeals. Affirmed.

William Ralston and his brothers were named as executors in the will of their father, but on being cited in, four years after testator's death, to show cause why letters of administration should not be issued, they renounced, and D. W. Hawk was appointed administrator. Various judgments were recovered against him in the common pleas court,—one in favor of John Johnston, and another in favor of John Blaney, to the use of William Ralston, on a claim bought by Ralston of Blaney. A rule granted to Johnston, to show cause why the Blaney judgment should not be opened, was discharged after hearing.

S. B. Schoyer and W. D. Patton, for appellant. M. F. Leason, for appellee.

MITCHELL, J. The judgment in favor of Blaney, to use, etc., was not confessed by Hawk, administrator, defendant, until after appellant's judgment—a test case upon a claim exactly similar—had been affirmed by this court. 6 Atl. 725. Presumably, therefore, there was no defense, and the learned judge of the common pleas so held in discharging the rule to open it. He also held that there was nothing in the evidence to justify a finding of fraud or collusion. This point, therefore, was *res adjudicata* between the present parties, and the only matter left open in the orphans' court was the alleged trust relation of William Ralston to the estate. A trusteeship, whether as executor or otherwise, cannot be imposed upon any party except by his consent, or as a consequence of his own acts. It is true, the law presumes that this office, like any other gift, is beneficial, and that it will therefore be accepted; but the decision rests with the donee, and, if he refuses, the presumption goes for nothing. The cases like *Shoenberger's Ex'rs v. Institution*, 28 Pa. St. 459, where notice to one named as executor, but who subsequently renounced, was held sufficient to bind the estate, rest on the ground that, as the party named can alone determine his acceptance or refusal, other parties, upon whom is a necessity of present action, may proceed on the presumption that he will accept, and their action is valid until he actually renounces, or they have notice that he will not accept. The appointment as executors, says Lowrie, J., "avails to make them representatives of the estate, so far as relates to acts in which they are merely passive, such as receiving notice of the dishonor of a note. * * * He who is bound to give such notice is not in fault in giving it to one who is thus potentially an executor." But neither this nor any other case that we have met with supports the inference that a man can be charged with any duty as executor without his own consent, or such acts as the law regards as sufficient evidence of acceptance of the trust. Delay and inaction, so far from raising a presumption of acceptance, are generally treated as evidence of refusal, (7 Amer. & Eng. Enc. Law, 200;) and though there are, in this state, many expressions that the refusal must be in writing and of record, (*Com. v. Mateer*, 16 Serg. & R. 418; *Heron v. Hoffner*, 3 Rawle, 398; *Miller v. Meetch*, 8 Pa. St. 420; *Bowman's Appeal*, 62 Pa. St. 169,) yet that point was not probably meant to be decided as broadly as the expressions, apart from the circumstances of the particular cases, would seem to imply. Even if such be the fixed rule, however, the time when it becomes imperative for the executor named to accept or renounce is when he is cited to do so, and mere inaction and delay, unaccompanied by any acts

of intermeddling with the estate, cannot amount to an acceptance against his consent.

The single act that is proved in this case, besides the delay, is the payment by the sons, including William, of the father's funeral expenses; but, as reported by the auditor, the evidence was that this was not done with the funds of the estate, or by the sons as executors, but as a matter of filial affection and duty. We agree with the auditor and the learned court below that such payment, "and mere quiescence for a long period of time, when there was apparently no estate to settle, do not amount to an acceptance." The stress of appellant's argument is that, by such quiescence, William allowed his brother to go on and finally wreck the business of the bank at Fairview, whereas, if he had compelled the winding up of that business while it was still solvent, the appellant's debt would have paid in full. But William, not having accepted the executorship, had no duties towards the appellant or any other creditor. His sole relation to the estate was that of a legatee, and as such, while he had the right to cite his brother, the surviving partner in the banking business, to account, yet he was not bound to do so. He could do so or not, as he chose, and the incidental effect of his action or nonaction on the assets available to other creditors when settlement was finally demanded made no change in his rights. The fact seems very clearly to be that all parties concerned—William, the appellant, and the other depositors—regarded the business of Ralston, McQuaide & Co. as perfectly solvent, and safe in the hands of the surviving partner, and the good faith of William is evidenced by the fact that the same confidence which lost the appellant his debt lost William his share of his father's estate. The loss becoming imminent, William, by the advice, if not at the suggestion, of his counsel, Gilpin, sought to recoup himself to some extent by the purchase of the Blaney claim at a discount. That he could not do this, if he was a trustee, follows from the case of *Heager's Ex'rs*, 15 Serg. & R. 63, and is clear upon general principles; but, as the proof of the trust relation entirely fails, there is no good reason, as the learned auditor well reports, why William should not have the same rights as others to buy up claims, and make a profit out of them if he could. Judgment affirmed.

(159 Pa. St. 360)

BERNHARDT v. WESTERN PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CARRIERS—INJURIES TO PASSENGERS—ALIGHTING FROM TRAIN—PRESUMPTION OF NEGLIGENCE—NONSUIT.

1. Where a passenger alighting from a train steps upon a bung from a keg lying on the platform, and sprains her ankle, no pre-

sumption of negligence on the part of the company arises.

2. In an action for damages, in the absence of any evidence as to how the bung came there, and how long it had been there, the court properly granted a nonsuit.

Appeal from court of common pleas, Allegheny county; W. D. Porter, Judge.

Action by Annie Bernhardt against the Western Pennsylvania Railroad Company for personal injuries received while alighting from one of defendant's trains. A compulsory nonsuit was ordered, and plaintiff appeals. Affirmed.

Samuel McClay and M. A. Woodward, for appellant. William Scott and George B. Gordon, for appellee.

THOMPSON, J. The appellant, resting the stress of her argument upon a presumption of negligence, seeks to convict the learned trial judge of error for entering a compulsory nonsuit. Without doubt, when an injury is the result of defective or unsafe machinery or the appliances of transportation, or an improper conduct of the business, a presumption of negligence arises, because, when the accident is connected with them, the presumption of negligence places upon them the stamp of defect, insecurity, or misconduct, and when so connected, from the nature of the carrier's business, necessarily carrying with it an almost exclusive knowledge of the cause of it, the presumption casts upon it the duty of removing such impress. In the present case, as the cause of the accident was disconnected with the appliances or means of transportation, or the misconduct of employees, this presumption necessarily has no foundation. The appellant, in her statement, avers that the appellee was possessed, in the city of Allegheny, of a station house, in which passengers carried by it alighted; "that it was the duty of the said railroad company, at all times, to keep the floors or walks of said station free from all obstructions likely to result in injury, so that all persons having occasion to go or return from trains, or get on or alight therefrom, might do so with safety." She then avers that, in alighting from a train, she stepped upon a stick, or bung of a keg, and in consequence of which her ankle was sprained and seriously injured. This averment was not that the platform was improperly or negligently constructed, but that the appellee was guilty of negligence in permitting to remain an obstruction which was likely to cause injury. Assuredly, it cannot be maintained that a small piece of wood,—a bung of a barrel,—probably accidentally dropped upon the floor of the station, was such an obstruction as would be likely to produce injury. It was neither an obstruction, nor was it likely to cause injury, and to predicate negligence from a failure to remove it, because it might possibly have remained where it fell the few minutes re-

quired for five or six passengers to alight from the train, would be to exact a degree of care from the appellee much beyond any recognized standard. She says that in alighting she stepped upon something, and did not know what it was; that her foot gave a twist, and she was injured; that the piece of wood was as long as her finger, something like a broom handle. Her other and remaining witness said that, after she stepped down, he saw a wooden stopper about two and a half inches or two inches in circumference, and between an inch and one half and two inches in length. It is clear that a piece of wood two-thirds of an inch in diameter, and two inches in length, cannot be regarded as "an obstruction likely to cause injury," and, if so, a failure to remove it promptly cannot be pronounced a neglect of duty. Under such circumstances, with the platform perfectly constructed, care of it almost microscopic in character is not demanded or required.

But it is contended that the injury occurred, and therefore the presumption of negligence as a consequence must prevail until rebutted; in other words, that, although the proofs clearly establish the fact that there was no negligence, such fact is to be negatived by a presumption. A presumption of death might possibly arise from prolonged, unexplained, and unaccounted absence beyond the seas, and to say that a person to whom such presumption has applied continues, under the operation of it, to be regarded among the departed, even after his return, would seem somewhat grotesque. The fact of no negligence is in this case fixed by the proofs, and a mere presumption cannot destroy it. A presumption, at best, is but a *prima facie* method of proof, and may be rebutted. In *Fearn v. Ferry Co.*, 143 Pa. St. 122, 22 Atl. 708, it is said by Mr. Justice McCollum: "The cause of the accident was known as well to the appellant as to the company. In such a case, the presumption of negligence arising from the mere fact that a passenger was injured while on the appellant's boat has no application. As the appellant failed to show any omission or violation of duty by the company in connection with the cause of the accident, we think the nonsuit was properly ordered." In *Railroad Co. v. MacKlinney*, 124 Pa. St. 462, 17 Atl. 14, Mr. Justice Sterrett said: "When a passenger is injured by any accident connected with the means or appliances of transportation, there naturally arises a presumption that it must have resulted from such negligent act of omission or commission of the company or some of its employees, because, without some such negligence, it is very improbable that the accident would have occurred. That is the basis upon which the presumption rests, and it stands as proof of negligence until it is successfully rebutted. It arises, not from the naked fact that an injury has been inflicted,

but from the cause of the injury, or from other circumstances attending it." In *Hayman v. Railroad Co.*, 118 Pa. St. 508, 11 Atl. 815, Mr. Justice Williams said: "There was no reason, therefore, for resorting to the legal presumption of negligence in aid of the plaintiff's case. The cause of the accident, and the location and construction of the door, were as clearly known to the plaintiff as to the defendant and its employees, and it was the duty of the plaintiff to make out his cause of action in this case, as he would be bound to do if the swinging door had been in an hotel or store. Not having done this, the court was clearly right in ordering the nonsuit." As there is no evidence in this case which establishes negligence, or from which it might be inferred, the learned trial judge very properly entered the nonsuit, and this judgment is affirmed.

(158 Pa. St. 552)

BRUNDRED v. EGBERT et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

TAX SALE—LAND CONVEYED—MISDESCRIPTION.

A mortgage purporting to cover 66⅔ acres, but describing land which was outside the mortgagor's tract of 200 acres, all but 16⅔ acres, was foreclosed, and the land sold. Thereafter, the land, assessed under the mortgage description as 66⅔ acres seated land, was sold for taxes to the county, which later resold to the foreclosure purchaser. Meantime, the rest of the 200-acre tract, assessed as 150 acres seated land, had also been sold for taxes, and the tax-title holder claimed thereunder the 16⅔ acres, on the ground that the title to the latter, being in the county at the time, passed by sale of the larger tract. *Held*, that said 16⅔ acres, having been separately owned, occupied, and assessed ever since the foreclosure, could not have been included in the assessment of the larger tract, be liable for its taxes, nor pass by treasurer's sale thereof.

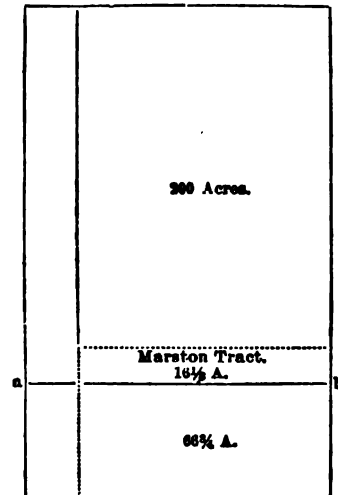
Appeal from court of common pleas, Venango county; Charles E. Taylor, Judge.

Ejectment by Benjamin F. Brundred against A. G. Egbert, John J. Doyle, W. S. Taft, and one Kipp. Judgment for defendants. Plaintiff appeals. Reversed.

J. H. Osmer, for appellant. C. Heydrick, C. A. Myers, and C. I. Heydrick, for appellees.

WILLIAMS, J. This case presents an interesting question. It is raised on the following facts: In 1859 a patent issued out of the land office to C. Heydrick and J. L. Hanna, for a tract of land containing 440 acres 27 perches, and an allowance of 6 per cent. They made an amicable partition by deed, allotting the eastern half of the tract to Hanna, and the western half to Heydrick. The division line was not actually run, but the deed provided that it should be run parallel to the east line of the tract, and at such a distance therefrom as to make

an equal division of the land. On the 6th of December, 1859, Hanna sold 200 acres to McBride, described in such manner as to leave the unsold part of his land at the south end. McBride conveyed the same 200 acres to Knapp. On the 10th of December, 1859, Knapp mortgaged 66⅔ acres to Clark and Andrews, describing it as within the Heydrick and Hanna tract, and extending across, or nearly across, the south end of the allotment to Hanna. In point of fact, all but 16⅔ acres of the land covered by the mortgage was south of Knapp's south line, and his mortgage was inoperative as to so much of the land it professed to cover. In 1863, proceedings were had on the mortgage, resulting in a sale by the sheriff of the mortgaged premises to Gilfillan. In 1864, Gilfillan sold to Marston, whose title is now held by the plaintiff. In July, 1860, six months after the mortgage to Clark and Andrews was recorded, Knapp made another mortgage, payable to McBride, covering his land down to his south line. This was, as to the land now in controversy, a second mortgage; and the sale upon the first divested the lien of the second, and passed a good title to the purchaser. The second mortgage therefore cuts no figure in this case. The situation on the ground is shown by the following diagram:



The external lines show the Hanna tract. The south line of the 200 acres sold to McBride, and by him to Knapp, is represented approximately by the line a, b. The dotted lines indicate the land covered by the mortgage to Clark and Andrews. The strip north of the line a, b, and within the dotted lines, is the strip covered by both mortgages, and now in controversy. The effect of the sale to Gilfillan was to sever the 16⅔ acres from the balance of the 200 acres, and to take it out from under the second mortgage. The lot was assessed for taxes, according to the description in the mortgage and the sheriff's deed, as containing 66 acres, and the taxes

were regularly paid until 1874. For the non-payment of the taxes of that year, the land was sold by the treasurer upon the seated list, and bought by the county. The county held it till 1884, charging up the taxes yearly against it, and in that year sold it to Marston. The plaintiff holds the title of the sheriff's vendee, and the title acquired by Marston from the county. Upon these facts, it is evident that the plaintiff's title is good against Knapp, or any one deriving title from him subsequently to the recording of the mortgage to Clark and Andrews. The defendants' title is derived from Knapp by virtue of the second mortgage, and covers all the land described in that mortgage except the lot in controversy. That it does not cover, because of the sale to Gilfillan under the prior mortgage, which severed this lot from the other land covered by the mortgage to McBride, and completely divested its lien.

But the defendants claim to have acquired the title to the land in controversy by virtue of a tax sale, and this remains to be considered. The defendants' tract was assessed as containing 150 acres, and as seated land. The taxes for 1877, 1878, and 1879 were unpaid, and the land was sold by the treasurer in 1880, to W. W. Dale, who, in 1882, assigned his title to Egbert, one of the former owners, against whom the taxes had been assessed, and one of the defendants in this case. It is now contended that, as the title to the Marston lot was in the county when the sale to Dale was made, that sale conveyed both the lot returned and the Marston lot to the purchaser. As authority for this conclusion, *Coal Co. v. Fisher*, 19 Pa. St. 267, is cited. In that case, however, it was the same tract, which was sold by the same description at both sales. The first sale was to the county commissioners for a tract of land in Hazel township, formerly Sugar Loaf, in the warranty name of John Kunkle, containing 410 acres. Four years later, the same tract was sold by the same description, at treasurer's sale, for taxes assessed subsequently to the first sale. The point decided is stated in the syllabus to be that, as the land had not been redeemed from the first sale when the second was made, the title of the county vested in the purchaser, "if it were the same land that was sold at the two sales." In this case we have two lots returned, actually owned by different persons, and having nothing in common, so far as the returns would indicate. One was described as containing 66 acres, and assessed as seated, against Marston, owner; the other described as containing 150 acres seated land, assessed against Egbert and others as owners. Both lots were on the ground. Each was bound for the taxes assessed against it, and liable to sale for its own proper charge only. The true question for the jury, there-

fore, was not whether the description in the mortgage given by Knapp to McBride would inclose the Marston tract, but whether, at the time the taxes for which it was sold were assessed, the Egbert lot did actually include the Marston. If it did, then the taxes assessed against Egbert and others were a lien on the 16 acres, and a sale for such taxes would carry a title to all the land covered by such liens. If, however, the lots were distinct in their ownership and in the assessment of taxes, so that each lot was subject to a lien for the taxes assessed against its owner, and liable to sale therefor, then a sale of either for nonpayment of the taxes against it would pass a title to the land covered by the lien of the taxes so returned. Taxes upon unseated lands are a charge upon the lands in the first instance. Taxes upon seated lands are, in the first instance, chargeable against the owner, and may be collected out of his goods and chattels. If payment is not obtained from the owner, the taxes are returned as unpaid, and charged against the property on which they were assessed. They become a lien, and bind the land against which they are returned, and a sale of the land so bound passes title to the vendee in precisely the same manner that a sale in foreclosure of any other lien does. The inquiry in this case is, therefore, what land was in fact assessed to Egbert et al.? When this is ascertained, we know upon what land the lien of the taxes rested after they were returned as unpaid by the collector, and what land passed to the treasurer's vendee by virtue of the tax sale. This inquiry is not difficult. The Marston lot has been separately assessed to its several owners since the sheriff's sale to Gilfillan, in 1864. During the same time the Egbert lot has been separately assessed to its owners. The lots were valued by the same assessor. They have been distinct from each other in ownership and assessment of taxes during all this time, and the sale of either for unpaid taxes can have, upon these facts, no power to affect the title to the other. Dale bought, therefore, at the tax sale, the land upon which the taxes against Egbert and his coworkers were charged, viz. the land owned or occupied by them when the assessment was made. They did not own or occupy the Marston lot, and it was not assessed to them. The taxes due from them did not, therefore, become a lien upon it when the collector returned them as unpaid, nor did the treasurer's sale divest the title of the real owner. We must sustain the 11th, 12th, 15th, 16th, 18th, and 21st assignments of error. This is conclusive of this litigation, and renders the discussion of the other questions involved unnecessary. The defendants exhibited no title whatever, and the jury should have been instructed to find for the plaintiff. The judgment is now reversed, and a venire facias de novo awarded.

(153 Pa. St. 568)

JOHNSON et al. v. SMITH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

PLEADING—VERIFICATION—BY AGENT.

Rules of court required plaintiff's statement to specify facts sufficient to show a good cause of action, to be supported by affidavit of the truth of the matters alleged, which might be made by an agent or attorney "connasant of the facts." In an action by a partnership, their manager made affidavit that the amount sued for was, he verily believed, due from defendant to plaintiffs on the instrument sued on, to the best of his knowledge and belief. He did not state that he was "connasant of the facts," nor was it shown why some one of the partners did not make the affidavit. Defendant died soon after suit begun. *Held* insufficient to entitle plaintiffs to judgment by default.

Appeal from court of common pleas, Venango county; Charles E. Taylor, Judge.

Action by S. W. Johnson, A. B. Maynard, A. L. Thompson, M. L. Bostwick, L. E. Johnson, and M. J. Stearns, trading as Johnson & Co., against Mary Smith, executrix of the will of D. S. Smith, deceased, surviving partner of D. S. Smith & Co. Judgment for plaintiffs. Defendant appeals. Reversed.

McCalmont & Osborne, for appellant. Thomas McGough, for appellees.

DEAN, J. In 1865 the partnership Dewoody, Smith & Co. contracted with Dewar & Smith for water power sufficient to operate their machine works in the borough of Franklin. They agreed to pay therefor an annual rental of \$100 for the period of 25 years from October, 1865. Dewar & Smith's right, by sundry transfers, passed to these plaintiffs. The partnership of Dewoody, Smith & Co., after some time, ceased to exist, when a new partnership, composed of D. S. Smith and Ayers Brashear, with firm name of D. S. Smith & Co., was formed. They continued to use, and pay the rental for, the water, until December 20, 1875, when the partnership was dissolved by the death of Brashear. Smith alone then continued to operate the works and use the water, until the spring of 1886, when the works were destroyed by fire, and were not afterwards rebuilt. The plaintiffs, claiming that the rental from 1886 to 1890, amounting to \$508.75, had not been paid, on 15th June, 1891, brought suit in assumpsit against D. S. Smith to recover that sum, filing statement accordingly. On November 7, 1891, Edward D. Smith, his son, filed an affidavit of defense, setting out his father was so ill as to be unable to read the affidavit of defense, or to assist in preparing it. He further appended an affidavit from the attending physician that the father was in the last stages of consumption, and so debilitated that he could not, without peril, attend to any kind of business. Among other matters of defense averred by the son in the

affidavit filed, he stated on information and belief that his father was not a party to said contract for the water power, and was not liable thereon; that he had not used the water power during the time covered by plaintiff's claim, and was not in any way indebted to the plaintiffs. On November 12, 1891, after the filing of the affidavit, a rule for judgment for want of a sufficient affidavit of defense was taken on defendant. On January 15, 1892, while this rule was pending, the defendant died, and his executrix, the widow, was substituted. On March 23, 1892, she supplemented the first affidavit of defense by filing another, in which she set out that on information she believed she had a good defense to the whole of plaintiffs' claim, but that she was without personal knowledge in the matter; and, further, praying the court to relieve her from filing further affidavit, and that plaintiffs be put to proof of the matters set out in their statement before a jury. On August 22, 1892, the court gave judgment for want of a sufficient affidavit of defense, and from that comes this appeal.

The court below filed no opinion, and, so far as the record shows, gave no reasons for the judgment. The facts, as we have stated them, appear from the record. When a judgment is entered against the personal representative of a decedent in default of a sufficient affidavit of defense within less than a year after his death, the plaintiff should show an unimpeachable record to sustain it. It is not necessary to inquire into the power of the court to adopt a rule subjecting administrators and executors to the same penalties for default as other defendants; but the practice of the courts and legislative action have generally, for very good reasons, made them exceptions. It is seldom they have such knowledge of the business affairs of their decedent as justifies a tender conscience in making an explicit affidavit. Unless the evidence of the transactions which form the subject of dispute rests in writings, they may well hesitate in that fixed belief, on mere picked-up information, which warrants an oath. If such a rule may be adopted and invoked to speed the collection of claims against decedents to which there is no defense, they should be administered with somewhat less rigor than exhibited by this record. But to avoid any discussion now of matters which may be the subject of future consideration in the court below, we turn our attention to appellant's first specification of error. It is urged that plaintiffs' statement is not verified as required by the rules of court of the common pleas of Venango county. Rule 6 says: "Plaintiffs' statement shall contain a specific averment of facts sufficient to constitute a good cause of action. Such statement shall be supported by an affidavit of the truth of the matters alleged as the basis of the claim." "Rule 21. The affidavits required in the rules of court may be made by the agent or attorney of the party,

where such agent or attorney is connasut of the facts constituting the cause of action." The plaintiffs are six in number. Their cause of action is very fully and in detail set out in the statement. The affidavit required by the rule is as follows: "Personally appeared before me, the prothonotary in and for said county, H. W. Bostwick, agent and manager for above plaintiffs, who, being duly sworn, says that the sum of \$508.75, with interest from date, is the amount he verily believes to be due and owing from the above defendant to the above plaintiffs upon the instrument in writing recorded, etc., and upon which suit is brought in this case; and that the above statement is true to the best of his knowledge and belief." The agent nowhere states "he is connasut of the facts" constituting the cause of action. He does not say the statement is true, but that he believes it to be true. No reason is suggested for the failure of some one of the living plaintiffs to make the affidavit. It seems to us very clear that plaintiffs did not bring themselves within the rule of court, and therefore were not entitled to judgment. This very objection is made in both the affidavit of the son and his mother, the executrix, yet no amendment was made by plaintiffs. We must, therefore, assume that such affidavit as was required by the rules of court could not conscientiously have been made by either of the plaintiffs or their agent. In cases of judgments in default of a sufficient affidavit of defense against defendants not sued in a representative capacity, we have held the plaintiffs to a strict compliance with the rules of court. *Gottman v. Shoemaker*, 86 Pa. St. 31; *Hutchinson v. Woodwell*, 107 Pa. St. 509. There is all the more reason why the plaintiffs here should show an unobjectionable record. The case of *Shoe Co. v. Elchenlaub*, 127 Pa. St. 164, 17 Atl. 889, cited by appellees, is not in conflict with the cases cited. The affiant there was the agent and manager of a corporation, a party which can act only through an agent. Neither was there any rule of court which required such agent should be "connasut of the facts constituting the cause of action." The judgment is reversed, at costs of appellees, and *procedendo* awarded.

(159 Pa. St. 442)

HARTMAN et al. v. PITTSBURG INCLINED PLANE CO.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

EMINENT DOMAIN—CONSTRUCTION OF ELEVATED TRACKS—DAMAGES.

1. The owner of a house and lot abutting on a street cannot recover damages for interference with access thereto, caused by the construction of an elevated inclined plane across the street on which it abuts, where such structure neither rests upon nor overhangs any part of the lot, either within or without the lines of the street.

2. In constructing its inclined plane, defendant built an abutment, from which water

was discharged against the walls of plaintiff's house, destroying the plastering and paper on the walls, causing the rooms to become damp and untenable. *Held* that, though the witnesses did not state the money value of the damages, the jury might have determined the amount, and the court erred in refusing to submit the question to them.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action by Marianne Hartman and others against the Pittsburgh Inclined Plane Company for damages to her property caused by a structure erected by defendant near plaintiffs' house. Defendant had judgment of nonsuit, and, on the court's refusal to take it off, plaintiffs appeal. Reversed.

The following are the specifications of error:

"First. The court erred in excluding the following offer of evidence: 'The plaintiffs' counsel proposes to prove by the witness on the stand, and by other witnesses, that by reason of the building of the structure of the defendant company's incline plane crossing Frederick street, a public highway, at about the height of 8 feet above the established grade, the access to plaintiffs' property is interfered with; the market value, by reason of such construction, has greatly depreciated; and that the defendant company claims the right of eminent domain, and claims to own the property adjoining the plaintiffs' property, upon which its abutment is erected. (Objected to, as incompetent and irrelevant. Objection sustained. Bill sealed for plaintiffs.) F. H. Collier. [Seal.]'

"Second. The court erred in sustaining the objection to the following question: 'Q. By Mr. Yost: Mr. Hartman, how does this structure over Frederick street affect the approach and access to your property? (Objected to as incompetent and irrelevant, and as not tending to show any damage to the plaintiffs, different in kind from that suffered by other persons whose properties abut on Frederick street.) By Mr. Yost: The purpose of my question was for the witness to state if he had any facts to give the court and jury as to how it interfered with the access to his property. I am not asking what it amounted to, but how it affected it. (Objection sustained, and bill sealed for plaintiffs.) F. H. Collier. [Seal.]'

"Third. The court erred in sustaining the objection to the following offer of evidence: 'Plaintiffs' counsel proposes to prove by the witness on the stand John Keller, (and other witnesses,) he having testified to his knowledge of the premises, and of the structure of the defendant company over Frederick street, that by reason of this structure the approach to the property is interfered with, and the access is interfered with, and that by the construction of this structure the property is damaged, and thus to prove that thereby the desirability of the house as a residence is affected, and the rent value of the property is affected, and proposes to

show by the witness how much the rent value of the property is affected from month to month. (Objected to as incompetent and irrelevant. Objection sustained, and bill sealed for plaintiffs.) F. H. Collier. [Seal.]

"Fourth. The court erred in entering the following judgment of compulsory nonsuit, and afterwards refusing to take it off, viz.: 'December 12, 1892, judgment of compulsory nonsuit. September 5, 1893, on argument list, and motion to take off nonsuit refused, and bill sealed for plaintiffs. By the Court. [Seal.]'"

William Yost, for appellants. A. M. Imbrie, for appellee.

STERRETT, C. J. If the inquiry contemplated by the offers recited in the last three specifications of error were any longer an open question in this state, the rejected testimony should have been received; but unfortunately, as it appears to me, the court is of opinion that our decisions construing article 16, § 8, of the constitution have closed the door against such evidence in cases of the class to which this belongs. *Railroad Co. v. Lippincott*, 116 Pa. St. 472, 9 Atl. 871; *Railroad Co. v. Marchant*, 119 Pa. St. 541, 13 Atl. 690; *Jones v. Railroad Co.*, 151 Pa. St. 31, 25 Atl. 134; *Pennsylvania Co. v. Pennsylvania S. V. R. Co.*, 151 Pa. St. 334, 25 Atl. 107. It was not proposed to show that defendant company's structure rests upon or overhangs any part of plaintiff's land, either within or outside the lines of the street. It is therefore unnecessary to further notice either of said specifications.

The fourth and last specification presents a different question, to wit, whether the learned court erred in refusing to take off the judgment of nonsuit. It is well settled that such refusal is tantamount to a judgment for defendant on demurrer to plaintiff's evidence, except that, in case of reversal, the record must be remitted with a procedendo, instead of giving judgment for plaintiff here. *Finch v. Conrade's Ex'r*, 154 Pa. St. 326, 26 Atl. 368. Hence it follows that, in considering the testimony in such cases, plaintiff is entitled to the benefit of every fact and inference of fact that might have been fairly found by the jury, or drawn by them from the evidence before them. Testing the case at bar by that rule, we have no doubt the judgment of non pros. should have been taken off. Without undertaking to summarize the testimony on which plaintiffs relied, or to refer specially to any portion of it, we think it is quite sufficient to have warranted the jury in finding in their favor. It tended to prove, among other things, that defendant company, chartered under the act of 1874, constructed its double-track incline against the westerly side of plaintiffs' dwelling house, (located on the northerly side of Frederick street,) and thence, on an ascending grade,

across the street, at right angles thereto. On the north side of the street the structure is elevated eight feet above the sidewalk, and on the south side several feet higher. Beginning at plaintiffs' house, and extending thence 40 feet westerly along the northerly line of the street, defendant built a heavy stone wall or abutment, on which were placed four iron beams, 36 inches wide, vertically, by which the superstructure was supported. That part of said abutment adjoining plaintiffs' dwelling was so constructed that water, conducted there by the iron beams and otherwise, was discharged against the brick wall of the house, and so saturated the same that the plaster and paper on the inside thereof were injured and partially destroyed, and the rooms became mouldy and untenable. While the witnesses did not state, in dollars and cents, any amount of damages resulting to plaintiffs therefrom, they so described the nature, character, and extent of the injury to the plastering, etc., that the jury could have ascertained with reasonable accuracy the amount thereof. As described by the witnesses, the actual damages were by no means inconsiderable. In *Allison v. Chandler*, 11 Mich. 542, it was said: "Juries are allowed to act upon probable and inferential, as well as direct and positive, proof; and when, from the nature of the case, the amount of damages cannot be ascertained with certainty, we can see no objection to placing before the jury all the facts and circumstances of the case having a tendency to show damages and their probable amount, so as to enable them to make the most intelligible and probable estimate that the nature of the case will permit." The ordinary intelligence and experience of jurors is sufficient to enable them to say, with reasonable accuracy, how much it would cost to repair damages such as were described by the witnesses in this case. But, if it were otherwise, the plaintiffs were entitled, under the evidence, to at least nominal damages, unless their witnesses were disbelieved. *Pastorius v. Fisher*, 1 Rawle, 27; *Sedg. Dam.* 142. In any event the case is a proper one for submission to the jury. Judgment reversed, and a procedendo awarded.

(159 Pa. St. 446)

WOELFEL v. HAMMER et al. (No. 262.)
(Supreme Court of Pennsylvania. Jan. 15, 1894.)

JUDGMENT—OPENING DEFAULT.

A default judgment on a bond will not be opened to admit the defense that the bond was void because given in settlement of a criminal prosecution, where it does not appear that a crime was committed by the defendant, nor that there was an actual agreement not to prosecute.

Appeal from court of common pleas, Allegheny county.

Action on a bond by Lawrence Woelfel against J. B. Hammer and others. There was judgment for plaintiff by default, and defendant Hammer obtained a rule to open the same. From a judgment discharging the rule, defendants appeal. Affirmed.

The bond on which judgment was entered in this case was executed in Squire McMasters' office, August 4, 1891. It was delivered to Woelfel, August 12, 1891. Judgment was entered on same, October 19, 1891. On January 27, 1893, J. B. Hammer filed a petition asking the court to open the judgment, and allow the defendants to make defense, on the ground that the bond was the consideration for stifling and settling prosecutions for larceny,—one of larceny by baillee, and seven other charges. On same day the court granted a rule on plaintiff to show cause why the judgment in the above case should not be opened, and defendants allowed to file affidavit of defense. On February 14, 1893, answer filed. Depositions were taken by both parties and filed. After hearing the evidence and argument by counsel, the court discharged the rule, pronouncing the following opinion:

"The defendants have shown no case for relief. It does not appear that there was any felony committed, but the contrary. Nor have the defendants shown there was any actual agreement not to prosecute. *Swope v. Insurance Co.*, 93 Pa. St. 251. The evidence shows that the judgment bond was given to secure any indebtedness that might be found against Hammer after a legal trial before arbitrators mutually chosen, each party giving bond for the same purpose. There was nothing illegal in this. Under all the evidence, we think there was a good legal consideration for the bond, and the rule to open judgment is discharged."

W. I. Craig, for appellants. J. A. Langfitt and A. B. Angney, for appellee.

PER CURIAM. The court below was right in refusing to open the judgment, and let the defendant into a defense. The decree discharging the rule to show cause should therefore be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant J. B. Hammer.

(159 Pa. St. 448)

WOELFEL v. HAMMER. (No. 240.)
(Supreme Court of Pennsylvania. Jan. 15, 1894.)

ARBITRATION AND AWARD—SETTING ASIDE AWARD.

Where one voluntarily submits to arbitration all matters in dispute between himself and another, and the amount of the award is paid by his sureties without exception or appeal, the award will not afterwards be set aside for technical irregularities.

Appeal from court of common pleas, Allegheny county.

Arbitration proceedings between Lawrence Woelfel and J. B. Hammer. From an order discharging the rule to set aside the award entered, Hammer appeals. Affirmed.

On August 4, 1891, Lawrence Woelfel and J. B. Hammer entered into an agreement that they would, "under the provision of the act of assembly in such cases made and provided," submit all matters in controversy between them, including all matters connected with the firms and business and accounts of Ladley & Co., of J. B. Hammer & Co., all claims of Lawrence Woelfel against J. B. Hammer individually, or against J. B. Hammer and wife, or against J. B. Hammer and any other person, or claims or demands otherwise howsoever, which either party may have against the other. "We further agree that our submission to such award or umpirage be made a rule of and in court of common pleas of Allegheny county." During the proceedings before the arbitrators, Woelfel put in evidence a claim for \$111 of Lawrence Woelfel & Co. against J. B. Hammer and wife, which was not embraced in the terms of the submission, and for which Lawrence Woelfel & Co. already had a judgment. An award was made against J. B. Hammer on March 24, 1892, for \$1,717.66, and filed with the agreement to submit on June 28, 1892, and judgment was entered thereon the same day. On July 2, 1892, J. B. Hammer filed a petition to have the award set aside, on the grounds that it could not be sustained as a common law award, because the agreement said it was under provision of the act of assembly in such cases made and provided; neither could it be sustained as an award under the act of assembly, because the parties did not select either common pleas court No. 1, of Allegheny county, or any other court of record in the commonwealth of Pennsylvania, and agree in writing that their submission should be made a rule of said selected court; that until an affidavit of an attesting witness was produced in the court selected, setting forth that the parties had agreed their submission should be a rule of that court, it was not proper to file the agreement to submit, and the court has no authority to make the said submission a rule, nor to confirm the award; that the arbitrators had no right to give L. Woelfel credit for the \$111 which Hammer owed L. Woelfel & Co., because it was not within the submission, and was already in judgment. The petition contained a prayer that the award be set aside, and on the same day a rule was granted on Woelfel to show cause why the prayer of the petition should not be granted. On August 19th following, Woelfel made answer that the award could be sustained as a common-law award, and that Lawrence Woelfel was the only member of the firm of L. Woelfel & Co., and that Hammer knew that fact. After argument, the court discharged the rule.

W. I. Craig, for appellant. J. A. Langfitt and A. B. Angney, for appellee.

PER CURIAM. Concurrent proceedings seem to have been taken to set aside the award, and open a judgment to secure the same debt, entered against the defendant. The decree of the court below, discharging the rule to show cause why the judgment should not be opened, etc., has been affirmed in an opinion just filed at No. 262 of this term, (28 Atl. 146,) and there is no reason why a similar disposition should not be made of this appeal. No apparent injustice has been done or is contemplated against defendant. He voluntarily submitted all matters in dispute between him and the plaintiff without exception or appeal, and the amount of the award against him has been collected through the medium of the judgment above mentioned, which had been given to secure it. It is not proposed to collect the debt a second time. The reasons upon which the application to set aside the award is based are purely technical. At most, the entry of the award was a mere irregularity, which did defendant no harm. Decree affirmed, and appeal dismissed, with costs to be paid by defendant.

(157 Pa. St. 646)

**FULLER v. EAST END HOMESTEAD
LOAN & TRUST CO.**

(Supreme Court of Pennsylvania. Oct. 23, 1893.)

ABSOLUTE DEED AS MORTGAGE—EFFECT.

Under Act June 8, 1881, relating to defeasances, a purchaser of land under a sheriff's deed cannot show that a prior deed by the former owner of the land to a corporation was intended merely to secure the payment of money.

Appeal from court of common pleas, Allegheny county.

Bill by Sidney Fuller against the East End Homestead Loan & Trust Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Plaintiff was the purchaser of certain land under an execution against one Simpson McClure. Defendant had the record title prior to this sale, but plaintiff claimed that defendant held the land merely as security for a loan, which plaintiff offered to pay.

J. Charles Dicken, for appellant. James C. Doty and Albert York Smith, for appellee.

PER CURIAM. Judgment affirmed.

(159 Pa. St. 378)

JOHNSTONE v. FRITZ.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

**ORPHANS' COURT—EXCLUSIVE JURISDICTION—
GUARDIAN AND WARD.**

The act of 1832, which gives the orphans' court exclusive jurisdiction of the es-

tates of minors, and of the settlement of their guardian's accounts, necessarily includes all questions of allowance for maintenance; and hence the court of common pleas has no jurisdiction of an action against a guardian to charge the ward's estate with necessities furnished him, though it would have of an action to charge the guardian individually therefor.

Appeal from court of common pleas, Allegheny county.

Assumpsit by A. A. Johnstone against S. Fritz, guardian of Thomas Johnstone, for necessities furnished the ward. From a judgment for plaintiff, defendant appeals. Reversed.

Laird & Keenan and N. S. & G. W. Williams, for appellant. R. S. Martin, for appellee.

STERRETT, O. J. In the view we take of this case, it is unnecessary to consider the errors assigned on the record. Had the purpose of the action brought been to charge the guardian individually, the jurisdiction must have been conceded, and the merits of the claim have been considered; but, having been to charge the minor's estate, the want of jurisdiction is so plain that this court is compelled, *suo motu*, to take notice of it. The act of 1832 gave the orphans' court exclusive jurisdiction of the estates of minors, and of the settlement of the accounts of their guardians, and, necessarily, of all questions of allowance for maintenance. "Nothing," said Mr. Justice Black in *Morris v. Garrison*, 27 Pa. St. 226, "can be better settled, as a general rule, than this: That a person who has a right to appeal from a judgment, to conduct the trial in its different stages, and to take a writ of error, is concluded by the final decision of it. If the ward, therefore, could rightfully do what her husband did in this cause, a judgment for the plaintiff would have been an estoppel in the orphans' court. Having been heard in the common pleas, she had no right to be heard again. The result of allowing a ward to appear in such a case would then be to change the forum for settling a guardian's accounts, contrary to that law which gives the exclusive jurisdiction of such subjects to the orphans' court." Upon the same principle, it was held in *Com. v. Raser*, 62 Pa. St. 436, that a suit upon a guardian's bond could not be brought in the common pleas until his account had first been settled in the orphans' court. So, in *McCreery's Appeal*, 31 Pittsb. Leg. J. 230, it was said: "We see no authority for the appellant paying the judgment against the preceding guardian, and thereby estopping the orphans' court from inquiring into the justice of the payment. The latter court has exclusive jurisdiction of the account of the guardian. It cannot be deprived of that right by a judgment obtained against him before a justice of the peace." But, even had there been no stat-

utory bar, and the jurisdiction of the two courts been originally concurrent, that of the orphans' court, having first rightfully attached, must, in pursuance of the well-settled rule, have become exclusive. The possession and management of the estate having already passed into its grasp, and both guardian and minor under its control and direction, a wise public policy would have forbidden any interference with the exercise of its jurisdiction. Those who deal with either guardian or minor must deal subject to the approval or disapproval of this one tribunal, else there will be an end of intelligent administration, and a beginning of the evils resulting from conflict of jurisdiction. If the common pleas may take cognizance of questions of allowance, it may take cognizance of the conduct of the guardian, and the settlement of his accounts, for the one involves the other. This the law will not permit. This principle, it will readily be seen, is equally applicable to guardian and minor. The one is an officer, and the other the ward, of the orphans' court. They are mutually interested in the settlement of the accounts, and it would therefore be manifestly unjust that the one, and not the other, should be estopped by an action at law. The judgment of the court below is therefore reversed, without a venire de novo.

(158 Pa. St. 559)

**YOUGHIOGHENY NATURAL GAS CO.
v. WESTMORELAND PAPER CO.**

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

**CONTRACTS—NATURAL GAS—ACTION—AFFIDAVIT
OF DEFENSE.**

In an action by a natural gas company for gas furnished defendant for his mill under a contract by which it agreed to furnish a sufficient quantity to supply five boilers at the rate of \$3.50 each per day, defendant to pay at such rate only for gas actually furnished and used, the statement alleged that defendant used gas furnished by plaintiff during three months, and became liable to pay plaintiff \$1,540, being \$3.50 for each of five boilers per day. *Held* that, even if the statement was not insufficient for failure to allege that plaintiff furnished enough gas to supply the five boilers during said time, it was error to render judgment for plaintiff for want of a sufficient affidavit of defense, where the affidavit showed that enough gas had not been furnished, and that by reason thereof defendant had to go to the expense of over \$6,000 in buying and using coal.

Appeal from court of common pleas, Westmoreland county.

Action by the Youghiogheny Natural Gas Company against the Westmoreland Paper Company for natural gas furnished defendant. From a judgment for plaintiff for want of a sufficient affidavit of defense, defendant appeals. Reversed.

Williams, Sloan & Griffith and Shiras & Dickey, for appellant. Jas. S. Moorhead and John B. Head, for appellee.

GREEN, J. The claim of the plaintiff was strictly limited, in the statement of claim filed, to a right to recover for gas under the original contract, as modified by the subsequent letters, during the months of January, February, and March, 1892. The claim is for \$542.50 for the month of January, \$507.50 for the month of February, and \$490 for the month of March, aggregating \$1,540. There was not, and there could not be, either under the original contract, or under the subsequent letters modifying it, any right of action to recover anything except for gas actually furnished by the plaintiff to the defendant during the months named, yet there is no precise and definite averment in the statement of claim that the gas for which the claim is made was actually furnished to the defendant during the months mentioned, or at any time. The first part of the statement alleges that the claim is to recover \$1,540 for natural gas furnished to the defendant for the months of January, February, and March, 1892, in accordance with a written contract of March 10, 1888, and certain letters, of which the dates are given, and copies attached. There is a description of what the claim is. Then follows an averment that the defendant used for fuel natural gas furnished by the plaintiff during the months named, and thereby became liable to pay the plaintiff at the rate of \$3.50 per day for each of five boilers, amounting in the aggregate to \$1,540, and adds a statement for each month. This statement amounts to this: that the defendant used, as fuel, natural gas, which was furnished by the plaintiff during the three months named, at the rate of \$3.50 for each one of five boilers, and became liable to pay therefor \$1,540. All this may be true, and yet the plaintiff may not have actually furnished any more than a mere fraction of the quantity really required for the use of the boilers. It would still be the use for fuel of natural gas furnished, although the quantity furnished may have been infinitesimal, and the defendant may have been actually required to furnish other fuel in large quantities to supply the deficiency. The amount of the liability specified in the statement does not help the insufficiency of the allegation as to the quantity furnished, as it is nothing more than a legal conclusion, and its correctness as such necessarily depends upon the quantity actually furnished, adjudged by the terms of the contract. Now, the contract requires that the amount of gas to be furnished should be "an amount sufficient to supply the boilers now in use, or hereafter to be erected for use, in its paper and pulp mills at West Newton, in said county, for the period of five years." By the subsequent terms of the contract, it appears that there were 13 boilers then in actual use, and each one was to be paid for at the rate of \$2.65 for every day of 24 hours. It is also further provided that in case of an interruption or failure in the gas supply, necessitating the

shutting down of the mills, no charge should be made for gas for the days the mills are not running, and also that if, for any other cause, the mills are not in operation, no charge for gas shall be made for the period of such cessation; "it being the intention of the parties hereto that said second party shall pay at the rate hereinbefore stated for the number of days and fractions of days said mills are in actual operation, and said gas is actually used." It will be seen, therefore, that the obligation of the defendant is to pay for gas actually furnished, only, and the amount to be furnished was to be sufficient to supply the boilers. The contract was made in 1888. In May, 1891, the correspondence commenced, and it is to be inferred from the letters, and is alleged in the affidavit of defense, that the plaintiff did not furnish enough gas to supply the 13 boilers. Thereupon, the original contract was modified so as to require the plaintiff to furnish enough gas to supply a minimum of 5 boilers at a price of \$3.50 per day for each. But the defendant, by the two final letters of June 4 and June 12, 1891, expressly stipulated as follows: "We do not want to agree to pay for any gas we do not use," and "we shall probably be glad to use all of the gas you can furnish us; but our understanding of the result of our correspondence is that you accept our proposition as contained in our letter of May 14th, and that we are to pay for gas only as used." In the letter of June 12th the defendant, writing to the plaintiff, says: "I feel authorized to accept your suggestion that five boilers shall be the minimum of boilers in use, and, if we cannot be supplied with this amount of gas, we will want to discontinue the use of gas altogether." As this is the last of the letters appearing before us, we conclude that it was the modified agreement of the parties that the plaintiff, from that time on, should furnish as much gas as was required to supply at least five boilers per day, and that only such gas as was actually furnished and used should be paid for.

If we consider the statement of claim in the light of the original contract and the modified contract, as appears by the letters, it would seem that it is quite insufficient to support the claim made, as it does not aver that an amount of gas necessary to supply a minimum of five boilers per day was ever actually furnished. It is extremely doubtful, therefore, whether a right to judgment could be sustained, even in the absence of any affidavit of defense. But the affidavits filed allege specifically and positively not only that the plaintiff never did supply enough gas to run the 13 boilers, and set out at length the precise injury done thereby in dollars and cents, which they were obliged to expend in obtaining coal to make up for the deficiency of gas, but also charged

that, during the three months for which the plaintiff's claim is made, "the plaintiff continued to divert its supply of natural gas from the defendant, and to deliver the same to consumers subsequent in date of contract to the defendant, and that the gas furnished by plaintiff to defendant during said three months, by reason of such deficiency in quantity, was only worth the following sums: January, 1892, one hundred and eight and 50-100 dollars, (\$108.50); February, 1892, one hundred and one 50-100 dollars, (\$101.50); March, 1892, ninety-eight dollars, (\$98.00)." As we are bound to assume the truth of the averments in the affidavits of defense, it is clear there can be no right of recovery for \$1,540 for the gas furnished in the three months, when the value of all that was actually furnished was only \$308. But the supplemental affidavit further alleges that gas was not furnished for the number of days claimed in the statement, but for a less number of days, which are specified for each month, and further avers "that during said months plaintiff wholly failed to deliver to defendant natural gas sufficient to supply five boilers with fuel, and that in order to heat said boilers, and to supply fuel for the operation of its mill, which, under the original contract, and the contract as amended by the letters set forth by plaintiff, defendant was compelled to purchase and did purchase coal at the market price thereof, which market price was the sum of five thousand and nineteen 37-100 dollars, which was paid by defendant, and defendant was compelled to employ laborers, at the fair market price of labor, to handle said coal, and the ashes and waste therefrom, and that the sum so paid for labor was thirteen hundred and forty-seven and 89-100 dollars, all of which was lost to defendant by reason of plaintiff's failure to supply gas for heating the boilers of defendant according to the contract as it originally stood, and as amended." The affidavit further alleges that the said sums of money were paid out because of the plaintiff's failure and refusal to supply a sufficient quantity of gas for heating the boilers of the defendant at its mills, and particularly the five boilers set forth in the plaintiff's statement, and that the expense was incurred on the days when the plaintiff undertook to furnish the said gas. Other averments of a specific and positive character are made, which tend directly to defeat the plaintiff's right of action. As all the averments in the two affidavits must be taken as verity, there can be no recovery for want of a sufficient affidavit of defense, and it was error to enter such a judgment, in the face of the facts alleged in these affidavits. They are precise, definite, positive, and, if true and unexplained, they seem to be fatal to any recovery. Judgment reversed, and *procedendo* awarded.

(158 Pa. St. 639)

In re McCLELLAN'S ESTATE.

Appeal of HENRY.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

LIFE ESTATE AND REMAINDER—MORTGAGE—FORS-CLOSURE—TITLE OF PURCHASER.

A life estate in land was devised to husband and wife; the will directing that after their death the land should be sold, and the proceeds divided among their children. The life tenants and the children joined in a bond secured by a mortgage on the land, and after judgment on the bond the land was sold on a writ of *fi. fa.*, and the mortgage entered satisfied of record. *Held*, that the purchaser at the sale acquired no title to the land, as the estate of the life tenants did not pass, because of noncompliance with Acts Oct. 13, 1840, and Jan. 24, 1849, regulating the procedure in case of life estates; and, as to the children, the direction in the will converted the land into personalty, and their interest could not pass by the sale, and, though the mortgage by them was an equitable assignment, the satisfaction thereof extinguished the lien.

Appeal from orphans' court, Beaver county; John J. Wickham, Judge.

Proceedings in the matter of the estate of William McClellan, deceased. From a decree distributing the proceeds of the sale of certain real estate, Thomas M. Henry appeals. Affirmed.

W. H. S. Thomson, E. N. Bigger, and Harry Calhoun, for appellant. A. P. Marshall, for appellees.

WILLIAMS, J. The fund in controversy was raised by a sale of land made under the direction of the orphans' court, for the purpose of making distribution in obedience to the will of William McClellan, deceased. By the terms of this will, an estate in the land was given to Francis, the son of the testator and his wife, during their natural lives. Upon the death of both, the testator directed that the land should be sold, and the proceeds divided equally between their children. One of the tenants for life is dead. The title of the survivor is now held by one of the children entitled to distribution. In consequence of the merger thus brought about, the court directed the sale and distribution in accordance with the terms of the will. The appellant appeared before the auditor as a claimant, and made a showing of the following facts in support of his claim: In 1882 Francis McClellan and his wife, the life tenants, and seven of their nine children, joined in a mortgage upon this land to the Beaver Valley Building & Loan Association, for a loan of \$1,200. In 1887, in consequence of the nonpayment of the installments falling due on the mortgage, the building and loan association determined to collect the debt, and caused a judgment to be entered on the bond accompanying the mortgage, and a writ of it to be issued. On this writ the land was seized and sold by the sheriff to Barrett

for nearly enough to pay the debt. The balance was paid by the defendants in the judgment, and both the judgment on the bond and the mortgage were satisfied of record. Barrett's title is now held by the claimant, who also holds an assignment from the building and loan association of the satisfied mortgage. What title to the land or its proceeds has he, therefore? This is the only question presented on this record. Under the will of William McClellan, his son Francis and his wife took a life estate in the land. This could be bound by judgment or mortgage, and sold by the sheriff, but the mode of proceeding in such cases is regulated by Acts Oct. 13, 1840, and Jan. 24, 1849. The sale made in this case was in utter disregard of these acts, and this court held in *Henry v. McClellan*, 148 Pa. St. 34, 23 Atl. 385, that it did not pass the title of the life tenants. As to the children of Francis and Jane McClellan, they took no estate under the will. The direction of the testator to sell the land and divide the proceeds worked a conversion of it from real to personal, as to them, and a sale of their land on a writ of *fi. fa.* against them did not give a title to the purchaser, for they had no interest or estate that was the subject of lien. The mortgage operated as an equitable assignment of the interests of those who signed it, but the mortgage has been fully paid and satisfied. The mortgagees have received every dollar of their debt, and interest, and their demand is extinguished. The appellant is therefore in this position: His title derived through Barrett by the sale on the writ of *fi. fa.* in 1887 is not good against the life estates of Francis McClellan and his wife, because of the neglect to comply with the acts of 1840 and 1849. It is not good against the children of the life tenants, since they had no estate. Their interests were personal, and not bound by the lien of the judgment, and could not pass under a sale by the sheriff of the land. *Brolasky v. Gally's Ex'rs*, 51 Pa. St. 509; *Bailey v. Bank*, 104 Pa. St. 425. The mortgage, when in life, was an equitable assignment of the interests of those who executed it, but the mortgage has been paid in fact, and is satisfied on the record. We see no way to relieve against the fatal mistake made in the collection of the debt by the building and loan association. They got their money, but the purchaser at sheriff's sale, whose money paid them, got absolutely nothing in return. The rule *caveat emptor* applied to him. He bought at a venture, and lost. His vendee stands on no better ground. The proceedings should not have been upon the mortgage. But, upon the judgment entered upon the bond, the life estate could have been effectually sold by the sheriff, if any attention had been paid to the requirements of the law. The distribution directed by the court below is correct, and the decree is affirmed.

(153 Pa. St. 236)

SPARKS v. PITTSBURGH CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CONTRACTS—CONSTRUCTION—PROPOSITION AND ACCEPTANCE.

1. Plaintiff proposed to defendant to erect a rig and drill a well a certain depth on any of defendant's leases, with the further provision that if defendant decided to drill any more wells on his leases or "in the vicinity" up to the number of five plaintiff was to have the contract therefor at the same price. At the end thereof was written: "Accepted. Contract to be drawn in accordance with the above proposition;" and then was added: "This is about right, and will be satisfactory to P." (defendant.) Pending a reference of this by the parties to an attorney to draw a contract, plaintiff drilled the one well, and was paid therefor. *Held*, that the proposition and acceptance was not a completed contract, so that, a contract not having been drawn, plaintiff could not recover damages for defendant's refusal to allow him to drill other wells which defendant thereafter sunk.

2. Even if the proposition and acceptance were a completed contract, wells which defendant sunk at the distance of two miles from the leased premises would not be "in the vicinity" thereof within the contract.

Appeal from court of common pleas, Allegheny county.

Action by George W. Sparks, for the use of Jarecki Manufacturing Company, against the Pittsburgh Company, for damages for breach of contract. Judgment for defendant. Plaintiff appeals. Affirmed.

A. Leo Weil, for appellant. Walter Lyon, Charles H. McKee, and John F. Sanderson, for appellee.

THOMPSON, J. Appellant's proposition to appellee was to erect a rig and to drill a well, the rig to be erected for the sum of \$450, the well to be drilled down to Berea sand upon any one of the leases that might be selected, to be for the price of one dollar per foot, to be paid for when completed, and the boiler and engine, except casing, to be furnished by him. It is then proposed by him as follows, viz.: "If you decide to drill any more wells upon said leases, or in the vicinity, up to the number of five, I am to have the contract of erecting the rigs and drilling the wells at the prices above named." At the end of the proposition is written: "Accepted. Contract to be drawn in accordance with the above proposition or bid," and the following words are then added: "This is about right, and will be satisfactory to the Pittsburgh Company." Without any contract executed in pursuance of this proposition, appellant sunk the first well upon one of the leases, and has been paid for the same. This well proved a dry one, and appellee, which had in its neighborhood leases upon about 1,000 acres of land, and for the development of which the well in question was sunk, gave them up, and abandoned the enterprise. It, however, sunk a number of wells near Ellwood, some two miles distant

from the territory thus abandoned. Appellant claims damages for the loss of profits arising from the refusal of appellee to allow him to sink those wells. This claim is therefore based upon an alleged contract and its breach. The appellant's contention is that the proposition itself constituted the contract, and the sinking of those wells at Ellwood the breach of it. The language at the end of the proposition, to wit, "Contract to be drawn in accordance with the above proposition or bid," and "This is about right, and will be satisfactory to the Pittsburgh Company," clearly imports that it was not intended to be the actual agreement, but simply the basis of one, to be subsequently perfected by a contract properly prepared. This appears to be apparent from the words used "If you decide to drill any more wells upon said leases, or in the vicinity, * * * I am to have the contract." The proposition was that when the decision should be reached to sink the five wells upon the leases or the vicinity, appellee was to make a contract with appellant for their drilling. As the time of such decision was not fixed; as the order of sinking the wells, whether together or successively, was not determined; as the points of locality were not settled; as the times for completion were not designated, and the modes of payment were not specified,—it is manifest that this proposition was not intended as a complete contract, but that it was tentative, and was only to become a contract binding upon the parties by a written agreement when properly prepared. This is apparent from the proofs adduced by the appellant himself. He testifies that the president of the appellee company took him to his private office, and sat down with him to write the intended contract, when he, appellant, told him that McConnell had the proposition, and that he had better prepare the contract. Mr. McConnell testifies that Mr. Tomlinson, the agent of appellee, and Mr. Sparks, the appellant, brought him the proposition after it had been altered, and that Mr. Sparks said he was going up to the leases, to be absent a week or 10 days; and asked him to have the contract ready by his return; that the proposition was left by Sparks for the purpose of preparing a contract; and Mr. Tomlinson testified that the president of the company told him to give the proposition to Mr. McConnell, to have him prepare a contract. It is thus plain that the proposition did not contemplate the preparation and execution of an agreement simply for the purpose of more authentic proof of it, but was only an expression of what was to be the basis of an agreement to be prepared to represent the final meeting of their minds upon the subject. It has not been perfected by any contract which is binding upon the appellee. It is contended that the proposition is not severable, and that appellant, without such written contract, and with the assent of the appellee, having sunk

the first well, and having been paid for it, no written contract was intended to be required for the sinking of the five other wells. The first well was to be sunk at all events, and upon its success depended the operations upon the 1,000 acres leased. The appellee was anxious to ascertain whether oil existed beneath that territory, and requested appellant to go on in advance of the execution of the written contract. By such parol arrangement of both parties the work was done. While it was being done they sat down to draw the agreement contemplated, but, at the suggestion of the appellant, it was referred to counsel to prepare it, who, it seems, failed to do so. The sinking of the first well was to be done promptly, and the five others were to be sunk only in case appellee should decide to sink them. The work of sinking that well was distinctive from that connected with the other five wells, which, as it had not decided to sink them, were not then to be sunk. The fact that the first well was sunk and paid for under such circumstances cannot operate to turn the proposition to sink the others into a contract, when a future agreement for the sinking of them was clearly contemplated to be prepared. As to the first well, the work was done with the assent of both parties, without the preparation of the written contract intended, and was paid for. As to the five other wells, the negotiations have not been completed by the preparation and execution of the contract contemplated.

Assuming, however, that the proposition be treated as an actual agreement, and not as tentative, there is no fact showing any breach of it. The proposition was in reference to sinking wells on the leases, or in the vicinity. The leases referred to were those on the land situate some two miles north of Ellwood, and the vicinity intended was in their immediate neighborhood. The proposition is to be construed with regard to the subject-matter. The parties were contracting for the well to be sunk, presumably to be followed by others upon this new and undeveloped territory, and necessarily "vicinity" must be construed with regard to it. It is ingeniously argued that "vicinity" is a relative term, used differently as to subjects,—as, when applied to planets, with reference to each other, involving vast distances; as, when applied to cities, in regard to each other, covering many miles,—and that, as it was thus an indefinite term when used, its limits in the present case should have been determined by the jury. The argument may be plausible, but it is not substantial. The use of a word in a written instrument, which may have in some uses different effects, cannot operate to change the duty of the court in the interpretation of it, and transfer that duty to the jury. The construction of the instrument is for the former, and not for the latter. The sinking of the wells by appellee upon lands owned by it near Ellwood two

miles distant from the leased territory covered by the proposition was not in its "vicinity," and was not, therefore, a breach of the proposition. Judgment affirmed.

(158 Pa. St. 598)

AETNA INS. CO. v. CONFER.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

AFFIDAVIT OF DEFENSE—RES JUDICATA.

1. On application for judgment for want of a sufficient affidavit of defense, the question is not whether plaintiff has a good cause of action, but whether the facts alleged in the affidavit are sufficient to send the case to the jury.

2. In an action by an insurance company to recover money paid to defendant for a loss, on the ground that he had afterwards recovered judgment against a railroad company for negligently setting the fire, an affidavit of defense which alleges that plaintiff had declined to join in the prosecution of the suit against the railroad company, and had waived all claim to any money which might be thus recovered, and that defendant's actual loss was greater than the amount recovered from the railroad company and the sums paid him by various insurance companies, is sufficient to withstand a rule for judgment, and to require the submission to the jury of the issues of fact presented.

3. A judgment recovered against a railroad company for negligently setting fire to property is not conclusive on the property owner as to the amount of his loss, as against an insurance company seeking to recover money paid to him on account of such loss before the recovery of the judgment.

Appeal from court of common pleas, Venango county; Charles E. Taylor, Judge.

Assumpsit by the Aetna Insurance Company against A. L. Confer to recover money paid defendant on account of a loss by fire. A rule for judgment for want of a sufficient affidavit of defense was discharged, and plaintiff appeals. Affirmed.

McCalmont & Osborne, for appellant. Dunn & Carmichael, for appellee.

DEAN, J. The defendant owned an oil refinery on the line of a railroad. He insured his property in five companies,—among them, this plaintiff,—each delivering to him a policy in the sum of \$3,140, and each policy, to the amount of it, embracing in the description the whole property. While the policies were in force, on the 24th of July, 1889, the refinery caught fire from locomotive sparks from the railroad, and was damaged to the amount of \$27,565.42, as averred by him in his proof of loss. Defendant, as required by his contracts of insurance, at once made claim on the insurers. On July 31, 1889, the plaintiff paid him, in full of its share of the loss, \$1,868.58; the other four companies paid a like sum. Afterwards, the defendant, alleging the fire was caused by the negligence of the railroad company, brought suit against it for his entire loss, and got a verdict for \$25,081.46, which, when paid, with interest and costs added,

amounted to \$27,069.83; whereupon this plaintiff, one of the insurance companies, brought this suit, to get back from defendant the amount it had paid him, —\$1,868.58,—less its share of the expenses of collection of the whole amount from the railroad company. To this claim of the company, the defendant filed affidavit of defense, in substance averring: (1) That immediately after the fire, at the time of the adjustment of his loss, he informed the insurance company fully of the cause of it, which, as he believed, was the negligence of the railroad company, and solicited said company to join with or aid him in a suit against said railroad company, that said insurance company might be reimbursed for the amount it had paid him, but that defendant refused to have anything to do with the matter; said it was not in the law business; had no claim against the railroad company; that insured was welcome to all he could collect from the railroad company. That thereupon he brought suit in his own name against the railroad company, and, after long, vexatious, and expensive litigation in the court below and in the supreme court, he, three years afterwards, obtained final judgment, and received his money. (2) That he paid out and expended a large sum of money in procuring attendance of witnesses, printer's bills, counsel fees, etc., amounting to the sum of \$5,389.83. (3) That his loss was much greater than the aggregate amount paid by all the insurance companies, and that the sum of the amounts paid by the insurance companies and railroad company did not cover his loss, after deducting the expenses of collection. On filing this affidavit, plaintiff took a rule for judgment for want of a sufficient affidavit of defense, which the court, on hearing, discharged. From that decree comes this appeal.

It must be a very plain case of error in law if we sustain appeals, in such cases as this, from the decree of the common pleas discharging the rule. The decree being interlocutory, no injury can result to the complaining suitor, other than delay of final judgment. Besides, it is doubtful whether the act of assembly authorizing these appeals has not, on the whole, aggravated delay. The observations of this court in *Griffith v. Sitgreaves*, *81 Pa. St. 378, and *Radcliffe v. Herbst*, 135 Pa. St. 568, 19 Atl. 1029, are pointedly applicable in the case before us. A very elaborate argument is made, with abundant reference to authorities, to show that appellant has a good cause of action. As nothing to the contrary has been intimated by the court below, that question being in no way involved in the decree discharging the rule, we are somewhat at a loss to understand why the point is so earnestly urged here. The jurisdiction of this court is appellate, not original, in actions at law. It is our duty to review judgments of the common pleas; not to make sugges-

tions, preliminary to a hearing, as to what decrees shall there be made. We presume the learned judge of the court below, if the question be raised before him, will rightly decide it. Certainly, we cannot pass upon it before hearing or decision by him. The only question properly before us is, does the affidavit set out sufficient to send the case to a jury? We do not think it advisable, at this stage of the proceedings, to inquire whether the agreement to relinquish or waive any claim by the insurance company, as averred by defendant, would constitute an estoppel. As the case must go to trial on other disputed facts, the sufficiency of this part of the defense can be better determined when the evidence is heard. We have no doubt plaintiff could, by parol, through an authorized representative, before suit was brought against the railroad company, have waived all claim on money contingent on a successful prosecution of a suit in which it declined to take any risk or part. Whether there was such a waiver by one authorized to make it, and whether the defendant, in view of it, took upon himself all the labor, expense, and risk of problematical litigation, which otherwise he would not have done, are questions on which we now, for obvious reasons, intimate no opinion.

But the defendant further avers that he expended a large sum of money in and about the prosecution of the suit, such as counsel fees, costs, and expenses of hunting up witnesses. The plaintiff undertakes to make a deduction from its claim for its share of this expense; defendant alleges that the deduction is not sufficient. This dispute can only be determined after hearing the evidence bearing on it. Then defendant further avers that his actual loss was greater than the aggregate amount received by him from both the insurance companies and the railroad company. The plaintiff replies that his claim against the railroad company was for his entire loss, and the judgment in that case is conclusive as to the amount. Undoubtedly, as between him and the railroad company, the judgment is conclusive. But the plaintiff was no party to that suit. However significant the judgment may be as evidence in this issue, it does not necessarily follow, as between these parties, that that judgment determines the whole amount of plaintiff's loss by the fire. His proven loss to the insurance companies, at time of payment by them, was \$27,565.42; the verdict of the jury, nearly 16 months after the fire, was only \$25,081.30. Deducting his alleged expenses from this amount, and adding the remainder to the amount received for insurance, makes a net sum less than the aggregate of his alleged loss, as first proven to the insurance companies. The defendant, on trial of this issue, may adduce fuller and more specific proof of loss than on the former trial; may offer evidence which will satisfy the jury,

as it satisfied the insurance companies when they paid him, that his actual loss was \$27,565.42. It is clear to our minds that the disputed facts mentioned can only be determined by jury trial. Therefore, the decree of the court below is affirmed, and the appeal is dismissed, at costs of appellant.

(159 Pa. St. 331)

PITTSBURGH, V. & C. RY. CO. v. PITTSBURGH, C. & S. L. R. CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

RAILROADS—BRANCHES—ABANDONMENT.

1. A company chartered to build a road, "with power to construct such branches as the directors may deem necessary, and to connect" them with any railroads built or to be built, has a continuing power of branch building, not to be abridged by a subsequent act giving the company a certain time to complete its road, "with one or more tracks, sidings, depots, and appurtenances."

2. Since railroads are not required by law to keep up their stakes, nor record maps of branch lines surveyed, as notice to others, a company which has surveyed such a line, and resolved to build it, but, without intending to abandon it, has done nothing for five years and two months, is not so estopped to assert its right of way against another company, as railroads are not included in Act March 22, 1871, making five years' nonuser of any turnpike, plank road, canal, or public highway of a corporation equivalent to abandonment.

3. Abandonment of a surveyed branch railroad can be asserted only by the state, not by another company attempting to use the right of way.

Appeal from court of common pleas, Allegheny county.

Action by the Pittsburgh, Virginia & Charleston Railway Company against the Pittsburgh, Canonsburg & State Line Railroad Company for an injunction of defendant's trespass on plaintiff's right of way. Injunction granted. Defendant appeals. Affirmed.

The master found as follows:

"The plaintiff company was incorporated by an act of assembly approved April 8, 1867, (P. L. 897,) under the name of the Monongahela Valley Railroad Company. By act of March 31, 1868, (P. L. 726,) the company was authorized to build its road on a somewhat different route, 'with the power to construct such branches as the directors may deem necessary, and to connect all or either of them with any railroad or railroads now constructed or that may be hereafter constructed;' and by the same act the time for completion of the railroad was extended five years. Before this time expired, by act of February 7, 1873, (P. L. 126,) the time for its completion, 'with one or more tracks, sidings, depots and appurtenances,' was extended for five years from January 1, 1873. The plaintiff's road was completed from Pittsburgh to Monongahela City by October, 1873. In November, 1886, John M. Byers, chief engineer of the company plaintiff, began the making of surveys of a branch line from Pe-

ter's Creek, a station on plaintiff's main line between Pittsburgh and Monongahela City, up the valley of Peter's creek to a point near McDonald station on the Panhandle R. R. The surveys and a map of them he completed in January, 1887. He marked the line on the ground by pins at irregular distances, indicating the center line of the railroad, the curves being run in and marked, but the cuts and fills not being indicated in any way, nor the width of the right of way to be appropriated. It does not affirmatively appear that this survey was made by him pursuant to any action taken by the direction of the company. On March 25, 1887, this map was before the board of directors of the company plaintiff at a special meeting, and the following resolution was adopted: 'On motion, resolved, that it is deemed necessary that a branch line of railroad shall be constructed from a point on the main line of this company's road at or near Peter's Creek station; thence southwesterly to a connection with the Chartiers Railway at or near Bridgeville station, and also to a connection with the Pittsburgh, Cincinnati and St. Louis Railway at or near McDonald station, all in the counties of Allegheny and Washington; and the construction of the same is hereby authorized according to the route as designated on a map now before the board, subject to such minor modifications as the president may deem wise during the construction thereof. And the said map is ordered to be verified by the secretary, and filed in the office of the company.' That no other or further action was ever taken by the board of directors as to this branch. The map in question was produced in evidence, verified by the secretary as directed by the resolution. While there was some talk by Mr. Du Barry, president of the company, with a contractor who may or may not have made bids on the work, nothing was in fact done towards the construction of this branch road from the date of this resolution, March 25, 1887, to May 3, 1892. The defendant company was incorporated October 24, 1889, under the provisions of the act of April 4, 1868, (P. L. 62,) to construct a railroad from Pittsburgh through Canonsburg to the West Virginia line. On October 28, 1889, four days thereafter, the board of directors of the company defendant passed the following resolution: 'Resolved, that the line of the Pittsburgh, Canonsburg and State Line Railroad be as follows: Commencing at a point in the city of Pittsburgh; thence via the valley of Saw Mill Run to Castle Shannon; thence via the most practicable route to Canonsburg, Pa.; thence via Houstonville and McConnell's Mills to the point of divergence of the two lines on what is known as the "Rea Farm;" thence to the state line of Pennsylvania and West Virginia, as the board of directors may hereafter determine. Carried.' Whether the survey of the line adopted by this resolution was made within the four days preceding its

adoption does not clearly appear from the evidence, but it does not seem probable it was so made. On August 2, 1890, and November 23, 1891, resolutions of the board were passed relating only to the part of the line from the Rea farm to the West Virginia line. No other corporate action was ever taken with regard to the location of the main line. On April 22, 1890, the executive committee of the defendant company appointed a committee to look up a route for a branch line from some point on the line of their road between Canonsburg and Castle Shannon to the Monongahela river. On July 22, 1890, the following resolution was passed by the board of directors of said company: 'Whereas, the executive committee of Pittsburgh, Canonsburg and State Line Railroad Company have had surveyed and advise the adoption of a branch line to the Monongahela river: Therefore, be it resolved by the board of directors of this company, that they do hereby adopt and permanently locate a branch road as follows: Beginning at a point on the main line of the P., C. & S. L. R. R. at or near Library, Allegheny county, Pa., thence by way of the valley of Peter's creek to a point at or near the mouth of said creek at the Monongahela river, following the surveys made by R. L. McCully, chief engineer, as near as may be practicable. Unanimously adopted.' At the time the survey referred to in this resolution was made the stakes put in by the company plaintiff on its branch line up Peter's creek had almost disappeared. There were some stakes to be found which would indicate a prior location of a railroad, but not by whom it was made. This line in many places was laid over the same ground as plaintiff's branch. Nothing further was done by either party until May, 1892. On May 3, 1892, the plaintiff company began to retrace its line. On May 11, 1892, the defendant company began the work of grading which is complained of in the bill. On May 14th, the plaintiff company likewise began grading, and on May 28, 1892, this bill was filed.

'The defendant asks the master to find that the location of the plaintiff company was not made in good faith. This he takes to mean that they located the road without any intention of building it, or of building it in any definite or reasonable time, but only to forestall others. There is no evidence from which such a finding would be justified. It was not for more than a month after the location that the engineer was ordered to suspend operations, and that and the subsequent fact that it was not built is all there is from which an intention not to build it could be inferred. The defendant also asks the master to find that the plaintiff company had abandoned the branch line in question. As this involves the consideration of some matters of law, the findings of fact in respect to that matter are postponed to a subsequent part of this report. The defendant company

did not register in the office of the auditor general under the provisions of the act of June 1, 1889, § 19, (P. L. 420,) until November 14, 1892. Upon these facts the company plaintiff contends that its location should be held good and valid and prior in right, as it is in time, to that of defendant, and that the defendant company, not having located its main line, has no right to build a branch line, and, not having complied with the law as to registration, has no right to go into operation. The contention of the defendant is: (1) That the plaintiff company had no authority to lay out a branch road, because the time allowed for the completion of the road, to wit, five years from January 1, 1873, had long expired before the branch in question was located; (2) that the plaintiff's location was to be deemed abandoned in July, 1890, or that it was forfeited; (3) that the plaintiff is estopped from asserting a right to the location claimed by it.

'Mr. Justice Williams remarks in *Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co.*, 141 Pa. St. 414, 21 Atl. 645, that it is singular that the question of what constitutes a valid location of a railroad should be to any extent an open one in Pennsylvania. It is certainly equally singular that the law of Pennsylvania does not seem to prescribe any means of preserving the evidence of such location, or of giving notice of it, or require any notice of it to be given, or, in the case of a branch, seem to prescribe any time within which the work shall be begun or completed. In the case just cited the requisites of a valid location, as to third persons and rival corporations, are said to be a preliminary entry by engineers and surveyors, who run and make out lines, map them, and report them to the company, and the adoption of such a line by the board of directors; and all this is to be proved as any other facts, and when proved has the same effect upon all interested as though it had been recorded. The locations of the branches of both plaintiff and defendant appear to conform to these requisites. As stated, it does not appear that the plaintiff's survey was ordered by the board of directors, and if it were not for the statement of the requisites of a valid location in the case just cited the master would be inclined to think that an order of the board of directors that the survey be made was requisite. The act of 1849 provides that the president and directors of such company shall have power by themselves, their engineers, agents, artisans, and workmen to survey, ascertain, locate, fix, mark, and determine such route for a railroad as they may deem expedient, etc. In *New Brighton, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 105 Pa. St. 13, it was held that the adoption of a survey made before the incorporation of the company did not constitute a valid location. Why should the adoption of a survey made by some of the employes of the company without the authority of the directors have

any greater effect? It is the 'president and board of directors' only who have power and authority to survey, ascertain, etc. The case in 141 Pa. St. and 21 Atl., however, stating the requisites of a valid location, does not include this among them.

"The act of March 31, 1868, (P. L. 726,) gives the plaintiff power to build a road, 'with power to construct such branches as the directors may deem necessary, and to connect all or either of them, with any railroad or railroads now constructed or that may hereafter be constructed.' This is evidently intended to give the special authority to make branches referred to in section 10 of the general railroad act of 1849, (P. L. 79,) and seems to be equivalent to the branching power conferred by section 9 of the railroad act of April 4, 1868, (P. L. 62.) This appears to be a continuing power, and the time fixed for completion of the railroad appears to have no relation to the building of the branches. There seems to be no case expressly deciding the point, but it appears to the master that it is of the very nature of the branching power that it should be continuous. If the branches are all to be begun and finished with the main line, there would seem to be no reason why their location and termini should not be stated in the charter or act of incorporation, as well as those of the main line, and not left to be afterwards determined by the directors as they may deem it necessary, or to be connected with roads thereafter to be constructed.

"It is argued by defendant's counsel that when the plaintiff company, by act of February 7, 1873, was given time to complete its road, 'with one or more tracks, sidings, depots, and appurtenances,' the word 'appurtenances' comprehended branches, and that, therefore, the limitation applies to the construction of branches, and that branches cannot, therefore, be constructed thereafter. If this reasoning be sound, it will follow that after January 1, 1878, the plaintiff company had no power to build a single additional track, siding, or depot. It seems to the master that, if the defendant's contention be correct, that branches are appurtenances within the meaning of that act, their collocation with tracks, sidings, and depots is an argument for the continuous nature of the power to construct them rather than against it. If, then, the plaintiff had a right to locate the branch, and did locate it, has it abandoned it, or suffered it to be forfeited? As has been already remarked, there is no allegation in the answer to that effect. It is deemed proper, however, that the whole case as presented by the evidence taken should be discussed. If the plaintiff's location is to be deemed to have been abandoned, it must be either because the facts and circumstances warrant an inference of an actual intention to abandon, or because they justified the defendant in acting upon the supposition of an abandonment, and so estop the plaintiff, or be-

cause the lapse of time was such that the law will presume an abandonment, or because the law has declared certain acts to be an abandonment. In this case there is no evidence whatever of an actual intention to abandon, but, on the contrary, the evidence is all the other way.

"The facts relied on to estop the plaintiff are that the plaintiff did not keep its line staked so as to give notice to the defendant of its location, and certain conversations had by officers of the defendant company with D. P. Corwin, secretary of the company plaintiff. No statute requires a railroad company, after making a location, to watch the pins or marks put in, and keep them in position, just as no statute requires any map or location to be recorded. The failure of the plaintiff to do so was therefore not an act which prejudiced the defendant by leading it to believe the plaintiff's branch line to be abandoned. Indeed, if it be true that the defendant company did not in fact know of the plaintiff's location when its own was made, it cannot have relied on any evidence of the abandonment of that which it did not know existed. As to the conversations with D. P. Corwin, it is sufficient to say that in none of them does he appear to have spoken, or was he supposed to have spoken, as secretary of the company plaintiff, or in any way for the company, but as a friend of Mr. Mayran, president of the defendant company, and as a landowner in the valley of Peter's creek.

"That an abandonment might be presumed from a great lapse of time is very probable. In the case of Western Pa. R. Co.'s Appeal, 104 Pa. St. 399, a much longer time had elapsed than the five years and two months delay in this case; and, while the point was not decided in that case, because the party claiming the abandonment was held not to have standing to make such claim, yet the defendant in this case has just the same standing, and no more. In the absence of any definite ruling, and considering the relatively long time necessary for the construction of so extensive and costly a work as a railroad, it would be presumptuous for the master to say that a delay of five years and two months in building a branch railroad is evidence of its abandonment by mere lapse of time. The legislature having fixed no limit, perhaps no court would be justified in fixing one short of the time in which a surrender might be presumed by prescription. The defendant, however, relies on the provisions of the act of March 22, 1871, (P. L. 231,) as applying to this case, and making the facts of this case conclusive proof of abandonment. The act provides 'that whenever any turnpike, plank road, canal or slackwater navigation or public highway of any company or corporation * * * has been or shall have been for the period of five successive years or upwards, decayed, out of repair and unused for the purposes mentioned in the charter of said

company, the same shall be deemed and held to be abandoned * * * and such condition and non-user may be given in evidence in any suit or proceeding wherein the facts of such abandonment may be material and shall be conclusive proof thereof.' This act does not seem to apply to railroads. It is true that railroads are public highways, belonging to corporations, but at the time of the passage of this act they constituted by far the largest and most important class of such highways, and it is not to be supposed that the legislature intended to include them under this general name after mentioning by name turnpikes and canals. The case is like that in Coke's Reports, referred to in Blackstone's Commentaries, where a statute regarding 'deans, prebendaries, parsons, vicars, and others having spiritual promotion,' was held not to extend to bishops, on the ground that persons or things of a higher degree were not to be supposed to be included in general words following an enumeration of those of a lower degree. Besides, the act evidently applies only to the case of highways which have been once built, and then suffered to fall into decay for five successive years, and not to those which have never been built. However all this may be, it does not appear that the defendant is in a position to raise a question as to the abandonment or forfeiture of plaintiff's location. This is for the commonwealth alone. It was held in the Western Pa. R. Co.'s Appeal, *supra*, that the act of June 19, 1871, (P. L. 1361,) did not give third persons the right to assume the position of the commonwealth as in a writ of quo warranto, and to prove the nonuser of a franchise to establish a forfeiture. What has been said covers the third claim of defendant,—that of estoppel.

"The direction of the act of June 1, 1889, as to registration is merely directory, and concerns the payment of state taxes only. It does not mean that the companies shall not go into operation until they register, but only designates the time when they shall register, and, if they do not do so in the time specified, they become liable to the penalty provided by the act. The master is therefore of opinion that the plaintiff has shown a valid location of a branch railroad over the points at which the defendant is engaged in grading, prior in time and in right to the defendant's location; that this location is still valid, and the plaintiff company alone has the right to build a railroad on or over the points named."

George W. Guthrie and Johns McCleave, for appellant. William Scott and George B. Gordon, for appellee.

PER CURIAM. Aided by carefully prepared and able arguments of learned counsel for the respective parties, we have fully considered the master's report, in connection

with the bill, answer, and proofs, and with special reference to the assignments of error, and have reached the conclusion that there was no error in overruling the several exceptions specified in the third assignment, or in entering the decree from which this appeal was taken. We are of opinion that the learned master's findings of fact were warranted by the evidence, and that his conclusions of law are substantially correct. Those findings and conclusions, together with the authorities cited in support of the latter, are clearly and concisely stated in his report, and need not be repeated here. They warrant the general conclusion that the location claimed by the plaintiff company was regularly and legally made and adopted, and its right thereto has never been relinquished or forfeited; and that, subject to the payment or securing of damages to land-owners, it has the lawful right to construct and operate its branch railroad upon said location. It does not appear to us that there is anything in the case that requires special discussion or further elaboration. Upon the facts found by the learned master, and for reasons sufficiently stated in his clear and satisfactory report, there appears to be nothing in either of the assignments of error that would justify either reversal or modification of the decree. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 381)

In re HAYS' ESTATE.

Appeal of ALLEGHENY NAT. BANK.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

SUBROGATION TO RIGHTS OF LEGATEES—FORFEITURE BY FRAUD.

Decedent gave the residue of his estate to his five children, subject to the payment of legacies. W., a devisee, purchased the undivided share of another devisee, giving him a purchase-money mortgage thereon, which was assigned to M. The two purparts allotted, on partition, to W., he mortgaged to petitioner. At a sale under foreclosure of his mortgage, petitioner bought in the property, having previously bought M.'s mortgage under a secret arrangement with M. that the latter should not bid for the property, and the proceeds of the sale were appropriated to a discharge of the legacies. *Held*, that petitioner's action in procuring M. not to bid at the sale was a bar to his right to be subrogated to the lien of the legatees on the purparts allotted the other devisees.

Appeal from orphans' court, Allegheny county.

Petition by the Allegheny National Bank to be subrogated to the lien of legacies charged on land devised to Lyda C. McCutcheon and others, devisees under the will of William B. Hays, deceased. The petition was dismissed, and petitioner appeals. *Affirmed*.

The following is the opinion of Hawkins, J., at hearing:

"Statement: In the first stage of this 'further proceeding,' respondents, by their demurrer, admitted the truth of petitioner's averments, and upon that record this court decided that petitioner was entitled to subrogation to the extent of the C. H. Hays purchase-money mortgage, of which it was assignee. The respondents were, however, given leave to answer, and have thereby set up the additional defense of fraud on the part of petitioner. In order to a proper understanding of this defense, it is necessary to make a preliminary statement of the relations of the parties: William B. Hays gave the residue of his estate to his five children,—William B., Curtis H., Lyda C., (now Mrs. McCutcheon,) Margaret, (now Mrs. McCandless,) and Mary E., (now Mrs. Stewart),—subject to the payment of legacies amounting to \$45,000, and the share of William B. Hays, Jr., to the additional sum of \$40,000. C. A. Hays, having first given a mortgage of \$7,000 to the estate, sold his undivided interest in the land devised to William B. Hays, Jr., from whom he took a mortgage for the balance of purchase money, which was afterwards assigned to D. R. McIntire, and by him to said bank. Proceedings in partition having been subsequently instituted, these two shares were allotted to William B. Hays, Jr., and thereupon William B. Hays, Jr., gave an additional mortgage for \$15,000 to the Allegheny National Bank, the present petitioner. The personal estate left by decedent was more than sufficient to have paid the testamentary charges in full, but was wasted by William B. Hays, Jr., who became insolvent, and was discharged from the trust. The Allegheny National Bank thereupon foreclosed its mortgage, and sold the shares allotted to William B. Hays, Jr., at marshal's sale. Pending the sale it became the purchaser of the C. H. Hays purchase-money mortgage. The proceeds of sale were appropriated on account of the testamentary charges, and the bank thereupon asked to be subrogated to the rights of the legatees, as fully set forth in the petition. There were two actively competing bidders when the William B. Hays, Jr., property was first offered by the marshal,—the Allegheny National Bank, which controlled the writ, and D. R. McIntire, assignee of the purchase-money mortgage. But, while the bidding was going on, Mr. Dickey, attorney for the bank, stated to Mr. Bleakley, attorney for McIntire, that he wanted to have an adjournment, and would make an agreement to pay the McIntire claim. Mr. Bleakley consented, an adjournment was had, and, before the next day fixed for sale, an agreement was made by which the bank was to pay McIntire the amount of his mortgage, and his attorney was not to bid against the bank; the bank was to bid in the property, and, after it had paid the amount due McIntire out of the proceeds of the sale by them, and also the amount due the bank by William B. Hays, Jr., the sur-

plus was to be divided between the bank and McIntire in proportion to their respective claims. There was no public assignment of the McIntire mortgage, the understanding being that no one but the parties to the agreement was to know of the arrangement. Mr. Bleakley was to, and did, continue representing Mr. McIntire as though he was a competitor, but was not to bid actively against the bank. The purpose of the parties was to make an arrangement by which they could make their claims and get the property as cheap as possible. The McIntire mortgage was paid by cashier's check of the Allegheny National Bank. The bank bid on the property, and bought parts of it at the adjourned sale. These respondents and the administrator were also present or represented, and bid on and bought parts of the property. The arrangement between the Allegheny National Bank and McIntire was unknown to them until within a few days of the last hearing in the present proceeding.

"Opinion: While a court of equity may act upon the conscience of a defendant, and force him to do right and justice, it will never thus interfere on behalf of a plaintiff whose own conduct, in connection with the same matter or transaction, had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. It endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of those who occupy a defensive position in judicial controversies, but it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies. This fundamental principle is expressed in the maxim, 'He who comes into a court of equity must come with clean hands.' * * * The maxim, considered as a general rule controlling the administration of equitable relief in particular controversies, is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction. With this limitation, 'it furnishes a most important, and even universal, rule affecting the entire administration of equity jurisprudence as a system of rights and remedies.' Pom. Eq. Jur. §§ 398, 399. The application of this principle to the present case is plain. Had the case rested on the petition and demurrer, these respondents must, as already shown, have been forced to do right and justice to petitioner by making contribution, but the proof of a secret arrangement, set up in the answer, by which a competing bidder was silenced, introduced a new element, and made a radical change in the relations of the parties. It is settled in this state that a contract between two or more lien creditors, by which one of them is not to bid at a judicial

sale, made without the knowledge and consent of the defendant, is contrary to public policy and void. The reasons for this rule are concisely given in *Barton v. Benson*, 126 Pa. St. 431, 17 Atl. 642, a case in which an attempt was made to enforce a contract similar to that shown here, as between the parties to it. 'The court below held that the contract declared upon was against public policy, and therefore void. It is true that a somewhat similar contract was sustained in *Maffet v. Ijams*, 103 Pa. St. 266. In that case, however, it appeared affirmatively that the agreement was known and assented to by the defendant in the execution, and all the lien creditors who were or could be affected by it. In the case in hand, the defendant was dead, and he could not, of course, assent or dissent. But his heirs stood in his shoes, and there was no evidence that they ever knew of the arrangement. It is true, it was alleged that the property was not worth the liens, and no one could have been injured. We cannot sustain the agreement upon this narrow ground. The allegation may be true, but it would introduce an uncertain element into judicial sales, were we to sustain such an agreement upon the ground that the property was not worth the liens. As a general rule, the defendant in an execution, or those who stand in his place, have an interest in making the property bring its full value. Hence, an agreement by which persons are debarred from bidding must have the sanction of the defendant. In *Slingluff v. Eckel*, 24 Pa. St. 472, it was held that an agreement made at sheriff's sale of real estate to pay the judgment of another if the latter would not bid, the former being permitted to purchase the property at the sale, was fraudulent as to the debtor or his creditors, and could not be enforced by suit.' That the petitioner in this case made use of his control of the judicial process upon which the sale was made for the purpose of silencing his competitor was an aggravation of the misconduct. What was the extent of the injury to respondents resulting from this second arrangement is immaterial, and impossible to state. It is enough that the misconduct of petitioner in 'some manner affected the equitable relations subsisting between the two parties, and arising out of the transaction.' That there was a loss to the respondents must be conclusively presumed. The value of defendants' property must necessarily have been increased by every additional bidder. For every dollar's increase, the extent of respondents' liability would have been diminished, and satisfaction of petitioner's claim out of William B. Hays, Jr.'s property, which was the primary fund, would have extinguished their liability. The extent of the loss is, in the nature of the case, incapable of ascertainment. The consequent uncertainty was caused by petitioner's illegal act, and must be taken most strongly against it. But, even assuming that the ex-

tent of loss could be measured, the fraud on respondents' rights remains, and vitiates all in its train. The connection between the secret arrangement and the claim made here is obvious. Petitioner is claiming because enough was not realized out of the primary fund to satisfy its mortgagee. The amount, if not the fact, of claim, is the direct result of the illegal arrangement made by petitioner in fraud of respondents' rights and to respondents' injury. He who has done iniquity cannot have equity."

Opinion on exceptions to decree dismissing petition for subrogation: "The Pennsylvania authorities, cited for the first time on the argument of these exceptions, by exceptant, are not in conflict with the decisions of this court in dismissing the petition for subrogation. In all of them except *Smull v. Jones*, 1 Watts & S. 128, it expressly appears that the joint bidding was 'open and fair,' and, as the *Smull v. Jones* decree was not mentioned as a fact in these cases, that element was probably wanting there also. No one doubts, nor is there reason to doubt, the validity of such bidding. In the case of *Barton v. Benson*, 126 Pa. St. 431, 17 Atl. 642, upon which the decision of this court was rested, it is distinctly recognized; but that, and the cases generally, stamp contracts made without the knowledge of defendants between lien creditors, by which one or more is debarred from bidding at a judicial sale, as against public policy and void. The result of the authorities is thus stated in 2 Pom. Eq. Jur. 934: 'Where property is to be sold at public auction, and especially where the sale is by order of the court, or is made in the course of governmental administration, a secret combination among the persons interested in bidding, whereby they stipulate to refrain from bidding in order to prevent competition and to lower the selling price of the property, is illegal, according to the uniform course of decision in this country. The stipulations of the buyer to pay compensation to the others in consideration of their promises not to bid, or to share the property with them, are void, and the sale itself, made as the result of the combination, is also tainted with the fraud, and will be set aside at the suit of the vendor.' See, also, *Greenh. Pub. Pol.* 185. The bidding in the present case was not 'open and fair,' but was admittedly made in pursuance of a secret arrangement by which this petitioner silenced a competing bidder in the very matter out of which its present claim of subrogation arises. The purpose and necessary tendency of this combination was to depress the value of the property, to petitioner's advantage, and these respondents' injury. Competition is the life of judicial, as of other, sales, and there is no reliable measure by which to estimate the result of it. Viewing this combination in the light of public policy, it is obviously incompetent to show that there was no injury done, for the effect must be to introduce an

uncertain element into judicial sales, (*Barton v. Benson*, supra,) and condone prohibited motives, (*Gibbs v. Smith*, 115 Mass. 592.) If the transaction be void as being against public policy, it would be also void to hold that that wrongdoer can evade its effect. Now, viewing the combination to stifle bidding as fraudulent, is such testimony competent? Fraud admitted implies injury such as will stay the hand of a court of equity. 'Whatever be the nature of the plaintiff's claim, and of the relief which he seeks, if his claim grows out of or depends upon, or is inseparably connected with, his own prior fraud, a court of equity will, in general, deny him relief, and will leave him to whatever remedies and defenses at law he may have.' *Pom. Eq. Jur.* § 401. And now, September 21, 1893, the exceptions must be dismissed, at the cost of the exceptant."

West McMurray and Shiras & Dickey, for appellant. Dalzell, Scott & Gordon, for appellees.

PER CURIAM. All the facts necessary to a proper understanding of this case are clearly and concisely set forth in the statement and opinions of the learned president of the orphans' court, dismissing appellant's petition for subrogation, etc. The questions involved have been so fully considered, and so satisfactorily disposed of, by him in said opinions, that we adopt them, and affirm the decree thereon. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 273)

CASS v. PENNSYLVANIA CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

NUISANCE — BRIDGE OVER STREET — RIGHTS OF ABUTTING OWNERS — MEASURE OF DAMAGES — LIMITATION OF ACTION.

1. The erection, by a railroad company, of a bridge on a street, under decree of court permitting it, is legal, and such structure is not a nuisance.

2. A person in front of whose property the structure was erected, if entitled to recover damages at all, is entitled only to permanent damages to his property as of the date of the completion of the structure.

3. Limitation to such person's right of action for damages, if he be entitled to any, commences to run not later than the time when the work commenced had progressed to such an extent as to obstruct ingress and egress to and from his property.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Action by Charles W. Cass against the Pennsylvania Company for damages to plaintiff's property, caused by the erection of a bridge in front of such property. There was judgment for defendant, and plaintiff appeals. Affirmed.

By a proceeding in the court of common pleas, in which the city of Allegheny was plaintiff, and a railroad company managed

by the Pennsylvania Company was defendant, there was in June, 1883, a decree made, by which the railroad company was authorized virtually to change the grade, and erect the bridge complained of.

The following is the opinion on question of law reserved:

"The main question in this case is as to when the statute of limitations in favor of the defendant begins to run. The Pennsylvania Company, lessee of the Pittsburgh, Ft. Wayne & Chicago Railroad Company, and of the Pittsburgh & Cleveland Railroad Company, and operating these roads, with their numerous tracks, at the locus in quo, deemed it necessary to make overhead crossings of their tracks for the streets. A difference arising with the authorities of Allegheny city, the Pennsylvania Company filed its bill in common pleas No. 1 at No. 614, September term, 1882, against the city of Allegheny, in relation thereto. The court proceeded to adjudicate the difference, and on the 14th of June, 1883, made a decree, both parties consenting thereto, by which the streets in question, and complained about in this suit, were directed to be made to cross the railroad tracks by bridges and viaducts in the manner described in the decree, and substantially in the manner in which the changes were made thereafter by the Pennsylvania Company. No additional land was taken, except that belonging to the railroad company. No street, or part of a street, was vacated. No additional part of the streets was occupied by the company for its tracks. On trial, the court ruled that it was substantially a change of grade of these streets, and not a taking of property, and that, the change having been ordered by a court of competent jurisdiction by the consent of the city, the structures were to be considered as lawful, permanent structures, and not a nuisance, and that, if consequential damage resulted to the plaintiff, an adjoining lot holder, he was entitled to recover damages therefor. The argument of plaintiff's counsel has not changed our opinion on this question. The plaintiff's title did not accrue until after the decree of the court authorizing the change, but it did accrue before the work was begun, which was more than six years before the bringing of this suit, but the work and change were not completed until within six years of the date of bringing this suit. Can the plaintiff recover? The authorities are not altogether consistent. In *Campbell v. City of Philadelphia*, 108 Pa. St. 303, the supreme court, in passing on the plaintiff's right to recover damages for change of grade of a street, says: 'The damages are a personal claim, to be assessed in favor of the owner at the time of the injury, and do not run with the land. The claim for damages was ripe when the grade was confirmed.' The judgment in favor of the defendant on demurrer by plaintiff to the plea of the statute of limitations was affirmed. To the same effect, sub-

stantially, is the case of *O'Brien v. Railroad Co.*, 119 Pa. St. 184, 13 Atl. 74. Contra: The case of *Navigation Co. v. Thoburn*, 7 Serg. & R. 411, lays down the general rule that the cause of action arises when the injury is complete,—the work done; and in *O'Brien v. Philadelphia*, 150 Pa. St. 593, 24 Atl. 1047, the present chief justice, quoting from *Ogden v. City of Philadelphia*, 143 Pa. St. 430, 22 Atl. 694, says this rule has been uniformly applied to the taking of private property for public use, from the case of *Navigation Co. v. Thoburn* down to the present day. There is nothing in the constitutional provision which indicates an intent to depart from the general rule that the cause of action could not arise until the actual cutting down of the grounds. If this were a taking of plaintiff's land for use of the company, and for which a bond should have been filed before the work was begun, then the occupation would be a continuing trespass, and the statute of limitations would not be a bar to recovery; but we take a different view of the case, holding it to be a mere change of grade, from which consequential damages resulted. If we are wrong in this, a new trial should be given, if it becomes necessary to reach the merits of the case, as only a portion of the street obstruction complained of abuts on plaintiff's property. In this case it seems to us that, under the authorities and the general rules of law applicable to the case, if the plaintiff had a right of action, having obtained title after the decree for change of grade, and before work was begun, he had a complete right of action when the work was begun, and his usual access to the street was cut off, and that was more than six years before suit was brought. A different rule, under such circumstances, would tend to vexatious delays. We are of the opinion that the statute of limitations is a bar to the action. And now, 15th July, 1893, after argument and upon consideration, the court being of the opinion that, upon the question reserved, the law is with the defendant, it is ordered that, upon payment of the verdict fee, judgment be entered in favor of the defendant non obstante veredicto. Per Curiam." "To which entry of judgment on the question of law reserved, counsel for plaintiff excepts, and thereupon bill sealed for plaintiff. Thos. Ewing. [Seal.]"

Specifications of error:

"(1) The court erred in entering judgment non obstante veredicto against the plaintiff, and in favor of the defendant, upon the special verdict, which special verdict, and the entry of judgment thereon, are as follows: 'We find for the plaintiff in the sum of twenty-five hundred dollars, (\$2,500.00,) subject to the opinion of the court upon the question of law reserved, to wit: We find that the work of changing the street and viaducts complained of was authorized as a whole by the decree of the court; that the work was begun so as to obstruct the streets more than

six years prior to the bringing of this suit, but was not finished until June, 1887, less than six years before the bringing of this suit. We also find that the title of plaintiff accrued 28th May, 1885; that the decree of court authorizing the viaducts and improvements complained of so as to avoid a grade crossing was made June 14, 1883; and that work was begun thereon after the time of plaintiff acquiring title. If, on this state of facts, the court be of the opinion that the law is with the plaintiff, judgment to be entered on the verdict in favor of plaintiff. If the court be of the opinion that the law is with the defendant, judgment to be entered in favor of defendant non obstante veredicto.' 'And now, July 15, 1893, after argument and upon consideration, the court being of the opinion that, upon the question reserved, the law is with the defendant, it is ordered that, upon payment of the verdict fee, judgment be entered in favor of the defendant non obstante veredicto. Per Curiam.'

"(2) The court erred in refusing the plaintiff's first point, which point and refusal are as follows: 'That, if the jury finds the property of plaintiff injured, the entry by the Pennsylvania Company upon Superior Run avenue in front of plaintiff's property, and the erection of the structure complained of, without compensation or security given to the plaintiff, was unlawful.' 'The first point is refused.'

"(3) The court erred in refusing the plaintiff's third point, which point and refusal are as follows: 'That, under the evidence in this case, the entry and occupation of Superior Run avenue was as against the plaintiff, if the jury find that his property has been injured by the erection and maintenance of the viaduct, a continuing wrong, and the statute of limitations does not run.' 'The third point is refused.'

"(4) The court erred in affirming defendant's second point, which point and affirmation are as follows: 'That, under all the evidence in this case, the viaducts and approaches on Superior Run avenue, Preble avenue, and Market street are not nuisances.' 'The second point is affirmed. The changes and improvements made are not illegal, and not nuisances, in that sense, any more than an authorized change of grade in a street is a nuisance.'

"(5) The court erred in refusing the plaintiff's second point, which point and refusal are as follows: 'That if the jury find that the structure erected was not of the character provided for in the decree at No. 614, September term, 1882, of the court of common pleas No. 1 of Allegheny county, Pa., then this structure is an illegal one.' 'The second point is refused.'

"(6) The court erred in refusing plaintiff's fourth point, which point and refusal are as follows: 'That, under the pleadings, plaintiff has a right to recover for damages to his use and enjoyment of the property up to the

bringing of this suit, and for permanent injury to his property as of the date of this suit." The fourth point is refused. The plaintiff is entitled to recover for permanent damage to his property as of the date of the completion of the work complained of, if there be any such damage."

Knox & Reed, E. W. Smith, and W. H. McClung, for appellant. William Scott and George B. Gordon, for appellee.

PER CURIAM. There was no error in refusing plaintiff's first to fourth points, inclusive, nor in affirming defendant's second point for charge; and hence the second to sixth specifications of error are not sustained. The only remaining specification is the first, which charges error in entering judgment non-obstante veredicto against plaintiff, and in favor of the defendant, on the special verdict. The correctness of that judgment is sufficiently vindicated in the opinion of the learned president of the court below. All that is necessary to be said on the questions involved will be found therein. Assuming, for the sake of argument, that plaintiff had a cause of action, it was barred by the statute of limitations. The right of action, to whomsoever it accrued, was complete not later than the time when the work commenced had progressed to such an extent as to obstruct ingress and egress to and from the property to the streets; and the jury expressly found "that the work was begun, so as to obstruct the streets, more than six years prior to the bringing of this suit." The statute was therefore a flat bar. We find no error in the record that should interfere with the affirmation of the judgment. Judgment affirmed.

(159 Pa. St. 10)

BUTLER SAV. BANK v. OSBORNE et al.

Appeal of OIL-WELL SUPPLY CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

PARTNERSHIP—WHAT CONSTITUTES—COTENANCY IN OIL-WELL LEASE.

1. Each of two firms bought an undivided one-half of certain leases of land on which an oil well had been drilled, and prepared the well for pumping, each paying one-half of the expense. When the first well was put in order, they drilled another well, and divided the expense incurred. The oil was run into pipe lines serving the district, and one-half of it was credited to each firm. *Held* not to show a partnership.

2. A sale by the sheriff, at the instance of a creditor, of the title of one of the firms in the leases, passed title, and the sheriff's vendee became a tenant in common with the other part owner.

Appeal from court of common pleas, Butler county.

Action by the Butler Savings Bank against D. Osborne and others. From a decree overruling its exceptions to the report of an auditor, distributing the proceeds of the

sheriff's sale of certain personal property of defendants, the Oil-Well Supply Company appeals. Affirmed.

James C. Boyce, A. T. Black, and T. C. Campbell, for appellant. Newton Black, for appellee Butler Savings Bank. W. H. Lusk, for appellees Collins and Heasley.

WILLIAMS, J. The question raised on this record grows out of the following facts: The firm of D. Osborne & Bros. was engaged in drilling oil wells, and producing oil. It was an owner of some leases on which it was operating, and a part owner, as a tenant in common with other part owners, in others. In the same district, the firm of Carruthers & Peters was engaged in the same business, and in the same manner. Each of these firms bought an undivided one-half of two leases, known, respectively, as the "Cookman Lease" and the "Duncan Lease." Both leases were obtained from the same vendor, who was engaged in drilling a well upon one of them at the time of sale. The sale included the drilling tools and machinery in actual use, and it was agreed that Duncan, their vendor, should proceed to complete the work of drilling he had begun. When this was done, the two firms proceeded to prepare the well for pumping, each paying one-half of the expenses incurred. As soon as the first well was put in order, the owners entered into an agreement with each other to drill another well on the same lease, and to pay their one-half part of the cost of it. They divided the expenses incurred in pumping and in the care of the leases in the same manner, each paying one-half. The oil produced was run into pipe lines serving the district, and there credited, one-half to Osborne & Bros., and one-half to Carruthers & Peters.

Upon these facts the appellant contends that the tenants in common of the Cookman and Duncan leases became partners. It is not alleged that any contract of partnership was ever entered into between the two firms, or that any new partnership name was adopted to represent them in their operations upon these leases. Their relation towards each other, as the result of their purchase of their respective interests in the leases, was that of tenants in common. They were engaged in the development and operation of the common property for their individual benefit. They were doing what tenants in common may properly do, and in the only way practicable for them, viz. turning the common property to the profit of its owners at their individual cost, and dividing the product between themselves, in the pipe lines, in shares corresponding with their interest in the title. The firm of D. Osborne & Bros. seems to have been badly in debt. The Butler Savings Bank was among its creditors, and was the holder of two judgments against the firm

and the individuals composing it, on which writs of fieri facias were issued on 29th of June, 1892. The appellant was also a creditor, having one or more judgments entered against the firm. On the 2d of July, 1892, it caused a special writ of fi. fa. to be issued, directing the sheriff to levy on the interest of D. Osborne & Bros. in an alleged partnership composed of the firms of D. Osborne & Bros. and Carruthers & Peters. The sheriff seized and sold, at the instance of the bank, the title of Osborne & Bros. in both leases. At the instance of the appellant, he seized and sold the interest of Osborne & Bros. in the alleged new firm.

Whether the appellant is entitled to come in on the fund raised by the sheriff by means of a sale made upon all the writs in his hands depends on whether the alleged partnership between the tenants in common had any existence. If it did, the two leases were partnership property belonging to that partnership. The interest of Osborne & Bros. would, in that case, go to the purchaser at sheriff's sale, subject to a settlement of the partnership business, and would be simply a right to receive one-half of what might remain after that business was closed up, and the proceeds of such sale would go to the special writ of fi. fa. If, on the other hand, no such partnership existed, then the title of D. Osborne & Bros. was that of a tenant in common owning one-half of the leases. The purchaser at sheriff's sale would succeed to their title, and the money raised would go to the bank, as the proceeds of the sale of the property of its debtor. In the case of *Dunham v. Loverock*, 27 Atl. 990, we have held, at the present term, that tenants in common engaged in the improvement or development of the common property will be presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began. As to third persons, they may subject themselves to liability as partners by a course of dealing, or by their acts and declarations; but as to each other their relation depends on their title, until, by their agreement with each other, they change it. The act of 25th April, 1850, gives the courts jurisdiction in equity over the settlement of accounts between tenants in common of mines and minerals, and empowers them to "cause to be ascertained the quantity and value of the coal, iron ore or other minerals, so taken respectively by the respective parties, and the sum that may be justly and equitably due by, and from, and to, them respectively therefor, according to the respective portions and interests to which they may be respectively entitled in the lands." This power over the accounts between tenants in common was exercised by the courts of equity in England long before our statute was passed, and, as between the tenants in common and third parties, the

same controversy frequently arose that exists in this case. The effort of third parties, extending credit to them, was to hold them liable as partners, just as the appellant seeks to do here. But the rule in England, as I understand it to be, is that when tenants in common agree to carry on mining operations upon their land, each contributing towards the expenses in proportion to his or her respective interest or estate in the land, they will be considered, with respect both to themselves and third persons, as the ordinary owners of land working their respective shares of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property. *Bainb. Mines*, c. 9, p. 296. The several owners may form a partnership for the purpose of operating the common property, if they so agree; but in the absence of an agreement they will be presumed to deal with each other and the common property as part owners, holding as tenants in common, and liable to each other in account rendered or in equity, as the circumstances may seem to require. In the case now before us, there is no need to rely on the presumption, as the auditor has found, as a fact, that no partnership existed between the two firms owning the Cookman and Duncan leases. From this finding of fact the auditor correctly concluded, as a matter of law, that the special writ of fieri facias issued by the appellant against the interest of D. Osborne & Bros. in the alleged partnership had nothing on which it could be executed. The contention of the appellant fails, therefore, on both grounds. The law does not imply a partnership between tenants in common because of the fact that they agree to develop or operate the common property, since they may rightfully do this by virtue of their respective titles as part owners; and, next, the existence of an express agreement creating a partnership is negatived by the finding of the auditor, concurred in by the court below. As it is thus settled that the alleged partnership did not exist, the conclusion is inevitable that the sale on the writ in favor of the bank passed the title of D. Osborne & Bros. in the two leases to the sheriff's vendee, who thereupon became a tenant in common with the other part owner. The proceeds of the sale were therefore properly distributed in the court below, and the decree of distribution is affirmed.

(158 Pa. St. 621)

WOLF v. WOLF et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

TRESPASS — AMENDMENT OF DECLARATION — EVIDENCE — INSTRUCTIONS — PARTITION BETWEEN TENANTS IN COMMON — STATUTE OF FRAUDS.

1. Where, in an action for damages for trespass on land, the title to which, with that of

an adjoining lot, was in plaintiff, but which had been occupied from the date of plaintiff's title by defendants and their ancestor, W., a brother of plaintiff, claiming ownership by virtue of W.'s alleged payment of part of the price of the whole tract and subsequent partition between plaintiff and W., the jury are instructed to find for defendants if W. paid part of the price, and plaintiff and W. orally agreed to a division, and a division was made, and each recognized such division, and are then told that, in the absence of any writing between plaintiff and W. as to the title of W., a parol partition would vest no title in W., and that therefore they were to disregard all testimony as to the alleged partition, a verdict for plaintiff will be set aside on appeal, as such instructions are conflicting.

2. The statute of frauds is not impinged by a parol partition of lands between tenants in common.

3. A parol agreement between tenants in common to divide the land, followed by a marking of the division line on the ground, and occupancy in pursuance thereof, is sufficient to vest the title in severalty.

4. In an action involving the ownership of land, the title to which was in plaintiff, but which was claimed by defendants by virtue of the alleged payment by their intestate of part of the purchase price of a larger tract, under an agreement with plaintiff to divide, plaintiff is incompetent to testify as to his acquisition of title under Act May 23, 1887, § 5. cl. E.

5. An amendment to a declaration in trespass, naming an entirely different tract from that described in the writ, should not be allowed.

6. In an action involving the ownership of land, the title to which, with that of an adjoining tract, was in plaintiff, a witness who had been called to prove that he had made a draft of the land described in plaintiff's deed cannot be asked, on cross-examination, whether the land in controversy was a part of the land described in the draft, where such question was not asked on the direct examination.

7. In an action for damages for cutting timber on plaintiff's land, it is error to admit evidence of a cutting by one M., where such evidence is not followed by proof that M. was acting for defendant or by his direction.

8. In an action for damages for cutting timber on plaintiff's land, evidence is competent that defendant hauled away timber from the land after the action was brought.

9. In an action involving title to land, a witness may testify that some 10 years before the bringing of the action he saw persons cutting timber on the land, where such testimony is followed by that of the persons seen, to the effect that they were acting for plaintiff, such evidence being competent as tending to show acts of ownership by plaintiff.

10. In an action involving title to land, it is error to exclude, on the ground that a contract in writing cannot be modified by parol, defendant's offer to show that, several years before suit, plaintiff and defendant, by a contract partly in writing and partly in parol, settled their dispute as to land, and agreed that the land in controversy was to belong to defendant, as it could not be known until the contract was introduced whether the verbal part contradicted the written part.

11. In an action involving title to land, error cannot be predicated on an instruction that, if there is no showing by defendant that the land was not the land of plaintiff, the offering in evidence by plaintiff of a deed to him of the land in controversy from the common grantor entitles him to recover.

Appeal from court of common pleas, Armstrong county; Calvin Rayburn, Judge.

Trespass quare clausum by Jacob Wolf

against Isaiah Wolf and another. From a judgment for plaintiff, defendants appeal. Reversed.

B. Nulton and W. D. Patton, for appellants. M. F. Leason and James H. McCain, for appellee.

GREEN, J. There seems to be a serious inconsistency between the general charge of the learned court below and the answer to the plaintiff's third point. There was considerable testimony to the long-continued possession of Daniel Wolf and his children of the land in controversy, and of an ancient possession in common with Jacob Wolf, the plaintiff. It was not at all disputed that Daniel Wolf and his family had lived on, and cultivated, a portion of the entire tract, from a time prior to the year 1860,—perhaps as far back as 1854. It was also in full proof that, during this period, all the ordinary acts of ownership, such as plowing, fencing, gathering crops, cutting wood and timber, and the usual acts and conduct of the owners of farm and woodland, were carried on by Daniel and his family upon the portion of the lands occupied by them. It was also claimed by the defendants that a parol partition of the land was made between Daniel and Jacob in the year 1871, and that a division line was then run, with the consent of both parties, by a surveyor named Briney, and that, after that time, each of the brothers occupied and cultivated his part of the land up to this division line. Under all the testimony in the cause bearing upon these features of the case, the court below left the questions arising to the jury, saying to them: "There is a dispute as to the facts about this by these witnesses before you, and it will be for you, gentlemen, to say, from all the circumstances surrounding the case, which of these parties is entitled to credence; and we say to you that if you believe that Daniel Wolf lived upon that part of this land all this time, and that he helped pay for the land, and that he and Jacob agreed to this amicable partition of land,—that is, if Jacob agreed with this, that the line should be run, and it was run and established there, and recognized by them as the line,—then the plaintiff would not be entitled to recover here; that would put the title to that part of the property in Daniel Wolf." Under this portion of the charge, the jury would have the whole case with them, and their verdict would settle the questions stated. But the answer of the court to the plaintiff's third point seems to take the entire subject of the alleged parol partition of the land away from the jury, and directs them practically to disregard the whole of the testimony on that subject. The point was: "The court is requested to say to the jury that in the absence of any writing between Jacob Wolf and Daniel Wolf as to the title of Daniel Wolf to any part of this land, signed either by Jacob Wolf or

his authorized agent, then a parol partition of the lands will vest no title to the land in dispute, either in Daniel Wolf or his heirs or legal representatives, and that the testimony given in this case as to a parol partition cannot be submitted for their consideration under the statute of frauds and perjuries." This point was affirmed by the court without qualification, and the jury was instructed that, if they found a trespass had been committed, they should determine what the damages were for the timber carried away. Now, the case of *McKnight v. Bell*, 135 Pa. St. 358, 19 Atl. 1036, decides precisely the reverse of this. We there held that, if tenants in common, intending to make partition, run and mark upon the ground a division line, and actually take possession of their respective parts in pursuance thereof, and the partition is fully executed between them, the title will vest in severalty. This was the practical effect of what was said in the general charge, but in the answer to the point this was all taken away, and the jury was directed to disregard all the testimony on this subject. Of course, the jury could not tell what they were to do in such circumstances, and for that reason we are obliged to sustain the tenth assignment. We held, in *McKnight v. Bell*, that the statute of frauds was not impinged by a parol partition of lands between tenants in common.

On the trial, Jacob Wolf was examined as a witness in his own behalf. As to matters occurring after the death of his brother Daniel, his competency as a witness was not questioned; but he offered, and was permitted, under objection and exception, to testify to his original acquisition of title, to the payment of the purchase money, and to his continued occupancy of the land, all of which occurred long before the death of his brother Daniel. The controversy was over Daniel's title, which had devolved upon his children, one of whom was a defendant in the case. The plaintiff was allowed to testify that he bought the land in 1860; that he paid the whole of the purchase money; that Daniel paid none of it; and that he (Jacob) lived on the land from the time of the purchase to the time of the trial. Now, the payment of the purchase money was one of the chief questions in the case, the defendants contending that Daniel had paid his share of it, and that thereby a resulting trust arose in Daniel's favor. As a matter of course, Jacob Wolf was not competent¹ to testify upon such subjects, as his brother's

mouth was closed by his death, and the title of Daniel was directly in issue. We therefore sustain the fourth specification of error.

An amended declaration was offered and admitted on the trial, under objection and exception. If this were only to correct some mistake in the description of the land, leaving the identity of the land described in the writ, with that described in the amendment, unimpaired, there would have been no error in allowing it. But in point of fact the land described in the amendment is an entirely different piece of land from that described in the writ. No part of the land described in the writ is contained within the boundaries of the land described in the amendment. It follows that the cause of action described in the writ was a trespass committed by cutting timber on one tract of land, and the cause of action described in the amendment was for cutting timber on another and different tract of land. A trespass on the one tract would not be a trespass on the other tract. In this case the land described in the writ was undoubtedly the land of Jacob, and, if the timber had been cut on that tract, a trespass would have been committed; but the land described in the amendment is land claimed by the defendants, and the cutting of timber on that tract would be no trespass as to Jacob, if the land belonged to Daniel. The change made by the amendment, therefore, was radical and vital. There was no attempt to prove the cutting of timber on the land described in the writ. All the proof was of a cutting on the land described in the amendment, and, if that land belonged to Daniel, there was no trespass as to Jacob. Hence, the amendment attempted to introduce an entirely new and different cause of action, and should not have been allowed. In *Wilhelm's Appeal*, 79 Pa. St. 120, it was said: "The true criterion is, as all the authorities show, did the plaintiff so state his cause of action originally as to show that he had a legal right to recover what he subsequently claims?" and, citing from the same opinion: "The principle has been very accurately and succinctly stated by the present chief justice in *Smith v. Bellows*, 77 Pa. St. 441: 'The test lies in the cause of action, and not the statute of limitations. If the cause of action is the same declared upon, then the writ, quoad it, was brought in time. If the cause of action was not the same, then the action was not brought for it, and the statute of limitations would fairly apply.'" We therefore sustain the eleventh and twelfth assignments of error.

The witness Slaymaker was simply examined in chief to prove that he had made a draft of the land described in the deed from Gilpin and Johnston to Jacob Wolf. He did not say, and was not asked to say, whether the land in controversy was any part of the land described in the draft. Hence, it was

¹Act May 23, 1837, § 5, cl. E, provides that where any party to a thing or contract in action is dead, and his rights therein have passed to a party on the record, neither the surviving or remaining party to such contract, nor any other person whose interests are adverse to the rights of the deceased party, shall be a competent witness to any matter occurring before his death.

not proper cross-examination to inquire of him on that subject. The first assignment is not sustained.

The defendants in the action were Isaiah Wolf and George Crissman. On the trial, evidence was given of an act of cutting timber by another person, named Merele Wolf. His name was not discovered till after the evidence was in, and then the defendants moved to strike out this testimony; but the court refused to strike it out, on the ground that it might be followed by evidence showing that he was acting for the defendants, or by their direction. We have not been referred to any such testimony, and therefore think that application to strike out the testimony of Painter in reference to acts done by this person should have been granted, and we sustain the second assignment.

We do not think the objection to the Painter draft was sufficient to warrant its exclusion, and therefore we do not sustain the third specification. The witness Lee Wolf testified to a cutting of timber by the defendants in the spring of 1891, which was before the action was brought. He also testified to seeing some timber hauled away from the land after the action was brought, and this was competent, under our ruling in *Trout v. Kennedy*, 47 Pa. St. 387. We therefore do not sustain the fifth specification.

We do not sustain the sixth and ninth specifications, as the testimony of A. G. Wolf, which was admitted under exception, was immediately followed by that of the persons as to whom he testified, who clearly established that they were working under Jacob Wolf, and the cutting, being an act such as an owner would perform, was for the consideration of the jury, along with all the other pertinent testimony.

We sustain the seventh assignment, because the offer of proof was sufficient, and if the testimony, when received, supported the offer, it was competent. It would not be possible to know in advance whether any part of it might be objectionable as resting in parol, and contradictory of a written agreement. After the part of the proof which was in writing was admitted, it would become possible to know whether the part of it which was verbal was contrary to the rule which rejects verbal testimony to alter or contradict a writing.

We do not sustain the eighth specification, because what the court said as to the effect of the deed was strictly correct, if there were were "no showing on the part of the defendants that the land was not the land of Jacob Wolf," as is stated by way of qualification in the concluding part of the clause of the charge assigned for error. We cannot infer, from anything contained in this extract from the charge, that the court intended to deny the very familiar rule that the plaintiff in trespass *quare clausum fregit* must not only show title, but actual possession. Judgment reversed, and new venire awarded.

(159 Pa. St. 133)

HAHN v. HUTCHINSON.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

FRAUDULENT TRUST—CREDITORS OF TRUSTEE.

Though a will, in terms, declares a devise of a life estate to testator's husband to be "in trust," yet where no trust is specified, and the absolute control of the entire income is vested in the husband to use and dispose of as he may see fit, without liability to account to any one, he must be deemed the absolute owner of the income as long as he lives; and a further provision in the will, exempting the income from liability for any of his debts, present or future, is void, as being an attempt to free the absolute owner of an estate from the claims of his creditors.

Appeal from court of common pleas, Allegheny county; White, Judge.

Application by Louis Hahn for a rule on David Hutchinson to show cause why a writ to sequester the rents, issues, and profits of certain land levied on by execution under a judgment obtained by Hahn against Hutchinson should not be awarded. From a judgment making the rule absolute, defendant appeals. Affirmed.

The will of Margaret Hutchinson, who died on 28th November, 1890, was dated 6th June, 1888, and proved 7th January, 1891, and registered in the register's office, in Will Book, vol. 38, p. 243. Mrs. Hutchinson was possessed of a considerable quantity of real estate. The plaintiff had a judgment against David Hutchinson, the husband of Margaret, obtained at No. 257, October term, 1882, common pleas No. 2. The cause of action for which the judgment was obtained accrued about 16th October, 1877. The plaintiff, claiming that David Hutchinson took a life estate under the will, made a levy upon the real estate which was of Margaret, and then took a rule on David to sequester the rents, issues, and profits thereof. An answer was filed, setting up that David did not have a life estate, but the estate was a trust estate.

A. K. Stevenson and W. B. Rodgers, for appellant. Shiras & Dickey, for appellee.

GREEN, J. The first clause of the will of the testatrix creates the interest given to her husband. The second clause creates the interest of the two daughters, but it is made "subject to all the provisions of the first clause." Neither the interest of the daughter Jeannette Moffit, nor of the daughter Annie Margaret Hutchinson, commences or has any existence during the life of their father, David Hutchinson. The daughter Annie Margaret has no right to any income from the estate until after her father's death. For the purposes of the present contention, it is only necessary to determine whether the power of David Hutchinson over the income of the estate is absolute in him, and unclogged by any trust for others, during the term of his own life, for it is only his life estate that is pro-

posed to be sequestered for the benefit of his own creditor. To dispose of this question, it is only necessary to consider the extent and character of the actual interest which he takes under the first clause of the will. The words of the clause are: "First. For the purpose of carrying out this, my will, I give, devise, and bequeath to my husband, David Hutchinson, my entire estate, real, personal, and mixed, in trust, he to have the entire control, so long as he may desire, of the same, and use so much of the income thereof as he may desire." Then follows a provision that the income shall not be liable to any of his debts, present or future, except such as he may contract for improvements or repairs for the benefit of the estate. The remaining provisions of the first clause of the will are simply to make sure and stable his right to take the entire income of the whole estate; to own it, use it, control it, dispose of it, without any liability to account for it to any one,—particularly to the children of the testatrix. To this end, he is empowered to improve, sell, or incur the real estate, "with the same effect as if he were the owner," except that, in making deeds or mortgages, he must execute them as trustee. He is also empowered to make a last will and testament, and thereby "to alter, vary, or change the amounts coming to" the children, under the will of the testatrix, and "to designate the property, and make a division of the same as he may deem best, and such division shall be binding and conclusive on all parties affected thereby." As the ownership of the income during the life of David Hutchinson is the only important subject of inquiry, it is not necessary to consider the rights and interests of the children or of others after his death.

It cannot be questioned, under all the authorities, that David Hutchinson is the absolute and uncontrolled owner of all the income of the entire property during all his life. He holds no portion of it in trust for his daughters, or either of them. He is not bound to accumulate a single penny of it for them, or to hold any portion of it for them, in any event. He is at perfect liberty to take the whole of it, and do what he pleases with it, without any liability to account for it at any time. It is true the will says he is to take it in trust, but there is no trust specified; and, as he alone has the absolute right to use and dispose of the whole of it, he is the only beneficiary of the so-called "trust." In other words, he is the absolute owner of it. The following cases fully establish the correctness of this conclusion: *Meyers' Appeal*, 48 Pa. St. 26; *Cox v. Rogers*, 77 Pa. St. 160; *Lininger's Appeal*, 110 Pa. St. 398, 1 Atl. 722; *Goe's Estate*, 146 Pa. St. 431, 23 Atl. 383; *Mercur's Estate*, 151 Pa. St. 49, 24 Atl. 1094. In *Rife v. Geyer*, 59 Pa. St. 393, it was said in the opinion: "Whenever the entire

beneficial interest is in the cestui que trust, without restriction as to the enjoyment of it, there is no reason why it should not be considered as actually executed." And we held that, in order to protect the estate from creditors, the legal estate must be in the hands of a trustee, and, if the equitable estate became merged in the legal, it could be immediately seized in execution by creditors. In *Estate of Beck*, 133 Pa. St. 51, 19 Atl. 302, we sustained a testamentary provision, in favor of a daughter, that her share should not be liable to be attached or seized for her debts, and held that while it was in the hands of the executor, in transit, it was protected, but also said that the trust would end as soon as the money was paid to the lessee. In the present case the income of this estate goes directly into the hands of the nominal cestui que trust, and it remains there because it is his own. If he is trustee at all, it is for himself alone. There can be no intervening person clothed with the title, and having a duty to perform of preserving the trust in order to pay the fund over to another, who is its equitable owner. All the title to the money, legal and equitable, is centered in the one person, and the payment to that one person is the only payment that can possibly be made. As a matter of course, a person cannot declare a trust of his own property in his own favor, and, by making himself his own trustee, prevent his creditors from getting access to it. Yet there is no real difference between such a trust and this one. The authorities cited by the appellee do not reach the state of facts which are present here. In *Ashhurst v. Given*, 5 Watts & S. 323, the trustee was clothed with the legal title to a large estate, with which he was to carry on an extensive business, and he was entitled to nothing out of the property or the profits, except a reasonable support for the service rendered. Other persons were to receive both the income and principal of the fund, except so much of the income as was necessary to support the trustee while performing his duties as such. In *Overman's Appeal*, 88 Pa. St. 276, the present question did not arise. It was a case of a perfectly good spendthrift trust, in which the executors were the depositaries of the legal title, and the children entitled to the income were the cestui que trust. It is true that one of the executors was one of the children, but that fact could not destroy the legal title of the trustees. As the terms of the trust prohibited liability for all debts and obligations, they operated just as certainly against a liability created by a devastavit as against any other form of indebtedness. In *Dickerson's Appeal*, 115 Pa. St. 198, 8 Atl. 64, although the donor was himself the trustee, the trusts declared were not for his benefit, but for his children, as to whom it was perfectly competent to create a valid trust. The trustee took nothing under the trust.

The writer has carefully examined all the reported cases in which spendthrift trusts were sustained, but he has not found one, nor has any been referred to us, in which the trustee was also the cestui que trust, with the absolute ownership of the subject of the trust, whether income or principal. But in the case of Mackason's Appeal, 42 Pa. St. 330, we held that one sui juris cannot, as against creditors, either prior or subsequent, settle his property in trust for his own use for life, and over to his appointees by will, and, in default of such appointment, to the use of his lawful heirs in fee. That property so settled is assets in the hands of the trustees for the payment of debts, whether contracted prior or subsequent to the execution of the deed of trust, and the devisees or appointees under the will of the settlor will be postponed to his creditors. In this case the deed was made to third persons as trustees, and they were to pay over the net income of the estate to the grantor during his life, and to his appointees by will after his death, and, in default of such appointment, to such persons as would have taken the same under the intestate laws. The deed of trust contained an absolute prohibition of any kind of debts, liabilities, or engagements of the cestui que trust. At the date of the deed the grantor was indebted, but all of that indebtedness was paid off by the trustees. Before his death, he again became indebted, to the amount of about \$8,000, and these debts were unpaid at his decease. The trustees sold the property, invested the proceeds, paid him the income during his life, settled their account after his death, and the fund was then claimed by his creditors and his appointee. The court decided in favor of the creditors. Mr. Justice Thompson, in delivering the opinion, said: "This statement brings us to the simple inquiry, can the owner of property so dispose of it for his own use, benefit, and support as to put it beyond the reach of liability for his future debts,—he being and continuing sui juris, and there appearing to be no reason therefor, except to withdraw it from such liability,—and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds. * * * The proposition is that such a settlor may be the complete equitable owner of all his property, deal as much as he pleases with it, and it shall not be liable for his debts." The whole course of the reasoning is that a man shall not be the real owner of property, with the full right to deal with it as he pleases, taking the full income of it to his own exclusive use, and keep the same free from the claims of his creditors. What he cannot do for himself in this regard, cannot be done for him by another.

When the grant comes from another, and yet has these incidents, it is as obnoxious to the foregoing objections as when it arises upon his own grant to third persons as trustees for him. Judgment affirmed.

(159 Pa. St. 194)

COMMISSIONERS OF SEWICKLEY WATERWORKS v. BOROUGH OF SEWICKLEY.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MUNICIPAL CORPORATIONS—CONTROL OF WATERWORKS.

Sp. Act Feb. 21, 1873, which creates a board of five commissioners to superintend the construction and operation of waterworks in the borough of Sewickley, to be paid for by the borough, and which requires them annually to report to the borough council as to the condition of the works, and as to the receipts and expenditures, vests the borough with the absolute ownership of the works, and the commissioners are merely its officers or agents; and, since the general borough act of 1851, under which Sewickley was incorporated, requires it to furnish a sufficient water supply for the extinguishment of fires, cleansing streets, "and other public purposes," the board of water commissioners has no legal right to control the common council of the borough in making a moderate and prudent use of the water for street sprinkling purposes, and in laying its sewers in a proper manner.

Appeal from court of common pleas, Allegheny county.

Bill by the commissioners of the Sewickley Waterworks against the Borough of Sewickley to enjoin defendant from using the water supply of said borough without the consent of the commissioners, except in case of fire. From a decree in plaintiff's favor, defendant appeals. Reversed.

Patterson & Smith, for appellant. John N. White, for appellee.

GREEN, J. The defendant was incorporated as a borough in the year 1853, under the general borough law of 1851, and of course possessed all the powers and authorities conferred upon such municipalities by the provisions of that law. Among these is the power "to regulate the roads, streets, lanes, alleys, common sewers, public squares, common grounds, foot walks, pavements, gutters, culverts, and drains, and the heights, grades, widths, slopes and forms thereof, and they shall have all other needful jurisdiction over the same." "To make such other regulations as may be necessary for the health and cleanliness of the borough." To borrow money, and to lay and collect taxes, general and special, and "the money so raised and collected shall be used, laid out and expended for the following purposes and none other, namely: for the purpose of purchasing, erecting and maintaining such fire plugs and hydrants, gas lamps, posts, gas or kerosene lamps, and hose for fire engine companies, as may be required to supply the said boroughs with a sufficient sup-

ply of water for the extinguishment of fires, cleaning the streets, and other public purposes, and with gas or kerosene oil for the purpose of properly lighting and illuminating the streets, lanes, alleys and other public places in said boroughs, of paying for said gas, water and hose for fire engines, and defraying the expenses in making all necessary attachments to gas and water mains in said boroughs, together with all other necessary expenses in securing a full, sufficient and abundant supply of gas, water and hose for fire engines, in and throughout the said boroughs for the said purposes, subject to all further provisions of this act." By the act of May 24, 1878, (P. L. 118, § 1; *Purd. Dig.* p. 206, pl. 83,) it is enacted that "the proper authorities of any borough of this commonwealth, owning or controlling water-works for the supply of water to the inhabitants of said borough whenever the schedule of water rents shall have been fixed or limited by general or special acts of assembly, shall be and are hereby authorized to change the rates or schedule of rents, from time to time, so that the same shall not at any time exceed the rates now limited by law." By a special act approved February 21, 1873, a method of supplying the borough of Sewickley with water was provided by means of a board of five commissioners, who were named in the act, and who were clothed with all powers necessary for the erection, maintenance, and operation of waterworks to supply the inhabitants with water. They were authorized to fix and change a schedule of water rents, and to collect the same; and they were required to furnish to the borough council "a particular and detailed statement of all cost in the construction of the works," and also to make annually to the councils "a full and detailed report of all receipts and expenses, and the condition of said works, and shall pay over to the borough treasurer, semiannually, the balance of money in their hands." The money to pay the cost of erection was to be furnished by the borough by an issue of bonds not exceeding \$60,000, and the borough council are to make provision for the payment of the interest and principal of the bonds with the money received from the water rents, and from taxes to be levied for the purpose.

From this review of the legislation affecting the subject it will be seen that the actual work of constructing, maintaining, and operating the waterworks was to be done by the board of water commissioners, who were to report annually to the council of the borough their transactions, and to pay over to the borough semiannually all the money in their hands. As a matter of course, the borough in its corporate capacity is the sole owner of the works and all their accessories of pipes, plugs, hydrants, buildings, machinery, and all fixtures and appurtenances belonging thereto, and the board of commissioners has no interest or ownership in any of these.

They are mere officers, through whose agency the works were constructed, maintained, and operated, with full powers for effectuating those purposes. They were constantly changing by the expiration of their terms of office, and by the election of successors. The occasion of the present contention was of a very trifling character, and from the tenor of the correspondence seems to be more a matter of personal feeling than of any actual substantial controversy. It appears that the borough authorities, deeming it necessary to have the streets sprinkled with water, employed a man with a watering cart to do the work, whereupon the commissioners objected that this was done without their consent, and passed a resolution declaring that the borough authorities "in so doing have acted without any lawful right." In the bill complaint is made, not only of the sprinkling of the streets, but also that contractors laying sewer pipes had opened the fire plugs, and used the water in their work. The answer alleges that as to the use of the water for sprinkling the streets it was done because the roads and streets of the borough had become very dusty, and the dust and sand were blown by the wind over the properties along the line of the principal streets, and that the councils were strongly petitioned by the citizens of the borough to employ a sprinkling cart to lay the dust on the streets, and relieve them from the nuisance occasioned thereby. That in complying with this request the councils acted for the best interest of the inhabitants, and without any thought or intent of interfering with the rights or duties of the commissioners. In regard to the use of water in constructing the sewers, the answer alleges that in July, 1892, the citizens of the borough, by a large majority, voted to increase the debt of the borough to the amount of \$25,000 for the purpose of street improvements, and the councils proceeded, in accordance with the action of the citizens, to contract for the laying of sewers on some of the principal streets of the borough, and also for the paving of certain streets with fire-brick pavement. That the contractors "informed the borough that they must have a moderate supply of water to use in putting down ditches, and for other purposes in and about the said public works;" and that the borough engineer had stated he would not be responsible for the result of the work unless a proper supply of water could be had. That the council applied to the commissioners for water for these purposes, and, receiving an ambiguous reply, which they understood to be an assent, proceeded to use the water moderately, and without waste, when the supply was shut off, and a further supply refused. The answer further alleges that under the imperative necessity of completing the public works the borough used the water in a careful and prudent way, and only so far as

was necessary for the prosecution of the work, and that the daily use of the water for some days previous to the filing of the answer was believed to have been less than 10 barrels.

To the answer no replication was filed, and no testimony was taken, but it was agreed that certain correspondence which had passed between the borough and the commissioners should be considered as having been taken before an examiner, and the case was heard in the court below upon the bill and answer, and the correspondence, which is printed in the appellant's paper book. The correspondence, aside from the matters of a personal character, consists of an allegation by the commissioners that the borough had no legal right to use the water for the purposes mentioned without first obtaining the consent of the commissioners, and of an assertion by the borough that they did have such right. The presence or absence of such right is the only real subject of contention here. The court below granted a perpetual injunction restraining the borough "from in any way opening fire plugs, except in cases of fires, or hydrants, or in any manner using the water supplied through the pipes and mains of the said the commissioners of the Sewickley Waterworks, without the consent of the said commissioners, or their authorized agents, first duly had and obtained." It thus happens that the borough is absolutely forbidden to use its own water, brought into the borough in its own pipes, from its own reservoir or other source of supply, and distributed through its own streets, to be drawn from its own fire plugs for the absolutely necessary public purpose of sprinkling its own streets, and using in the laying of its own sewers. The allegations of the answer, being responsive to the averments of the bill, and uncontradicted either by the bill or by any testimony, must be accepted as verity; and, the answer having declared that an application was made to the commissioners for their consent to use the water for the public purposes stated, the supply was shut off, and a further supply refused, that fact must be taken as established. This state of facts presents the question, do the water commissioners possess the legal right to control the borough in the use of water for the public purposes stated? It is very plain that the commissioners have no power whatever to determine when or whether the streets require sprinkling, or when or whether it is necessary to construct sewers. No such authority is conferred upon them by the act of 1873, under which they were brought into existence, and of course there is no other source from which authority can be derived. On the contrary, the borough is expressly clothed with all power to regulate the streets and sewers. The borough is also required to use the money raised by loans and taxation to furnish "a sufficient sup-

ply of water for the extinguishment of fires, cleansing the streets, and other public purposes." It is at once apparent that the sole and exclusive right and power to determine when water is required for cleaning streets and constructing or using sewers is vested in the borough. But, if the borough possesses this right and power, it cannot be trammelled or controlled by any other authority in the full performance of its functions in these regards. It must have the water, and it has the sole power to determine when and to what extent the water must be used. It is the exclusive owner of the entire water supply and works of the municipality; the purposes for which it needs the water are of an entirely public character; and to deny the borough the right to use the water for those purposes is simply to prevent it from performing its plain legal duties. We are very clear that this power is possessed by the borough exclusively, and that the water commissioners have no right or power to interfere with the borough in the exercise of this class of its functions. It is not necessary for the borough to obtain the consent of the water commissioners for the use of the water supply for these purposes, simply because the commissioners have no power or authority or control over the subject. The answer avers that the borough only made a moderate and prudent use of the water for these purposes, and this is not contradicted or disproved. But if, in any given case, the borough should abuse its right to the injury of the citizens, the courts are always open for redress. As the complaint of the commissioners is that their consent was not obtained, and that the borough has no right to use the water, even for public purposes, without such consent, and we do not agree to that view of the subject, it follows that the decree of the court below must be reversed. Decree reversed, and bill dismissed, at the cost of the appellees.

(150 Pa. St. 317)

DAWSON v. CITY OF PITTSBURGH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS —DAMAGES—EVIDENCE.

1. Act May 16, 1891, (P. L. 71.) relating to street improvements, and requiring the viewers to report separately the amount of damages and the benefits assessed, whereas prior thereto they reported the result of their findings on the two matters of damages and benefits as a single sum, either damages or benefits, but not both, did not change the law as to the measure of damages to abutting owners, but it is still the difference between the market value of the property before and after the improvement.

2. On appeal from the report of viewers appointed to assess damages for a street improvement, where the viewers' report is referred to by both parties as part of the case, the judge may call the jury's attention to the assessment of benefits against appellant, and tell them that, unless the market value of her prop-

erty was enhanced to that amount, she should have damages, though the report has not been distinctly put in evidence.

3. Though the measure of damages to abutting property, caused by raising the grade of a street, is the difference between the market value of the property before and after the improvement, it is error to confine the witnesses as to such values to a bald answer to that one question, but they should be allowed to testify as to the necessity of filling the lots, raising the houses, etc., and that this would be expensive, and entail the loss of valuable trees and shrubbery, as this evidence, though not admissible as showing items of damage, is competent as bearing on the market values.

4. A witness may testify to injury to property by change in the grade of a street, though he does not know the figures at which property in the neighborhood is held, as he may know the effect of the change on the relative value, without being able to fix the actual market price.

5. Where, on appeal from the report of viewers as to damages and benefits for a street improvement, one of the viewers testifies as a witness as to the effect of the improvement on appellant's property, the report signed by him, showing an entirely different estimate, is admissible to contradict him, and affect the weight of his opinion with the jury.

Appeal from court of common pleas, Allegheny county.

Petition by the city of Pittsburgh for the appointment of viewers to assess costs, damages, and expenses of grading, paving, and curbing Westminster street. Susannah Dawson appealed from the report of the viewers appointed, and a jury trial was had. From the judgment entered on the verdict, she appeals. Reversed.

M. A. Woodward, for appellant. William C. Moreland and Thomas D. Carnahan, for appellee.

MITCHELL, J. The main contention of appellant—that the act of 16th May, 1891, (P. L. 71,) introduced a new rule for the estimation and measure of damages in the opening or change of grade of streets—cannot be sustained. Before that act, the practice was for viewers to report the result of their findings on the two matters of damages and benefits as a single sum, either damages or benefits, but not both. Under the act of 1891 they report both matters separately, but the net result is the same. The only effect of the change is to give the court primarily, and the parties finally, more information as to the steps by which the result was reached, and better opportunity to have it examined and reviewed. How much of the cost of a local change, which is also a general improvement, should be justly charged to those in the immediate vicinity, and how much to the public at large, and what shall be the legal definition and limits of such vicinity, are questions of great practical difficulty. If all cases were as clear and uncomplicated as the examples put by appellant's counsel, the rule contended for by him, as the intention of the act of 1891, would be a just and desirable one; but in practice

the difficulties are numerous, and the danger of injustice and abuse great. Viewers, as all experience shows, have a strong tendency to find benefits sufficient to cover the whole cost of the improvement, and if, in the search for properties enough for that purpose, they may first find the cost and damages, and then take up the assessment of benefits as a separate and distinct matter, it is safe to prophesy that such properties will always be found. An extension of the doctrine of special local benefits, of such doubtful constitutionality, and not at all doubtful inexpediency, will not be lightly assumed. The settled law was that each property owner concerned was entitled to have his case as a whole, both as to damages and benefits, separately and specially considered, and that, in such consideration, the general increase in value from the development of the neighborhood was not such a local and special advantage to him as to be taken into account as part of the benefit to be assessed upon him. We fail to find any intent in the act of 1891 to change these rules.

In the present case the finding of the viewers as to benefits was not appealed from. Whether such an appeal, from part only of the award, is authorized by the statute, we express no opinion about. Being accepted by both parties, that element of the case was conclusively settled. Whether the viewers' report was distinctly put in evidence or not, it seems to have been referred to by both parties as part of the case, and the learned judge was therefore quite justified in calling the jury's attention to the assessment of \$1,400 on plaintiff for benefits, and telling them that, unless the market value of her property was enhanced to that amount, she should have damages. But, even if it had been technically error, the appellant could not justly complain of it. The greater the value of her property before the new grade, the greater her damages necessarily were; and the judge directed the jury to add these \$1,400 of assessed benefits to the market value before the improvement, and then compare it with the market value afterwards. This was manifestly favorable to the plaintiff.

We are, however, obliged to hold that the learned judge drew the line too strictly upon the appellant's witnesses as to their testimony on the injury to the property. It is true that the measure of damages is the difference between market value before and after the improvement. That is the test by which the jury must be governed, and to which each witness must be brought as a final result of his testimony. But he cannot be confined to a bald answer to that one question. If he could, the jury would have to arrive at a verdict by a mere count of numbers and amounts. The value of an expert's opinion may be fortified on the one hand, or reduced on the other, by an exam-

ination as to his general experience, his means of knowledge in the particular case, and the facts and reasons on which he bases his conclusion. It is matter of opinion at best, and the lowest grade of evidence that ever comes into a court of justice. It is permissible only because, bad as it is, there is nothing better obtainable. Opinions of this, as of other kinds, are apt to differ, and their value is not always in proportion to the confidence with which they are advanced. It is proper, therefore, that the jury should have all the aids possible in enabling them to judge of the weight to which any particular opinion is entitled. To assist them to a right conclusion, matters are often admissible which are not in themselves separate and independent grounds of damage. Thus, in *Railway Co. v. McCloskey*, 110 Pa. St. 436, 1 Atl. 555, it was said by our late Brother Clark that "the cost of fencing cannot be recovered as a distinct item of damages, but the question how much the burden of fencing will detract from the value of the land may be considered by the jury." And in *Harris v. Railroad Co.*, 141 Pa. St. 242, 21 Atl. 590, it was said: "In estimating the value of the lot before the taking, its possible and probable uses are important elements, and may be shown by the opinions of experts. But the details of improvements, the cost, probable rent afterwards, etc., require knowledge of the subject to insure the proper weight to be given, and the inferences to be drawn from them. [And it might have been added, as it was in *Railway Co. v. McCloskey*, that they are speculative in character.] Hence, they are not admissible as independent facts for the jury. * * * But such details ought to enter into the view of the expert in forming his judgment, and whether they have done so is a legitimate subject of cross-examination," or of examination in chief. The case of *Chambers v. South Chester Borough*, 140 Pa. St. 510, 21 Atl. 409, is not at all in conflict with these views. In that case, which was closely analogous in its facts to this, the plaintiff offered to prove the cost of filling up the lot to a level with the street at its new grade, but the offer was excluded by the court "because it does not appear that it was a level lot formerly;" and, further, the court said: "You may show that the house had to be raised, but I don't think the cost will be evidence," i. e. of a separate item of damage. That this was the meaning of the court is clear from the charge further on, where it is said: "You may consider these several matters as elements in the cause, but you are not to award damages for the building of walls, or the filling up of lots, as special damages. You are not to take up these separate items, and award separate damages for them, and add them together, and say that is the damage suffered. The law has given another rule," etc. This was quoted and approved in the opinion of this court. In the present case, the learned judge

applied the rule that limits the jury to the estimate of the difference in market value so stringently to the witnesses that some, at least, of them, were prevented from testifying on matters that were relevant and material to the main issue. No doubt these rulings were largely induced by the persistency of counsel in trying the case on the theory that the act of 1891 had introduced a new rule, and by the difficulty of getting witnesses, under his examination, to conform to the true rule as laid down by the court. But, however produced, they deprived the plaintiff of some evidence that she was entitled to put before the jury. Thus, the facts that the new grade left the plaintiff's house in a depression; that one of the ways in which that disadvantage could be remedied would be by raising the house, and filling in the ground; and that that process would not only be expensive, but would also entail the loss of valuable trees and shrubbery,—all these matters, and, in a general way, the cost of them, were competent evidence; not, indeed, as in themselves items of damage, for, as the learned judge justly said, there are cases where property is entirely destroyed for its former use, and yet its market value is increased, but as elements bearing on the difference of such market value. Moreover, testimony as to injury to the property was competent, though the witness, as in the case of *Mawhinney*, (sixth assignment of error,) could not state the figures at which property in that neighborhood was held. A man may know the effect on the relative value without being able to fix the actual market price. Such evidence is admissible, at least in corroboration of others who may give definite figures.

It was also error to exclude the report of the viewers in contradiction of *Woodwell*. It showed that he, as a viewer, had signed a report making an entirely different estimate of the effect of the improvement on plaintiff's land from that to which he had testified at the trial. It was competent for the plaintiff to show this, and to have the benefit of it in reduction of the weight of *Woodwell's* opinion with the jury, even though, in so doing, she might introduce evidence not admissible for other purposes. Judgment reversed, and venire de novo awarded.

(153 Pa. St. 579)

WILEY v. BRUNDRED. (No. 141.)

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

PARTNERSHIP—DISSOLUTION—UNLIQUIDATED CLAIMS.

A firm having sold out its business on the basis of a trial balance of debts and claims still outstanding, sold them to B., one of their number, he assuming all the liabilities and paying a little cash. He in fact paid some \$700 more of debts than were stated. The partners had all had free access to the books, and had talked over certain discriminations against them on freight, of which they suspected the F. R. R. B. had urged them to bring suit,

and had consulted counsel, but they had discouraged the idea. B., soon after he had taken the assets, by his own energy obtained a settlement from the P. R. R. *Held*, that his former partners had no right to any share in it.

Appeal from court of common pleas, Venango county.

Action by John A. Wiley, trustee, for himself and Wesley Chambers and the estate of Marcus Hulings, deceased, against B. F. Brundred and the Union Refining Company, Limited, for an accounting. Decree on master's report for plaintiff, except as to estate of Hulings. Brundred appeals. Reversed.

Lee & Criswell and Roger Sherman, for appellant. Ash & Speer, J. H. & A. R. Osmer, Carl I. Heydrick, and C. Heydrick, for appellee.

GREEN, J. There is but a single question involved in the present contention, and that is whether the defendant is liable to account to the plaintiffs for the sum of \$8,000 received from the Pennsylvania Railroad Company. The right of recovery is based upon the proposition that the defendant was guilty of a breach of the good faith which is required between partners. If this charge is true, the plaintiffs have a right to recover. If it is not true, they have no case. The effect of the assignment to the defendant, through the Union Refining Company, Limited, by all the individual members of the company, of "all claims, rights of action, and demands due to said" company by the paper executed on April 6, 1883, is not questioned. The defendant succeeded to every right and claim which was owned or possessed by the company at that time, and that contract was fully carried out by the parties on both sides, and it is not now in controversy. But it is claimed by the plaintiffs and denied by the defendant that the facts then existed which gave the plaintiffs the right to have an account, and a distribution of the money which the defendant subsequently obtained from the Pennsylvania Railroad Company. If, at the date of the assignment, the defendant had a knowledge of a legal right to recover that money which was superior to the knowledge possessed by the plaintiffs, and concealed that knowledge from his partners, and thereby obtained the assignment of all the claims, rights of action, and demands of the firm to himself, he is responsible to the plaintiffs in this proceeding, unless the statute of limitations or the laches of the plaintiffs bars their action. The bill charges that the defendant had such knowledge of the claim against the railroad company, and that he concealed it from his partners, while the answer denies the charge in the most direct, emphatic, and positive manner, and sets up a counter assertion that he had no other knowledge of the claim than his partners had, and that he concealed nothing from them in this respect, either before or at the time of the transfer.

The answer also alleges that the subject of a claim against the railroad company for excessive freight charges was frequently a matter of conversation among all the members of the firm, and that he, the defendant, was in favor of a legal proceeding to recover the claim, but that the other partners were either opposed to any proceeding, or indifferent to it. The answer further alleges that the defendant did not discover any evidence which could be used against the railroad company until after the assignment was made. These matters of fact, therefore, are of the very essence of the controversy, upon which its decision depends. On the hearing before the master considerable testimony was taken upon these subjects. All the partners were examined, and the bookkeeper of the firm. On the question whether the defendant at the time of the assignment had any knowledge of the claim against the Pennsylvania Railroad Company superior to the knowledge possessed by the other partners the master makes no finding. Nor does he find that the defendant concealed any personal knowledge of his own from them. He finds that nothing was said about it, and that it was not mentioned in the trial balance that was then before the parties. But if nothing was said about the matter, and if nothing was concealed, and if the defendant had no knowledge of the claim that was superior to that of his partners, it is difficult to understand upon what ground the plaintiffs' claim can be sustained. The circumstance that it did not appear on the trial balance as an asset of the firm is of no sort of consequence, as there was no reason why it should be there. It was not an ascertained, definite claim, as for goods sold, or for anything due. It was, at the best, an undefined, uncertain, unproved, unliquidated right of action, which might or might not be sustained, and about which none of the parties had any explicit knowledge, or anything more than a belief. What was its amount, if it had any amount, was totally unknown to all. Of course, it could not be made out as a cause of action before a court and jury, unless testimony could be obtained of witnesses having knowledge of specific facts to which they could testify. The master does not find, and there is not a scrap of testimony on this record to prove, that at that time—April 6, 1883—or before any one of these parties had the slightest knowledge of even the existence of any witnesses who could give any testimony on this subject, nor of any definite acts to which any such witness could testify. It was impossible, therefore, to put down among a list of assets any such claim or demand as this. Even as a right of action it would require the assent of all the parties entitled to it to give it any tangible character, for if, knowing that it was the subject of a demand which might be made, yet the parties en-

titled to assert it refused or were unwilling to assert it for any reason, such as the expense or the uncertainty or delay of legal proceedings, it would be the same as if it had no existence. Nor is it anything to the purpose to know by the subsequent event that such a claim had value, or had been so managed that value was infused into it.

The question is, what was the situation of the parties relative to the subject at the time of the transaction? It is to be regretted that there has been no finding of the master respecting these most essential matters. The testimony of witnesses was quite considerable with reference to them, and yet that testimony has not been discussed, nor even referred to, in the master's report. All of the plaintiffs were examined in their own behalf, and yet not one of them proved or attempted to prove that the defendant had superior knowledge to them of the existence of the claim, or that he concealed anything from them. They all admitted, with some reluctance, and on cross-examination, that the subject of discriminations and excessive freight charges by the railroads was a matter of conversation and discussion between them. Thus Gen. Wiley testified: "We all discussed matters generally, and had a voice in the management. * * * We all discussed the business of the company. I was the secretary and treasurer of the company. I participated in the meetings of the board. I think we were all officers of the company. * * * I had access to the books at all times, and to the correspondence and other papers, so far as they were in the proper books. * * * We met occasionally; came together informally, not daily, quite frequently. * * * The bookkeeper was there and the books. I think that the bank book was kept at the Hulings' office,—the check and bank book, part of the time at least,—and that was the place we had the meetings. Q. Was it not a matter of frequent discussion between the members of your company, including yourself, and Mr. Brundred, that the railroad companies that carried your product to market, or some of them, including the Pennsylvania Railroad Company, were discriminating against you and in favor of the Standard Oil Company in respect to charges for transportation? A. It is possible there might have been such discussion, but I don't remember an instance wherein we concluded we were discriminated against. The freights to New York were considered reasonable. Q. Did not you believe, and did not the other members of your company express their belief, that your company had been discriminated against by the Pennsylvania Railroad Company and other railroad companies in the matter of transportation? A. I don't know that we made up our minds in any sense at all that we were discriminated against. I did not believe it. I don't know what the others believed about it." After saying that it had been commonly

said that the railroad companies discriminated against the company and in favor of the Standard Oil Company, and that he did not remember discussions among the members of the company of claims for discrimination, he was asked: "Q. And did not Mr. Chambers on at least one occasion express himself adversely to a resort to litigation on account of said claims, assigning as one, among other, reasons, that the amounts which you would be entitled to recover, if any, would not be large enough to justify the expense and risk of failure? A. I don't remember any such proposition as that. It might have been talked of. I don't recollect it." Mr. Hulings, another of the plaintiffs, who took an assignment of all claims and debts due and payable to the company up to October 1, 1882, to be used in paying all debts and liabilities of the company, and who administered his trust to April 6, 1883, when the final assignment was made, was examined for the plaintiffs, and gave testimony. He was asked: "Q. While your company was shipping oil, state if it was not their belief that other companies were getting better rates in freight than you were. A. I think there was some talk of that kind, but I have no definite recollection in regard to it. Q. State if Mr. Brundred didn't state that he believed that there were rebates or better rates given to other parties who shipped refined oil west. A. I believe there was conversation of that kind, but I can't recall anything definite. Q. Did he not also make the same allegation of refined oil shipped east? A. I can give you nothing more definite than to say there was some conversation of that kind, but I recollect nothing definite. Can't recall how often he spoke about it." Mr. James B. Berry, the bookkeeper of the company, who was present at the meeting of April 6, 1883, said: "There had been a conversation from time to time that there was a claim against the Pennsylvania Railroad Company, but there was no definite knowledge. I had frequently heard the officers of the Union Refining Company, Limited, talking of discrimination in freights. It was a matter of newspaper news, but nothing definite. I had no information that would justify in putting the claim on the books of the company as a definite charge. * * * Q. Didn't you know that Wiley, Chambers, Hulings, and Brundred all claimed, at and a long time before the settlement, that the Pennsylvania Railroad Company had been discriminating against them in the transportation of their products? A. Only in the way of conversation; suspicion that such was the case; nothing to base any charge on. Q. Then they had expressed their belief that they had been discriminated against in their conversation? A. Yes, I suppose in general conversation." Mr. Chambers, another of the plaintiffs, was examined for the plaintiffs. He was asked: "Q. Was it not a subject of conversation

among the members of the company, prior to the time you sold out, that the Pennsylvania Railroad Company and other railroad companies were discriminating against you in favor of the Standard Oil Company in the transportation of your product? A. I don't remember what was said among the members of the company about the discrimination of freights, for the reason that I had so many public discussions of the subject in general with different persons and in the Producers' Association previous to that time. It would be hard to separate my conversations, if I had any, with the company, from the general discussions outside. The general discussion had been very common. Q. Do you remember that some time in 1882 Mr. Brundred proposed bringing suit against the Pennsylvania Railroad Company, and that you opposed such suit, for the reason that it would be expensive, and your company would not be able to cope with the railroad company? A. I don't remember it, but I had a general idea that our claims would be too vague and indefinite to base a suit on. I don't remember any conversation about it. I thought we knew too little about it."

The foregoing is practically the whole of the testimony of the plaintiffs in relation to the subject of this claim. There was other testimony, but it related to other matters, and is not pertinent to the present inquiry. Bearing in mind now that the essential facts necessary to be established by the plaintiffs are that the defendant had a knowledge in reference to the claim, or a claim, against the Pennsylvania Railroad Company, which was superior to the knowledge possessed by the plaintiffs, and that he concealed that knowledge from them, and that without establishing these facts the plaintiffs have no right of recovery in this proceeding, it is proper to inquire, does this testimony establish or tend to establish either of these propositions? To this inquiry there can be but one answer. There is nothing in the testimony of all or any of the plaintiffs that establishes or tends to establish either assertion. No facts are given in evidence which disclose any superior knowledge of the defendant, or that he concealed from his partners any fact that he knew relative to the subject. Mr. Wiley, admitting that there were discussions among the partners upon the subject, which he could not particularize, said distinctly that he did not believe that they were discriminated against; and Mr. Chambers, making a similar admission, said he thought their claims were too vague and indefinite to base suit on. It is very evident from the testimony of all the plaintiffs that the subject of the discriminations of the railroad company against them, was a matter of conversation among the members of the firm; and it is also evident that none of the parties, plaintiffs or defendant, had any specific knowledge of facts upon which

a charge of discriminating rates against the railroad company could be made out. They do not pretend to prove any such knowledge on the part of the defendant, and they admit they had none. The master makes no finding on this subject, and he does not review the testimony or discuss the question. If the defendant had entirely omitted to testify, it is difficult to understand how there could be any recovery against him on the testimony furnished by the plaintiffs. But he did testify, and the following are some of the matters he gave in evidence: He was distinctly interrogated as to whether he had any knowledge of any facts or evidence to establish the claim before the transfer of April 6, 1883, was made, and he said he had not. He was asked: "Q. State whether, at the time of the transfer of the refinery, you were in possession of any facts or evidence of any claim existing in favor of your company against the Pennsylvania Railroad Company for or on account of overcharges for freight, or discrimination against your company. A. I was not, and I did not know where we could secure any evidence of such. Q. State whether or not you knew or had any evidence of any discrimination by said railroad company against your company in fact; or, in other words, had you any evidence that your company had been discriminated against, as a matter of fact? A. I had none whatever. Q. On the 6th of April, 1883, when the paper marked 'Exhibit B' was executed and delivered to you, had you or had you not any evidence of a claim existing against the Pennsylvania Railroad Company as an ascertained fact, and did you then know that such evidence existed anywhere? If so, state all you then knew on the subject. A. I did not. I did not have any evidence, and did not know where evidence could be obtained, necessary to substantiate a claim." The foregoing is a specific and flat denial of the possession of any knowledge on the subject, either of the fact, or of any evidence to prove the fact, of adverse discrimination, up to and including the time of the transfer of April 6, 1883. The plaintiffs were afterwards recalled, and again examined in their own behalf; but they made no contradiction of the above testimony, they made no attempt to prove that the defendant had such knowledge, or knew of any testimony which he could get to support the claim; and their failure to submit such proof is practically conclusive that they were not able to do so. It was proved by the defendant and the bookkeeper, Berry, and admitted by the plaintiffs, that they had perfectly free access at all times to the books and papers of the partnership, and that they exercised an active intervention in the business. They must have known precisely what rates were charged, and therefore had the same knowledge on that subject that the defendant had. The defendant testified: "The bank book, check book, draft

book, minute book, and stock book were kept at the city office. We kept letter books. Letters written by and in behalf of the company were all copied,—press copied. These letter books and correspondence of the company were kept at the office at the works. These books were accessible to the members of the partnership. We had a telephone in each office, and we made about daily reports backwards and forwards by telephone or by written reports. The members of the company met frequently, and had general discussions about the company's business. Mr. Wiley was frequently up at the works. And Mr. Chambers was very frequently up at the works, and would go over the business with us generally, and would often come to my house in the evenings and Sunday afternoons, and go over the same stuff then that he had been over several times during the week. These conversations with Mr. Chambers were discussions as to the business of the company; such as the profits, sales, stocks, freights, insurance, and other details.

* * * He was looking after some of these things with me about the whole time.

* * * The matter of freight rates was very frequently discussed between myself and the other members of the firm, especially with Mr. Wiley and Mr. Chambers. We had different discussions as to rates. Some of them we regarded as excessive, and some of them we regarded as discriminations. There were competitive refiners, who were constantly underselling us, and the advantage they possessed which enabled them to do so apparently rested entirely on more favorable rates of freight than we possessed; and these points would be called to the attention of Mr. Wiley and Mr. Chambers about as often as they would occur, which was very frequently. Freight rates were very frequently the subject of correspondence on behalf of the company. Mr. Wiley and Mr. Chambers had access to the company's letter books at all times. Mr. Wiley participated in that correspondence on behalf of the company. * * * I had a conversation with Mr. Chambers and Mr. Wiley with reference to the freight charges of the Pennsylvania Central. We had discussions right along, but the first I recall now was in the forepart of 1881. I always claimed that our competitors were getting better rates than we were. I called their attention to the fact that we were evidently being discriminated against, because Pittsburgh and other parties were continually able to undersell us, and I thought it must be entirely attributable to better rates. I know I said these things to Mr. Chambers, because he gave the business a great deal of attention. There was hardly a week passed that he was not at this rate business in some shape, and annoyed me so about the thing that I got out of all patience sometimes with him. I didn't see as much of Mr. Wiley as Mr. Chambers, but I frequently spoke to him about these

things and the chats with Mr. Chambers. The discussions of the subject continued till we sold out. I spoke of this 25 cent advance as one of the instances. I had another talk with Mr. Chambers, complaining of these discriminations; that we couldn't meet the Chicago markets because the Tide Water Refining was getting their oil into Chicago from Philadelphia on only a 65 cents per barrel rate. This matter was the subject of correspondence by the company." Certain letters were then given in evidence. The witness proceeding said: "I had talked to General Wiley and Mr. Chambers in regard to supposed discriminations of Pennsylvania Railroad Company, and talked of bringing suit against the railroad company. In June, 1882, I consulted Mr. Ash on behalf of the company in regard to the suit, and he said, after asking what evidence we had, he thought it was doubtful if we could collect anything without definite information; that he would like to bring a suit for us at any time. I explained this to my partners, and told them I thought if we could get these people on the stand we could worm something out of them. General Wiley seemed indifferent about it. Mr. Chambers opposed it; said it would be nothing but a wild goose chase; we did not know enough about it, and he did not want to go into it. At the time of the talk with Mr. Ash we had only the suspicion that they were discriminating against us. I had no information as to discrimination that was not common to my partners. The date of my consultation with Mr. Ash was June 6, 1882. It is in my diary, made at the time."

Notwithstanding that Gen. Wiley and Mr. Chambers were subsequently examined on their own behalf, neither of them uttered a word of denial of this most important testimony, absolutely fatal to their case if true. As a matter of course, it must be taken as verity. There is not a reason why it should not be. The master pays no attention to it in his report, does not discuss it, or any question growing out of it. Gen. Wiley and Mr. Chambers had previously admitted,—the one, that he did not believe that they were overcharged; and the other, that they did not have enough facts "to base a suit on." So that they really corroborate the defendant in his testimony.

The legitimate effect of the testimony is to prove conclusively—First, that the defendant had no other knowledge of any claim against the railroad company than was possessed by the plaintiffs; and, second, that, instead of the defendant concealing such information and belief as he possessed from his partners, he was most persistent, and even pertinacious, in his efforts to give them every information he had, and his conviction as to what they might be able to do by bringing a suit against the railroad company. He advised with counsel for the purpose of bringing a suit, and in-

formed his partners as to what he had done, and of the reply of the counsel. Notwithstanding that reply was unfavorable to an immediate proceeding because they had not enough facts, the defendant still urged a suit upon his partners, saying, if they could "get these people on the stand, they could worm something out of them." But Gen. Wiley was indifferent, and Mr. Chambers opposed it; "said it would be nothing but a wild goose chase; we did not know enough about it; and he did not want to go into it." How is it possible that these plaintiffs, after such damaging—indeed, fatal—testimony as this, which they do not pretend to deny, can come into a court of equity and claim that they were kept in ignorance of their rights by the defendant, when he was the only member of the firm who took any interest in the assertion of the right, informed them most fully of all he knew about it and all he believed, and urged them to commence a lawsuit for the recovery of the very claim which he subsequently prosecuted with success, and they positively refused to engage in? They were a majority of the firm. Without their consent he could not bring any suit or take any active steps to recover the excessive freights. Of course they were not ignorant of the supposed claim, and of course the defendant concealed nothing from them. There is no other conclusion than this that can be drawn from this testimony. We have no right nor any disposition to disregard it. The master overlooked it not intentionally, but because he mistook the true character of the contention, and adjudged the case by the application of principles and reasoning that do not control the controversy. There is no dispute about the law and the good faith required of partners. The plaintiffs had sold out with evident satisfaction all their interest in the partnership and had received from the defendant the full consideration of the transfer of their rights. There is no attempt here to set aside that transfer. The plaintiffs enjoyed the full benefit of it. They have in their hands the money which the defendant paid them for it, and they do not propose to return it. In addition to that, the defendant testified that he had paid, after the transfer, several hundred dollars worth of debts of which they were all ignorant at the time of the transfer. The plaintiffs have also been relieved from liabilities which they dreaded, and which they were glad to get rid of. They do not ask, therefore, to set aside the transfer. They ask only an accounting for the money received by the defendant from the railroad company six months after the transfer. They are entitled to have it if they can prove two things, to wit, that the defendant had superior knowledge to theirs of the supposed claim against the railroad company, and that he concealed that knowledge from them. They have utterly failed

to prove either of these facts. On the contrary, the testimony is simply overwhelming that they knew all that he knew about it, and that, instead of his concealing anything from them upon this subject, he was constantly informing them of his views in regard to it, constantly discussing the matter with them, and earnestly endeavoring to induce them to engage in efforts to learn the actual facts, and to recover the excessive charges by adverse proceedings in the courts. But they would have none of it.

There was far more testimony in support of the defendant's contention than his own and the plaintiffs' admissions. Thus Louis Morris, who was an inspector of oil trains during the time of the partnership, testified that his business required him to be frequently at the works of the company; that he knew Wiley and Chambers; that "they came up to the works nearly every day. * * * I saw Mr. Chambers very often there, and also Mr. Wiley. They overlooked the business, the books, and yard. They overlooked the works, but mainly in the office. I heard Mr. Brundred, Mr. Chambers, and Mr. Wiley speaking of discrimination and charges of railway companies. They were complaining of overcharges of the railways. Q. State whether or not they referred to any road as discriminating against them; and, if so, what company? A. The Pennsylvania Railroad mainly. I heard these conversations pretty often, but I cannot say how many times. Q. In these conversations which you refer to, state what they did say about railroads discriminating against them. A. They said the railroads had raised them 25 cents a barrel, and they thought the other roads were discriminating against them also. Q. Did they express an opinion as to their belief whether other refineries were getting better rates than they had to pay, and, if so, what was that opinion? A. It was simply this way: They expressed their belief that other parties had better rates, and gave as a reason that other refineries could undersell them, especially Pittsburgh. These conversations were principally after the time the rate was raised 25 cents per barrel. They were in 1881. Q. How long did these conversations continue from the time you first heard them? A. They continued until they sold out the Union Refinery. Mr. Chambers did most of the talking in these conversations, as near as I know. Am not positive. The three participated in the conversations. These conversations referred mainly to the P. R. R. Q. They related also to other roads shipping oil from their refinery, did they not? A. They related to nearly all the roads, I suppose; mainly to the P. R. R. That was the general talk. The matter of freight is a very important matter in refining and selling oil." Thus it appears from the testimony of this witness, who was entirely disinterested, that the subject of discriminating and excessive rates was a constant subject of discussion

and complaint between the plaintiffs and defendant, and continued to be so until the time they sold out their refinery, which was in 1882, shortly before Hulings was appointed trustee to collect the debts and pay the liabilities. As the claim was one which rested entirely in suspicion and belief, and had no definite aspect, the partners were all upon the same footing in regard to it; and it was a live and pressing subject all the way to the last. There was no lack of community of knowledge and information among the partners. But the defendant believed in it as a thing that might be realized by proper exertion and action, and so urged upon his partners, but the plaintiffs had no faith in it, and refused to take any action. The same witness gave further testimony of a similar kind. Among other things he said: "There was a general talk right along about discrimination by Wiley, Brundred, and Chambers. I did not take part in the conversation. I was working for the Green Line. About all I heard was about discrimination in freights and rebates in refined oil and its products. Mr. Brundred threatened to sue the railroad company."

E. L. Ancker, another witness, who was one of the bookkeepers for this company, said that "Mr. Chambers and Mr. Wiley were there frequently, but Mr. Chambers more frequently than Mr. Wiley; Mr. Hulings occasionally. Wiley and Chambers, when there, came as members of the firm, and talked over the business matters. * * * The books were always open to any member of the firm. Mr. Chambers looked over the books quite frequently; and Mr. Wiley, whenever he came down there, which was not so often as Mr. Chambers. * * * Have seen them look over them all,—the ledger, cash book, and order book. In these conversations they would discuss the shipment of goods, and discriminations in freights. In discussions of discriminations of railroads in freights, Mr. Brundred was present. I never heard any discussion on this subject when Mr. Brundred was not there. I believe, a month or two before they sold out, these discussions were quite frequent; more so than before. In this matter the Pennsylvania Railroad was most mentioned. On this road we made about three-fourths of our shipments. They said they thought they were being discriminated against, but didn't know they were. They all held to this opinion."

F. J. Baker, who was a tally man in the employment of this company, was asked: "Q. State whether or not in 1881 and 1882 you heard discussions and talk in the office about railroad companies discriminating against the Union Refining Company in freights,—giving others better rates. A. I have. I have heard Mr. Brundred, Mr. Chambers, and Mr. Wiley talking about it. The conversation was that they thought they were discriminated against, by the railroads, but just how it was they

could not tell. * * * The conversations were frequent. It was part of the business." The witness J. B. Berry testified to similar effect.

In the face of all this testimony, none of which is discussed, or even referred to, either by the master or learned court below, it is useless to say that there was not a community of knowledge by all the partners upon this subject, or that there was any concealment by the defendant from his partners of any knowledge, information, or belief possessed by him. The simple truth of the whole matter is that none of them had any absolute or definite knowledge upon the subject. The defendant had a stronger conviction than the others that something could be done by proper exertion, and this he imparted fully and frequently to his partners, but could not induce them to act. It was all in vain; they would do nothing. But it is not true in the smallest degree that they were misled or defrauded, by any act, word, or omission of the defendant, into parting with their entire interest in the concern. After the transfer of April 6, 1883, the plaintiffs gave themselves no concern whatever about any claim which they had, or supposed they had or might have, against the railroad company, for excessive freight charges. They took no step of any kind to discover evidence which would establish such a claim, or to institute any kind of proceedings to recover any money on account of it. It was not so with the defendant. The moment he was free to act for himself, and was untrammelled by the opposition of his partners, he set to work to discover evidence upon which a claim could be founded. He knew a young man in the freight office of the railroad company, and he went direct to him, and pressed him with inquiries until he began to obtain some information. He says, speaking of the young man: "He told me there were 13 cents paid to some parties on eastern shipment, and 10 cents he thought on western shipments, of oil; but just what it was on, the particular kind, or the length of time, he did not know." This was enough for the defendant to act upon, though it was not definite as to his own company. He immediately went home, and had a statement made up of claims for all shipments eastward at the rate of 13 cents a barrel, and on all western shipments at 10 cents a barrel. These statements he sent to the railroad company, who at once rejected them, and refused to pay them. Then, during May and June, 1883, he went to Philadelphia, and tried to get the railroad company to reconsider their decision, but they again refused. On August 28th he went there again, and made another effort, and was again refused. Then, he says: "I made up my mind there was was no chance to get anything out of them, and was just leaving, as Mr. Wilson, the general freight agent of the Pennsylvania

Railroad Company, made a remark reflecting on the ability of his predecessor; that he couldn't be expected to make good the errors and bulls of his predecessor. His predecessor was J. Mc. Creighton. I thought this was a good time to interview Mr. Creighton. Went to his house. He wasn't at home. Saw him down town, in Philadelphia, and explained this remark of Mr. Wilson's to him. It provoked him to such an extent he asked me if I could go back with him and see Wilson. We accordingly went back there. Found Mr. Wilson had gone over to New York in the mean time. Then went up to Mr. Green's office, and went in. He asked to see Mr. Green, who sent out word he was busy. Mr. Green was vice president of the Pennsylvania Railroad Company. He then told the messenger boy to tell Green that Jim Creighton wanted to see him, and pretty damned quick. We were then admitted to Mr. Green's office. Creighton told him of Wilson's remark, and added that as that was the third or fourth time he had heard derogatory remarks of that kind made by the Pennsylvania Railroad Company's officials, that he had made up his mind that it had got to stop. He said that I had explained to him the nature of the claim I had made on them, and if I was obliged to sue it he would testify in regard to it, and show them whether he had made those bulls and errors they had alleged. * * * I came home. After that the claim was sent in again. There was a request from the company to send in the claim again. That is my letter." Then follows the correspondence between the defendant and the company, and some more oral testimony as to further efforts made by the defendant, which resulted in an adjustment of the claim at \$8,000, and payment of the money in the latter part of October, 1883, more than six months after the plaintiffs had sold out to the defendant. It is a matter of surprise to us that the foregoing testimony made no impression upon the master or the court below. It proves most conclusively that this so-called "claim" had no existence as a "claim" at any time prior to the sale by the plaintiffs to the defendant of all their interests in the partnership. It was brought into existence on August 28, 1883, by a merely casual remark of one who was an entire stranger to this firm. But that remark was merely a suggestion and an incentive that excited the ingenuity and the astuteness of the defendant, prompting him as to how he could best make use of it to obtain the information he so much needed. He happened to strike the right chord, and by his appreciation of the motives which govern many persons accomplished success by his own unaided efforts. He had not the slightest assistance from any of his former partners. If he had not succeeded, they, of course, would have had no claim upon him as for not collecting a visible asset, for

neither they nor he, when they sold him all their interest in the firm, had the slightest available knowledge on the subject. This testimony also disproves most conclusively all idea of a reservation or withholding of knowledge by the defendant from his partners of facts necessary or available to establish the claim in a legal sense, because he never obtained that knowledge until months after the transfer. These considerations dispose of this case. The matters discussed in the master's report and the opinion of the court below are foreign to the point upon which alone the case must be decided. Upon a most careful examination of the whole of the testimony, we are clearly of opinion that there is no proof of any breach of partnership duty on the part of the defendant, and he is entitled to enjoy the fruits of his own exertions and his own skill and ingenuity in obtaining the evidence upon which to build up the claim, and in his subsequent efforts to enforce it. The decree of the court below is reversed, and the plaintiffs' bill is dismissed, at the cost of the plaintiffs.

(153 Pa. St. 579.)

WILEY v. BRUNDRED. (No. 259.)

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Venango county.

Bill by John A. Wiley, trustee, for himself and others, against Benjamin F. Brundred and the Union Refining Company, Limited, for an accounting. From the decree, complainant appeals. Reversed.

Lee & Criswell and Roger Sherman, for appellant. Ash & Speer, J. H. & A. R. Osmer, Carl I. Heydrick, and C. Heydrick, for appellee.

GREEN, J. For the reason stated in the opinion in this case on Appeal of Brundred, 28 Atl. 173, the decree of the court below is reversed, and the plaintiff's bill is dismissed, at the cost of the plaintiff.

(159 Pa. St. 338.)

ORTH v. WEST VIEW OIL CO. et al.

Appeal of JARECKI MANUF'G CO., Limited.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MECHANICS' LIENS—OIL-WELL SUPPLIES.

Act Feb. 17, 1858, gives mechanics and material men a lien on all improvements, engines, pumps, machinery, and fixtures put up by a lessee on land of another, limited, however, to the lessee's interest, and to property erected or repaired by the lien claimant. Plaintiff's claim was for oil-well supplies, oil, gas, water, and steam fittings, and pipe furnished defendant for its four excavations for wells, and over each a derrick, three boilers, four engines, connected with each other and said derricks, and the necessary drilling, pumping, and cleaning machinery connected with the wells, and forming part thereof. The bill of particulars did not show for which engine, boiler, machine, or well any of the supplies were delivered or used, but the largest charges were for casing, tube lines, and sand lines. *Held*, that the claim

was too vague to support a lien, even if such temporary and movable material could be the subject of one.

Appeal from court of common pleas, Allegheny county; Stowe, Judge.

Action by George C. Orth, trustee, against the West View Oil Company. The Jarecki Manufacturing Company claimed a lien under Act Feb. 17, 1858,¹ extended to Allegheny county by Act March 21, 1865, on funds in the hands of the auditor for distribution from the execution sale of defendant's property. The auditor disallowed the lien, and his report was confirmed. The Jarecki Company appeals. Affirmed.

A. Leo. Weil, for appellant. James Bredin, for appellees.

GREEN, J. The claim of lien in this case is filed indiscriminately "for oil-well supplies, oil, gas, water, and steam fittings, and pipe furnished to said West View Oil Company for said oil wells, rigs, boilers, engines, machinery, and fixtures connected therewith, and appurtenant thereto;" and in the descriptive part of the claim the subjects of the lien are described as "consisting of four excavations for wells, and over each of these a wood rig or derrick, for the purpose of drilling or operating said wells when drilled, three boilers, four engines, connected by proper pipes and fittings to each other and to the walking beam and bull wheels of said derricks, and the necessary machinery and fixtures for drilling, pumping, operating, cleaning, and caring for said oil wells, connected therewith, and forming part thereof." The bill of particulars annexed to the claim contains no statement indicating to which of the "improvements, engines, pumps, machinery, screens, and fixtures" the various items of the bill were furnished, nor at which of the wells the articles claimed for were delivered or used. The bill is simply a general bill to the West View Oil Company for numerous minor articles, together with a few larger items of casing and tubing and sand lines, and the only attempt at classification is a designation of the persons to whom the deliveries were made. It would be impossible to tell, from anything contained in the claim of lien, what things, or whether any things, were furnished to any of the engines, or to

any of the boilers, or to any of the machinery or fixtures. Presumably, the casing was furnished to the wells; but whether to one or all, or to which, does not appear. It might be inferred that the tubing lines and sand lines were worked from the derricks; but there is no statement to that effect, or for which of the wells they were furnished. There are numerous items of unions, cups, cocks, nipples, washers, valves, coupling, and bolts, but nothing to show where any of them were used, or whether they were furnished to any particular engine, boiler, rig, fixture, or improvement. In the case of *Ely v. Wren*, 90 Pa. St. 148, a very similar kind of claim to this was filed by Wren, the claimant, "for a debt due to him for work done and material furnished by him for and about the erection and construction, and upon the credit, of improvements, engines, pumps, machinery, screens, and fixtures put up or erected by E. B. Ely & Co., tenants of a leased estate on land of another in the said county of Carbon." A lien was claimed against the improvements, engines, pumps, machinery, etc., and against the leasehold estate of the tenants, all of which was fully described. A bill of particulars, with a schedule of the machinery, etc., on the premises, was annexed. This claim of lien was held by this court to be so defective in its want of particularity and precision that it was ordered to be stricken from the record. The present chief justice, delivering the opinion, said: "The claim was thus filed, not only against the interest of E. B. Ely & Co. in the improvements, engines, etc., but against the improvements, engines, etc., themselves, and also against a number of undefined structures and articles adjacent thereto, upon which it is not claimed that any work was done, or for which any materials were furnished by the claimants. It was not confined, as the act provides, to the specific improvements upon which the work was done, or for which materials were furnished. * * * There is an absence of that certainty and precision which should characterize a statement that forms the basis of a special lien, which, if not otherwise satisfied, is designed to be enforced by a judicial sale, resulting in a transfer of title. The proceeding is in rem, and the claim should be so certain and definite as to indicate with at least reasonable precision the property that is to be subjected to the lien, and the extent thereof. Without this it fails to furnish sufficient data for the entry of a judgment upon which the lever must issue for the sale of the property." Applying this principle to the present case, the practical difficulty in the way of enforcing the lien is apparent at once. The largest item of the bill of particulars is a charge of \$344.51 for a considerable quantity of casing. It is, of course, obvious that this item could not

¹Act Feb. 17 1858, (Purd. Dig. 1162,) extends the provisions of Act June 16, 1836, and its supplements, "to all improvements, engines, pumps, machinery and fixtures, erected or put up by tenants of leased estates on lands of others in the counties of Luzerne and Schuylkill, and to all mechanics, machinists and material-men doing work or furnishing the articles or materials therefor: Provided, that the lien hereby created shall extend only to the interest of the tenant or tenants, lessee or lessees therein, and to the improvements, engines, pumps, machinery, screens and fixtures, erected, repaired or put up by the mechanics, machinists, persons or material men entering liens thereon."

have been furnished for any rig, boiler, engine, machinery, fixture, or improvement, and could only be used in a well. It would, therefore, not be a lien on any of the machinery, etc., and could not be a lien at all, except possibly against a well. But which well? The claim does not say, or whether it was furnished to all the wells, or any number of them less than all. If it was furnished for one or two, of course the other wells which had none of it, and might be far distant, could not be subjected to any lien for it, and could not be sold to pay for it. The other largest items are for tube lines and sand lines. These aggregate \$267.37, and together with the casing amount to \$611.88, and the entire claim is but \$782.65. It is manifest that these lines could not have been furnished to any one of the three boilers, or any one of the four engines, or to any of the machinery, screens, fixtures, or improvements. They are only for use in the wells, and are entirely loose, and unfastened to the leasehold premises or any of the machinery; and yet, if this lien were sustained, the whole of the leasehold, and all of the boilers, engines, and machinery, could be sold for the nonpayment of this item. Nor is it stated for what one or more wells these lines were furnished or used; and this simply increases the confusion. In *Coal Co. v. Martz*, 75 Pa. St. 384, a claim of lien was filed against a leasehold and machinery, etc., under this same act of 1858. Mr. Justice Sharswood said in the opinion: "The claim of the plaintiff was for work done in the erection of a patent hoisting and dumping cage; yet the claim filed is against the entire leasehold in the colliery. The act of assembly gave the plaintiff no such lien. It confines the lien clearly to the interest of the lessees in the improvement and machinery upon which his labor and services were bestowed."

Independently of the foregoing considerations, it is extremely doubtful if either the casing which is placed in an oil well, or the tubing and sand lines, are of such a character as to admit of their being made the subject of a lien. The casings may or may not remain in the well. If oil is not obtained, they are liable to be, and probably are, taken out, and removed to some other well. As for the tubing and sand lines, they are, of course, unattached to any machinery, and are only for temporary use, at best. In *Esterley's Appeal*, 54 Pa. St. 192, we held that under the act of 1858 a lien could not be filed for a railroad track laid in the slope of a coal mine. Mr. Chief Justice Woodward, in delivering the opinion, said: "In *Thomas v. Smith*, 42 Pa. St. 73, we said the word 'improvements,' in this act, was to have a reasonable construction, and was not to be applied to temporary and insignificant additions, but to such permanent and substantial erections as do essentially augment

the interest which the tenant has in the land. The same observation may be applied to fixtures and spikes for a railroad down a slope in the interior of a mine. They do not belong, in our judgment, either to such improvements or fixtures. The railroad itself is as temporary as the use of that slope. * * * In its nature it is a mere transient convenience, and an attempt to execute a lien against it would be attended with all the embarrassments pointed out in *Summerville v. Wann*, [37 Pa. St. 182,] and more. Doubtless, it might be called an 'improvement' or 'fixture,' if we felt that the statute was entitled to a liberal construction; but, conceiving that it is not, we are disposed to stop where its words stop, and not to push them an inch beyond their indubitable meaning." These observations apply, with, if possible, a greater force, to the casings and lines used in boring and operating oil wells. When it is considered how large a proportion of the wells are only "dry holes," and are therefore abandoned at once, and all the machinery and appliances removed, and how large is the number of wells that yield so small a product as to be unprofitable to work, and they also are abandoned, and how many wells that have been for a time profitable to work have soon run down to an unprofitable production, and how many become exhausted in a short time, it is readily understood that no character of permanency can be attributed to such articles as casings and tubing and sand lines. These are all as capable of use in one well as another, and may be, and are constantly, transferred from wells where they are of no use to others where they may be of service. In *Coal Co. v. Martz*, supra, we held that no lien could be filed against a hoisting and dumping cage used in the shaft of a coal mine,—an appliance which has much more of permanence and of continuous use in its nature than the casings or lines used at oil wells. Upon a consideration of the whole case, we are of opinion that the treatment of this claim by the auditor and court below was right. Decree affirmed, at the cost of the appellant.

(150 Pa. St. 246)

DUGGAN v. BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MASTER AND SERVANT — TORTS OF SERVANT — WRONGFUL ARREST — CARRIERS — DAMAGES.

1. Where a railroad company gives an employe general authority, actual or apparent, to act for it in the capacity of a detective officer, and such authority includes, expressly or by general usage and consent, the power to make an arrest in its behalf, it will be liable for a wrongful arrest made by him without a warrant, though it does not expressly authorize an arrest without a warrant.

2. A carrier is liable for the wrongful arrest, without a warrant, of a passenger by policemen, in accordance with a telegram to its conductor from a detective, not only if the con-

ductor participated in the arrest by pointing out the passenger, but also if he made no efforts to use his power as conductor to prevent it.

3. In an action by a passenger against a carrier for wrongful arrest and imprisonment, it is error to charge that plaintiff can recover only such damages as resulted from his being unable to complete his trip that day, since he is entitled to recover, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings.

4. It is also error to charge that plaintiff's recovery "could only be by way of compensation, and, if he sustained no loss in consequence of it, the damages would simply be nominal," as the jury are apt to be misled to think that the compensatory damages should only include definite pecuniary loss.

Appeal from court of common pleas, Allegheny county; J. W. F. White, Judge.

Action by John Duggan against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff for less than the amount claimed, plaintiff appeals. Reversed.

The charge of the court below was as follows:

"This is an action brought by the plaintiff, John Duggan, to recover against the Baltimore & Ohio Railroad Company, operating the Pittsburgh & Connellsville Railroad. The plaintiff lives in New Haven, opposite Connellsville, in Fayette county, and on the 16th of December, 1891, came over to Connellsville, shortly after 4 o'clock in the morning, intending to come to Pittsburgh on the express train, and purchased a round-trip ticket, for which he paid \$2.75. When the train got to McKeesport, some police officer came aboard the train, and, in pursuance of a telegram which had been sent from Connellsville, and signed by R. F. Shephard, the officer took the plaintiff off the train, and from that to the police station in McKeesport, and from there to the lockup. The train arrived at McKeesport about 6 o'clock in the morning, and shortly after that the plaintiff was taken to the lockup, where he remained until something after 9 o'clock, when he was released. Mr. Shephard, who had sent the telegram, on coming to McKeesport and going to the lockup, discovered that he was not the party that was wanted, and consequently he was immediately released. The telegram was as follows: 'To conductor No. 9, McKeesport, Pa. If two men got on at Connellsville, one day operator here, small in size, small hump on back, black mustache, other slender built, very dark complexion, dark mustache, have both arrested and advise me. Connellsville. [Signed] Robert F. Shephard.' It seems from the evidence that this telegram, although directed to the conductor of the train, was received at McKeesport by the baggage agent, or the man who handles the baggage about the platform, who spoke to one of the police officers, who were at the station when the train stopped. The baggage master gave this telegram to the conductor, and the officers went onto the

train, and were talking to the conductor. There is a little difference of statement as to what occurred after the officers went in. The plaintiff stated that, when they came in, the conductor said: 'This is the man. Take him off.' Plaintiff admitted, however, that something was said about these men getting on the train at Connellsville. Another witness says that the conductor said, 'These are the two men that got on at Connellsville,' and pointed out the two men. It seems that there was some little delay at McKeesport, and the conductor started his train, and said, as some of the witnesses state: 'If you want to take this man off, take him off. I will not stay here all day.' After the train started it was stopped, and the officer took the plaintiff off. Some others spoke about the conductor having said: 'Take him off. There are the men. If you want them, take them off,' or some expression of that kind. The question arises here as to whether the defendant company were liable at all in this action. Defendant's counsel has asked me to say that there is no such liability on their part. The action is brought for false arrest and false imprisonment. It seems from the testimony that Mr. Shephard was the detective agent of the Baltimore & Ohio Railroad Company, but there is no evidence that the company ever authorized him to arrest any person, or to direct the arrest of any person, without a proper warrant being issued. Ordinarily, no man or officer has a right to arrest another on some charge of a crime committed, unless there is an information upon oath charging the party with the crime, and a warrant issued for his arrest. Sometimes when a party is seen committing a crime, an officer may arrest him 'on view,' but ordinarily no person or officer has such right without an information made, and warrant issued for his arrest. I say there is no evidence in this case that Shephard was thus authorized by defendant company, and it is not to be presumed that he had that power. If Shephard himself had come to McKeesport, and had gone aboard the train, and taken this man off, without an information and warrant, he would have been guilty of an unlawful arrest, and would be personally responsible for such conduct. The company would not be responsible any more than it would if the conductor had committed an assault and battery upon a passenger, or had committed any other crime upon a passenger. Therefore this telegram was no authority for these officers to arrest the plaintiff and take him off the train, and in no event would the railroad company be liable for what these officers did after plaintiff was taken off the cars. He was taken to the police station. It was early in the morning, and, according to the evidence, he told them who he was, and where he lived, and showed them his bank book and other papers, to show that

there certainly was some mistake in his arrest, and he said to the officers on the car that he was not the man they were after. When such information was given to the officers, they ought to have been careful as to what they did. It was enough to put them on their guard, and as they were proceeding illegally, proceeding at their peril, in arresting him, they ought to have been more careful. The telegram did not authorize them to lock him up in the prison of McKeesport. It simply authorized, if they did anything, that they should arrest and hold him until they would identify him. They might have detained him, perhaps detained him without any trouble at all, because he made no resistance,—might have perhaps kept him at the station house, or any place else; but taking him to the lockup, and locking him in the prison, without any warrant or anything of the kind, was a gross outrage, but the railroad company would not be responsible in any event for that.

"The question is, did the conductor do anything wrong? And that is the only question in this case. I say to you that if the conductor simply pointed out the plaintiff as one of the men that got on at Connellsville, if that is all he did, there can be no recovery here at all against the defendant company. I submit to you the question on another aspect of the case, because of the testimony of some of the witnesses. If the conductor pointed out these two men as the men that were wanted under this telegram, and if he pointed out the plaintiff as one of the men referred to in the telegram, and aided the officers to take him off the train, then I say to you that the plaintiff can recover, but to recover only such damages as resulted from his being unable to complete his trip that day. In that event he could recover only what pecuniary loss he sustained by not being enabled to go to Pittsburgh on that train; and then the question is, has he proven any loss? He got his breakfast in McKeesport, paid for by Mr. Shephard, because, as soon as it was found that there was a mistake in the case, Mr. Shephard took him out, got him his breakfast, and got his transportation down to Pittsburgh without any expense. I presume he gave up his ticket from Connellsville to Pittsburgh when the conductor first came around, but he paid nothing for his trip from McKeesport down, and, according to his testimony, he found out from the party he saw in McKeesport that there was really no necessity for his going to Pittsburgh that day, for the party he wished to see was not there. He returned to Connellsville, his home, that evening, and the next day came back to Pittsburgh. Now, if the plaintiff was wrongfully put off by the conductor, and he suffered any loss, he would be entitled to recover damages covering any loss he might sustain; but, as this was a plain, palpable mistake, the recovery against the

company could only be by way of compensation, and, if he sustained no loss in consequence of it, the damages would simply be nominal. By nominal damages we mean a very small sum,—a few cents. It is different from what is called substantial damages, where there has been a substantial injury; but, where there has been simply a technical wrong, the damages are simply nominal."

Iams & Brock, for appellant. Johns McCleave, for appellee.

MITCHELL, J. The instructions to the jury on the measure of damages cannot be sustained. The charge that plaintiff could recover only such damages as resulted from his being unable to complete his trip that day is substantially the same as the point presented in *Railroad Co. v. Spicker*, 105 Pa. St. 142, that "damages must be limited to compensation for loss of time, expenses incurred then and there, and the cost of another ticket," which this court held was properly refused.

The further charge that plaintiff's recovery "could only be by way of compensation, and, if he sustained no loss in consequence of it, the damages would simply be nominal," was likely to confuse the jury as to nominal and compensatory damages, and to mislead them to suppose the latter should only include definite pecuniary loss. Such is not the rule. Nominal damages are those recoverable where a legal right is to be vindicated from an invasion that has produced no actual present loss of any kind. If there has been any actual loss, then the damages must be compensatory, and for false imprisonment, as for trespass in improperly ejecting plaintiff from the cars, such damages include, in addition to actual expenses incurred, compensation for loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings. If the plaintiff was entitled to have his case go to the jury at all, these matters were proper subjects for consideration in estimating his compensation. *Perry v. Railway*, 153 Pa. St. 236, 25 Atl. 772; 7 Amer. & Eng. Enc. Law, 690.

The main question in the case, was the defendant responsible for the violation of plaintiff's rights? may turn on either of two grounds: First. Was Shephard the agent of defendant in ordering the arrest, and had he such authority, actual or apparent, as justified the conductor in obeying his telegraphed order? It is not necessary, as the learned judge seems to have told the jury, that the defendant should have authorized Shephard to make an arrest without a warrant. If he had the general authority, actual or apparent, to act for the defendant in the capacity of detective officer, and such authority included, expressly or by general usage and consent, the power to make an arrest in-

their behalf, then the mode of execution of such power, with warrant or without, was immaterial, and the defendant was liable in either event. That is the general ground of the operation of the maxim "respondeat superior." If the master orders the thing done, he is responsible for the manner in which the servant does it. There was some evidence of Shephard's employment as detective for the defendant, and that question must go to the jury. Secondly, Was the defendant made liable by the action of the conductor? This, also, was a question for the jury. The conductor has general power and control over the train and all persons on it, with authority to compel observance of the regulations of the company, to preserve order, and to employ the whole force of the trainmen, and of passengers willing to assist, for these purposes. These extensive powers involve the correlative duty to protect passengers, not only from injury by negligence or accident, but also from violence and illegal annoyance or interference by other parties. In *Railroad Co. v. Hinds*, 53 Pa. St. 512, a woman passenger was injured during a fight among a mob of disorderly men that had got on the train at a way station. This court held that the railroad company escaped liability for allowing them to get on only because the evidence showed clearly that the conductor had no opportunity or force adequate to prevent them, and the railroad company was not bound to anticipate such an occurrence, but that it was liable if the conductor did not do all he could to stop the fighting. The law on this point as to the duty to protect passengers from violence and disorder is laid down by Chief Justice Woodward with great stringency. The conductor, he says, "has large powers at his disposal, and, if properly used, they are generally sufficient to preserve order. * * * His official character and position are a power. Then he may stop the train, and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand. * * * Until, at least, he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict." Again, in *Railroad Co. v. Pillow*, 76 Pa. St. 510, it is said that there is no sound distinction between injuries from negligence in the equipment or management of the train and those arising from the misconduct of passengers upon it. "If the employees of the road had no control or power over passengers, this argument would be sound. But they have such power, and they are just as responsible for its proper exercise as they are for the proper running of the train." This case was quoted approvingly in *Rommel v. Schambacher*, 120 Pa. St. 579, 11 Atl. 779, where, upon the same principle, an innkeeper was held liable for not protecting a guest from the drunken freak of another. And what is said in *Lang v. Railroad Co.*, 154 Pa. St. 342, 26 Atl. 370, as to the protection of

goods, applies a fortiori to the protection of the persons of passengers. "The railroad company was represented in the carriage and safe-keeping of the freight on the train by the men to whom the train had been committed. If they deserted their posts, and left the goods uncared for, and they were stolen or destroyed, their employer must suffer for their inefficiency?" In the present case the telegraphed order of Shephard was addressed to the conductor. He appears to have accepted it as valid, and the subject was within the general line of his duty. If, therefore, he took part in the illegal arrest, the defendant was liable for the consequences of his act. But, even beyond this, it was his duty, under ordinary circumstances, as already said, to protect his passengers from trespass while under his care; and if he stood by and saw them illegally molested in any way, without an effort to protect them, it would be negligence, for which the defendant would be liable. He was not, however, required to enter into a contest with, or put himself in opposition to, the officers of the law; and, if he merely stood by without taking part in the arrest by known policemen, he was not necessarily bound to inquire into their authority, or assert his own against it. How far the conductor in the present case assisted in the arrest is the subject of some conflict in the testimony, and what knowledge he had of the illegality of it is not clear. Although the telegram was addressed to him, as the conductor of that train, he does not seem to have assumed the direction of the affair, but rather to have acquiesced in what the police, whom he found there on his arrival, should do, with the suggestion that they should not detain his train. The case must therefore go to the jury, to determine what he did, and whether, in accordance with the principles of law, it was a proper performance of his duty. The distinction made in the English cases cited by appellee, with reference to acts *ultra vires* as to the corporation, does not seem to have commanded general assent in this country, (see 7 Amer. & Eng. Encl. Law, 684;) but we are not required to consider it at present, as our own cases show that the alleged act of the conductor, as well as of Shephard, were such as might be viewed by the jury as within the apparent authority delegated by the defendant.

The paper book of appellant is open to just complaint. In a rather full brief of cases from other states not a single Pennsylvania decision is referred to, although, as this opinion shows, there are several which are much closer in point than any of those cited, and they are, of course, much more authoritative with us than those of other states, however well reasoned. In the pressure of business on this court, we ought not to be called on to do counsel's work. It is not always possible to recall at once even cases with which we are familiar, and we should be able to

rely on counsel for reference, at least, to everything relevant and material in our own Reports. Counsel who neglect this duty take a risk not fair either to the court or their client.

Judgment reversed, and venire de novo awarded.

(159 Pa. St. 248)

DUGGAN v. BALTIMORE & O. R. CO.
(Supreme Court of Pennsylvania. Dec. 30, 1893.)

Appeal from court of common pleas, Allegheny county; J. W. F. White, Judge.

Action by John Duggan against the Baltimore & Ohio Railroad Company for assault and false imprisonment. From a judgment for plaintiff, defendant appeals. Dismissed.

Iams & Brock, for appellant. Johns McCleave, for appellee.

MITCHELL, J. For the reasons set forth in the opinion in *Duggan v. Railroad Co.*, 28 Atl. 182, (filed herewith,) this appeal is dismissed.

(159 Pa. St. 212)

In re REIMER'S ESTATE.
Appeal of EWING et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

WILLS—CONSTRUCTION — RESIDUARY BEQUESTS — DESCRIPTION OF PROPERTY—"EFFECTS."

1. Testator, after having declared an intention to dispose of his whole estate, and given specific bequests and devises, provided: "I give and bequeath to my brother A. any and all of my household goods, books, clothing, furniture, etc., that he may desire; the balance of the personal effects to be divided among the children of my sister M." *Held*, that the residuary bequest to the children of M. carried a balance of testator's personal estate consisting of money and securities, and as to which he would otherwise have died intestate.

2. The term "effects," in the residuary clause of a will, will carry a balance of personal estate consisting of money and securities, in the absence of anything in the will to show a contrary intention.

3. Costs, including attorney's fees, for the trial of issues *devisavit vel non*, cannot be charged to the estate unless it is benefited thereby.

Dean, J., dissenting.

Appeal from orphans' court, Allegheny county.

Proceedings in the matter of the estate of George G. Reimer, deceased. From the decree of distribution, Amos D. Ewing and others appeal. Reversed.

Negley & Millar and Robb & Fitzsimmons, for appellants. Hudson & McCue and R. E. Stewart, for appellees.

GREEN, J. It cannot be doubted that the testator intended to dispose of the whole of his estate. The first clause of his will is as follows: "I order that all my just debts and funeral expenses, also charges for probating this my will, be first fully paid and satisfied, and, after the payment of the

same, I direct that the whole of my estate remaining shall be divided as follows." The testator then makes bequests of personalty, and thereafter devises of real estate, preceded by these words: "After which, I direct my real estate to be divided as follows." Then follow six devises of specific real estate, which, it is asserted by the appellants, and is not denied by the appellees, comprise the whole of the real estate of the testator. It is manifest, therefore, that the testator was perfectly conscious of the distinction between personal and real estate as subjects of testamentary disposition, and that he fully intended to dispose, by his will in question, both of all his personal estate and all his real estate. The present contention arises upon the meaning of one of the clauses disposing of his personal estate. It is in the following words: "First. I give and bequeath to my brother Andrew Reimer any and all of my household goods, books, clothing, furniture, etc., that he may desire; the balance of the personal effects to be divided among the children of my sister Mary Ewing." It is too plain for argument that this was an absolute bequest to Andrew of all the chattels named, because he was at liberty to take all of them, if he so desired. If he so desired, and took them all, there would be none left for the children of Mary Ewing to take, and the bequest to them would be nugatory for want of a subject-matter upon which to operate, if the contention of the appellees is correct. The controversy is upon the distribution of a considerable balance of personal estate which consisted of money and securities. The learned court below decided, and the appellees contend, that the children of Mary Ewing could only take the "balance," if there was any, of the class of chattels given to Andrew, and could take no part of the money and securities. If this is correct, it follows that, if Andrew took all the chattels of the class named, Mary's children would get no part of the personal estate under the will; and it follows, also, that, in order to produce this result, it must be held that the testator died intestate as to all of his personal estate, other than the chattels mentioned in the bequest to Andrew. It is also alleged, without contradiction, that the testator's personal estate, according to the inventory, amounted to \$23,796.54, of which the household goods, books, clothing, and furniture were appraised at \$258.50, all of which went to Andrew Reimer under the first clause of the will. The remainder consisted of cash and securities, and as to this the court below held that the testator died intestate, and made distribution of the whole of the balance to the next of kin. The fund was claimed by the children of Mary Ewing under the bequest to them of "the balance of the personal effects," in the first clause of the will.

It is a perfectly well established rule, in the construction of wills in Pennsylvania,

that no testator is presumed to die intestate as to any part of his property, if the words of the will will carry the whole. In the case of Appeal of the Boards of Missions, 91 Pa. St. 507, Mr. Justice Gordon, after reviewing the provisions of the will in question, said: "From all this, it would appear that the testator did not intend to die intestate as to any portion of his property, real or personal; and this intention must govern, unless there is something in the devise itself which forces us to a different conclusion, for it is a rule long and well settled that a will must be so construed as to avoid a partial intestacy, unless the contrary be unavoidable." Applying this doctrine to the facts of that case, this court held that the residuary clause of that will, which directed the executors to sell all the rest and residue of his estate, and pay the proceeds to a certain legatee, included money which had accrued as dividends on bank stocks, and was not a subject of sale. In the case of Hofius v. Hofius, 92 Pa. St. 305, it was said by Mr. Justice Trunkey, delivering the opinion of the court: "The learned judge of the common pleas truly said, 'It should not be, and never is, presumed, that a testator intended to die intestate of any portion of his estate, if a contrary intention can be fairly deduced from the language of his will;' and he might have added, 'No presumption of an intent to die intestate as to any part of the estate is to be made when the words of the testator will carry the whole.' Raudenbach's Appeal, 87 Pa. St. 51." It was held that a residuary clause which directed that the residue of the estate should be put out at interest by the executors with ample security, and the interest thereof should be paid to the widow during her life, and should be equally divided after her death between two of the testator's children, embraced a tract of 40 acres of land which was not otherwise disposed of. In Jacob's Estate, 140 Pa. St. 268, 21 Atl. 318, it was held that a residuary clause in the following words: "The remainder and residue of my money I give and bequeath to the hospital of the Protestant Episcopal Church in Philadelphia,"—carried certain real estate with it to the residuary legatee, not otherwise disposed of. The decision was put upon the ground that the testatrix did not intend to die intestate, and that she did not intend her heirs to have any part of her estate. In Sweltzer's Estate, 142 Pa. St. 541, 21 Atl. 885, we held that a bequest in the following words: "The rest, or nine-tenths, of my available stocks, I bequeath to my sister Charlotte during her lifetime; after her death, to be divided equally between the children of my brother,"—carried with it cash, notes, shares of corporate stocks, United States 4 per cent. bonds, and corporate bonds or loans of a navigation company. This result was reached by the application of the same rule we are considering; and the

various securities above mentioned not having been otherwise disposed of, and the testatrix having said, "I believe it my duty to dispose of my whole estate. * * * I therefore make this, my last will," etc., we decided that the clause of the will above mentioned should be construed as a residuary clause in favor of the legatee named therein.

These illustrations of the rule might be infinitely multiplied, but the foregoing are sufficient, and it is only necessary to examine briefly the language of the will to make the application. The decision of the court below turned chiefly upon the meaning of the word "effects," in the first clause. The learned judge held that the whole right of the children of Mary Ewing was to take the remainder of the specific chattels which Andrew Reimer did not take. Apart from the consideration that this ruling would produce an unintended intestacy as to the great bulk of the estate of the testator, it is clear from the authorities that the word "effects" has a much larger signification than was accorded to it. Thus, in 2 Williams, Ex'rs, p. 1015, it is thus stated: "The word 'goods' is nomen generalissimum, and, when construed in the abstract, will comprehend all the personal estate of the testator, as stock, bonds, notes, money, plate, furniture, etc.; and a bequest of all the testator's 'chattels' will have the same effect as a bequest of all his 'goods and chattels.' So, the word 'effects,' standing alone, will pass the whole of the testator's residuary estate,"—citing a number of cases. Of course, this meaning may be restricted by residuary words; but in their absence they have the enlarged significance stated. In Hogan v. Jackson, Cowp. 299, Lord Mansfield said: "I take 'effects' to be synonymous to 'worldly substance,' which means whatever can be turned to value, and therefore that real and personal effects mean all a man's property." To this reference may be added Campbell v. Prescott, 15 Ves. 500a, in which it was held that the word "effects," in a will, was equivalent to "property" or "worldly substance." In our own case of Dowdel v. Hamm, 2 Watts, 61, Rogers, J., said: "The term 'goods and chattels' includes choses in action, as well as those in possession. Ford & Sheldon's Case, 12 Coke, 1; Ryall v. Rolle, 1 Atk. 182. The term 'chattels' is more comprehensive than 'goods,' and will include animate as well as inanimate property. And so of the term 'effects;' for the term 'goods' will not embrace fixtures, but the term 'effects' may. Lee v. Risdon, 7 Taunt. 188; Salmon v. Watson, 4 Moore, 73; Pitt v. Shew, 4 Barn. & Ald. 206. The term 'effects, both real and personal,' in a will, passes freehold estate, and all chattels, real and personal. 2 Chit. Bl., in the note. Toller, in his Law of Executors, uses the term 'effects' as including choses in action. * * * And we come to the same result if we adopt the popular signification of the term. It means such funds in the hands of the ex-

ecutor as may be made effective or available for payment of debts or legacies."

Recurring to the language of the will in the present case, we fail to discover any words restrictive of the general meaning of word "effects." The bequest is, "the balance of the personal effects to be divided among the children of my sister Mary Ewing." The court below said that this meant the balance of the specific chattels bequeathed to Andrew Reimer which he did not desire. By what authority is such an inference drawn? The will does not say so. It gives Andrew the right to take all of those specific articles; and, assuming that Andrew would take all that he was entitled to take,—which is but ordinary human nature,—there would be no balance for Mary's children to take. If the testator had meant to restrict their right to only that kind of goods or chattels or effects, he would have so provided that there should be such a balance. But, on the contrary, he so provides that the children can get none of those effects, except what Andrew chooses to give them; and then their title would be not under the will, but under Andrew. Such a construction leads to the absurd result that the will has no meaning at all in that view, because Andrew could give them a portion of the effects with or without the will. But, independently of this consideration, the plain meaning of the words, just as they stand, does not invite or permit any restricted meaning to the bequest. The first sentence of the first clause simply gives to Andrew certain specific chattels, and then stops, thus: "I give and bequeath to my brother Andrew Reimer any and all of my household goods, books, clothing, furniture, etc., that he may desire." This is a simple gift of all the articles mentioned. If Andrew does not desire some of them, those not taken become a part of the residuary personal estate of the testator, and will pass by any residuary bequest. Then, in immediate connection with the first sentence of the clause, the testator provides thus: "The balance of the personal effects to be divided among the children of my sister Mary Ewing." Whose "personal effects?" Obviously, the testator's. What are his personal effects? Necessarily, everything embraced within the description "personal property." This is the language of all the authorities in all cases where the natural meaning of the word "effects" is not restricted by the context; and here there is no such restriction. "The balance of the personal effects" of the testator means all of his personal effects, except such particular personal effects of a designated class as may have been taken by Andrew under the first sentence of the first clause of the will. To us this meaning seems perfectly simple. It is in entire accord with the authorities; it effectuates the plain intent of the testator; and it prevents him from dying intestate as to a large part of his estate,

the whole of which he has expressly declared his intention to dispose of. We are clearly of opinion that the second sentence of the first clause of the will is residuary in its character, and was intended as such by the testator, and that the fund for distribution should be given to the children of Mary Ewing. There is nothing in the provision for the monument which in the least degree conflicts with this view. Of course, it was to be paid for out of any moneys in the hands of the executors.

There is not the slightest merit in the third assignment, relating to the payment of attorney's fees for defending the will. It has been decided over and over again that the costs, including counsel fees, for the trial of issues *devisavit vel non*, cannot be charged to the estate unless it is benefited thereby. *Koppenhaffer v. Isaacs*, 7 Watts, 170; *Mumper's Appeal*, 3 Watts & S. 441; *Scott's Estate*, 9 Watts & S. 98; *Yerkes' Appeal*, 99 Pa. St. 401. But, if this were not so, we cannot discover that any such question was raised in the court below. The very brief appendix that is published does not show that any such question was raised. The opinion of the court makes no allusion to it, and there is no credit claimed by the accountant for any such payment. The decree of the orphans' court is reversed, at the cost of the appellees, and the record is remitted, with instructions to make distribution of the fund in accordance with this opinion.

DEAN, J., (dissenting.) Dr. George G. Reimer, owing some debts, mainly unpaid taxes, and being owner of very valuable improved real estate, consisting of houses and lots, in Pittsburgh, and also having personalty to the value of \$7,320.38, made up of money in bank, (\$5,617.88), cash in house, money payable to him on mortgages and other evidences of debt, on the 2d day of February, 1888, made his will. He was a single man, but had a number of collateral, near relatives. Seventeen days before this, he had been stricken with paralysis, and, doubtless prompted by the fear that the disease would soon end his life, undertook in this form to dispose of his estate. However, he did not die, but lived until November 26, 1891, nearly four years afterwards. In the mean time he recovered his health sufficiently to give attention to his business affairs. So far as the will purported to dispose of his personal property, no change was made in it. The sixth paragraph—a devise of a house and two lots in the twenty-second ward of Pittsburgh to his nephew, C. N. Reimer—was canceled by scrawling it over with pen and ink. Considerable change in the interval was made in the character of the property. He sold a lot in the twenty-first ward devised to his brother Andrew; also, two lots in the same ward, and a piece of ground on

Frankstown avenue, devised to his sister Mary. He made no new purchases of real estate. By the accumulation of income, and the purchase money of the land sold, his personalty at his death, instead of the \$7,320.38 at the date of the will, was \$21,049.28. The appellants claimed that, under the first item of the will, this passed to them, the children of Mary Ewing. The appellees resisted this, and alleged that as to this portion of his estate the testator died intestate; and such was the opinion of the learned judge of the orphans' court, so he, after deducting cost of a family monument and collateral inheritance tax, distributed the balance (\$15,224.87) to the surviving brother, Andrew, and the children of deceased brothers and sisters. From that decree of distribution the children of Mary Ewing appealed, and their appeal is sustained by this court. Notwithstanding the very able opinion of my Brother Green, I cannot concur in the judgment. The contention is determined by the interpretation to be given to the first paragraph of the will, which is as follows: "First. I give and bequeath to my brother Andrew Reimer any and all of my household goods, books, clothing, furniture, etc., that he may desire; the balance of the personal effects to be divided among the children of my sister Mary Ewing." This is preceded by the usual direction for payment of debts and funeral expenses, and then these words: "And, after payment of the same, I direct that the whole of my estate shall be divided as follows." Then comes the first paragraph already quoted. This is followed by the second, which reads thus: "I direct that my executors hereinafter named shall collect the rents from my real estate, and place the same in some good reliable bank until such times that said rents, together with any other moneys I may have remaining after paying my debts, funeral expenses, etc., as aforesaid, shall amount to the sum of five thousand dollars, (\$5,000;) and I then direct that my said executors shall take said five thousand dollars, and use the same in the erection of a family monument on our cemetery lot, near the town of Tarentum, in Allegheny county, Pa.; after which, I direct my real estate to be divided as follows." Then follow six separate devises of real estate, which, it is conceded, included all he owned at the date of the will, and, because of sales in the interval, more than at the date of his death.

It is argued by appellant that the words, "the balance of the personal effects are to be divided among the children of my sister Mary Ewing," are to be understood in the same legal sense as if he had said, "the balance of my personalty," or "all that remains of my personal estate," or similar phrases, which necessarily import personal estate, as distinguished from real estate. My first impression was that the court below had

fallen into error in its interpretation of this first paragraph; but a careful scrutiny of the whole will, having before me the subjects of the bequests and devises, constrains me to hold otherwise. In interpreting this bequest, we start with the primary rule, which determines the construction of all wills, that the intent of the testator, as ascertained from the whole will, must be carried out. It is true, as argued, that the words, "the balance of the personal effects," might be descriptive of and include all and every kind of personal property, and pass the money here in dispute. It is often used in wills as a synonym for personal estate, and, as the very many adjudicated cases cited, both from the courts of England and the United States, show, has been held to be sufficiently significant and comprehensive to pass plate, jewelry, heirlooms, evidences of debt, money, and all property not realty; but, in giving the word "effects" such meaning in every instance, the court was impelled to do so because the testator had in no way indicated an intention to limit its scope to a particular kind, or to less than the whole, of the personalty. In not a single case that I have been able to discover has the rule laid down in 1 Jarm. Wills, 751, been departed from, that the word "will comprise the entire personal estate of the testator, unless restrained by the context within narrower limits." Controlled by that rule here, what was the intent of the testator when he adopted as the expression of his intention the word "effects?" He has before his mind the objects of his bounty,—his brother Andrew, and the children of his sister Mary Ewing. The first subject of disposal occurring to him is the property in his house; that before his eyes. As to this, he says: "I give and bequeath to my brother Andrew Reimer any and all of my household goods, books, clothing, furniture, etc., that he may desire." This, in the mind of the testator, obviously, whatever may have been Andrew's right, is not a gift of all the household goods, books, clothing, furniture, etc., but only so much as he may desire. There is a right of choice in the brother, which, when exercised by selection, may dispose of only part of the property. As the bequest in the mind of the testator does not necessarily pass all the "household goods, books, furniture, etc." to Andrew, the next thought is, what shall be done with that which he does not choose to take? The testator immediately answers by continuing to speak in the same paragraph thus: "The balance of the personal effects to be divided among the children of my sister Mary Ewing." Then, further, the fact that the personal effects from which his brother is to choose are mentioned in detail, while no single article of the "effects" given to the children is mentioned, makes the gift to them accord with the idea that the intention was to give them the balance of the personal effects not selected by his

brother. Again, the juxtaposition of the two sentences in the same paragraph, their natural association in thought, all indicate clearly that the word "effects" was used in a restrictive sense. That it was so used is further shown by the testator's direction concerning his money in the next paragraph of the will, already quoted. The executors are directed to collect his rents, and place the same in bank, until such times that said rents, "together with any other moneys I may have remaining after paying my debts, funeral expenses, etc., as aforesaid, shall amount to the sum of five thousand dollars," when the money is to be expended in the erection of a family monument. If by the use of the words, "the balance of the personal effects," in the first paragraph, he thought to dispose of his money, these directions are wholly inconsistent with such intent, while they are in harmony with the intention to restrict them to the balance of the household goods, books, clothing, and furniture not desired by his brother. The cases cited by appellants are, in their form of expression, all distinguishable from the one on hand. In *Campbell v. Prescott*, 15 Ves. 507, it was held these words passed the whole personalty: "I give to my sons all my * * * merchandise stock, with jewels, plate, household goods, furniture, and all effects whatsoever." *Mitchell v. Mitchell*, 5 Madd. 69, this was the language of the testator: "All and singular, my plate, linen, china, household goods and furniture, and effects that I shall die possessed of." This was held to pass the personal estate. In these and the other cases cited the word "effects" is framed in paragraphs different from that in this will. There was no indication, from what the testator said, to restrict the sweeping effect which the law otherwise gives to the word. But here, as is said by the court in *Ennis v. Smith*, 14 How. 400, "'effects,' in French, or the word 'effets,' has the same meaning in common parlance and in law that it has in English. Its meaning, properly, in either, when used indefinitely in wills, but in connection with something particular and certain, is limited by its association to other things of a like kind."

But it is useless to go over the many cases cited on each side here; for, as is said in *Steele v. Thompson*, 14 Serg. & R. 83: "Every case of this cast is individual. There can be no adherence to precedents; for no two wills can be exactly alike." And as is said in *Hoge v. Hoge*, 1 Serg. & R. 156: "Cases on wills have no great weight, unless exactly similar in every respect. To render them authoritative, they should be in verbis ipsissimis, and made by the testator in the same situation and circumstances." The question is not what might pass by the words "personal effects," but what did this testator intend, here, should pass? The argument based on the context preceding the

paragraph in a doubtful case would probably turn the scale in favor of appellant. In this introductory paragraph the testator positively announced an intention to dispose of his whole estate, not to die intestate as to any part of it; and that, this being an intention which the law favors, the interpretation asked for, it is urged, should be put upon the first paragraph. My trouble is that these are the only words in the will which indicate an intention to dispose of this large sum of money in the executor's hands. After directions as to payments of debts and funeral expenses, and before proceeding to dispose of his estate, he says: "I direct that the whole of my estate remaining shall be divided as follows." Giving to these words their literal meaning, they are a positive declaration of an intention to die testate as to the whole estate, real and personal. As to the weight to be given to such declarations in the introductory clauses of wills, the remarks of Chief Justice Tilghman in *Steele v. Thompson*, 14 Serg. & R. 83, are in point. He says: "In connection with other circumstances, such an introduction may be worthy of consideration; but the better opinion seems to be there is not much in it, because it is generally considered by the drawer as a matter of form, and put down of course, before he begins to express the will of the testator, and because it cannot be doubted that most men, when they make their wills, do intend to dispose of their whole estate, whether they say so or not." And as is held in *Rupp v. Eberly*, 79 Pa. St. 141, while these introductory words are to be considered as illustrating the intention, they will not of themselves pass property which is clearly omitted. Here, while the testator said he intended to dispose of his whole estate, he clearly did not do so. There is no ambiguity in the will. The first paragraph bequeaths to his brother so much of his household goods, books, and furniture as he chooses to accept, and the balance of the personal effects is bequeathed to the children of his sister. He directed that his money should be applied to his debts, and \$5,000 to the erection of a monument; he devised all of his real estate in separate parcels to particular persons, but made no disposition of the large sum of money now for distribution. Therefore there was nothing left for the court below to do but to distribute this fund under the intestate laws; and the judgment, in my opinion, ought to be affirmed.

(159 Pa. St. 420)

COTE v. MURPHY et al.

(Supreme Court of Pennsylvania. Jan. 2, 1894.)

CONSPIRACY—COMBINATION OF EMPLOYEES TO RAISE WAGES—COUNTER COMBINATION OF EMPLOYERS—LAWFULNESS—PREVENTING SALES TO CONCERNING EMPLOYERS.

1. Where employees enter into a lawful combination to control, by artificial means, the

supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is lawful, since it is not made to lower the price of labor, as regulated by supply and demand.

2. A combination of employers prevented dealers in the supplies used by such employers from selling to an employer who was not a member of their combination, and who had conceded a demand of the employees, by informing such dealers that no member of the combination would buy from them if they sold to such employer. *Held*, that this was not unlawful coercion.

Appeal from court of common pleas, Allegheny county; Ewing, Judge.

Trespass by George M. Cote against Hugh Murphy, M. Diebold, George Cunningham, Nathan Jones, Edward Eller, David J. Evans, A. J. Breitwieser, D. R. Speer, W. L. Coyle, George S. Lacy, George Loeffert, and John Loeffert to recover damages alleged to have been sustained by reason of a conspiracy between defendants to damage plaintiff in his business, deprive him of his source of buying and the customers to whom he sold, to defame his character and to subject him to great loss, to interfere with his trade generally, and to injure the public at large. From a judgment for plaintiff, defendants appeal. Reversed.

J. McF. Carpenter and J. S. & E. G. Ferguson, for appellants. J. A. Wakefield and J. W. Kinnear, for appellee.

DEAN, J. The defendants were members of the Planing Mill Association, of Allegheny county, and Builders' Exchange, of Pittsburgh. The different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building. The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike by the unions of the different trades was declared. The plaintiff, at the time, was doing business in the city of Pittsburgh, as a dealer in building materials. He was not a member of either the Planing Mill Association, or of the Builders' Exchange. There were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen. They sought to secure building material from dealers, wherever they could, and thus go on with their contracts. If they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay. The tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle. The two associa-

tions already named sought to enlist all concerned, as contractors and builders, or as dealers in supplies, whether members of the associations or not, in the furtherance of the one object,—resistance to the demands of the workmen. The plaintiff, and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance by inducing lumber dealers and others to refrain from shipping or selling them, in quantities, the lumber and other material necessary to carrying on the retail business. In several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations engaged in the contest with the striking workmen. The strike continued about two months. After it was at an end, the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials, themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for plaintiff in the sum of \$2,500 damages, which the court reduced to \$1,500; then judgment; and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice. The mechanics of Pittsburgh, engaged in the different building trades, on the 1st of May, 1891, demanded that eight hours should be computed as a day, in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or a laborer, in this commonwealth, to fix such value on his services as he sees proper, and under the constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept. But in this case the workmen went further. They agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law, this last was a conspiracy, and indictable, but under the acts of 1869, 1872, 1876, and 1891, employees, acting together by agreement, may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor

from doing so, by force, or menace of harm to person or property; but the strike here was conducted, throughout, in a lawful, orderly manner. The employers—contractors and others engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged—refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of, or had conceded, the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power, this agreement was carried out. This, clearly, was combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include, within their express terms, workmen. Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators, in their attempts to resist the demands for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which, by statute, is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff, who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues, for damages, members of another combination, who resist the advance. Nor is there any difference in the character of the acts or means on both sides in furtherance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work, until the demand is conceded. The employers will not sell to contractors who concede the demand, and they do their best to persuade others engaged in the same business from doing so. Then, the element of real damage to plaintiff is absent. By far the larger number of dealers in the city and county were members of the combination which refused to sell. Only the plaintiff and six others refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances, he paid more to whole-

sale dealers, and put in more time buying, than he would have done if the associations had not interfered with those who sold him. But it is not denied that as a result of the combination he was, individually, a large gainer. True, he avers that if defendants had gone no further than to refuse to sell, themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him. But that, by the fact of the combinations and strike, he was richer at the end than when they commenced, is not questioned.

We then have these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source,—a contest between employers and employed as to the price of daily wages,—and then the further fact that this contest, instead of damaging him, resulted largely to his profit. We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts, to the damage of plaintiff, the judgment should stand. All the authorities of this state go to show that, while the act of an individual may not be unlawful, yet the same act, when committed by a combination of two or more, may be unlawful, and therefore be actionable. A dictum of Lord Denman in *Rex v. Seward*, 1 Adol. & E. 711, gives this definition of a "conspiracy:" "It is either a combination to procure an unlawful object, or to procure a lawful object by unlawful means." This leaves still undetermined the meaning to be given the words "lawful" and "unlawful," in their connection in the antithesis. An agreement may be unlawful, in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in *Reg. v. Peck*, 9 Adol. & E. 690, that his definition was not very correct. See note to section 2291, 3 Whart. Crim. Law. It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight-hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Com. v. Carlisle*, Brightly, N. P. 40, says: "Where the act is lawful for the individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression

of individuals, and where such prejudice or oppression is the natural and necessary consequence." In the same case it is held: "A combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means on either side is criminal." This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means on either side." The prejudice to the public is the use of artificial means to affect prices, whereby the public suffers. A combination of stockbrokers, to corner a stock; of farmers, to raise the price of grain; of manufacturers, to raise the price of their product; of employers, to reduce the price of labor; of workmen, to raise the price,—were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor; and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what for more than a century had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price, determined by supply and demand, might or might not be fair wages,—often was not,—and as long as workmen were not free, by combination, to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however, is clear: The moment the legislature relieves one, and by far the larger number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price, which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large.

Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what, otherwise, they would accept. Employers would not pay what, otherwise, they would consider fair wages. Supply and demand consist in the amount of labor for sale, and the needs of the employer who buys. If more men offered to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy, in this class of cases. But in this case the workmen, without regard to the supply of labor, or the demand for it, agreed upon what, in their judgment, is a fair price, and then combined in a demand for payment of that price. When refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded. Further, they agree, by lawful means, to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used, or menaces to person or property, they had a lawful right to do; and, so far as is known to us, the rise demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was, by combination, wholly withdrawn, and, as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means, the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor, as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice towards plaintiff or others, is lacking, and this is the essential element on which is founded all the decisions as to common-law conspiracy in this class of cases; and, however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price, when they combine to resist a combination to artificially advance price. "The

reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Com. v. Carlisle*, supra,—that it would not be unlawful if there was first recurrence to artificial means by workmen to raise the market price. Here, the first step provocative of a combination by the employers was an attempt, by lawful, artificial means on part of the workmen, to control the supply of labor, preparatory to a demand for an advance. Nor does the fact that the appellee was not a workman, nor a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook, for his own profit, to aid the cause of the workmen. His right so to do was unquestionable. But if the employers, by a lawful combination, could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

The case of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173, is not in point. It was the attempt to enforce the collection of a draft given by one member of a combination formed to raise the price of coal to another, in consideration of certain stipulations in the agreement. It was held that the combination, being in restraint of trade, was unlawful, and, as the draft was given in pursuance of the unlawful contract, it, also, was tainted with the illegality, and there could be no recovery. But, if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed "threats," were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or vilify them in the newspapers, or bring on them social ostracism, or similar declarations,—these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions. But to say—and even that is inferential from the correspondence—that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom was most profitable, and have acted accordingly. But this was not such coercion and threats as constituted the acts of the combination unlawful. *Rogers v. Dutt*, 13 Moore, P. C. 209; *Bowen v. Matheson*, 14 Allen, 499; *Manufacturing Co. v. Hollis*, (Minn.) 55 N. W. 1119, (not yet officially reported.) On the main question the case last cited goes further than we are called upon to go, as yet, in this

state. It holds that what is not unlawful when done by an individual cannot be unlawful when done by many, and therefore the combination not to deal with those who broke the rules of the association was not a conspiracy. For this a number of cases from other states, as well as from England, are cited. But the law in this state has heretofore been determined otherwise, from a very early day, by an unbroken line of decisions, which here call for no qualification; for, so far as concerns the facts of this case, the legislature has so changed the law as to render these decisions inapplicable. We concede, however, that the decisions of other courts are by no means uniform. Mr. Wright, in his work on the Law of Criminal Conspiracies and Agreements, (London, 1873,) says: "It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that as a rule an agreement or combination is not criminal, unless it be for acts or omissions, whether as ends or means, which would be criminal apart from agreement." Logically, the same rule would apply, as was held in *Manufacturing Co. v. Hollis*, to combinations which, although not criminal, are alleged to be unlawful. But without regard to whether the general rule be settled by weight of authority, as claimed by appellants, we hold here that this combination was not unlawful, because (1) it was not made to lower the price of wages, as regulated by the supply and demand, but to resist an artificial price made by a combination which, by statute, was not unlawful; (2) the methods adopted to further the objects of the combination were not unlawful.

Another point has been most earnestly pressed upon our consideration by counsel for appellants. It is argued that, under our declaration of rights, either the acts of assembly of 1869, 1872, 1876, and 1891, exempting employees from the penalties of unlawful combination to fix the price of labor, are void, because, by their terms, they embrace only a particular class of citizens of the commonwealth, or their scope must be enlarged beyond the express terms of these acts, so as to include within their protection all those interested in the same subject of legislation. It is argued that it is not within the power of the legislature to declare some citizens innocent of any offense against the law, for the very same act which, when committed by some others in the same business, the law will still hold to be criminal; that what the statute declares is not conspiracy in one case cannot, under the law, be conspiracy in the other; and therefore, in every contest of this kind between workmen and employers, the statute if not void, must at least be held to operate equally to the exemption of all citizens interested in the subject affected by the combination. If there be nothing criminal

in a combination to artificially raise wages, there can be nothing criminal in an employers' combination to resist the advance, or to artificially depress them. This question is not in the case, in the view we have taken of the facts. We are at all times averse to passing on questions, the answers to which are not necessary to a decision of the case immediately before us. Much less are we inclined to discuss and decide questions involving the constitutional power of a co-ordinate branch of the government. For this reason we refrain from a consideration of the able argument of counsel for appellants on this point.

The refusal of the court below to affirm appellants' seventh prayer for instructions, that "under all the evidence the verdict must be for defendants," was error, and, being here assigned for error, the appeal is sustained, and judgment reversed.

(150 Pa. St. 433)

BUCHANAN v. KERR et al.

(Supreme Court of Pennsylvania. Jan. 2, 1894.)

CONSPIRACY TO INJURE BUSINESS—SUFFICIENCY OF EVIDENCE.

Evidence that employers in the building trades combined to resist a lawful combination of employees to advance wages, agreed among themselves not to sell materials to contractors who conceded the demand, and refused to furnish materials to plaintiff contractor, or to work for him, because he was paying the demanded wages, and that a member of such employers' combination broke his contract with plaintiff to deliver materials, was insufficient to show a conspiracy by such employers to injure plaintiff in his business.

Appeal from court of common pleas, Allegheny county.

Trespass by Thomas Buchanan against John Kerr, Robert Kerr, Henry Kerr, Robert Twyford, Henry G. Squires, H. R. Barnes, George S. Fulmer, A. A. Wensel, Samuel Francis, J. F. Bruggeman, S. A. Steel, T. J. Hamilton, and Henry Barley to recover damages for injury and loss sustained by reason of the combined action of the defendants to ruin his business as a contractor. From a judgment entered on a verdict for plaintiff against defendants Henry Kerr, Squires, and Twyford, said defendants appeal. Reversed.

J. S. & E. G. Ferguson, for appellants. W. J. Brennen and L. K. Porter, for appellee.

DEAN, J. The opinion in *Cote v. Murphy*, 28 Atl. 190, (filed this day,) decides this case also. There was no evidence of a combination to break down Buchanan in his business as a contractor or builder. The evidence showed a lawful combination of workmen engaged in the building trades to advance wages, by demanding that in the future the employers pay for eight hours' work the same wages that had theretofore been paid for nine hours. The defendants were members of an association of employers, which,

by combination, resisted this demand. This combination agreed among themselves they would not sell material to contractors who conceded the advance; would not do work of any kind for them. In pursuance of this agreement they refused to furnish material to plaintiff, or to work for him, because, as they believed, he was aiding the striking workmen in their attempt by combination to advance the price of labor. There is no evidence of malice, or intention to injure this plaintiff. If Kerr, one of defendants, as plaintiff alleged at the trial, broke his contract to deliver him brick, then he has an action against him on the contract, for damages. But the other defendants were not answerable for conspiracy because of such breach of contract by one of their number, when such breach of contract formed no part of the agreement or combination to resist a combination advance in wages.

The defendants' fourth prayer for instructions, which was refused, and which constitutes appellants' third assignment of error, that there was "no evidence of a common purpose between any two or more of them to injure plaintiff," should have been affirmed. The judgment is reversed, at costs of appellee.

BUCHANAN v. BARNES et al.

(Supreme Court of Pennsylvania. Jan. 2, 1894.)

Appeal from court of common pleas, Allegheny county; John M. Kennedy, Judge.

Trespass by Thomas Buchanan against H. R. Barnes, John Carr, and William P. Van, impleaded with James Bradshaw, for damages for conspiracy. Judgment for plaintiff. Defendants bring error. Reversed.

J. S. & E. G. Ferguson, for appellants. James Fitzsimmons and L. K. Porter, for appellee.

DEAN, J. In none of its material facts is this case distinguishable from that of *Cote v. Murphy*, 28 Atl. 190, in which judgment is this day entered. For the reasons given in the opinion filed in that case, we rule this. Appellants' first assignment of error is herewith sustained, and the judgment is reversed, at costs of appellee.

(150 Pa. St. 46)

IRON CITY NAT. BANK OF PITTSBURGH v. FT. PITT NAT. BANK OF PITTSBURGH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

NEGOTIABLE INSTRUMENTS—RECOVERY OF MONEY PAID ON FORGED CHECK—NEGLIGENCE.

1. Under Act April 5, 1849, relating to commercial paper, which provides for the recovery of money paid on forged signatures, whether of drawers, acceptors, or indorsers, the right of recovery by the payor exists only in case of the exercise of the care and diligence, and the giving of the notice required by the settled rules of the law of negotiable paper.

2. Where a bank paid a forged check drawn on it, entered it on its books, and then appar-

ently dismissed it from further attention, and the forgery was not discovered until five days afterwards, through an investigation started by another bank, from which it received it, the former bank is guilty of negligence, and cannot recover from the latter the amount so paid.

Appeal from court of common pleas, Allegheny county.

Action by the Iron City National Bank of Pittsburgh against the Ft. Pitt National Bank of Pittsburgh to recover the amount paid by plaintiff to defendant on a forged check. From a judgment for plaintiff, defendant appeals. Reversed.

Knox & Reed and Patterson & Smith, for appellant. Watson & McCleave, for appellee.

MITCHELL, J. The argument of the learned counsel for the plaintiff meets the exigency of his case courageously, and stands squarely on the proposition that "the effect of the act [of 5th April, 1849, P. L. 426] is undoubtedly to declare that there is no legal duty imposed upon the payor towards the holder of the check to know the genuineness of the signature,—whether it be the signature of the depositor, or of some other party; and, there being no such legal duty, of course, the payor cannot be guilty of negligence vesting any right against him in the holder." There can be no question that this is the necessary result of the construction contended for,—that the act abrogates all the rules of the common law relative to the payment of forged commercial paper. There is no logical stopping place short of such proposition. A bank, therefore, may pay a check, or certify it as good, no matter how negligently, and the holder may, on the faith of such action, part with his goods or his land, and yet have no claim on the bank, or, if he has been paid, may be liable to refund the money. Still more, any man may, no matter how carelessly, pay a note purporting to bear his own signature, lay it away, and yet, at any time within six years, bring suit, and recover back the money, on the ground that the signature was a forgery. The disastrous consequences of the introduction of such a rule into the law of commercial paper—a law founded throughout the civilized world on the utmost promptness, diligence, and good faith—should warn us to look closely into the true intent of a statute before pronouncing that the legislature meant it to have such effect. The act of 1849 is an omnibus act, made up of the most heterogeneous materials. Sections 7 to 11, inclusive, are the only ones having any relation to the present subject, and they provide that no defense for want of proper and timely demand of payment or acceptance, or proper and timely protest for, or notice of, nonacceptance or nonpayment, shall avail, unless the proper place shall be distinctly set forth in the instrument; that, when such place is omitted, demand and notice may be made at any time before suit,

and the instrument shall be held payable, protestable, etc., at the place where they are dated; and that all bills, drafts, etc., drawn in the state, but payable out of it, with added exchange, or with "in current funds," or such like qualifications, superadded," shall be negotiable. Section 10, with which we are particularly concerned, provides for the recovery of money paid on forged signatures, whether of drawers, acceptors, or indorsers. In these sections, thus briefly summarized, there is nothing indicative of an intent to revolutionize the law merchant with regard to negotiable paper, but rather to relieve against some hardships in practice which that law gave rise to. The strictness of demand and notice, which was easily complied with when transactions by bills and checks were comparatively few, and the parties known to each other, became often of great difficulty in the extended business of modern times. So undesirable, however, was even this departure from the general commercial law found to be, that sections 7, 8, and 9, as to demand and notice, were repealed, after only two years' experience, by the act of April 8, 1851, (P. L. 398.) At common law, acceptance of a bill was an admission of the drawer's signature, and the acceptor, having thus given it currency, could not set up that it was a forgery, (Byles, Bills, 199;) and payment of a forged check or bill could only be recovered back by giving notice on the same day, (Id. 230.) But, even with prompt notice, any fault or negligence of the party paying would prevent his recovery; and it has been held, from Lord Mansfield down, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence, than by a mistake, if he pays on a forged signature. Id. 334. So strictly was this rule held with regard to a bank, that in our own case of *Levy v. Bank*, 1 Bin. 27, the mere entry of the check as cash in a depositor's book was held to be equivalent to payment, and to make the bank liable to the depositor for the amount, though the forgery was discovered, and notice given the depositor, the same day, and there was no proof that the depositor had, in the mean time, lost anything, or been prejudiced in any way, by the bank's action. Shippen, C. J., said: "The acceptor is presumed to know the drawer's handwriting, and, by his acceptance, to take this knowledge upon himself." The act of paying was thus held to be a conclusive estoppel, without reference to any questions of negligence or delay, or consequent loss to the other party. This was the kind of hardship which the act of 1849 was intended to remedy, and this is the extent of its operation in regard to a bank or other drawee, paying on a forged signature of the drawer. The mere fact of payment is no longer, eo instanti and of itself, a bar to recovery of the money; but the principles of the commercial law are still applicable, and there is still the same

necessity as before for care, diligence, and proper notice, under the settled rules of the law of negotiable paper. Such has been the construction of the act heretofore. Thus, in *Roth v. Crissy*, 30 Pa. St. 145, and *Rick v. Kelly*, Id. 527, it was held that notice of the forgery within reasonable time, and an offer to return the note, are necessary to enable the party paying it to recover. In the former case, the court below charged the jury that the plaintiff was bound to pursue his remedy with due diligence, and this was affirmed. In *Rick v. Kelly* it is said that the act of 1849 really accomplished little, as, for the most part, it was only declaratory of the former law; and, in *Chambers v. Bank*, 78 Pa. St. 205, the necessity of diligence was admitted, though a delay of 16 days in the discovery of the forgery was held to be excused by the circumstances, notice having been given immediately on the discovery.

The two cases specially relied on by appellee are not in conflict with this view of the statute. They are entirely sound on their own facts, and what is said in them must be read with reference to the facts. In *Tradesmen's Bank v. Third Nat. Bank*, 66 Pa. St. 435, the defendant had collected the money as agent for another bank, and had credited it in the other's account. Under *Levy v. Bank* this would have been equivalent to actual payment, and would have fixed the defendant's liability to its principal; but it was held that the act of 1849 now prevented the mere book entry from being conclusive, and, as the defendant could pay the money back to the plaintiff without loss to itself, it was bound to do so. But in so holding this court said: "The money received is in the hands of defendants, and we are not called upon to decide what would have been their situation if it had been actually paid over by them." In *Corn Exch. Bank v. National Bank of Republic*, 78 Pa. St. 233, the court below had charged that, "under the act of 1849, the plaintiff is entitled to recover, unless there has been negligence on its part, and through that negligence the defendant has been put in a position to lose by paying this money to plaintiff." The judgment was reversed, not because this charge was wrong, but because the evidence of negligence was not sufficient; *Paxson, J.*, saying that it was "not necessary to express an opinion as to how far negligence is a defense under the act, for the reason that there was not sufficient evidence upon this point to justify submitting it to the jury." It is always a good defense that the loss complained of was the result of the complainant's own fault or neglect, and it would require a statute in very explicit terms to do away with so universal a rule of law, founded on so incontestable a principle of justice.

The result of the act of 1849, and the cases upon this subject, is that the mere acceptance or payment of forged paper is no

longer, of itself, a bar to the recovery of the money by the party paying, even though it be a bank or other drawee. Nor is such party absolutely bound, as at common law, to discover and give notice of the forgery on the very day of payment. All that he need do, in any case, is to give notice promptly, according to the circumstances and the usage of the business, and, unless the position of the party receiving the money has been altered for the worse in the mean time, it would seem that the date of notice is not material. But, on the other hand, the statute does not dispense with the necessity of care and diligence on the part of the payor, nor exempt him from the consequences of his own negligence, if thereby loss would accrue to the other party. In the present case the plaintiff received the check on December 19th, paid it, entered it on its books, and then apparently dismissed it from further attention. In all probability, the forgery would not have been discovered until the deposit book of the supposed drawers, *Dice & Co.*, came in for settlement, had not the defendant's officer, on December 24th, called, and started the investigation which resulted in the discovery. This must be pronounced a want of due diligence. The drawee is still presumed to know the drawer's signature, and, in the language of Chief Justice Shippen, *supra*, "to take this knowledge upon himself," though the first slip is no longer conclusive against him. But, having finished his examination, dismissed the subject from further attention, and allowed five days to elapse, during which the party receiving the money has paid it out in reliance upon the plaintiff's act, the latter cannot be allowed to say that he acted with due diligence and absence of negligence. As the facts are all clearly set out in the statement, there is nothing to go to a jury. Judgment reversed.

(159 Pa. St. 1)

ARTHURHOLT v. SUSQUEHANNA MUT.
FIRE INS. CO. OF HARRISBURG.

(Supreme Court of Pennsylvania. Dec. 30,
1893.)

INSURANCE—PAYMENT OF PREMIUM TO BROKER.

Where a broker, being applied to by an insurance agent to place a risk, writes to a company for the insurance, and the company sends him the executed policy, which he forwards to the agent to deliver, with directions to collect and remit him the premium, the assured's payment to such agent binds the company, though the policy is conditioned to be void unless the premium be paid within 15 days from issue to the secretary, "or an agent of the company, duly appointed as such in writing," if the broker was in fact appointed by the company to deliver and collect for that policy, the agent merely acting for him in the matter; and evidence that the company had for years sent the broker policies on his applications, the premiums for which he collected and remitted, less his commissions, is proper to go to the jury on the question of such appointment.

Appeal from court of common pleas, Mercer county.

Action by C. F. Arthurholt against the Susquehanna Mutual Fire Insurance Company of Harrisburg on a policy of insurance. Judgment for plaintiff. Defendant appeals. Affirmed.

J. C. Miller and Miller & Gordon, for appellant. E. P. Gillespie and B. Magoffin, for appellee.

DEAN, J. Arthurholt, the plaintiff, was a retail merchant in Clarksville, Mercer county. He owned the building containing his stock of goods. In January, 1892, he applied to McKean, an insurance agent in Mercer, Pa., for insurance on the building and goods. McKean could not place the risk in any of the companies he was agent for, so he applied to Downing, an insurance broker in Philadelphia, to get the insurance. Downing applied, by letter, to the Susquehanna Mutual Insurance Company, (this defendant,) having its office at Harrisburg, to take a risk of \$1,000 on the goods, and \$300 on the building. The defendant, in response, on the 13th of January, 1892, made out the policy, and transmitted it by mail to Downing, at Philadelphia, who immediately sent it by mail to McKean, at Mercer, who, by mail, delivered it, on January 27th, to Arthurholt, the plaintiff, at Clarksville. The next day, Arthurholt forwarded, by check, the premium, \$19.50, to McKean, who duly received it, and drew the money from the bank, but he did not pay it over to either Downing or the insurance company. On the 3d of March, 1892, both goods and building were destroyed by fire. The defendant refused to pay any part of the loss because (1) the premium was not actually paid to the company, as required by the terms of the policy; (2) there were fireworks in the building at the date of the insurance, and this, by a stipulation in the policy, rendered it void; (3) there was other insurance, making, in the aggregate, more than two-thirds the value of the property, and this avoided the policy. Under the instructions of the court on the evidence, there was a verdict for plaintiff; hence this appeal.

It is very clear the court was right in submitting the conflicting evidence on the questions of fact, raised by the second and third objections of defendant to the determination of the jury; but, as counsel for appellant has not pressed the assignments of error to the instruction in these particulars, they may be dismissed. As to the first objection, which is embraced in the first assignment of error, it is earnestly argued that, on the undisputed facts, the court should have directed a verdict for the defendant. The stipulation in the policy which, it is urged, must defeat a recovery, is as follows: "If the premium for this policy, or for any renewal of the same, shall not be paid to the secretary, or an agent

of the company duly appointed as such in writing, within fifteen days from the date of its issue," then the policy shall be void. It will be noticed that the premium money was paid to McKean, who was neither the secretary nor an agent of the company duly appointed by writing. He had no official connection whatever with the company. But the company's formally attested policy came into his hands for delivery to the insured. Why? Because it was sent to him by Downing for that purpose. He was then the mere representative of Downing,—the vehicle chosen by him for the transmission of the policy, and the reception and remittance of the premium. This appears from the testimony of both Downing and McKean. Downing's agency was not by a formal, written appointment; defendant denies that he was its agent at all. He testified he had been an insurance broker, with an office in Philadelphia, for 15 years; that he had placed a number of risks with defendant company before he applied for this policy; always collected the premiums, and remitted them, less his commissions, to the company; that, on his application, the company sent him this policy, and he sent it to McKean to deliver to the insured, and collect and remit the premium due to him. For negotiating and placing these risks, the company allowed him (Downing) a commission of 20 per cent. of the premium, he remitting to the company 80 per cent. He did not deny his liability to the company for the premium. If the company delivered this policy to Downing on the understanding that he was to deliver it to the insured, collect the premium, retain his percentage, and remit the balance to the company, certainly, whatever may have been his attitude before that time, while negotiation was pending, he was the agent in fact of the company for the delivery of the policy and the collection of the premium; as fully the agent of the company as if the secretary had handed him the policy in the company's office, with instructions to deliver it to the insured next door, and collect the premium. Downing does not deny that McKean merely represented him in the delivery of the policy and the collection of the money. The payment to McKean was, in its legal effect, a payment to Downing. Taking, then, the provision in the policy, as it stands, that payment shall be made only to the secretary, or to an agent duly appointed as such in writing, it is clear no act of the insured, or no act of one assuming to be an agent, and who is really not an agent, of the company for the collection of the premium, will protect the assured against the failure of the money to reach the company; but if the company itself, either expressly or by acts which warrant the implication, has in fact appointed an agent to deliver a policy and collect the premium, the receipt of the money by such agent is the receipt by the company. To hold otherwise would be a

fraud upon the policy holder. He runs the risk of the honesty of his own agents who apply to the company for insurance upon his property, and the risk of the authority to collect from the man to whom he pays, but he does not guaranty the company that its own agents, sent by it to deliver his policy and receive his money, will pay it over to them. The intention in inserting this provision, doubtless, was to protect the company against default on the part of those who were mere solicitors of insurance for the insured; but it was not intended to make the insured answerable for the default of the company's own agents, nor will any perversion of the manifest purpose of the stipulation be permitted to work such a result. The court properly submitted the evidence to the jury to find whether McKean was the mere messenger or servant of Downing, and the payment to him a payment really to Downing. Then, further, from the evidence that Downing had for years at times acted for the company,—it issuing policies at his request, he collecting the premiums for 20 per cent. commission, and paying the net balance to the company,—whether the company had, without writing, in fact appointed him its agent to deliver this policy and receive the premium. If so, the payment to Downing was a payment to the company, and the policy could not be avoided merely because the money had not been physically lodged in the company's treasury. The cases cited by appellant as holding a different rule are, without doubt, the law, but they are clearly distinguishable on their facts from the one before us. In Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co., 100 Pa. St. 137, there were three different brokers between Haeseler, the agent of the company, and the insured. The policy was delivered to the insured, who paid the premium, but the money was remitted no further than the second broker. There was no pretense that it had reached the agent of the company authorized to deliver the policy and collect the premium. Our Brother Green puts the decision expressly on the ground that the insured had paid the premium to a broker he knew was not the agent of the company, and therefore took the risk. If, in that case, Haeseler, the agent of the company, had sent an errand boy with the policy to the assured, to deliver it and bring back the premium, the policy would have been enforced, even though the errand boy had lost the money or embezzled it. So, in the other cases cited, there was no actual payment of the premium to an agent authorized by the company to receive it. Here the jury has found, on competent evidence, there was such payment to such agent.

While this case is clearly distinguishable in its facts from those cited, and for this reason is not ruled by the principles announced in them, yet if the results contended for here by appellant necessarily follow from the construction placed upon such

stipulations, then must follow some qualification of the rule laid down in them; otherwise, the ruling in *Marland v. Insurance Co.*, 71 Pa. St. 393, followed by *Greene v. Insurance Co.*, 91 Pa. St. 387, and *Pottsville Mut. Fire Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137, may not seldom lead to injustice. The law in those cases may be invoked by dishonest insurance companies to escape payment of what ought to be held a clear legal obligation, and attempts will be made, under them, to pervert the clause referred to into a mere trap for unwary, but honest, insurers. Take the case in hand. The owner of property, on the 27th of January, receives a policy dated the 13th of same month, regularly attested, issued by the company, insuring property to the value of \$1,300 against fire for one year from its date. He pays the premium to the person handing him the policy, assuming, as a business man naturally would, that, the company having intrusted the executed policy for delivery to the man who offers it to him, the same man has authority to receive the money. Then, resting on the security inspired by the possession of the company's executed contract, and his payment of the consideration demanded, he makes no further inquiry. Seven weeks after the date of the policy, when nearly one-seventh of the term covered by the insurance has expired, his property is destroyed, and he is met by a refusal to pay, on the ground that the premium paid had not reached the company's treasury. All this time he has had possession of the policy, with no notice from the company that the premium had not been handed over; yet, during the same time, the risk must have been carried on the books of the company as a valid outstanding risk,—that is, if the company kept any books showing the condition of its business and the extent of its liabilities. We assume the policy was not canceled for nonpayment of the premium, for no notice of the fault was given the assured, and the secretary of the company, who was familiar with the books, and who testified at length, does not say that it was canceled. Under such a state of facts, and applying to them the law invoked in the cases cited, unless the policy holder, as in this case, can further adduce evidence that he to whom he paid his money was in fact authorized to receive it, he is insured if there be no fire, but not insured if one occurs; for if, without notice to him of the nonreceipt of the premium on an executed and delivered policy, the company can declare it void when a fire occurs, seven weeks after it has been paid for, it can do the same seven months after; in effect, the policy holders, under such a clause, become insurers of the honesty and promptitude of those to whom the insurance company, without a written appointment, intrusts its policies for delivery. It ought to be held that, under such a clause, the insur-

ers themselves waive it whenever, by their voluntary act, the policy leaves the office, to be delivered to the insured on payment of the premium; and this, without regard to the fact that some one, having no nominal connection with the company as agent, hands over the policy and receives the premium. By the very fact of issuing a policy which requires, apparently, nothing but delivery and payment of premium to put it in force, the company arms every man, into whose hands it may come, with the power to receive its money. There could be no conduct more significant of an intention to waive the advantage of such a clause than this. But, without regard to the soundness of this individual opinion of what the law ought to be, the case before us, on its facts, being clearly outside the principles laid down in the cases cited, the judgment is affirmed, and appeal dismissed.

(159 Pa. St. 403)

VANESSE v. CATSBURG COAL CO., Limited.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MASTER AND SERVANT—NEGLIGENCE—DANGEROUS PREMISES—CONTRIBUTORY NEGLIGENCE.

1. In an action for personal injuries, it appeared that defendant was engaged in widening the entrance to its mine by digging out the sides, and placing roof timbers and supports about six feet apart. After such supports were placed, the loose coal and slate between them were, under the supervision of defendant's superintendent, knocked down, and left to be carried out by the cleaning gang, which followed some 50 feet behind. Plaintiff, a workman in the cleaning gang, was injured by loose stone falling from the top. *Held*, that it was for the jury to say whether defendant was negligent.

2. It was not error to refuse to instruct that if it had been shown that plaintiff could have seen, by looking, that there was imminent danger of the stone falling, and he did not look, it would prevent his recovery, since he had the right to presume that the entrance had been made safe, and was not required to examine it.

Appeal from court of common pleas, Allegheny county; Thomas Elwing, Judge.

Action by Desire Vanesse against the Catsburg Coal Company, Limited. From a judgment for plaintiff, defendant appeals. Affirmed.

D. F. Patterson and A. M. Todd, for appellant. D. R. Jones, for appellee.

DEAN, J. The defendant operates a drift coal mine in the Monongahela valley. For the purpose of enlarging and improving the main drift or gangway, actual digging of coal was temporarily stopped on the 2d of July, 1892. One Coulter had up to that time been mine boss, but on that day he was discharged, and a new boss, Wordley, was employed, who was expected to assume his duties on the 5th of July, but did not actively do so. The main entry or gangway through

the mine was at first only wide enough for a single pit-car track. This, while mining was going on before the 2d of July, had been widened so as to admit of laying two car tracks, thus doubling the capacity of the gangway. This double width was attained by digging out the coal at the sides of the old drift, and by taking down top for height. The permanent safety of the way was secured by timbering with posts at the sides, connected with cross timbers at the roof; each set of timbers to stand about six feet from each other in the gangway course. The greater part of the digging necessary to the widening had been done before the work of timbering was begun. The method of performing this last was to dig holes for the upright posts, and, when necessary, shear out slightly the sides to get them in place for the roof cross timbers. The loose or fractured material, consisting of coal, bone, and slate on the sides and top, outside of or between the sets of timbers, was then knocked down, and left on the floor of the gangway, to be shoveled into the pit cars, and hauled to the dump. The workmen setting the timbers did nothing, after knocking down that which was not solid. When this was done, they proceeded to place in position a new set of timbers. Other workmen or laborers followed, to remove the piles of loose material left on the floor of the gangway. Vanesse, the plaintiff, was one of those employed to shovel up this loose material on the floor of the mine. On the afternoon of the 5th of July, while shoveling a pile of this stuff on the cars, which had been left there several days before by those setting timbers, a large piece of coal and slate fell from the side and angle at the top of the gangway, between the timbers, upon him, so seriously crushing his leg that amputation was necessary to save his life. He brought suit for damages against his employer, alleging his injury was caused by the negligence of the company in constructing the gangway so that it was left in a condition unnecessarily dangerous to workmen and others who might afterwards have occasion to use it, either in working or passing. The plaintiff alleged that it was the duty of his employer to exercise ordinary care in the construction of this gangway, so that there should be as little danger as practicable to the workmen whose duty it was to use it. The court submitted the evidence to the jury to find whether there was negligence on part of defendant; also, whether plaintiff was guilty of contributory negligence, in not exercising proper care and vigilance to avoid the danger. Under the instructions the verdict was for the plaintiff. From the judgment entered on the verdict the defendant appeals, assigning for error: (1) The refusal of the court to peremptorily direct a verdict for the defendant, because there was no evidence of negligence to submit for the consideration of the jury; and this assignment embraces the second. (3) In charging the jury

as follows: "If it had been shown that, by looking, he could have seen there was imminent danger of this piece of slate falling on him, and he did not look, as he said he did not, it would be sufficient to prevent his recovery; but I recall no evidence that would show that he himself, by inspecting,—just by a glance at it,—could have seen that it was specially dangerous, any more than any other piece of slate that was hanging that way."

As to the first assignment, while the evidence of negligence on the part of defendant was very contradictory, and to the minds of many the weight of it would have turned the case in favor of defendant, still it rose much higher than a scintilla in favor of plaintiff. Negligence is absence of care, according to the circumstances. What were the circumstances here? The employer was constructing a tunnel or way into his mine, which he knew, for years, must be used by his miners and workmen in moving to daylight thousands of tons of coal. Above this gangway, pressing always downward and inward, were hundreds of thousands of tons of rock and earth. The tendency would be, continually, to fracture and loosen the surface of the tunnel at the sides and top, and cause it to fall; and especially would this be the case at the time the timbers were being set, for necessarily, then, the surface of the gangway would be disturbed. The testimony on both sides showed that in setting the timbers, immediately after they were in place, ordinary care required testing for loose and fractured parts between them, and the knocking down of these. This work of making safe was done under the immediate supervision and orders of defendant's superintendent and general manager,—one of the owners of the mine. Whatever risk was incident to and taken in that special work, by those setting timbers, when that work was completed, and they were 40 or 50 yards in advance of where the accident occurred, any special risk at that point, it was reasonable to presume, had ended. The gangway there was ready for use. If the loose and fractured pieces of coal, bone, and slate between the timbers—which, both sides say, care required should be knocked down and taken away as soon as the timbers were set—had not all been removed, then it was for the jury to determine whether it was negligence in defendant to leave undisturbed this piece, the fall of which caused the injury. The conflicting testimony as to whether plaintiff belonged to the timbering gang, or was working independently in the finished gangway, as a shoveler, 40 or 50 yards behind that gang, was clearly for the jury. Nor does the case turn on the question as to whether defendant's method of timbering and making safe the gangway was the best. There was contradictory evidence as to this; but there was also evidence—mainly inferential, it is true, but still of facts which might have war-

ranted the inference—that defendant pursued its own method carelessly in the work of making the gangway safe; that the danger here lurked, not in a latent or hidden defect, but in one easy of ascertainment by those whose duty it was to remove it; that leaving this ton or two of loose material to fall on and crush those who came after was not a mistaken judgment as to method, but of indifference to the consequences of carelessness in carrying out that method. Of course, we are speaking of the case now in that view of it which is most favorable to plaintiff,—a view contradicted by the evidence of defendant in the most material points, and perhaps by the weight of the evidence; but neither the court below, nor we, have the right to determine that. It was for the jury to say, not whether the employer had adopted the very best method of constructing a gangway, but whether he had exercised care according to the circumstances in providing a gangway which was reasonably safe for his own workmen to work in, or pass and repass to their work. We discover no error in submitting the evidence on this question to the jury, and appellant's first assignment of error is not sustained.

As to the second assignment, we appreciate the difficulty of the learned court below in failing to recall any evidence of contributory negligence on part of plaintiff in causing his injury. If he had heedlessly put himself in peril,—had stepped under a visible overhanging mass of coal and slate, liable to fall at any time and crush him,—that would have been contributory negligence. But the very point fairly made on this evidence by plaintiff was that this danger was imperceptible to him, while to his employer, whose duty it was to detect it when setting the timbers, it was obvious, or by ordinary care would have become so. A workman, who sees an apparently safe gangway, with new timbers just put in place; knows that under the eye of his employer, an experienced miner, a gang of workmen have just finished making it safe for him and his fellows; then is commanded by his employer to work in a particular place in it,—certainly, before obeying, is not required to enter upon an inspection of the space between the timbers, to determine whether those who had, but a short time before, tested it, had performed their duty with care. We see nothing in this assignment calling for further notice.

The cases cited by the learned counsel for appellant are undoubtedly the law, but his trouble is with the evidence. The jury did not agree with him as to the verdict which it warranted. If there was sufficient evidence to warrant it, it does not matter whether we agree with the jury. It is their business to declare the truth from the evidence, not ours. The assignments of error are overruled, and the judgment is affirmed.

(159 Pa. St. 411)

CITY OF ALLEGHENY v. MILLVALE, E. & S. ST. RY. CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

HORSE AND STREET RAILROADS—GRANT OF FRANCHISE—VALIDITY OF REQUIREMENTS—NECESSITY OF ACCEPTANCE.

1. Under Const. art. 17, § 9, providing that no street passenger railway shall be constructed within the limits of any city without the consent of such city, a city, as a condition to the grant of franchise to a street railway company, may impose a tax on the dividends to be earned, and fix the maximum rate of fare to be charged, by the company.

2. As a city is authorized, under Const. art. 17, § 9, to impose conditions on its grant of a franchise, a company to which a franchise has been granted on its acceptance of certain conditions must accept all the conditions imposed before it acquires any rights under the grant.

Appeal from court of common pleas, Allegheny county.

Action by the city of Allegheny against the Millvale, Etna & Sharpsburg Street-Railway Company to enjoin defendant from proceeding with the construction of its railroad. From a decree granting the injunction, defendant appeals. Affirmed.

W. B. Rodgers, F. M. Magee, and A. M. Neeper, for appellant. John S. Ferguson and George Elphinstone, for appellee.

MITCHELL, J. By section 9, art. 17, of the constitution, "no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities." This language is repeated in section 15 of the street railway act of May 14, 1889, (P. L. 217,) but this is merely an express subjection *ex majore cantela*, of the privileges to be granted by the act, to the terms of the constitution, which would be implied without it. It neither enlarged nor diminished the constitutional powers of the local authorities, and may therefore be disregarded. The provision of the constitution is peremptory and unlimited. It is part of the pervading intent of that instrument to give local bodies the control of local affairs. The public history of the time, of which the court may take judicial notice, shows that one of the prime objects of the people in calling a constitutional convention was to do away with special legislation which interfered with local affairs, or granted privileges to particular bodies, and withheld them from others, with a semblance of partiality, rather than of equal favor to all. That object was carried out in the constitution adopted, so broadly that it is a matter of grave doubt whether the object itself has not sometimes been defeated by tying the hands of the legislature too closely to permit it to help special localities, with special needs, by legislation which they really want and ought to have. But, however that may be in other matters, the provision now under con-

sideration, as already said, is peremptory, and without express limitations of any kind. It is a gift directly from the constitution to the local bodies, and needs no help, nor permits any interference, from the legislature. If any limitations are to be implied by the courts, the implication must arise from clear necessity, as absolute, as peremptory, and as unavoidable as the constitutional mandate itself. The burden is therefore on the party affirming that the exercise of the local authority is not valid. "Omne majus in se continet minus." The man who can give the whole can give part, or who can grant absolutely can grant with a reservation of rent or other condition. He who can consent or refuse without reason does not make his consent or his refusal either better or worse by a good or a bad reason. The same principle applies to the present subject. It is conceded that the local authorities may impose some conditions, such as those relative to the police power. But where is the grant to any other body to supervise and limit the conditions, or say what they shall be? The legislature clearly cannot do it. The very purpose of the provision was to put an end to the legislature's interference. Nor can the courts trespass upon the discretion given absolutely by the constitution to the local bodies. We do not undertake to say that no condition could possibly be attached to consent, which would be an abuse of, or transcend, the discretion given. A condition, conceivable for the purpose of illustration, that the members of council voting for the consent should have perpetual free passes, or other gratuities, might be declared void as against the fundamental principle of the purity of the administration of public affairs for the public benefit. But even then the question would remain whether the consent was not void, as well as the condition on which it was given; but it would require a very clear case of the contravention of some controlling and paramount principle of public policy to justify an interference by the courts to put a limit on the unlimited constitutional grant. There is nothing of that kind here. There is nothing illegal in the conditions as to the rate of fares or the taxation of the dividends. The legislature could have imposed both as conditions to the grant of the charter, or could have delegated that power to the cities as a condition of their consent. If the authority would have been legal on a delegation from the legislature, a fortiori it cannot be illegal on a grant from the constitution. Neither the constitution nor the legislature has in fact conferred such power on the cities; but the illustration holds good to show that there is nothing in the conditions imposed by the city of Allegheny intrinsically opposed to the law or to public policy. It is not a question of the municipality's power to do that. If the city was assuming such authority as against the railway com-

pany, the argument for appellant would be of convincing force. But the city is not doing so. It simply says: "I have the sole and exclusive power to consent or refuse. On certain conditions I consent; otherwise, I refuse. I don't compel you to do anything; I merely give you a choice between alternatives. You have no power or right to demand my consent. You ask it, and I give it on my own terms, or not at all."

Nor can we see that there is anything unreasonable in these conditions, even if that matter were within our province. A valuable franchise—to use public property (the streets) for corporate profit—is about to be granted. It is not illegal or unreasonable that the public, or the city which represents it, should have a consideration for the privilege that it confers. If it were a right of passage over private property, there would be no question about it, and the right could not be got in any other way. We see no reason why the public interest should not be promoted by requiring special privileges in the public property to be paid for in the same way. It is matter of general knowledge that the street railways in the city of Baltimore pay part of the fare of every passenger into the city treasury for the development and care of Druid Hill park; and we learn from the report of *People v. Barnard*, 110 N. Y. 552, 18 N. E. 354, that, by an act of 1886, in New York municipalities are obliged to put up their consent to the construction of street railways within their limits at auction, and award it to "the bidder who will agree to give the largest percentage per annum of the gross receipts." The constitutional provision in New York is closely similar to our own. Whether the legislature could prescribe that the consent of the local authorities in this state could only be given on such condition, we express no opinion about, as it is not before us. But it would certainly be no cause of complaint if our own legislators, general or local, should look as closely after the pecuniary interests of the public involved in the grant of franchises. How valuable they may be is illustrated by that case, which shows that in the city of Buffalo the successful railway at the auction agreed to pay 36 per cent. of the gross receipts every year for the privilege.

The conclusion thus reached is so clear upon indisputable principles that it does not require aid from authority, but it is, in fact, supported by the exactly similar case already cited from 110 N. Y. 552, 18 N. E. 354, and by our own decision in *Federal St. Ry. Co. v. City of Allegheny*, 14 Pittsb. Leg. J. (N. S.) 259. In the latter case the city, in 1870, without authority, either constitutional or legislative, to tax, but under the proviso in the charter of the railway that no street should be occupied without consent, made its consent conditional on the payment of a car tax and a percentage of the dividends into the city treasury. The company

accepted the ordinance, paid the car tax, but refused to pay the percentage on the dividends, upon substantially the same grounds as the appellant relies on here. The court, however, gave judgment against it, saying, *inter alia*: "The policy of our legislation has been to make the passenger railway companies pay the municipalities for the use of the streets. * * * It is said the city has no power to impose such conditions when giving its consent to the use of the streets. * * * The act [charter] gave the company no power to move a stone or lay a rail on any street of the city without the consent of the councils. The act imposed no restrictions on the city. The councils could refuse absolutely their consent, and the company had no redress." The proviso of the act of 1878 (in the words of the constitution as to consent of the local authorities) "is a condition precedent. The power of the municipal authority to give or refuse consent is unlimited and unqualified. That necessarily implies the power to impose reasonable conditions in giving their consent. If they impose unreasonable conditions, all the company can do is to refuse to accept." This court affirmed the judgment on the opinion of the court below. The case is really stronger than the one in hand, because, although the company had accepted the ordinance of consent with its conditions, yet, the case having arisen under a charter and ordinance prior to the present constitution, the municipal authority to impose conditions, and their consequent validity, rested only on the powers permitted to it by the legislature, and not, as here, on a paramount constitutional grant. There is a wide difference between the present case and *Pittsburgh's Appeal*, 115 Pa. 4, 7 Atl. 778. The contention there was over the rights of a natural gas company in the streets of the city. As to that subject, the legislative control of the streets was complete, and the city had only such authority in regard thereto as the legislature chose to allow it. This court held that, the legislature having invested the gas company with the right of eminent domain, and provided only that it should get the assent of the city, and be subject to "such regulations as the councils may adopt," the city's legislative power over the subject was limited, and did not extend to any conditions to be attached to its consent, except such as were reasonable regulations of the mode of carrying out the statutory powers of the corporation.

The conditions in the present case being within the power of the city to prescribe, and therefore entirely valid, the other question raised becomes unimportant. It may be well to say, however, that the ordinance of consent was an entirety, to be accepted or refused just as it was, and acceptance was expressly made a condition precedent. Nothing, therefore, could make the ordinance a consent but the performance of the condition,—the acceptance of the whole. Even if

any part of the condition was impossible or ultra vires, the result would only be that the consent could never become effective. No amount of hardship, or impossibility, or illegality will avoid the bar of a condition precedent unperformed. Co. Litt. 206; 2 Bl. Comm. 157. Decree affirmed.

(159 Pa. St. 419)

MAY v. MEEHAN.

(Supreme Court of Pennsylvania. Jan. 2, 1894.)

MORTGAGE—FORECLOSURE—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

1. In scire facias on a mortgage, an affidavit of defense stated that defendant never had any dealings with or saw plaintiff until the suit was commenced; that he had no knowledge of a mortgage against his property until it was accidentally discovered; and that he never saw the alleged mortgage, or borrowed any money on it, or received any money from plaintiff on mortgage, or in any way secured on the mortgaged property. *Held*, that the affidavit was insufficient.

2. Nor was an affidavit of defense sufficient which stated that defendant never received any consideration for the alleged mortgage, either in money or otherwise, and is not indebted to plaintiff in any sum of money, or in any manner whatsoever.

Appeal from court of common pleas, Philadelphia county.

Scire facias on a real-estate mortgage by Frederick L. May against John Meehan. From a judgment for plaintiff, for want of sufficient affidavit of defense, defendant appeals. Affirmed.

The affidavit of defense, and supplemental affidavit of defense, are as follows:

Affidavit of defense: "County of Philadelphia—ss.: John Meehan, the above-named defendant, being duly sworn according to law, doth depose and say that he has a full and lawful defense to the whole of the claim in the above case, of the following nature and character, to wit: That he never had any dealings with or ever saw plaintiff until a suit on a mortgage in the above case had been commenced. That he had no knowledge of a mortgage being against his property, No. 845 Jackson street, until it was accidentally discovered in a search against his name, when he gave notice to have the mortgage satisfied within forty-eight hours. No claim had ever been made for interest, and it was only when the demand for satisfaction was made that a scire facias was issued. That he never saw the alleged mortgage, never borrowed any money on said mortgage from or through any person, and never received any money from the plaintiff, or any one representing him, on mortgage, or in any way secured on said house. All of which facts the defendant believes and expects to be able to prove on a trial of the cause."

Supplemental affidavit of defense: "County of Philadelphia—ss.: John Meehan, the above-named defendant, being duly sworn

according to law, doth depose and say that, as a supplemental defense to the claim of the plaintiff, the leave of the court having been first had and obtained, he never received any consideration from the plaintiff, or any one representing him, on or for the alleged mortgage, either in money or otherwise, whatever; that he never made application to the plaintiff, or any one representing him, for any money, and is not indebted to the plaintiff in any sum of money, or in any manner whatsoever. All of which facts the defendant believes and expects to be able to prove on a trial of the cause."

H. W. Gimber, for appellant. William F. Meyers, for appellee.

PER CURIAM. It appearing to the court that the judgment in the above-entitled case was affirmed at bar January 6, 1893, but no record thereof was made, it is now ordered that the prothonotary enter said judgment of affirmance nunc pro tunc.

(159 Pa. St. 99)

MICHAEL v. CRESCENT PIPE-LINE CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

OPINION EVIDENCE—COMPETENCY OF WITNESS—VALUE OF LAND.

1. Witnesses are not shown to be competent to give an opinion as to the market value of land where they are shown merely to have "heard" of sales in the neighborhood, without stating how, where, or from whom, and do not profess to have a knowledge of what lands are generally held at for sale in the neighborhood.

2. The bond given by one condemning land on appeal from the award of viewers does not limit the amount of the landowner's recovery, there being no appeal from the order approving the bond, and Const. art. 10, § 8, providing that the amount of damages in case of appeal shall, on demand of either party, be determined by a jury.

Appeal from court of common pleas, Allegheny county.

Action by James Michael against the Crescent Pipe-Line Company for damages for the taking of land for a pipe line for transportation of oil. From a judgment for plaintiff on appeal by defendant from the award of viewers, defendant appeals. Affirmed.

S. D. Mitchell, Alexander Gillilan, and J. McF. Carpenter, for appellant. John C. Haymaker, for appellee.

STERRETT, O. J. An essential test of the competency of witnesses called to give an opinion in respect of the market value of land is that they should affirmatively appear to have actual personal knowledge of the facts affecting the subject-matter of the inquiry. *Railway Co. v. Vance*, 115 Pa. St. 325, 8 Atl. Rep. 764. They cannot intelligently testify without such knowledge. Its possession is a necessary element in the

value of such testimony, but cannot be assumed. The court cannot pass on the question of competency until it be made to appear. Hence the possession and sufficiency of such knowledge should be made to appear, and be passed upon by the court, before the witness should be permitted to express any opinion. What constitutes sufficient knowledge was thus stated by Mr. Justice Clark in *Railway Co. v. Vance*, supra: "The market value * * * is estimated upon a fair consideration of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood at the time. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve, may be regarded as the market value. *Railroad Co. v. Patterson*, 107 Pa. St. 464. The general selling price of lands in the neighborhood cannot be shown by evidence of particular sales of alleged similar properties. It is a price fixed in the mind of the witness from a knowledge of what lands are generally held at for sale, and at which they are sometimes sold, bona fide, in the neighborhood." The competency of the witnesses who were allowed to give their opinions in this case was not tested in the manner here indicated. What was the source, extent, and character of their knowledge does not satisfactorily appear. They had "heard" of sales in the neighborhood, but how, where, or from whom, was not stated. They do not profess to have had "a knowledge of what lands were generally held at for sale," in the neighborhood. With one exception, they do not appear to have had any knowledge from either observation or personal experience of the effect of the pipe line upon farming lands. The value of opinions, given under such circumstances, is seldom, if ever, appreciable. The witnesses may have had the requisite knowledge, but it certainly was not made to appear; and for this reason the judgment must be reversed.

The tenth specification of error, claiming that the amount of damages, if any, to which plaintiff was entitled, was limited by the bond given by defendant, has no merit. The constitution expressly provides that "the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury, according to the course of the common law." Const. art. 16, § 8. If the "amount" of the damages shall be determined "by a jury," the necessary inference is that the power of the jury in that respect cannot be limited by the act of the court in approving the bond tendered by defendant. The bond is not intended as a measure of damages, but merely as security. There is no provision for appeal from the order of court approving the bond; but in recognition of the constitutional right

of trial by jury for the purpose of determining the amount of damages express provision is made for appeal from any preliminary assessment of damages "by viewers or otherwise." In practice the court is generally careful to require a bond sufficiently large in amount to cover all damages to which the landowners may be entitled; but, whether that be done or not, the power of the jury in the premises is wholly unaffected by the amount that may be named in the bond. Judgment reversed, and a venire facias de novo awarded.

(159 Pa. St. 53)

BOLE et al. v. NEW HAMPSHIRE FIRE INS. CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

FIRE INSURANCE POLICY—CONDITIONS.

Where a policy on a manufacturing establishment is renewed at the request of the assignees for benefit of the assured's creditors, many days after the operation of the machinery ceased, but while the premises are occupied by the foreman, who is engaged in putting together and selling engines and other articles belonging to the assigned estate, and a loss occurs during such condition of affairs, the establishment has not ceased to be operated within the meaning of the policy.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Action by John Bole and others, assignees for benefit of creditors of Hugh M. Bole, against the New Hampshire Fire Insurance Company, on a fire insurance policy. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. S. & E. G. Ferguson, for appellant. R. A. & Jas. Balph, for appellees.

WILLIAMS, J. Hugh M. Bole, a manufacturer in the city of Pittsburgh, made a deed of assignment for the benefit of creditors in April, 1891. The plaintiffs are the assignees. At the time of the assignment, H. M. Bole held a number of policies of insurance upon his building, machinery, and materials, which did not expire until the 24th day of October following. On or about the day on which the policies expired, the broker through whom they were obtained visited the premises to see about their renewal. The machinery was not then in operation, and had not been for some days, but the premises were actually occupied by the foreman, who was engaged in putting together and making sale of engines and other articles belonging to the assigned estate. He renewed the policies for an amount then agreed upon, and the premiums were paid. In the policy sued on, and several others, the following provision appeared: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void * * * if the subject of insurance be a manufacturing establishment, and it be operated in whole or

in part later than ten o'clock at night, or if it cease to be operated for more than ten consecutive days." The defense rested mainly on the facts that the subject of insurance was a manufacturing establishment, and that it had not been operated for manufacturing purposes for more than 10 days before the happening of the fire. This appeal depends on the meaning of the words, "cease to be operated for more than ten days," found in the provision we have quoted from the policy. In determining the meaning of these words we must remember that words having no fixed technical meaning should be taken in their natural and obvious sense; that a provision capable of two or more meanings should be construed most strongly against him whose undertaking it is; and that the circumstances surrounding the parties when the contract was made, and affecting the subject to which it relates, form a sort of context that may be resorted to in doubtful cases to aid in arriving at the meaning of the contract. In *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. St. 236, 19 Atl. 77, the policy contained a provision that it should be void unless "the assured was the sole and unconditional owner of the property insured." He was in fact a lessee. But it appeared that the policy was issued without a written application, and on the knowledge of the agent. We construed this provision in the light of the circumstances surrounding the issuing of the policy, and permitted the insured to recover for the leasehold interest which was actually held by him. In *Krug v. Insurance Co.*, 147 Pa. St. 272, 23 Atl. 572, a canning establishment, at the close of the season, was insured as a place of storage, and the policy provided that it should be used for storage only. A fire was built under the boiler to blow the water out of the pipes and flues, and on the night of the same day the premises were destroyed by fire. The building of the fire to blow out the pipes was held not to be the use of the premises for any other purpose than storage. It was to complete the preparation necessary for devoting the establishment to that particular purpose, and was, therefore, not a violation of the condition in the policy. In *Doud v. Insurance Co.*, 141 Pa. St. 47, 21 Atl. 505, and in *Roe v. Insurance Co.*, 149 Pa. St. 94, 23 Atl. 718, the policies sued on contained a provision that they should be void if the premises should be vacated without the consent of the insurer. In both cases the fire occurred while the houses were unoccupied, between the outgoing of one tenant and the incoming of another. In *Roe's Case* the tenant went out on the 24th of March, although his lease did not expire till the 1st of April. Another tenant was to move in on the 1st of April. The fire occurred on the 28th of March. We held that, as to the owner, the

premises had not been vacated within the meaning of the policy. The property was under lease, but some time might naturally elapse between the outgoing and incoming of tenants which might vary with circumstances over which the insured had no control. A similar disregard of the mere letter in aid of the real purpose of the contract was made in *Dougherty v. Insurance Co.*, 154 Pa. St. 385, 25 Atl. 739. The policy provided that the company should not be liable if the insured was injured or killed while on a railroad bridge, trestle, or roadbed. He was killed on the roadbed of a railroad, at a public crossing, while passing along a highway. We held the company to be liable. Similar in principle are the cases of *Pickett v. Insurance Co.*, 144 Pa. St. 79, 22 Atl. 871, and *Humphreys v. Association*, 139 Pa. St. 264, 20 Atl. 1047. In each case the letter was disregarded in order to reach a proper interpretation of a stipulation in the policy. In the case before us, when the policy was issued the proprietor of the manufactory had failed. His property was in the hands of his assignees, who were seeking insurance. The machinery was not in operation at the time, and had not been for days. Unsold manufactured goods and unused materials were scattered through the factory, which was really in use as a store and sales room in charge of the foreman. It was not vacant or unoccupied, but the fires were out, and the wheels were still. Operations at a factory ordinarily include both the manufacture and sale of the articles produced. The manufacturing processes of the insolvent were discontinued, but the sale of goods on hand by the assignees was in progress, and the factory was occupied regularly for this purpose. This branch of operations was necessarily conducted in the factory, where the articles were. The apparent risk was not increased, but diminished, by the closing of the machine shop, so long as the occupancy of the premises as a sales room continued. It continued down to the time of the fire. In the language of the special verdict rendered in the case: "The foreman of the shops remained in charge, keeping the place cleaned up, and selling stock and material on hand. * * * He also attended to the delivery of the property sold, and when he needed help in this work or in delivery he was furnished with the necessary assistance." He actually delivered a steam engine to a purchaser on the 31st of March, 1892, and the fire took place on the afternoon of the following day. We agree with the learned judge of the court below that upon these facts the factory had not ceased to be operated within the meaning of the policy, and that judgment on the reserved question was properly entered in favor of the plaintiff. The judgment is therefore affirmed.

(189 Pa. St. 287)

GRANBY MINING & SMELTING CO. v.
LAVERTY et al.(Supreme Court of Pennsylvania. Dec. 30,
1893.)PARTNERSHIP—UNAUTHORIZED DEBTS—POWER OF
ONE PARTNER TO BIND FIRM.

A partnership agreement between S. and L. provided that all checks be signed by both parties, and the agreement was communicated to their bank. All checks were drawn according to the agreement to within four months of the dissolution of the firm, and at that time S. drew a number of checks, executed by himself alone, for purposes not entered on the books, nor known or consented to by L. *Held* that, as between the bank and an attaching creditor of the firm, the bank was entitled to credit for money paid out on the checks drawn by S. only so far as it could show that the money was used to pay firm obligations.

Appeal from court of common pleas, Allegheny county.

Action by the Granby Mining & Smelting Company against Charles E. Lavery and another, partners as the Manufacturers' Galvanizing Company. On a judgment for plaintiff, the First National Bank of Pittsburgh was served with an execution attachment, and summoned to appear as garnishee. From a judgment for the garnishee, plaintiff appeals. Reversed.

John Dalzell, William Scott, and George B. Gordon, for appellant. Shiras & Dickey, for appellees.

WILLIAMS, J. The plaintiff alleges that the bank (the garnishee) holds moneys belonging to its debtor,—the firm doing business as the galvanizing company. This the bank denies. It admits that the firm was a depositor, but asserts that the money so deposited has been paid out upon the checks of the firm. To this the attaching creditor replies that some of the checks charged to the firm account were really the individual checks of one partner, and were not binding on the firm. This raised the question on which the case turned in the court below. The general rule undoubtedly is that the attaching creditor stands on no higher ground than his debtor. He acquires, by virtue of his attachment, no rights other than those his debtor possessed. The determination of the question in this case requires, therefore, the adjustment of the account between the bank and its depositor. To facilitate such an adjustment, the attaching creditor presented to the referee 15 requests for findings of facts from the evidence before him. Ten of these were considered, and the findings made substantially as requested. They showed the formation of a partnership between Lavery and Scully under the firm name of the Manufacturers' Galvanizing Company, in August, 1886, and its dissolution in a state of insolvency in February, 1889. They showed that the articles of copartnership required that all checks and drafts should be signed by both parties, and that, to give effect to

this stipulation, a form of check for use by the firm was prepared and lithographed, having two lines for signatures, at the end of one of which the word "Chairman" was printed, and at the end of the other the word "Treasurer." It further appeared that this provision in the articles of partnership was communicated to the bank soon after, or at the time, the firm account was opened, and the form for executing checks by the firm entered on the signature book of the bank. The fact further appears that from the opening of the account in August, 1886, down to within about four months of the dissolution of the firm, the partners and the bank conformed to the articles of partnership, and all checks were signed by both parties, in accordance with the lithographed form of check. In a few instances, checks were paid bearing but one name, but the other was added at the first opportunity, and at the request of the bank, so that, of several thousands of checks drawn, all bore the name of both partners until about four months before the dissolution. At that time Scully began to draw a series of checks in addition to those bearing both names, which were executed by himself only, for purposes and in transactions not entered on the firm books, nor known to his partner. These checks were 101 in number, and amounted to \$8,101.63, and were repudiated by Lavery as soon as they came to his knowledge. In the remaining five requests for findings, the referee was asked to say that, while these checks were being drawn by Scully, he was carrying on business outside the scope of the partnership, without the knowledge or consent of his partner, not entered upon the firm books, which resulted in losses, and caused the insolvency of the firm; and that, if the bank had not paid the checks in controversy, this losing business could not have been carried on by Scully. The referee was asked also to find and report to what partnership purpose, if any, these checks were applied. The referee was of opinion that these requests related to subjects that were not material to the present controversy, and reported that he "did not think it necessary to decide" upon them, because they were important only in "settlement of the equities between the partners." This may be so, but is by no means certain, until the facts are found. If, as between the bank and the partnership, the payment of these checks was unauthorized, then the bank is not entitled to a credit for them as against the garnishee. It is very clear that the checks were drawn in violation of the partnership agreement, and paid in utter disregard of the notice to the bank, and the mode of execution appearing on the signature book. The paying teller understood this, and refused payment of these checks. He paid them only under the direction of the cashier, who was the father of John Scully, Jr. Upon these facts the bank took the risk of their being drawn for a legitimate partnership pur-

pose, and is entitled to credit no further than it is able to show that the money drawn upon them was used in payment of obligations for which the firm was legally bound. For this reason the referee should have found, as requested, to what purpose the money drawn by Scully on checks signed by himself was actually applied, so that his general finding that the money was applied to partnership purposes might be examined in the light of the facts which led him to this conclusion. He should also have determined whether the business conducted by Scully without the knowledge of his partner was the business in which these checks, or any portion of them, was used, and, if so, whether the debts so contracted were binding on the firm. The mere fact that Scully behaved in bad faith towards his partner is unimportant. The question to be determined between the plaintiff and the garnishee is whether the bank is entitled to credit for the checks drawn by Scully alone; and this, as we have seen, depends on whether these checks or their proceeds were applied to obligations legally binding on the firm. The judgment is reversed, and the record remitted, that the further findings indicated above may be made.

(158 Pa. St. 651)

TAYLOR v. BELL.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

WILLS—DEVISE OF LIFE ESTATE.

A will of personal and real property provided: "To my beloved wife I will allow the use, as she may deem best, the residue of my estate, for her own advantage, and at her death, if any of it remain, to be equally divided between my three children," named; also, "if it be necessary, to pay my debts, * * * that my real estate will need to be sold, that that is devised to A. [the daughter] shall be reserved for her." *Held*, that the widow had only a life estate in the land, with no power to sell or dispose of it.

Appeal from court of common pleas, Indiana county; Harry White, Judge.

Assumpsit by Sarah J. Taylor against John T. Bell for a payment due on real estate sold him by plaintiff. Judgment for plaintiff. Defendant appeals. Reversed.

J. N. Banks, for appellant. Jack & Taylor, for appellee.

GREEN, J. The clause in the will of Robert C. Taylor under which his widow, the present plaintiff, claims title, is in these words: "To my beloved wife I will allow the use, as she may deem best, the residue of my estate, for her own advantage, and at her death, if any of it remain, to be equally divided between my three children, Alexander, John, and Alice." Upon a careful examination of the rather numerous decisions upon this class of cases, we feel constrained to differ with the learned judge of the court below, and to hold that the inter-

pretation of this will is controlled by our rulings in Follweiler's Appeal, 102 Pa. St. 581, which it closely resembles; Cox v. Sims, 125 Pa. St. 522, 17 Atl. 465; and cases kindred to them. In Follweiler's Appeal, the residuary clause of the will gave the whole residue of the estate to the widow, "to keep and enjoy during her lifetime, and, after her death, what shall be left shall be divided equally, my heirs and her heirs, share and share alike." The right "to keep and enjoy during her lifetime," and the right "to use as she may deem best, for her own advantage," terminable at her death, are practically identical in any legal sense, as they are in a physical sense. We can see no difference between them in considering what was the character of these two defined rights in these two cases. In all other respects these two testamentary grants are precisely alike. There was no power of alienation or testamentary disposal conferred upon the widow in either case. There was an express limitation over in both cases, and the devisees in remainder in both take their title directly from the testator, under the same will, and the same clause of the will, in each case, which creates the life interest of the widow. So far as any implication of a fee in the widow arises out of the grant of the right to "keep and enjoy," in the one case, and "to use as she may deem best * * * for her own advantage," in the other, there is no difference. Both these rights end with the life of the widow,—the one, by express limitation, "during her lifetime;" and the other, by the devise over, "at her death," to designated devisees. In the Follweiler Case the ultimate words were: "And, after her death, what shall be left shall be divided equally, my heirs and her heirs, share and share alike." In the present case these words are: "And at her death, if any of it remain, to be equally divided between my three children, Alexander, John, and Alice." No larger implication, as to the estate of the widow, arises in the one case than in the other. We think, clearly, the two cases are precisely similar in all essential particulars. In delivering the opinion in the Follweiler Case, Mr. Justice Trunkay said: "Primarily, the land is given to her 'to keep and enjoy during her lifetime.' The will works no conversion. The executors are not authorized to sell the land under any circumstances, and no power to dispose of it is given to the life tenant. After her death, it is given to the testator's heirs and his wife's heirs, share and share alike, and, as already remarked, the heirs of each are collateral. * * * No case has been cited by the able counsel for the appellant which can be wrested into a precedent for construing the language of this will to vest a fee in her." All of this language is precisely applicable to the case at bar, and, in our judgment, disposes of the present con-

tention. There is this difference in favor of this ruling in this case: Under the will of plaintiff's testator, the residuary real estate devised to the widow is subject to be sold for the payment of debts, if that should be necessary, in preference to selling the other real estate, which was devised to the testator's daughter Alice. The will says: "If it be necessary, to pay my debts and the amount above devised to my mother, [\$1,000,] that my real estate will need to be sold, that that is devised to Alice shall be reserved for her." So that it is clear the testator did not intend that an unqualified fee should pass to the widow under the grant to her of a right to use the land for her own best advantage. The case of *Cox v. Sims*, 125 Pa. St. 522, 17 Atl. 465, (decided in 1899,) followed *Follweiler's Appeal*, and was disposed of upon the sameline of reasoning. The words of the will in that case are a little stronger in favor of a life estate only, in the wife, than in either the *Follweiler Case*, or in this. But the language from which it was claimed that a fee should be implied in the widow was rather stronger in them than here. The will gave the widow the whole of the residue, real and personal, just as here, "to have and to hold the same for and during the whole period of her natural life; and, from and immediately after the death of my said wife, all the property hereby devised or bequeathed to her as aforesaid, or so much thereof as may remain unexpended, I give, devise, and bequeath unto my beloved children," naming them. It was claimed that the widow took a fee under the implied power to expend the principal, but we held, reversing the court below, that the words were used in describing the devise over to the children, and not in describing the widow's estate, and that they were, at any rate, only applicable to the personal estate, as was held in *Fox's Appeal*, 99 Pa. St. 382, and in *Follweiler's Appeal*, supra, and that no power of sale was given to the widow. All these features concur in the present case, and control its decision. There are a number of decisions upon this general subject, most of which are cited either in the opinion of the learned court below, or in the argument of counsel for the appellee, which seem to support the contention of the appellee; but they will be found, upon careful examination, to be based upon the presence of a power to sell or to dispose of the property in the will creating the estate. We are saved the necessity of reviewing them in detail by the circumstance that this work has been very recently and exhaustively done by our Brother Williams in an elaborate opinion in the case of *Boyle v. Boyle*, 152 Pa. St. 108, 25 Atl. 494, in which the widow's right to a fee was sustained. The distinctions which divide the cases are most carefully presented, so that it is not at all difficult to determine to which class a given

case belongs. In the present case the widow has the right to use the residuary estate as she may deem best for her own advantage. This would entitle her to an absolute estate in the personalty, because it includes a power of disposition; but, under the decisions above cited, it gives her only a life estate in the realty, with no power of sale or other disposition. That being so, the plaintiff cannot make a good title to the defendant, and the defendant is not bound to accept the deed tendered, or to pay the purchase money. The judgment is reversed, and judgment is now entered, under the case stated, in favor of the defendant, with costs.

(159 Pa. St. 94)

BUGHMAN v. CENTRAL BANK.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

SALE—RIGHT OF SELLER TO RESCIND—BONA FIDE PURCHASERS—BURDEN OF PROOF.

1. Where the buyer is insolvent when he contracts for goods, and, about the time of delivery executes a judgment note and a bill of sale to a creditor, which practically closes up his business, the seller is entitled to rescind the sale.

2. Where defendant received goods from an insolvent, who purchased them from plaintiff under such fraudulent circumstances as to entitle plaintiff to rescind the sale as against the insolvent, the burden is on defendant to show that he purchased the goods absolutely, and without notice of the fraud on plaintiff.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action by H. C. Bughman, trustee under the will of James H. Hays, deceased, against the Central Bank, to recover the value of coal sold by plaintiff to Thomas Fawcett & Sons, and which afterwards came to the possession of defendant by bill of sale from the Fawcetts. Defendant had judgment, and plaintiff appeals. Reversed.

The plaintiff, as trustee of the estate of James H. Hays, deceased, owned and operated certain coal works on the Monongahela river, and for a number of years prior to the sale in this case had sold coal to the firm of Fawcett & Sons, who were engaged in the business of mining and purchasing coal, and transporting it in their barges to New Orleans and other southern markets. The coal so furnished them by plaintiff was always bought on credit, and was paid for by notes usually running four months, the amount of the notes being determined by the gauger's certificate at Louisville, where the coal was gauged. On the 19th of November, 1890, Fawcett & Sons sent two of their empty barges to plaintiff's works to be loaded with coal in accordance with their previous course of dealing. On that day, Fawcett & Sons, who were indebted to the Central Bank in a sum exceeding \$250,000, for money previously loaned, executed a judgment bond to the bank for \$160,157, (real debt,) on which judgment was entered in Al-

leghey county on the 22d of the same month, and execution issued the same day. On the 21st of the same month, in consideration of \$90,000, they executed and delivered to the bank a bill of sale, which covered a large number of their coal boats and barges, and included the two barges in question, with the coal contained therein, purchased from plaintiff. It was signed and delivered during the forenoon of the 21st of said month, at which time only one of the barges referred to was loaded, and the other was not loaded till the afternoon of that day. These barges were removed from plaintiff's works the same day, (21st,) one in the forenoon and the other late in the afternoon; and were towed from there by the steamer Maggie, which Fawcett & Sons had sent up for that purpose, under an arrangement with the bank, by which they were to take charge of them, and were then delivered to the steamer Boaz, a few miles below Pittsburgh, to be towed by it to New Orleans, along with all the other boats and barges specified in the bill of sale. It is claimed that on the 24th of the same month, (three days later,) and while the barges were on the way to New Orleans, the plaintiff learned for the first time of the insolvency of Fawcett & Sons, and of the fact that they had confessed the judgment and executed the bill of sale above mentioned; and thereupon he notified his attorneys of the fact, and of his desire and purpose to reclaim the coal, and directed them to take steps to that end. Within a week after this, plaintiff's attorneys, after investigating the matter, and in obedience to plaintiff's direction, called upon J. H. White, Esq., the attorney for the bank in the transaction, and notified him that, under the circumstances, plaintiff claimed the right to disaffirm the sale, and recover the coal, and on the 27th of the following month, (December,) and while the barges were still on their way to New Orleans, they addressed a letter to D. P. Reighard, the president of the bank, reiterating plaintiff's desire to reclaim his coal, and requesting him to give plaintiff such an order or instrument of writing as would enable him to obtain possession of it. These barges arrived at New Orleans on the 15th of January, 1891, and the bank, not regarding the request contained in the letter referred to, sold the coal the same day, with the barges in which it was contained, and appropriated the proceeds, and has ever since refused to account to the plaintiff for any portion of the money.

Fawcett & Sons ceased their business in November, 1890, after they had given the judgment bond and bill of sale. They have never resumed it, and have been insolvent ever since. On the conclusion of the evidence, defendant's counsel moved the court for a compulsory nonsuit, which the court granted, and the next day, plaintiff's counsel moved to take off the nonsuit. The motion was subsequently argued and refused, and

upon exception to this refusal the court sealed a bill for plaintiff.

Lazear & Orr, for appellant. J. H. White and J. S. & E. G. Ferguson, for appellee.

MITCHELL, J. Buyer and seller, under ordinary circumstances, deal at arm's length. On one hand, the rule is caveat emptor, while, on the other, the buyer is not bound to disclose his pecuniary condition or his ability to pay. A man has a right to take chances, and to be sanguine as to his affairs; hence the law of most commercial states holds that even insolvency, although known to the buyer at the time of the purchase, need not be disclosed, and the concealment of it, by mere silence, without any active misrepresentation, is not such fraud as will avoid the sale. In this state the cases have gone further. In *Smith v. Smith*, 21 Pa. St. 367, it was held that even an intention by an insolvent buyer at the time of the purchase not to pay will not amount to a fraud, unless some false representation, trick, or artifice, or conduct which involves a false representation, be added. The law as thus declared was not in harmony with that of a majority of other states, nor with sound policy or the principles of business honesty. It was, moreover, a departure from the previous decision of this court in *MacKinley v. McGregor*, 3 Whart. 369, where it was expressly held (page 396) that, whatever may be the limitation of the right of the vendor as against other persons into whose hands the goods may have come, "it is certain, as a general principle, that when a person purchases goods with a preconceived design of not paying for them it is a fraud, and the property in the goods does not pass to the vendee." This seems to us much the sounder doctrine. While, as already said, a man has a right to take chances, and to be even sanguine in so doing, yet they ought to be reasonably fair business chances, and the hopefulness permitted by good faith. A purchase with a present intent not to pay is a rank fraud in morals, and should be so pronounced in law. The departure that was made in *Smith v. Smith* is therefore much to be regretted. It was not made by a unanimous court, nor has it ever received the unmixed approbation of the bench or the bar. But it has been expressly followed in several cases, and has remained in the books, without being overruled, for 40 years; and, recognizing that the subject is one on which legal minds have always been apt to differ, we do not think it wise now, notwithstanding our own clear convictions on the principle, to unsettle the law by another change. We will therefore stand on the authority of *Smith v. Smith* and its kindred cases, but we will not go a step beyond what they require. Any additional circumstance which tends to show trick, artifice, false representation, or,

in the language of *Smith v. Smith* itself, "conduct which reasonably involves a false representation," will be sufficient to take the case out of the rule of those authorities. In so declaring we are in fact only putting into express words what has been the practical application of the rule by this court heretofore. Thus, even in *Rodman v. Thalheimer*, 75 Pa. St. 232,—one of the two cases chiefly relied on by appellee,—it is said per curiam: "There must be bad faith,—an intent at the time to defraud the seller. Insolvency and the knowledge of it at the time of the sale are evidence to go to the jury with other facts to show the intended fraud," though they are not sufficient by themselves. How little additional is required to make them sufficient is illustrated in *Harner v. Fisher*, 58 Pa. St. 453, where it was held that a creditor employing an agent to buy a horse from the debtor as if for himself, but with the prearranged scheme to pay for it with the creditor's claim, was such a fraud as prevented the passing of the title. The distinction in morals between getting a man's horse by a nominal purchase, with an intent to pay for it by the seller's own duebill, and getting it with intent not to pay at all, is thin; and the advantage rather seems to be with the first method as the less dishonest of the two. But Chief Justice Thompson, after referring to *Smith v. Smith*, said the scheme was a poor excuse for a fraud that vitiated the whole transaction.

In the present case, *Fawcett & Sons*, at about the time, if not before, the delivery of the coal, not only committed an act of insolvency by the confession of judgment and bill of sale to the bank, but in fact disabled themselves from continuing their business, and practically brought it to an end. This was a most material fact in the transaction. It was such a change in circumstances as the vendor was entitled to know, and it does not admit of doubt that if he had known it he would not have delivered the coal. In the New York cases this fact makes the purchase a fraud in law, and is conclusive. *Mitchell v. Worden*, 20 Barb. 253. This, we think, is the sound and true rule. It is in accord with what we know would be the practical result in business life, and it follows the close analogy of a concealed defect in an article sold, which entitles the purchaser to rescind the sale. We hold, therefore, that, as between the appellant and *Fawcett & Sons*, the transaction was a legal, if not an actual, fraud, and passed no title to the coal.

There remains, however, the question whether the appellee is in any better position than the *Fawcetts*. Is the bank a bona fide holder for value, in such sense as to give it a good title notwithstanding the fraud of its assignor? The New York cases hold that, as against a vendor who has been defrauded, no title passes until the goods

come to the hands of a bona fide holder for a new consideration, passing at the time of transfer; and that receipt of them for an antecedent debt, even in payment and satisfaction, is not enough. *Root v. French*, 13 Wend. 570. If the question were open, we should adopt this as a sound and just rule. But it is settled in Pennsylvania in regard to commercial paper that taking it in payment and satisfaction of a prior debt is a taking for value that shuts out the equities between the original parties; and in *Dovey's Appeal*, 97 Pa. St. 153, the same rule was applied to a taking of stock. For reasons already set out in reference to the other branch of the case, we do not think it wise to make a new departure now. The evidence does not show clearly whether the bank took the bill of sale in payment or as security, or whether it had notice before taking it that the coal had not been delivered. These questions must therefore go to the jury, with the burden of proof on the bank, inasmuch as its vendors, the *Fawcetts*, acquired no title against the plaintiff by their fraudulent purchase. Judgment reversed, and venire de novo awarded.

(159 Pa. St. 112)

MCLEAN et al. v PITTSBURGH PLATE-GLASS CO. et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CORPORATIONS—PREFERRED STOCK—DIVIDENDS.

Neither the resolution of the stockholders authorizing the issue of preferred stock, to be entitled to noncumulative dividends of 12 per cent. per annum, before payment of dividends on common stock, with the explanation that the directors should, from time to time, declare dividends payable from the net earnings for each year, first to the preferred stock, to the extent of 12 per cent., provided that, in case of a deficiency in the earnings for any year, whereby the preferred stock receives less than 12 per cent., the deficiency shall not be made up in a subsequent year; nor the provision of the stock certificates that the preferred stock is entitled to dividends from the net earnings of each year, when declared by the directors, to the extent of 12 per cent. per annum, before payment to common stock; nor corporation act of 1874, providing that preferred stock shall be entitled to such dividends as the directors may prescribe, payable out of net earnings,—entitles preferred stock to a dividend, where the directors decide to apply the earnings on a large indebtedness incurred during the year in enlarging the works and business.

Appeal from court of common pleas, Allegheny county; White, Judge.

Suit by Charles B. McLean and another, holders of preferred stock, against the Pittsburgh Plate-Glass Company and its directors, to compel a dividend to be declared and paid on the stock. From a decree for defendants, complainants appeal. Affirmed.

The following resolution was passed by the stockholders of defendant corporation: "Resolved, that the stockholders of this company do authorize the issue of preferred stock of the company to the amount of one hundred

and fifty thousand (\$150,000) dollars, which preferred stock shall be entitled to dividends to the extent of twelve per cent. per annum, before the payment of any dividend to the common stock, but said dividends to the said preferred stock shall not be cumulative; that is to say, the board of directors shall from time to time declare dividends, payable from the net earnings of the company for each year, first, to said preferred stock, to the extent of twelve per centum per annum. Should there be further earnings to be divided for said year, the common stock shall receive dividends to the extent of twelve per cent. per annum, and, should there be still further earnings to be divided for said year, the same shall be distributed in dividends to the preferred and common shares equally, but in case of a deficiency in earnings for any year, by reason of which the common stock receives no dividends, and the preferred stock receives less than twelve per cent., the deficiency on the dividend to the preferred stock aforesaid shall not be made up in any subsequent year."

J. S. & E. G. Ferguson, for appellants.
Dalzell, Scott & Gordon, for appellees.

GREEN, J. We think the decree of the learned court below in this case was entirely correct. We do not see that there is anything in the resolution of the stockholders at the meeting held the 18th of October, 1883, authorizing the issue of preferred stock, or in the certificates issued to the holders of preferred stock, which takes away from the directors, or impairs, the discretion which they must exercise in the declaration of dividends. According to the language of the certificates, "the holders of preferred stock of said company are entitled to dividends out of the net earnings of each year, when declared by the board of directors, to the extent of twelve per centum of the par value of said stock, before the payment of dividends to the holders of common stock, but the dividends on the preferred stock are not cumulative." By this language the preferred stockholders are entitled to have their dividends "when declared by the board of directors," and such declaration by the directors is antecedent to the right to have them. The resolution of the stockholders is the mere general expression of the authority given to the directors to issue preferred stock, prescribing the preference in the way of dividends to be given to the holders of preferred stock, but not assuming to regulate the circumstances which shall determine the action of the directors, or to control their discretion in the exercise of their right. The sixteenth section of the corporation act of 1874, which confers the power to issue preferred stock, provides distinctly that "the holders of which preferred stock shall be entitled to receive such dividends thereon as the board of directors of the corporation may prescribe, payable only out of

the net earnings of the corporation." As a matter of course, the directors must determine not only the amount of all dividends to be declared, but the circumstances in which they will or may declare them. They are certainly not entitled to refuse them, either arbitrarily, or when, in view of all the considerations which should properly affect the question, they ought to grant them. Their action, or refusal to act, is undoubtedly subject to review by the courts, but, within the regulated limits of their authority as suggested, they have the exclusive control of the whole matter, and their action is binding upon the stockholders. In a given case, therefore, it is only necessary to inquire, what were the reasons which controlled their action? In the present case, which was heard upon bill and answer only, they allege that "in or prior to the year 1892 the said company decided to enlarge, extend, and increase its works and business, and during the said year, in so doing, made large expenditures and incurred large indebtedness. No dividends have been declared for the said year 1892 upon the preferred or common stock, solely for the reason that, in the judgment of the board of directors of said company, it was and is expedient and necessary to apply all the earnings of the company upon the company's indebtedness incurred in said enlargement, extension, and increase of its works and business, and the said earnings have been so applied."

In the fourth paragraph of the bill it was alleged that the liabilities of the company, aside from its capital stock, amount to \$1,353,000, while, without its investment account, its assets consisting of material, stock on hand, and outstanding accounts amount to the sum of \$739,000. This statement is admitted in the answer to be correct. Of course, such assets are not cash, and are not available for use in paying debts, except in the process of liquidation. The question, then, is whether, with debts and liabilities amounting to \$1,353,000, it was an abuse of discretion on the part of the directors to abstain from paying any dividends for the year 1892. We think not. This very question has been determined by the supreme court of the United States in two cases, both of which appear to be entirely applicable to the facts of this case: *St. John v. Erie Ry. Co.*, 22 Wall. 136, and *Railroad Co. v. Nickals*, 119 U. S. 296, 7 Sup. Ct. 209. In the first of these cases the property and franchises of the company had been sold under the proceedings in foreclosure, and reorganization was had, by which the unsecured creditors of the company were to take preferred stock for their claims, and the stockholders of the old company should be common stockholders of the new. The preferred stockholders were to be paid dividends of 7 per cent. out of the net earnings of the road, before the common stockholders were to get any. The company perfected its or-

ganization, and carried on its operations for several years, and paid the 7 per cent. dividends to the holders of the preferred stock. After the making of the agreement of reorganization, the company leased new roads, some of which were unprofitable. They also borrowed large sums of money, which were spent in repair and equipment of the road. It then happened that, after paying interest on the old debts, rent for the new roads, and interest on the new loans, the company could pay nothing more, and the dividends on the preferred stock were no longer paid. A preferred stockholder filed a bill to compel the payment of his 7 per cent. dividends, and claimed he had a right to have them paid out of the net earnings upon the condition of the road as it was when the agreement was made, and in advance of any payments of interest on newly-borrowed money, or of rentals of other roads under new leases. The supreme court denied this right, and held that the right to have preferred dividends out of the net earnings meant earnings which resulted after all charges or outlay were deducted. Mr. Justice Swayne, in delivering the opinion, said: "There is nothing in the agreement or the statute, and we are aware of no legal principle, which would authorize the stockholders in question to analyze the business, select out a part of it, and to say that the net earnings specified must be a predicate of that part, and of none other. The company had the right to conduct its operations in good faith, as it might see fit; and it was from them, and all of them, that the materials for the computations of earnings were to be derived. * * * The corporation never agreed to be limited in the exercise of its faculties, and the complainant must abide the result. If errors were committed, and a loss ensued, a court of equity cannot relieve him. It is one of the chances of the enterprise in which he embarked." In the other case above mentioned,—*Railroad Co. v. Nickals*,—a somewhat similar state of facts was presented. The property and franchise of the company had been sold, and a reorganization effected, under which new preferred stock was to be issued in exchange for old preferred stock, on which noncumulative dividends were to be paid at the rate of 6 per cent. out of the profits of each year, in preference to the payment of any dividends on the common stock. New common stock was to be issued in exchange for old common stock. There were other details of the agreement for reorganization which are not material. The company was reorganized, and carried on its operations. In the year 1880 the report of the directors showed that a profit of \$1,790,620.71 had been made on the business of the year, after deducting the payments made for interest on the funded debt, rentals of leased lines, and other charges, but the whole amount of the resulting profit, together with a large

additional sum, had been expended in the building of a double track, erection of buildings, providing additional equipments, acquiring and constructing docks at Buffalo, and making other improvements to the road and property. In consequence of these expenditures, no dividend was declared on either the preferred or common stock, and a preferred stockholder filed a bill to recover his dividends, claiming that the company had no right to expend its earnings in that way to the prejudice of the preferred stockholders. The lower court allowed a recovery, but the supreme court reversed the decree, holding that there could be no recovery, on the ground that there was no abuse of discretion on the part of the directors in refusing to pay the dividend, or in the management of the affairs of the company, by which the expenditures were made. Mr. Justice Harlan, in the course of the opinion, said: "The directors of such corporations, having opportunities, not ordinarily possessed by others, of knowing the resources and condition of the property under their control, are in a better position than stockholders to determine whether, in view of the duties which the corporation owes to the public, and of all its liabilities, it will be prudent, in any particular year, to declare a dividend upon stock. While their authority in respect of these matters may, of course, be controlled or modified by the company's charter, and while the power of the courts may be invoked for the protection of stockholders against bad faith upon the part of the directors, we should hesitate to assume that either the legislature or the parties intended to deprive the corporation, by its managers, of the power to protect the interests of all, including the public, by using earnings when necessary, or when in good faith believed to be necessary, for the preservation or improvement of the property intrusted to its control." Reviewing, further, the contention of the plaintiff, and the power of the directors over the earnings and their expenditure, and the agreement of reconstruction, the court held that the preferred stockholder was bound by the action of the directors, and was not entitled to any dividend, because none was declared, and there was nothing to impugn the good faith of their action. These rulings and principles and reasoning announced are quite applicable to the present case, and, as we think, dispose of it. The directors are far better able to judge what is the best policy, and for the best interests of all, in determining how far earnings ought to be applied to the reduction of indebtedness, rather than to the payment of dividends. As a rule, it is always a measure of sound policy to discharge corporate indebtedness, rather than divide the earnings among the stockholders, allowing the indebtedness to remain. The stockholders are almost certain to obtain larger advantages and returns in the future,

especially where, as here, the property, works, and business were so greatly enlarged by the expenditures in question. There is not the least pretense of any bad faith on the part of the directors in making the expenditures and withholding the dividends, and we think the stockholders are bound by their action. Decree affirmed, at the cost of the appellants.

(159 Pa. St. 159)

MEADE v. CLARK et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MARRIED WOMEN—DEEDS—ACKNOWLEDGMENT.

When a wife has sold land for an adequate cash price, given possession, and, with her husband, signed a deed, a judgment thereafter taken against her is no lien on the land, if, later, she and her husband acknowledge the deed, since only she, not her creditor, can repudiate her contract.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Ejectment by K. T. Meade against William Clark, John L. Griffith, and Caroline Davies, tenants, and Alfred Davies, landlord. Judgment for plaintiff. Defendants appeal. Reversed.

Young & Trent, for appellants. K. T. Meade and James C. Doty, for appellee.

WILLIAMS, J. Rules of court are devised and enforced by the courts to facilitate the administration of justice. This is accomplished by requiring the parties litigant to disclose to each other the nature of their demand or defense, and narrowing the range of inquiry to questions that are subjects of actual controversy. Their enforcement should not be insisted on, when such a course will defeat the purposes they are intended to serve. For this reason it is usual to allow an omission made in the preparation of an abstract or a notice of special matter to be supplied by amendment, upon such terms, as to continuance or costs, as shall be fair to the other party. As this case appears to us, on the printed pages of the paper books, it would seem that the motion for leave to amend the defendants' abstract should have been allowed. The omitted line of defense was held by the learned judge to be relevant and material. Without it, justice could not be reached; and, for want of it, a verdict was directed in favor of the plaintiff.

But we prefer to rest our judgment in this case on a more important question. It was raised on the following facts: Mrs. Oates was the owner of the property in controversy prior to June, 1891. On the 10th day of June, 1891, she sold it to Alfred Davies, and delivered possession to him. The price was a fair one. The sale was made in good faith. A deed was prepared and executed by both husband and wife on the same day the sale was made, and it was delivered to Davies, at his request, to show to his mother. It was

acknowledged in due form some six months later, and put upon record. Meantime, in October, 1891, a judgment was obtained in the common pleas of Allegheny county against Mr. Oates and his wife, upon which a sheriff's sale took place in July, 1892. The plaintiff, K. T. Meade, was the purchaser, and, upon his title acquired under the sheriff's deed, he brings this action of ejectment against Davies and his tenants or vendees. On the trial the defendants asked the court to charge the jury that if the sale by Mrs. Oates to Davies was made in good faith, and for an adequate price, on the 10th day of June, the judgment entered in October was not a lien upon the land, and that the sale by the sheriff conferred no title. The learned judge refused this prayer for instructions. If Mrs. Oates had been seeking to avoid her unacknowledged deed, the rule laid down in *Kirk v. Clark*, 59 Pa. St. 479, on which the learned judge relied, would have been applicable. It was applied in *Glidden v. Strupler*, 52 Pa. St. 400, where the married woman repudiated her own agreement; in *Kirk v. Clark*, where her heirs at law asserted her title against her vendee. But I have been able to find no case in which her creditors have been allowed to assert it for her, and against her will. Let it be conceded that the judgment against her was a lien upon real estate owned by her at the date of its rendition. Let it be conceded, further, that her unacknowledged deed did not bind her, and that she might have recovered the land conveyed by it from her vendee without returning to him the purchase money she had received. The question still remains, can a creditor compel her to be unjust to her vendee, against her own will? As matter of fact, she had sold her property in June, received the purchase money, and delivered possession to the purchaser. As matter of law, she was not bound by her bargain until her deed was duly acknowledged. She had the right to repudiate the sale, or to perfect it by joining her husband in a proper acknowledgment of her deed. Which she would do, she had the power to determine. She decided to be honest, and accordingly acknowledged the deed. She is bound by her decision. Her deed vests her title irrevocably in her vendee, and all claiming under her are bound, as she is, by it. A creditor, who obtains a judgment four months after she parted with her property and delivered possession to the purchaser, claims the right to set up her disability to defeat a conveyance made in good faith, and perfected in a manner which the law declares to be binding upon her. This cannot be done. Disability, whether arising from infancy or coverture or lunacy, is declared for the protection of the person on whom the disability rests. An infant can ratify after reaching a proper age. A lunatic can ratify after the return of sanity. A married woman may ratify after the coverture terminates, but, as

her disability results from the unity of husband and wife, she may bind herself at any time during coverture by complying with the requisite legal formalities. In *Grim's Appeal*, 105 Pa. St. 375, it was held that a married woman was bound to the same measure of good faith as other persons in like cases, except where her disability rendered her act void. In such a case she is not bound by the rules relating to estoppel, but is at liberty to use her disability as a shield against the remedies applicable to other persons. Whether she will keep faith in that class of cases, she alone must determine, or those on whom the law casts her right at her death.

The nearest case to this, in the question raised, is *Freiler v. Kear*, 126 Pa. St. 470, 17 Atl. 668, 906. The wife in that case owned a brewery. She leased it to a firm, of which her husband was a member. They were in arrears for rent. She brought suit in the name of her husband and herself for her use against F. G. Kear and Freiler, her husband, trading as F. G. Kear & Co. The court below held that the action could not be maintained, and that Kear could avail himself of the objection that the plaintiff was the wife of his partner and codefendant. This court reversed the judgment, holding that the husband alone could raise the question, and "that the objection of coverture could not be insisted on by a stranger to invalidate such proceedings and judgment, when waived by the husband." He might have been heard to deny his wife's right of action against him, but he did not choose to deny it. His partner could not compel him to do so. Mrs. Oates might have repudiated her deed at any time before its acknowledgment; but she did not choose to do so. No one else could do it for her, or compel her to do it. She had sold her property, and had its price. She had delivered possession and her deed to the purchaser, but the statutory proof of its execution was not made when the judgment was obtained against her. This proof she soon after supplied, and the deed was then binding, according to its terms. The title of the purchaser related to its date, and, as against a creditor who had no lien at that time, it went without incumbrance. Under this view of the case, it is unnecessary to consider the effect of the act of 1887 on the form of the acknowledgment by a married woman. The fourth assignment of error is sustained, and the judgment is reversed. As this is conclusive of the case, a venire will not be awarded.

(159 Pa. St. 308)

FT. PITT BLDG. & LOAN ASS'N v. MODEL PLAN BLDG. & LOAN ASS'N.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

STATUTES—REPEAL BY IMPLICATION—CHANGE OF CORPORATE NAME.

Act April 20, 1869, giving power to the court of common pleas "to change the name,

style, and title of any corporation," is necessarily repealed by Act June 13, 1883, conferring on the governor power to amend or alter the articles or conditions of any charter; and a change in a corporation's name by the court of common pleas after June 13, 1883, is void.

Appeal from court of common pleas, Allegheny county.

Action by the Ft. Pitt Building & Loan Association against the Model Plan Building & Loan Association, doing business as the Ft. Pitt Building & Loan Association, to restrain defendant from using plaintiff's name. From a decree sustaining a demurrer to the bill, plaintiff appeals. Reversed.

John B. Chapman, for appellant. Morton Hunter, for appellee.

STERRETT, C. J. The first sections of the acts of April 20, 1869, and June 13, 1883, to use the apt expression of our Brother Mitchell in a similar case, (*Newbold v. Pennock*, 154 Pa. St. 591, 26 Atl. 606,) "cannot stand together without establishing two methods of practice for reaching precisely the same result, or making a mongrel method, which is not the one prescribed by either statute" in the creation of corporations of the second class. The power which was vested in the court of common pleas by the act of 1869, to "change the name, style, and title of any corporation," was necessarily implied in the power which was conferred on the governor by the act of 1883, to improve, amend, or alter the articles and conditions of any charter. "The name is an indispensable part of the constitution of every corporation, the 'knot of its combination,' as it has been called, without which it cannot perform its corporate functions. This name is conferred by the charter, and cannot be changed without an alteration of the charter. A general power to alter or amend implies a power to alter or amend any part of the charter, and necessarily includes the power to alter the name, which is part of the charter." Thayer, P. J., in *Re Fidelity Mut. Aid Ass'n*, 12 Wkly. Notes Cas. 271. The power to change the name of corporations conferred by the two acts being, then, the same, and held by different but co-ordinate authorities, how shall it be exercised? This question is answered by the principle that a subsequent statute, revising the whole subject-matter of the former, and evidently as a substitute for it, although it contains no express words to that effect, must, in accordance with principles of law, as in reason and common sense, operate to repeal the former. *Rhoads v. Association*, 82 Pa. St. 180. The act of 1883 revised the whole subject-matter of the act of 1869, and was evidently intended as a substitute so far as related to corporations of the second class. A new system was devised, and in it a tribunal was created for the amendment of charters; and the act of 1869 was thereby rendered useless. Acts which grant a right

conditioned on different things are clearly inconsistent. *Gwinner v. Railroad Co.*, 55 Pa. St. 126. The legislature certainly never contemplated, in passing the act of 1883, that the courts of common pleas and the governor should act jointly. If independently, under which act should proceedings be had? And would change of name, made under one, satisfy the other? If refused by one, could a charter be granted by the other? Assuming the act of 1869 as still in force, these and other embarrassing questions which might be suggested would give rise to doubt, confusion, and endless litigation. There is no apparent reason why this condition of affairs should exist. The methods provided by the two acts looked to precisely the same result. They cannot be harmonized; and the act of 1883 was useless and vain, unless it was intended to provide a substitute for the act of 1869. The evident purpose of the legislature in passing the act of 1883 was to provide a new, uniform, and exclusive method for the amendment of charters of corporations of the second class. It follows, the change of name of the Model Plan Building & Loan Association authorized by the court of common pleas under the act of 1869 was illegal and void, and that plaintiff has a right to the exclusive use of the corporate name of Ft. Pitt Building & Loan Association. The name being an essential in plaintiff's corporate existence, its further wrongful use by defendant will have a natural tendency to injuriously affect plaintiff's identity and business. For this the law has no adequate remedy, and resort was properly taken to the equitable remedy by injunction; and as the plaintiff's exclusive right rests, not in parol, but in the record before the court, a final disposition of the matter will now be made. *Newby v. Railway Co.*, 1 Dady, 609. The decree of the common pleas, sustaining the demurrer, is therefore reversed; and it is now adjudged and decreed that the plaintiff has a right to the exclusive use of the corporate name Ft. Pitt Building & Loan Association, and that the defendant, its officers, members, servants, agents, and employees, be perpetually enjoined and restrained from further using the said corporate name of the plaintiff; and it is further ordered that the defendant pay the costs, including the costs of this appeal.

(159 Pa. St. 374)

BEIHOFFER v. LOEFFERT et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MALICIOUS PROSECUTION—EVIDENCE—ADVICE OF MAGISTRATE—COMPETENCY.

In an action for malicious prosecution it is not competent for defendants to prove that in instituting the prosecution they acted on the advice of an alderman or justice of the peace. *Neall v. Hart*, 8 Atl. 628, 115 Pa. St. 247, distinguished.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action by Joseph Beihofer against George Loeffert and John Loeffert for malicious prosecution. From a judgment entered on the verdict of a jury in favor of plaintiff, defendants appeal. Affirmed.

T. H. Baird Patterson, for appellants.
Arch H. Rowand, Jr., for appellee.

McCOLLUM, J. It is well settled that in an action for malicious prosecution it lies on the plaintiff to show malice and want of probable cause, and that a jury may infer the former from the latter. A discharge by the examining magistrate casts upon the defendant the burden of establishing probable cause, unless it appears in the plaintiff's testimony. If probable cause is shown, it matters not whether the motive of the prosecutor was praiseworthy or malicious. If in good faith he sought, obtained, and honestly followed the advice of competent counsel on a full and fair statement of all the facts within his knowledge, or which he had reasonable cause to believe he was able to prove, the advice so received and acted upon will constitute a defense to the action. It is wholly unimportant, so far as the defense is concerned, whether the advice was warranted by the facts submitted to the counsel, as the prosecutor, in this particular, is only responsible for a full and truthful statement of them. If there is no dispute in relation to the facts, it is for the court to determine whether they constitute probable cause; if the evidence as to the facts is conflicting, it is for the jury to find them under proper instructions from the court. In this case the issue in the court below was whether the appellants maliciously and without probable cause prosecuted the appellee for perjury. As he was discharged by the examining magistrate, it was for the appellants to show probable cause for the prosecution; and, as they failed to do this to the satisfaction of the jury, it is our duty, on their appeal, to inquire and determine whether the learned court below committed any error which contributed to the result of which they complain. Specifications 2, 3, 4, and 5 relate to the rejection of their offers to show what they said to Alderman Brinker, and what he said to them concerning their criminal proceeding against the appellee. The offers were avowedly made for the purpose of negating malice and mitigating damages, and the real question is whether an opinion obtained from a magistrate on a fair statement by their prosecutor of his case will afford him any protection in a suit brought against him for malicious prosecution. We think this question was squarely met and decided in *Brobst v. Ruff*, 100 Pa. St. 91, where it was held that it was not competent for the defendant in such suit to prove that in instituting the prosecution he acted upon the advice of a justice of the

peace. It was contended in that case, as it is in this, that the offer was at least admissible in connection with other evidence in mitigation of damages. The cases relied on by the appellants to sustain their offers are plainly distinguishable from the case cited. *Neall v. Hart*, 115 Pa. St. 347, 8 Atl. 628, was an action for false imprisonment, and the material question in it was whether the justice had authority to issue the warrant for the arrest of the plaintiff. In order to determine this question it was necessary to ascertain upon what information he acted in issuing the warrant, and, as this was derived from the prosecutor, it was held that the latter's statement of the case to the former was admissible. *McCarthy v. De Armit*, 99 Pa. St. 63, was an action against the mayor and certain police officers of the city of Pittsburgh for false imprisonment, and they were permitted to show the information which induced them to make the arrest. In the cases cited the evidence referred to was admitted for the purpose of showing probable cause for, and the absence of malice in, the action of officials. A prosecutor may show that he acted upon information received from reputable private citizens, and such information may constitute probable cause for the prosecution; but their advice to him upon facts within his or their knowledge is not admissible for any purpose. An honest belief in the existence of, and his ability to prove, facts and circumstances which constitute probable cause for the prosecution will protect him, but the opinion of an alderman or justice of the peace as to their legal effect is not available as a complete or partial defense to the action for it.

The appellants have no reason to complain of the charge. It was quite favorable to them. It fairly presented their evidence, with an instruction that it constituted, if believed by the jury, a good defense to the action. The jury were also instructed, in effect, that if the prosecution was instituted by the appellants in an honest though mistaken belief that the facts were as claimed by them, the plaintiff could not recover. Surely these instructions were all that the appellants could properly ask for under the law applicable to the evidence in the case. The specifications of error are overruled. Judgment affirmed.

(159 Pa. St. 366)

BEIHOFFER v. LOEFFERT et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MALICIOUS PROSECUTION — INSTRUCTIONS — HARMLESS ERROR — EVIDENCE — ADVICE OF COUNSEL — ADVICE OF MAGISTRATE.

1. In an action for malicious prosecution, it is error to instruct the jury that, "If the facts are disputed, it is for you to determine whether or not there was probable cause."

2. Where an examination of the charge as a whole fails to satisfy the supreme court that

such erroneous instruction was harmless, the judgment will be reversed.

3. In an action for malicious prosecution for perjury, it is error to reject defendants' offer to prove by the attorney to whom they submitted their case before making the information on which the warrant was issued that on their statement he advised the prosecution, and to characterize such offer as "entirely immaterial," and state in connection with it that, unless defendants sustained their allegation of perjury, they had no excuse for making the information.

4. Though it was error to tell the jury that there was evidence in the case to indicate that the magistrate advised the prosecution of defendants for perjury, and that it ought to be considered by them, especially when such evidence was properly excluded, such instruction was favorable to defendants, and the error does not justify a reversal on their appeal.

5. The information on which the warrant was issued for the arrest of plaintiff was properly admitted in evidence.

6. Where all the evidence is not printed, the supreme court cannot say whether or not there was error in excluding evidence sought on cross-examination of a witness, since it has no means of judging of its relevancy to the examination in chief or to the issue.

7. In an action for malicious prosecution, evidence of the advice given defendants by the magistrate before making the information is not competent. *Brobst v. Ruff*, 100 Pa. St. 91, followed.

Appeal from court of common pleas, Allegheny county.

Action by Albertina Belhofer against George Loeffert and John Loeffert for malicious prosecution. From a judgment entered on the verdict of a jury in favor of plaintiff, defendants appeal. Reversed.

The seventh specification of error, referred to in the opinion, is as follows: "The court below erred in ruling as follows, (John Loeffert, defendant, examined as witness:) 'Q. Well, before making the information, did you consult anybody about it? A. They sued us one time, and got judgment, and I had to pay that judgment; and I went to Squire Brinker, and paid him that, and asked him what he thought I could do in that, and he said— (Objected to.) By the Court: The advice of the squire is not evidence.'"

T. H. Baird Patterson, for appellants.
Arch H. Rowand, Jr., for appellee.

MCCOLLUM, J. This is an action for malicious prosecution, and, on the trial of it in the court below, the learned judge, in his charge to the jury, said, "If the facts are disputed, it is for you to determine whether or not there was probable cause." It needs no citation of authority to show that this instruction was erroneous, and as our examination of the charge, as a whole, has failed to satisfy us that it was harmless, we are constrained by it to reverse the judgment. The charge was somewhat obscure and confusing, in the statement of the issue and the review of the evidence; but this was attributable in part, at least, to the unsatisfactory condition of the pleadings, and the failure of the parties to clearly specify the testimony to which the accusation of perjury referred.

The learned judge erred in rejecting the appellants' offer to prove by the attorney to whom they submitted their case before making the information on which the warrant was issued that, upon their statement, he advised the prosecution. It was a clear mistake to characterize and reject this offer as "entirely immaterial," and to state in connection with it that, unless they sustained their allegation of perjury, they had no excuse for making the information.

We are unable to discover why the jury were told that there was evidence in the case to indicate that the magistrate advised the prosecution, and that it ought to be considered by them on the question of malice, when, as the record shows, the appellants' offer to prove that he did advise it was rejected on the ground, as stated by the learned judge, that "the advice of the squire is not evidence." The ruling on the offer was right, the instruction was wrong, and the appellants complain of both; but, as the erroneous instruction was in their favor, it does not justify a reversal on their appeal.

It was not error to admit in evidence the information on which the warrant was issued for the arrest of the appellee. Nor can we say that error was committed in sustaining the objections to the questions contained in the third, fourth, and fifth specifications. It seems, from the form of the questions, and the remarks of the court in reference to them, that they were asked on cross-examination; but, as the appellants have not printed the testimony, we have no means of judging of their relevancy to the examination in chief or to the issue. We cannot learn from the appellants' paper book whether the court sustained or overruled the objection to the question contained in the sixth specification, nor can we understand why the appellants complain in the eighth specification of the admission of competent evidence offered by themselves. The ruling upon the offers shown by the seventh specification is fully sustained by the decision of this court in *Brobst v. Ruff*, 100 Pa. St. 91. In accordance with the foregoing views, we sustain the ninth and sixteenth specifications of error, and overrule the remaining specifications.

(159 Pa. St. 360)

LIGGETT v. SHIRA.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

LEASES—FORFEITURE—REFORMATION OF CONTRACT.

1. A lease which granted an exclusive right to drill for oil and gas on the leased land provided that the lessee should commence a well before a certain date; that a failure to do so, and to complete the well with due diligence, should render the lease void; but that the payment by the lessee of a specified monthly rental from the time specified for the completion of the well should extend the time for completion during the time for which such rental should be paid. *Held*, that the lessor only could assert

a forfeiture for failure to complete the well or pay the rent.

2. A lease will not be reformed in equity, so as to make it conform to another lease, where both leases have the same legal effect, as judicially construed.

Appeal from court of common pleas, Allegheny county.

Bill in equity by Thomas Liggett against William M. Shira to reform a lease which granted to plaintiff an exclusive right to drill for oil and gas on defendant's land. Bill dismissed. Complainant appeals. Affirmed.

The following are the provisions of Exhibit A and Exhibit B, which relate to forfeiture of the lease: "A. It is further agreed that the party of second part shall commence a well on the above-described premises within forty-five days from the date above, or, in default thereof, pay to the party of the first part, for further delay, a monthly rental of one hundred dollars on the said premises, from the time above specified for commencing a well, until such well shall be commenced. The said rental shall be deposited to the credit of the party of the first part at the Butler Savings Bank, or be paid direct to said first party. And a failure to commence such well, and to prosecute the same to completion with due diligence, or to pay said rental within time above specified therefor, or within ten days thereafter, shall render this lease null and void, and the same can then be renewed, extended, or continued in force only by the mutual consent of the parties of both parts." "B. It is further agreed that the party of the second part shall commence to drill a well on the above-described premises on or before Sept. 15th, 1889. A failure to commence such well within the time above specified therefor, and to prosecute the same to completion with due diligence, shall render this lease null and void, and without effect, between the parties hereto; but, if said party of the second part shall pay to the party of the first part a monthly rental of one hundred dollars upon the said premises from and after the time above specified for the completion of said well, such payment shall operate to extend the time for completion of said well during the period for which such rental shall be so paid. Such rental may be deposited to the credit of the party of the first part at the Butler Savings Bank, or be paid direct to the said first party."

West McMurray and Samuel McClay, for appellant. James Bredin, for appellee.

WILLIAMS, J. The plaintiff is seeking to reform a written agreement between himself and the defendant. He alleges that he entered into an agreement for exploring and operating the land of the defendant for oil upon the terms and conditions appearing in the form of lease attached to his bill, known as "Exhibit B;" that this lease had been to some extent defaced by erasures and inter-

lineations, and the form of lease marked "Exhibit A" was filled out by his attorney to take its place, and was signed by the parties. He further alleges that it was so signed with the understanding on the part of the defendant and himself that it was in legal effect the same as the form Exhibit B, and that he was so advised by his counsel. He now finds the lease to be different in one important particular from what he supposed the effect of Exhibit A to be, and for this reason he asks to reform the lease so as to make it conform to Exhibit B. No fraud is alleged. No stipulation was omitted by mistake. The contract was read before it was signed, and the complaint now made is that the plaintiff was mistaken in his construction of it, and that, as the court now expounds it, it is not in accordance with the understanding between the parties. This is denied by the defendant, and we concur in opinion with the learned master that the proof of mutual mistake is not so clear and precise as to justify a decree if the plaintiff was in other respects entitled to the relief he seeks. But, as the learned master points out, the legal effect of both forms of lease, so far as the forfeiture clause is concerned, is the same: The lessor is the only person who can assert a forfeiture. The lessee may do, or omit to do, that which the lease declares shall be a cause of forfeiture, and so subject his leasehold interest or estate to an entry and forfeiture by the lessor; but he cannot enter on himself, and declare his own estate forfeited, and so divest the rights and defeat the remedies of his lessor. A tenant of a dwelling house may forfeit his right and title under his lease by doing that which his lease names as a ground of forfeiture; but that he can, by his own breach of his contract, forfeit his landlord's right to the rent, is a proposition so preposterous that whoever asserts it must show a plain, unambiguous agreement of the lessor to that effect. In form B, the lessor had a right of forfeiture which he might exercise or not. The lessee could prevent its exercise by payment, but he could not compel its exercise by nonpayment. The learned auditor and the court below were right on both questions considered. The proofs did not come up to the standard required by a court of equity. If the proofs had been sufficient to reform the lease so as to make it conform to the original draft, Exhibit B, still the legal effect of the lease would be unchanged. The decree is affirmed, at the cost of the plaintiff.

(159 Pa. St. 124)

COCHRAN v. PEW et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

OIL LEASES—DRILLING WELL—PAYMENTS IN CASE OF FAILURE—RIGHT TO TERMINATION—CONTEMPORANEOUS AGREEMENT—MISTAKE OF LAW.

1. A lease for oil and gas mining contained a covenant that the lessee should com-

mence operations within three months, or thereafter pay lessor \$160 a year till work was commenced. *Held*, that the fact that operations in the neighborhood demonstrated that a well on the property would be of no avail did not release lessee from his obligations.

2. The provision of the lease that failure of the lessee to make a payment when due should render the lease null and void, and not binding on either party, does not make the lease void, except at the option of the lessor.

3. In an action on a lease by the lessor, defendant alleged a contemporaneous parol agreement that the lessee should have the right to terminate the lease at any time when satisfied that there was no oil or gas in the leased land, and, as well for the protection of the lessee as of the lessor, there was inserted in the lease that failure of the lessee to make a payment when due, should render the lease null and void, and not binding on either party, and that but for such agreement, and the belief of the lessee that it was substantially expressed in the lease, he would not have signed it. *Held*, that this was the mere assertion that the lessee thought the language used gave him the right to terminate, and was therefore no ground for relief.

Appeal from court of common pleas, Allegheny county.

Action by Cephas Cochran against J. N. Pew and E. O. Emerson to recover the amount stipulated in a lease. Judgment for plaintiff. Defendants appeal. Affirmed.

By the lease plaintiff granted to defendants the exclusive right to mine for oil and gas on 160 acres of land. It contained a covenant that defendant should commence operation on the land for said purpose within three months, or thereafter pay \$160 per annum in quarterly payments, with the provision that the failure of the lessees to make any one of the payments when due, or within 10 days thereafter, would render the lease null and void, and not binding on either party. Defendants, in their affidavit of defense, alleged that, at and before the executing of the said lease, it was agreed by and between the parties thereto that these defendants should have the right to terminate the same at any time when they should become satisfied that carbon oil or natural gas could not be found in the land therein described in such quantity as would justify mining for it, and, as well for their protection as for the protection of the said plaintiff, there was inserted in the lease a clause in the words following, to wit: "The failure of the second party to make any one of the payments when due, or within ten days thereafter, will render this lease null and void, and not binding upon either party;" and but for such agreement, and the belief upon the part of the defendants that it was substantially expressed in the writing, they would not have signed the lease.

C. Heydrick and W. S. Miller, for appellants. Robb & Lindsay, for appellee.

MITCHELL, J. The argument of the appellant, able and ingenious as it is, nevertheless is but another effort to escape from the rule laid down in the series of cases from *Galey v. Kellerman*, 123 Pa. St. 491, 16 Atl.

474; *Wills v. Gas Co.*, 130 Pa. St. 222, 18 Atl. 721; *Ray v. Gas Co.*, 138 Pa. St. 576, 20 Atl. 1065; *Ogden v. Hatry*, 145 Pa. St. 640, 23 Atl. 334; *Jones v. Gas Co.*, 146 Pa. St. 204, 23 Atl. 386; *Phillips v. Vandergrift*, 146 Pa. St. 357, 23 Atl. 347; and *Leatherman v. Oliver*, 151 Pa. St. 646, 25 Atl. 309,—down to *Liggett v. Shira*, 28 Atl. 218, (at the present term, not yet officially reported,) that covenants for the lease to be void, or to cease and determine, etc., on failure by the lessee to comply with the conditions specified, do not make the lease void except at the option of the lessor, and that that legal effect, no matter what form or cumulation an express stipulation that the lease shall be of phrases be used, can only be changed by voidable at the option of either party or of the lessee. The averment in the affidavit of defense that it had been "ascertained, by methods practiced and approved by men skilled in the business, that neither carbon oil nor gas existed in the land leased," and the view, based thereon, urged with so much force by the distinguished counsel, that it must now be accepted as a demonstration of science that putting down a well on land shown by exploration of neighboring territory to be dry is a useless expense and damage, and that parties, in contracting on the subject, must be considered to have had this fact in mind, would be a strong argument to the jury, if the case was one for them, that the plaintiff had suffered no actual damages by the defendants' default. But the conclusive answer in the present case is that the parties have clearly stipulated for the mode in which the trial shall be made, and it is to be by a well on this land. There is no room for science, any more than there is for a jury, to say that it will be of no use to do it. The parties have explicitly agreed on the exact thing to be done, and the exact amount to be paid for failure to do it. The scientific nature of mining in the present day, and the certainty of scientific conclusions from exploration of neighboring territory, may be fully recognized and admitted, but nevertheless hopeful parties may desire an actual test; and, if we are to take notice of facts in the history of oil mining, we know that some of the most extraordinary and profitable productions have been the result of "wild-cating" in unpromising fields. But it is enough for us that the parties have contracted for the thing to be done, and the damages for not doing it. Under such circumstances, it is never open to the covenantor to say that the thing would be of no value to the coveantee if it were done. On the terms of this covenant, we see no distinction upon which it can be taken out of the rule of the authorities already referred to.

But the affidavit also sets up a contemporaneous parol agreement that the defendants were to have the right to terminate the lease at any time when they should become satisfied that oil or gas could not be found

in paying quantities. Had this been all of the affidavit on this subject, it might have resolved itself into a question of proof of the agreement averred; but the affidavit goes further, and states that "there was inserted in the lease a clause in the words following," etc., and that the defendants would not have signed except for the alleged agreement," "and the belief on the part of defendants that it was substantially expressed in the writing." This is not an averment of a contemporaneous parol agreement, which ought to modify the written instrument, but of an agreement put into writing, which the defendants construe in a certain way. It does not set up any accident or mutual mistake, but that the parties used language which the defendants thought to mean what the law says it does not mean. This is not the kind of mistake that affords a basis for reformation of the instrument, or for relief from its terms as the parties wrote them. Judgment affirmed.

(159 Pa. St. 142)

McMILLAN v. PHILADELPHIA CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CONSTRUCTION OF LEASE—LESSEE'S OPTION TO FORFEIT

Lessor demised land to lessee for drilling or operating for oil or gas for three years, or as long as such products should be found in paying quantities; it being stipulated that lessee begin work within sixty days, and complete one well within three months thereafter, and otherwise pay a fixed rental until completion of one well, and that failure to perform the contract or its conditions annul the lease, lessee "having the option to drill the well or not, or pay said rental or not, as he may elect." Held, that the lessee must dig a well, or pay the rent.

Appeal from court of common pleas, Allegheny county; J. W. F. White, Judge.

Assumpsit by A. McMillan against the Philadelphia Company for royalties on a mining lease. Judgment for plaintiff. Defendant appeals. Affirmed.

Dalzell, Scott & Gordon, for appellant. Lazear & Orr, for appellee.

WILLIAMS, J. The distinction between an option and a contract of sale or lease is broad and plain. An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. A contract of sale or lease fixes definitely the relative rights and obligations of both parties at the time of its execution. The offer and the acceptance are concurrent, since the

minds of the contracting parties meet in the terms of the agreement. The instrument sued on in this case is treated by the defendant as an option. If that is its legal character, then the defendant could elect not to accept its terms; but, if the instrument is an agreement by which not one but both of the parties should be held bound, then the plaintiff is entitled to a verdict.

It becomes necessary to look at the terms of the instrument, therefore, to determine its character. It bears date on the 6th day of May, 1892, and recites that in consideration of one dollar in hand paid, and the rents, stipulations, and covenants contained therein, to be kept and performed by the party of the second part, the first party "has demised and let unto the party of the second part, for the sole and only purpose of drilling and operating for oil or gas, a tract of land in Penn township, Allegheny county, bounded and described as follows, to wit." These are not the words of an offer or option, but of a contract taking effect as to both parties at its date. The specific terms and conditions follow, fixing the royalty, if oil is found, at one-eighth of the product, and the price of each gas well yielding gas in quantities sufficient for utilization at \$500 in money. The duration of the term is three years, "and as long thereafter as oil or gas shall continue to be found in paying quantities." The lessee covenants to commence operations within sixty days, and complete one well on the leased premises within three months thereafter, unavoidable accidents excepted; and, in case of failure to complete one well within such time, he agrees "to pay thereafter as rental, to the party of the first part, for such delay, the sum of twenty-five dollars per month until one well shall be completed." The instrument is thus seen to contain mutual covenants, which were binding upon the parties from the date of its execution. Following these covenants comes the forfeiture clause, which affords the lessor an additional method of enforcing the contract, or ridding himself of an undesirable tenant. It provides that a failure to perform the contract or any of its conditions shall render the lease null and void, and no longer binding on either party. This clause is for the benefit of the lessor, and he may assert the forfeiture, or forbear to do so. *Leatherman v. Oliver*, 151 Pa. St. 646, 25 Atl. 309; *Liggett v. Shira*, 28 Atl. 218, (heard at the present term); *Glasgow v. Oil Co.*, 152 Pa. St. 48, 25 Atl. 232. The only words on which it is sought to distinguish this case from those just cited, and turn this contract into an option, are those that follow the forfeiture clause, viz.: "He [the lessee] having the option to drill the well or not, or pay said rental or not, as he may elect." These words must be construed in connection with the remainder of the contract, and so that, if possible, its stipulations may stand together. The lessee

had covenanted to do one of two things,—to begin a well within sixty days and complete it within three months thereafter, or pay \$25 per month as rental for the privilege of doing so afterwards, and within the three years which limited his term, unless oil or gas was found in paying quantities. The words relied on declare that he may do which he pleases. He may drill the well, and so pay no rental, or he may pay the rental, and not be compelled to drill the well. It is not for the lessor, but it is for the lessee, to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words, and make it part of the contract. The contention of the defendant destroys the character of the whole contract. It makes the lessee say that he will drill a well within a given time, or, failing to do so, that he will pay a monthly rental, but that he will do neither unless it pleases him, and, if he does neither, he shall be liable in no manner for his breach of contract. Such a construction is so unjust and absurd that the words relied upon as requiring it must be plain and unambiguous, and must be incapable of an exposition in harmony with the body of the contract, before we can consent to adopt it. The judgment is affirmed.

(159 Pa. St. 32)

SAFE-DEPOSIT & TRUST CO. OF PITTSBURGH v. KELLY, (two cases.)

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

PAYMENT OF DEBT BY SATISFACTION OF MORTGAGE—INTENTION OF MORTGAGEE—EVIDENCE.

1. On the question of whether decedent mortgagee intended to extinguish a debt due her by defendant, her son-in-law, by satisfaction of record of the collateral mortgage, it appeared that defendant had saved to decedent a large amount of money, by inducing her to withdraw it from an insolvent bank, for which decedent always felt grateful; that defendant did not know of the entry of satisfaction until after decedent's death, but continued to pay interest on the debt; that decedent stated to a daughter and another witness that she had satisfied all claims against defendant; that, when the daughter suggested that she ought to tell defendant and his wife that the debt was satisfied, decedent said: "No; I won't tell them at all. When they find it out, it will be all the sweeter to them." *Held*, that a finding that decedent intended to extinguish the debt was justified.

2. On the question of whether the satisfaction of a mortgage on the record extinguished the debt, subsequent declarations of the mortgagee tending to contradict the record of satisfaction are inadmissible.

Appeal from court of common pleas, Allegheny county; J. W. F. White, Judge.

Two actions by the Safe-Deposit & Trust Company of Pittsburgh, executor of the will of Ann Sheehan, deceased, against James M. Kelly; one being a scire facias on a mortgage, and the other an action in assumpsit on the accompanying bond. The two actions were tried together, and de-

fendant had judgment in each. Plaintiff appeals. Affirmed.

Following are plaintiff's assignments of error:

"(1) The court erred in directing the jury to find for the defendant in the *scire facias* on the mortgage, and in charging as follows in respect thereto: 'On the 25th day of May, 1886,—that would be nine years after the bond and mortgage were given,—Mrs. Sheehan went to the recorder's office in this county, where the mortgage was recorded, and on the face of the mortgage acknowledged to have received full satisfaction of that mortgage; signed her name and put her seal to that acknowledgment. I say to you that is a complete answer to the *scire facias* on the mortgage, and that in that case your verdict should be for the defendant. Where there is an entry of satisfaction on the mortgage, as in this case, it is a fair presumption that it is in satisfaction of the debt as well as of the mortgage. The inference, and the fair inference, in the absence of any other evidence, would be that that satisfaction was intended to wipe out the debt as well as remove the mortgage. That is what is called "prima facie evidence;" that is, such is the presumption of law, but it is a presumption that may be overcome by evidence of a different character. It is so conclusive as not to be explained or not to be overthrown by evidence showing that there was a mistake in the matter, or that it was intended for a different purpose, or something of that kind. Now, there is not, in this case, a scintilla of evidence that Mrs. Sheehan did not intend to relinquish entirely that mortgage,—to satisfy it and to remove it from the farm that was covered by it,—and in the absence of any evidence to indicate any mistake on her part, or any other intention than what appears on the face of the satisfaction, I say the satisfaction is conclusive as to her intention to relinquish that mortgage, and release the property from the lien of it.'

"(2) The court erred in refusing plaintiff's first point, which point was as follows: 'That in the suit on the bond, if the jury find that the bond was never delivered to defendant, but was retained by Ann Sheehan, the obligee, in her possession, till her death, and that she collected interest upon it from defendant after the date of the alleged satisfaction down to the time of her death, then the verdict must be for the plaintiff for the unpaid balance of said bond, with interest.'

"(3) The court erred in refusing plaintiff's second point, which point was as follows: 'That, under all the evidence in said action on the bond, the plaintiff is entitled to the verdict.'

"(4) The court erred in refusing plaintiff's third point, which point was as follows: 'That in the suit on the mortgage, if the

jury find that Ann Sheehan, the mortgagee, retained the mortgage in her possession till her death, and collected interest upon the debt secured by said mortgage till the time of her death, and that defendant also paid interest thereon to the plaintiff, her executor, after her death, then the plaintiff is entitled to a verdict in this case for the unpaid balance of principal, with its interest, notwithstanding the entry of satisfaction upon the record of the mortgage.'

"(5) The court erred in refusing plaintiff's fourth point, which point was as follows: 'That under all the evidence in the case, (No. 10, July term, 1892, the suit on the mortgage,) the verdict must be for the plaintiff. Answer. The foregoing points are refused, for the reasons stated in the charge. Plaintiff excepts, and bill sealed.'

"(6) The court erred in sustaining the objection to plaintiff's offer of the testimony of Mary Loughrey, a granddaughter of Ann Sheehan, which offer, objection, and ruling of the court in respect thereto, were as follows: This witness having stated that she had a conversation with her grandmother, in respect to the bond and mortgage shortly before she died, 'plaintiff's counsel offer to prove by the witness that shortly before her death she complained that James M. Kelly was in default of payment of this mortgage, and that she intended to make him pay the principal as well as interest, or words to that effect. (Objected to as incompetent and as hearsay.) By the Court: Any declarations of Mrs. Sheehan contrary to her satisfaction of the mortgage, made after she satisfied the mortgage, I do not think are competent evidence. The objection is sustained, and exception on part of the plaintiff.'

"(7) The court erred in the portion of the charge relative to the payments credited on the bond, and the slip of paper pinned to the same, as follows: 'Another ground is that after the satisfaction of that mortgage the defendant paid money, and that Mrs. Sheehan received money on this debt after the 25th of May, 1886, and several receipts have been put in evidence. In the first place, on the back of the bond itself are receipts testified to by the daughter as being in the handwriting of their mother, Mrs. Sheehan. All of these receipts on the back of the bond are prior to the 25th of May, 1886, the time that the bond was satisfied, except one, and that is a receipt on the 13th of October, 1888. Now, in connection with this is this little paper pinned to the bond. That, according to the testimony, is in the handwriting of Ann Sheehan, but how it got there is not definitely explained. It may have been pinned there by Ann Sheehan, or it may have been in the bond, or connected with the bond, at the time it was found. It gives payments made after May, 1886, and perhaps one or two before that, and covering these receipts that have been put in evi-

dence by the plaintiff, and the wording of these receipts may throw some light on this case. The entry of satisfaction was in May, 1886. The first receipt after that is 13th of October, 1887: "Received of James M. Kelly interest in full to date." It does not say how much. It does not say whether on a bond or mortgage, or what it is on. The next is April 13, 1888: "Received of James M. Kelly interest in full to date." That does not say on what,—bond or mortgage; does not give the amount. The next is the receipt of October 13, 1888: "Received of James M. Kelly interest in full of all demands. Ann Sheehan." That does not say whether on the bond or mortgage, or what. That receipt, or that amount, rather, she has entered on the back of this bond, and it says, "Received interest in full of all demands to October 13th, 1888." There was abundant space on the back of this bond to enter all of these payments. Why were they put on a little slip of paper like that, and not on the back of the bond? The next receipt is April 13, 1890: "Received of James M. Kelly interest in full of all demands to date." Does not give any amount; does not say whether on bond, or what it is on. There are none of these that refer to the mortgage. On the back of this bond, the executors after they had obtained the papers, made an entry that the interest was paid up to April 13, 1890, by receipts in the hands of Mr. Kelly, and that is the receipt I last read. These are the payments made to Ann Sheehan during her lifetime, and it is argued, and is a matter for the consideration of the jury, whether, if she intended that satisfaction to be an extinguishment of the debt, she would have received interest afterwards; and in that connection it may be worth while for the jury to consider why she did not enter those payments on this bond, and why they were put on a little slip of paper like that."

Lazear & Orr, for appellant.

To constitute a gift of a bond, note, or other chattel, actual delivery is necessary. In *re Campbell's Estate*, 7 Pa. St. 100; *Trough's Estate*, 75 Pa. St. 115; *Kidder v. Kidder*, 33 Pa. St. 268; *Zimmerman v. Streep-er*, 75 Pa. St. 147; *Scott v. Lauman*, 104 Pa. St. 593; *Bond v. Bunting*, 78 Pa. St. 210; *Walsh's Appeal*, 122 Pa. St. 177, 15 Atl. 470.

Geo. H. Quail, for appellee.

GREEN, J. These cases were tried in the court below in exact conformity with the decision of this court in the case of *Fleming v. Parry*, 24 Pa. St. 47. The leading facts in that case were almost precisely similar to the leading facts of this. In both there was a mortgage, and a bond given by the mortgagor to the mortgagee. In both the mortgagee executed on the record of the mortgage an acknowledgment of satisfaction in full of

the mortgage. In both the mortgagee retained possession of the mortgage, and also of the bond, until death. In both the actions were brought by the legal representatives of the mortgagee; in the *Fleming Case*, the action being debt on the bond, and in this case there being an action on the bond, and also a *scire facias* on the mortgage. The serious difference between the cases is that in the *Fleming Case* there was literally no supporting testimony to show that the mortgagee intended to extinguish the debt by the entry of satisfaction of the mortgage, while here there was an abundance of the most convincing and satisfactory testimony to show that the entry of satisfaction was made for the very purpose of extinguishing the debt. In the *Fleming Case* the court below was of opinion that the entry of satisfaction on the mortgage extinguished the debt due on the bond, of its own force, whereas in this case the court below left the question of intent to extinguish the debt to the jury, with careful and precise instructions as to what must be found in order to determine that question. This court, in the *Fleming Case*, held that the satisfaction of the mortgage did destroy the mortgage and all remedies upon it, and that whether the debt was intended to be thereby extinguished was a question of fact, which the jury must determine upon all the evidence. The court below, in the present case, charged that the mortgage was extinguished by the entry of satisfaction, and directed the jury to find for the defendant in the action of *scire facias*, but left the question of extinguishment of the debt to the jury, in the action on the bond. On this question the jury found for the defendant, and the verdict was eminently justified by the evidence. It thus appears that the very course directed to be pursued by this court in the *Fleming Case* was actually pursued by the court below on the trial of this. In the *Fleming Case*, Mr. Justice Woodward, delivering the opinion, said: "A bond and mortgage taken for the same debt, though distinct securities, possessing dissimilar attributes, and subject to remedies which are as unlike as personal actions and proceedings in rem, are nevertheless so far one that payment of either discharges both, and a release or extinguishment of either, without actual payment, is a discharge of the other, unless otherwise intended by the parties. * * * Had the mortgage been paid, the law would treat the bond as paid; and, satisfied on record, the mortgage, though not paid, was thenceforth gone, and all remedies on it. But was the bond, also, null? This depended on the understanding and intention of the parties, as a jury should deduce them from all the circumstances in proof. * * * The court relied much on the words used in satisfying the mortgage. They were substantially, but not exactly, the words prescribed by the act of assembly, but neither the debt nor the bond are mentioned: 'I, Andrew Fleming, do here-

by acknowledge to have received satisfaction in full of this mortgage.' These words signed, and sealed by the mortgagee, were all-sufficient to put the mortgage out of existence, and sufficient, too, to satisfy the debt, if so intended. *Prima facie*, they would indeed import extinguishment of the debt as well as the mortgage, and the burden of showing they were not so intended was on the creditor; but when he submitted evidence on that point, proper for the consideration for the jury, it was for them to decide whether the words had been satisfactorily explained, as intended only to wipe off the mortgage."

It will be perceived that the question in this case, as in the Fleming Case, was, not a question of the gift of a bond, but a question as to the intended extinguishment of a debt which was evidenced by a bond, for the security of which a mortgage was also given, and the mortgage was extinguished by a solemn entry of satisfaction on the record of the mortgage, duly signed and sealed by the mortgagee. What was the effect of this entry of satisfaction? Did it extinguish the mortgage only, or did it also extinguish the debt? If it was so intended, it did have that effect, and so the court instructed the jury. On the trial, considerable testimony was given by the defendant to show that the mortgagee did intend to extinguish the debt, and supposed she had done so. A clerk in the recorder's office testified to the fact of the entry of satisfaction of the mortgage. It was written and attested by him, and signed and sealed by Mrs. Sheehan. There was not a particle of testimony to show that there was any mistake or misunderstanding about it on the part of Mrs. Sheehan. It was also proved that the wife of the defendant was the daughter of Mrs. Sheehan, and that the defendant had been the means of saving to his wife's mother several thousand dollars, by inducing her to withdraw from an insolvent bank a large amount which she had on deposit there shortly before its failure, and that she always felt very grateful to him on that account. It was also proved by the testimony of Mrs. Parker, another daughter of Mrs. Sheehan, that, in conversation with her mother about persons to whom she had loaned money, she spoke of Jim Kelly as one of them, and she testified as follows: "She said she had held a mortgage against him, and she told me it was now satisfied. She says: 'About a year ago,—perhaps not that long,—I went down to the courthouse, and with my own hand I satisfied that mortgage from all claim against Jim and Mary.' She says, 'I feel this way,' and I said to her: 'Why, don't you think that is making fish of one and flesh of another? You are giving more to one than to the other children.' She said: 'I am not. I have treated my children all the same, outside of yourself.' Those were her very words, and then she told me how Jim came to get that money: 'I had it in Prager's Bank, and

he came to me one day, and said, "You take your money out of that bank. It is not safe." * * * In a few days, she went down, and drew the money out. She said she hadn't it out any length of time until the bank did break, and my father and her son George both had money in there at that time, and they lost it." In another conversation, about three weeks before her death, she told the witness: "Mary, I am glad in my heart that I have that affair of Mary's settled. * * * I am glad in my heart that I have settled that affair of Mary's." The witness, who lived with her mother at this time, also testified that Mrs. Kelly continued to pay the interest, but that her mother did not give receipts for the payments, and Mrs. Kelly was worried about it, and wanted the receipts, but she would put her off with frivolous excuses, and one day she (the witness) said to her mother: "You must give to those people their receipts. They must have their receipts." "Well," she said, "some day I will get at it, and fix it all right." But she said, "You know, Mary, that affair at the court house, receipts or no receipts, settles that for them." Q. Receipts or no receipts, every thing is settled? A. Yes, sir; that is mother's exact words. Q. Was there anything in those conversations, said by her, as whether or not, or do you know whether or not, she communicated the satisfaction of the mortgage to Mrs. Kelly or to Mr. Kelly? A. No, sir; they knew nothing about it. Q. Did you say anything to your mother about it? A. I told her she ought to tell them. They came down there, and seemed troubled,—worried. They either wanted a settlement, or they wanted their receipts. I says, "You ought to tell those people," and she said, "No, I won't tell them at all. They will find out, and when they find out," she said, "it will be all the sweeter to them." That is her exact words."

It is impossible to believe this testimony, and not believe that the act of satisfaction was intended by Mrs. Sheehan to be a complete extinguishment of the debt itself, and that she fully believed that result had been accomplished. A mere satisfaction of the mortgage as a lien would be of no value to her son-in-law and daughter, if the debt remained, and it certainly would not be "sweeter" to them to know after her death that the debt still remained. This testimony also explains the fact that the old lady retained possession of the mortgage and bond after the entry of satisfaction, and received sums of money from her daughter as payments of interest, and also the payment of interest made after her death. She did not want them to know of it during her life, but to discover it after her death, as a pleasant surprise. All of this and other testimony was submitted to the jury with entirely correct instructions as to the effect it should or might have, as evidence, on the one hand, of an intended extinguishment of the debt.

and, on the other, of an intention that the debt should remain. There was other testimony corroborative of the foregoing. Another witness, Oliver C. Kelly, who had borrowed money of her, testified that she had asked him to pay, not only the interest, but the principal, also, of what he owed her, and in the conversation between them on this subject, "she said she wanted to get her business straightened up, and she would like if I would straighten up so she would get her money together,—all of it. 'Now,' she said, 'Jim. I don't expect there will be any trouble about his.' She said, 'I have got his business fixed. There will be no trouble after I am gone.' * * * She said she wanted to get her money all in, if she could, and get her business straightened up. Her life was short, she said; she was getting old. But she said, 'Jim does not need to bother. There will be no trouble about his after I am gone.' That is as near her words as I can tell you." The jury evidently gave credence to the testimony, and found, under the charge of the court, that Mrs. Sheehan, when she satisfied the mortgage of record, intended to, and did, thereby extinguish and discharge the debt also. As this was an act which she was entirely competent to do, the legal effect upon the debt was the same as the legal effect upon the mortgage. An entire extinction of both was accomplished, and the retention of possession of the papers by her was of no more consequence than the retention of possession of the mortgage alone would have been after an entry of satisfaction. The authorities cited for the appellant upon the point that the gift of a chose in action is not complete without actual delivery are not applicable. In all those cases the question is, has title been acquired? Have those things been done which are necessary in order to pass the title out of the donor? If not, the gift is not complete, and no title passes. But here the question is, has a right of action already existing been extinguished by a suitable act disclaiming the right? It is not a question of the acquisition of title to the bond by a gift of it, but whether the debt which is evidenced by the bond has been discharged. An act of discharge sufficient to extinguish the mortgage has been performed by the entry of satisfaction. That act is sufficient to discharge the debt, if it was so intended, and that such was the intention has been determined by the verdict of the jury upon the testimony, which was sufficient to support the verdict.

The foregoing considerations dispose of all the assignments of error, except the sixth and seventh. As to the sixth, the declarations offered were made after the satisfaction was entered, and could not suffice to destroy the legal effect of that act. As to the seventh, it relates only to comments of the court, regarding the omission of Mrs. Sheehan to enter the interest payments on the bond after the entry of satisfaction, and the

circumstance that she had merely written them on a loose slip of paper. We see nothing wrong in those comments. The entire effect of them was to call the attention of the jury to the subject, but the whole matter was given to the jury,—as we think, quite properly,—for their exclusive action. Judgment affirmed.

(159 Pa. St. 244)

TERRERI v. JUTTE et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

ACTIONS—SPLITTING—ASSUMPSIT.

A salaried superintendent, who agreed with his employer to board its workmen, buy supplies, and pay certain expenses on its account, after leaving his place and recovering the salary due him by suit, may bring a second suit for board furnished, supplies bought, and money paid; this cause of action being independent of the other, though accrued when he sued on the first.

Appeal from court of common pleas, Allegheny county; John M. Kennedy, Judge.

Assumpsit by Carmine Terri against W. C. Jutte, E. L. Stratton, and Thomas Foley, doing business as Jutte, Stratton & Foley. Judgment for plaintiff. Defendants appeal. Affirmed.

Stone & Potter, for appellants. Montooth Bros. and Jas. T. Buchanan, for appellee.

STERRETT, C. J. If this case were here on a motion for a new trial, there might be some excuse for the implied reflection on the integrity of the jury, contained in defendants' printed argument, viz. that they found in favor of plaintiff because the defendants "are known as well to do contractors, able to respond to any claim for damages which may be brought against them." Such a gratuitous charge against the constitutional triers of fact is foreign to an argument addressed to us on questions of law, especially when the testimony before the jury discloses a more substantial basis for their verdict. If, for any such reason as that suggested by the defendants, the verdict should have been set aside, and a new trial ordered, the court below was the proper forum. The record does not show that such relief was even asked. It is conceded that plaintiff was employed by defendants in the spring of 1890, and continued in their service for nearly three months, but the parties differ very widely as to the terms, etc., of their contract relation. Plaintiff alleged and testified, in substance, that he was first employed by defendants as superintendent of their stone quarry at a salary of \$100 per month; that afterwards, and in addition thereto, he was requested by them to procure supplies, provisions, etc., for boarding their men engaged in and about the quarry, and to transact other business for them; for which expenditures, outlays for traveling expenses, etc., as set forth in his statement of claim, they

promised to reimburse him, etc. It is conceded that for the amount due him as monthly salary plaintiff brought suit before a justice of the peace in Fayette county, and recovered a judgment for \$266.66, which was afterwards paid by defendants, and, of course, is not included in this action. The defendants testified to an entirely different version of the contract,—that, in substance, plaintiff undertook to operate the stone quarry at his own expense for employees, etc., for which they were to pay him \$4.25 per cubic yard of stone at the quarry. They denied having made any other than this single contract with the plaintiff in relation to the matters in controversy. Without reference to the testimony of the respective parties to the suit, it is very evident there was a direct conflict as to the facts upon which the right of the plaintiff to recover depended. His testimony was in support of his statement of claim. As to material facts, he was contradicted by one or more of the defendants. Outside of the principals to the contract, there was very little, if any, direct testimony as to its terms. It thus became the duty of the jury to consider and weigh all the testimony, pass upon the credibility of the respective witnesses, and ascertain, as best they could, what the facts were. The only inference that can be legitimately drawn from their verdict, considered in connection with the clear and comprehensive charge of the learned president of the common pleas, is that they found the controlling facts to be substantially as claimed and testified to by the plaintiff. That finding is really the gravamen of the defendants' complaint; but we are powerless to relieve them, even if we were satisfied that they are entitled to relief, unless the verdict resulted from some erroneous ruling of the court. In view of plaintiff's testimony, before the jury for their consideration, it would have been error to have charged as requested in defendants' first point. If the contract was as he testified,—that defendants agreed to pay him \$100 per month for his services as superintendent of their quarry,—he had an undoubted right to bring suit for that as a distinct and independent claim, which had no necessary connection with either of the items of claim embraced in this suit. He was not bound, under penalty of forfeiting his right to the latter items, to include them in his suit for services as superintendent. Authority for so plain a proposition as that is unnecessary. The transcript of the justice before whom that suit was brought clearly shows that plaintiff's claim in that case was for services at defendants' stone quarry, "two months and twenty days, at one hundred dollars per month, amounting to two hundred and sixty-six and two-thirds dollars." For a like reason there was no error in refusing to charge that "under all the evidence * * * the verdict should be for defendants so far as the claim for board is

concerned." If plaintiff's testimony as to the contract was believed, as it evidently was, he was entitled to recover for that as well as other items. The case was carefully and correctly tried, and fairly submitted to the jury, with full and adequate instructions. There is nothing in the record that would justify a reversal of the judgment. Judgment affirmed.

(159 Pa. St. 235)

VOGEL v. WEBBER.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

EASEMENTS—RIGHT OF WAY—MINING COAL.

A deed of all the merchantable coal in an opened mine under the grantor's land, with right of way on said land to carry the coal away, does not convey the right to take out of the pit on said land, and carry by such right of way, coal mined under another tract, nor to dump at the pit's mouth the refuse from the latter; nor can the grantee, having accepted such deed, assert a servitude on the land for such purposes by reason of the practice of the former common owner of both tracts.

Appeal from court of common pleas, Allegheny county; McClung, Judge.

Trespass by William Webber against Gottlieb Vogel. Judgment for plaintiff. Defendant appeals. Affirmed.

S. Schoyer, Jr., and S. B. Schoyer, for appellant. J. S. & E. G. Ferguson, for appellee.

THOMPSON, J. Mrs. Lewis and Miss Lewis, by their deed, conveyed to Sutton all the merchantable coal contained in a certain stratum opened, operated, and lying beneath the tract specified, together with the free and uninterrupted right of way into, upon, and under said land, at such points and in such manner as may be proper or necessary for the purpose of taking and carrying away the coal, and also the tracks and tramways in the pit or pits opened in the seam. By deed, Sutton granted and conveyed his right and title to the coal to Weinmann, of whom appellant (defendant below) was lessee. Upon the surface of appellee's tract there was opened a pit, out of which the coal was taken. The coal underlying the adjoining tract owned by Weinmann was also leased by him to the same lessee. He claimed the right to take through this pit the coal underlying such adjoining land, to deposit the refuse at its mouth, and to carry the coal so mined to a public road over a way or road used by the former owner, when he united in himself the title to the appellee's tract, and to that adjoining, and held them as one tract. Appellee (plaintiff below) denied the right to so use the pit which was upon his tract, the surface of which he had bought from Mrs. and Miss Lewis, subject to the grant to Sutton, and because of such use brought suit, and recovered in the court below. Appellant's right to use the pit in question is by the terms of the grant confined and restricted to the coal

lying beneath the tract of the appellee. Its words are clear and explicit, to wit: "All the merchantable coal lying and being," etc., is granted, "with the free and uninterrupted right of way for the purpose of digging, mining, and carrying away the said coal." Under these terms appellant had no right to take through that pit coal from beneath the adjoining tract, except such as may possibly have been required as a part of the mining operation for the purpose of opening up an air-shaft, and necessarily incident to the mining under appellee's tract. If, therefore, appellant mined coal from beneath the adjoining tract, and carried it through the pit in question, he became liable for doing so, and also if, in dumping the refuse at the mouth of it, he did not do so in good faith, with a proper regard to the rights of the owners of the surface, or to an extent beyond the purpose of the grant. But it is ably argued that, when the former owner (Kelly) owned these tracts adjoining each other, he was engaged in mining the coal beneath them as one tract, and, while so engaged, used a road or way running from a pit nearly on the line between the tract bought by Weinmann and part of the tract bought by Mrs. Lewis and Miss Lewis, across Weinmann's tract, and near to the pit on appellee's land, and thence to the turnpike; that when Weinmann purchased his tract the servitude attached to it, and appellee's tract was servient to it; and that, as such is the case, the conveyance of Sutton to Weinmann did not, it is alleged, operate to destroy his right to use the pit and the road or way to take out the coal from the adjoining tract. Undoubtedly, the principle is settled that, where an easement or servitude is imposed by the owner on one portion of his real estate for the benefit of another, a purchaser of it at a private or judicial sale without an express reservation takes the property subject to the easement or servitude. *Zell v. Society*, 119 Pa. St. 390, 13 Atl. 447. But the application of this principle to the present case fails. By the terms of the grant to Sutton, he became the owner of the merchantable coal under appellee's tract, and was entitled to mine the same; but he had no right to mine upon other lands, and use the pit for such mining operations, because his grant expressly limits his right to the coal mined and lying beneath the tract in question. Weinmann, standing in Sutton's shoes, as his grantee, cannot successfully assert that because the former owner (Kelly) held the different tracts as one tract, and made a use of the road or way as stated, he has the right to tack that use of the road or way to this grant to mine coal, and thus make it the means of mining the coal upon other land, and transporting it over that of appellee. The former owner of the land, in the exercise of his ownership, hauled coal over this road or way, which passed by both pits to the turnpike. While an owner cannot accurately be said to have an easement upon

his own land, yet he may alter the quality of two parts of his heritage; and having attached particular qualities to a part, and having conveyed it, if such qualities are palpable and manifest the purchaser takes it with the qualities which the owner has thus attached to it. In this case the appellant, as lessee, claimed the right to mine and take coal out of the adjoining tract through the pit on appellee's land, and over it, although his lessor had accepted the grant, which restricts the use of the pit and the right of way to the mining and hauling of the coal which underlies only the tract of appellee. The use of the pit and of the right of way was specially restricted to the mining and to the hauling of the coal under appellee's tract. Clearly, the acceptance of the grant restricted such use by the lessor and his lessee, and was a complete negation of any claim that the use by reason of the alleged easement appurtenant to the adjoining tract became unrestricted. Judgment affirmed.

(159 Pa. St. 64)

STOUGHTON v. MANUFACTURERS' NATURAL GAS CO.

(Supreme Court of Pennsylvania. Dec. 30, 1898.)

CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action against a natural gas company for the burning of plaintiff's house, the gas having rushed into the house with such force as to burst the plumbing, it appeared that plaintiff tried to turn the gas off at the furnace, but the pressure was too great; that he could have stopped the gas by using the shut-off in the wall, two or three feet from the furnace; that being excited by the situation, and warned by his wife, he rushed from the basement without delay. *Held*, that his contributory negligence was a question for the jury.

Appeal from court of common pleas, Allegheny county.

Action by W. R. Stoughton, for use of insurance companies, against the Manufacturers' Natural Gas Company, for the burning of plaintiff's house. Judgment for plaintiff. Defendant appeals. Affirmed.

Geo. W. Guthrie, for appellant. J. M. Garrison and Boyd Crumrine, for appellee.

WILLIAMS, J. Two questions were submitted to the jury on the trial of this case: First. Was the burning of the plaintiff's dwelling house by the extraordinary inflow of gas due to the negligence of the gas company defendant? Second. Was the plaintiff guilty of contributory negligence? It appeared that the plaintiff's house was situated in a village called Arlington. That several houses in the village, among which was that of the plaintiff, were supplied with natural gas as a fuel by the defendant company. Upon their line the gas company had placed a regulator, to reduce the pressure of the gas in the houses so supplied to a point of safety. The action of the regulator was liable to

be affected by cold, and, to counteract this, a small gas jet was allowed to burn just under the regulator. The theory of the plaintiff was that this gas jet had caused the joints where the regulator was attached to the line to open so as to permit the escape of gas therefrom; and that this gas, taking fire, had increased the heat until the regulator was destroyed; and the gas, liberated from restraint, had rushed into the plaintiff's house with more force than his plumbing could withstand, and, taking fire, had consumed the house. Whether the facts were as alleged was a question for the jury, and, upon the evidence, we are unable to see how it could have been withdrawn from them. Upon the other question the facts were not in controversy. The plaintiff, becoming aware of the presence of an unusual quantity and pressure of gas, went down into his basement to turn it off at his furnace. The pressure was too strong to be controlled by the cut-off at the furnace, but as he stood by the furnace he was within three feet of the cut-off at the outer wall of the basement, and only had to raise his arm and turn the valve, in order to control the gas. This he did not do, and his failure to shut off the gas in this manner was the contributory negligence alleged. The plaintiff sought to explain his failure to use the means of protection within his reach by alleging that his situation was one of great danger, and that the excitement occasioned by it, and by the warning of his wife, led him to rush from the basement without an instant's delay. His neighbors acted with more coolness, and saved their homes by using the cut-off at the wall. He could have done the same thing in much less time than was required to reach the floor above, and his neglect of this means of safety was properly pressed as strong evidence of contributory negligence. The question, however, was one of fact. Whether his conduct was, when all the circumstances were considered, that of a man of ordinary prudence or not, depended on the judgment of the jury. The question was submitted to them under instructions that were fair to both sides, and has been disposed of by them. If their verdict was mistaken, as we might think it to be from an examination of the evidence as it appears in the printed books, the remedy was in the court below.

We have been pressed to reverse this case because of a remark of the learned judge which is made the ground of the ninth and tenth assignments of error. Looking at this remark alone, it might seem as though the question of the necessity of a regulator inside the plaintiff's house, and whether it was the duty of the plaintiff or the defendant to furnish it, was submitted to the jury as one of the questions in the cause. But, looking at the charge as a whole, it seems to us quite clear that this was not intended by the learned judge, and that the two questions of

fact on which the case really depended were submitted so clearly by him, as the proper questions for their consideration, that they could not have been misled by the remark complained of in these assignments. We think the appellant has more reason to complain of the jury than of the learned judge. None of the assignments is sustained, and the judgment is affirmed.

(159 Pa. St. 228)

HEINOUR et al. v. JONES.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

OIL LEASES—FORFEITURE—QUESTION FOR JURY.

In an action by heirs, on an oil lease made by their ancestor, to recover rent, it appeared that the lessor died within a year, and that L., one of plaintiffs, was appointed administrator. The monthly payments were made to the lessor until his death, and to L. thereafter to the end of the year. The lessee testified that on failure to make the next payment L. declared the lease forfeited. L. denied the forfeiture, but admitted that he did not take the rent, and until suit brought he never asked for payment. *Held*, that the question as to whether or not there was a forfeiture by L. was for the jury.

Appeal from court of common pleas, Allegheny county; Christopher Magee, Judge.

Action by Lorenz Heinour and others against Nathan D. Jones on an oil lease to recover certain monthly payments which the lease required defendant to make until operations were commenced thereunder. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiffs, defendant appeals. Reversed.

Willis F. McCook, for appellant. T. H. Davis and W. A. Sipe, for appellees.

WILLIAMS, J. The plaintiffs are the heirs at law of Lorenz Heinour, deceased. They bring this suit upon an oil lease made by their father on the 4th day of April, 1889. By the terms of the lease, Jones, the lessee, was required to complete one well on the premises within six months, or, failing in this, to pay monthly after the end of six months the sum of \$30 per month until operations should be begun on the land. The lessor died in February, 1890. His eldest son, Lorenz Heinour, was appointed to administer upon the estate within a few days after his death. No well was completed on the land, nor was the work of drilling begun. The monthly payments were made to the lessor until his death, and to his son and administrator thereafter, until the 4th of April, 1890. When the next monthly payment fell due it was not made, and in reply to Heinour's question the holder of the lease informed him that it would not be paid. Heinour then communicated this fact to Jones, the lessee, and, as Jones asserts, then and there declared the lease to be forfeited, and refused to take the rent, saying that he could obtain a bonus of \$500 for the lease.

Heinour denies the declaration of a forfeiture, but admits that he did not take the rent from Jones, and that for two years, and until this suit was brought, he never asked for payment, and the lessee never entered upon the land. The defense rests on the alleged forfeiture by Heinour, who was administrator and heir at law of the lessor. This, it is urged, divested Jones' title under the lease, and relieved him from rent accruing thereafter. But, however this may be held, the defendant insists that it estopped Heinour from recovering his share of the rentals falling due after such forfeiture. Upon this subject the learned judge instructed the jury that "the real controversy is upon the question of legal liability under the evidence, and I have taken the view that there is a legal liability, and that no forfeiture of the lease has been shown." Having this view of the case, his general direction that "the plaintiffs are entitled to recover the full amount of their claim" was logical and consistent. But there was evidence upon which the question whether a forfeiture had been declared or not should have gone to the jury. If the testimony of Jones was believed,—and its force was not much weakened by that of Heinour,—a forfeiture was asserted about the 1st of May, 1890. The subsequent conduct of both Jones and Heinour was consistent with this theory. It was not consistent with the idea that the lease was understood to be in full force. If upon this question the jury had found for the defendant, then clearly Heinour could not recover for himself. Having declared that Jones had no further right of entry, it would be inequitable to permit him to recover, because Jones, taking him at his word, had abstained from entering after he had been distinctly told that his right to do so was at an end by reason of the forfeiture. Whether the other plaintiffs were bound by Heinour's action depends upon whether he was in a position to speak for them. On both points this case is ruled by that of *Wilson v. Goldstein*, 152 Pa. 524, 25 Atl. 493. It is not necessary to repeat what was there said. The judgment is reversed, but as the rights of the brothers and sisters of Heinour were not separately considered, a *venire facias de novo* must be awarded.

(159 Pa. St. 106)

TOWER et al. v. GROCERS' SUPPLY & STORAGE CO. OF PITTSBURGH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

WAREHOUSEMEN—INSURING GOODS—NEGLIGENCE.

1. Plaintiff, whose goods were burned, uninsured, in defendant's warehouse, testified that defendant's office man asked her if she wanted the goods insured; that she asked him to have it done, and he so agreed. *Held*, that such evidence went to show a usage by defendant to effect insurance on its customers' goods on request, as an incident of the bailment, and plaintiff need not prove a specific parol contract to insure.

2. Where the cause of fire in a cold-storage warehouse is not shown or known, there is no question of the warehouseman's negligence to go to the jury.

Appeal from court of common pleas, Allegheny county; S. A. McClung, Judge.

Action by Theodore S. Tower and others against the Grocers' Supply & Storage Company of Pittsburgh for the value of goods burned in defendant's warehouse. Judgment for plaintiffs. Defendant appeals. Reversed.

J. J. Miller, for appellant. D. S. McCann and John Wilson, for appellees.

THOMPSON, J. The appellant was the owner of a large building used for the storage of goods, containing rooms equipped with refrigerating machines for cold-storage purposes. A fire originated in the second story, and destroyed the entire structure, with its contents. Among the latter were the goods of the appellees, which were stored there. The present suit was brought to recover their value. The appellees alleged that their loss was the result of appellant's negligence in not keeping their goods safely, and in not insuring them, having agreed to do so. As to the latter, one of the appellees, Miss Tower, testified that when she paid the storage on these goods the assistant in charge of appellant's office inquired whether she wanted the goods insured, that she requested that appellant should have it done, and that it agreed to do so; that, after the fire, she called, and, being told these goods were not insured, she said, "I left orders for you to have the goods insured." The assistant, however, denies that she gave any order to have them insured. The evidence was therefore for the jury, to determine whether the appellant made an agreement with the appellees to obtain for them an insurance upon the goods in question. It is contended by appellant that, as the proofs do not show the essential elements of a parol contract for insurance, no agreement was proved. The appellant was engaged in the storage business, made it a part of such business to effect insurances in companies when requested by customers to do so, and protected itself for its advances and charges by holding the goods. A contract made for that object, therefore, would be in the direct line of its business, and not one of insurance, requiring certain essential elements to constitute it. It would not be a voluntary and gratuitous act, but in fact would be an undertaking in connection with the bailment. Miss Tower testified that the appellant's representative asked her if she wanted the goods insured, and she replied that she thought they being there insured them. He replied, "Not unless you leave orders to that effect." She says that she then gave the order. If this testimony be not successfully contradicted, it shows the course of the business was to obtain insurances for bailors; that appellant so indicated

to appellees, who acted upon it; that it accordingly entered into the contract, and made it part of its duties, to obtain the insurance, for which it was to be paid, and for the expenses of which, as well as other charges, it was to hold the goods. The learned judge, therefore, properly submitted the evidence in regard to the alleged contract to the jury; and the assignment of error that he refused to charge: "That the burden is upon the plaintiff to prove that, at the time the alleged agreement was made to insure plaintiff's goods, the amount of insurance, the time for which it was insured, the rate of insurance, the premium to be paid, and the risk insured against, all were agreed upon. A want of any of these elements is essential, and makes the contract an incomplete one, and the plaintiffs cannot recover,"—is not sustained.

But there was error in submitting to the jury the question of negligence or want of care. The appellant was a bailee for hire, and was bound to exercise ordinary diligence and care. Its liability could only be the result of a failure to exercise such care or diligence. The proofs do not show a want of this care or diligence, nor do they warrant an inference of either. The cause of the fire is not shown, and apparently is not known. One witness saw the fire coming out of the second story of the building, and knocked at the front door. The engineer in charge, holding a small torch such as engineers usually have, came towards the door, of which he had no key, and then went back towards the engine room. He subsequently explained to witness that he did so in order to turn off the ammonia tanks, manifestly to avoid an explosion. This witness testified there seemed to be something like grease or butter that was burning and dripping down through the elevator shaft. Another witness testified that the engineer had a light in his hand, stood in the front of the door, hallooed out something, and started back. This was the extent of the plaintiff's proof. On the part of the defendant, it was testified there was no inflammable material or fire in the building. One of appellant's witnesses, an employe, testified that on the evening of the fire, prior to it, he went to the top of the building, and had in his hand a little circular oil lamp, with a wick cut through the top; that, when he reached the top of the building, he blew it out, and descended in the dark to the first floor, where, having placed a cover over the wick of the lamp, left it in his room, back of the engine room; having done so, he left the building in the charge of the engineer. The testimony clearly does not justify an inference of negligence, and does not amount to a scintilla. The learned judge therefore erred in refusing to charge: "There is no evidence in this case showing that the defendant did not exercise ordinary care of plaintiff's goods. As a bailee for hire, it is not responsible for this

accidental loss by a fire which was not caused by its negligence." This judgment is reversed, and a venire facias de novo is awarded.

(159 Pa. St. 43)

IN re BOROUGH OF VERSAILLES.

Appeal of WILSON et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

INCORPORATION OF BOROUGH—PETITION—TIME OF SIGNING.

Where the petition for the incorporation of a borough is required to be signed by the petitioners within three months immediately preceding its presentation to the court, (Act June 2, 1871; P. L. 233,) a failure of the record to show when the petition was signed, except by inference from the date of the plot accompanying it, renders the proceedings fatally defective.

Appeal from court of quarter sessions, Allegheny county.

To the petition of W. H. Sykes and others for the incorporation of the borough of Versailles, Robert Wilson and others filed a remonstrance, and from a decree granting the petition remonstrants appeal. Reversed.

W. A. Challener, for appellants. E. P. Douglass, for appellees.

McCOLLUM, J. The statutes which confer upon the several courts of quarter sessions within this commonwealth the power to incorporate boroughs by and with the concurrence of the grand jury of the county, must be strictly construed, and performance of all the conditions essential to the exercise of this power must appear affirmatively on the record. In Borough of West Philadelphia, 5 Watts & S. 281, Chief Justice Gibson referred to the act of April 1, 1834, in relation to the incorporation of boroughs, as standing on a more questionable basis than legislation authorizing corporations to enact ordinances and by-laws, and said it "is not to be carried further than the words of it absolutely require." It was held in the case cited that, while the words of the statute empowered the court of quarter sessions to incorporate any town or village containing 300 inhabitants, they did not authorize the incorporation into a borough of two or more distinct villages, together with a tract of open farming country. The provision of the act of 1834 which required that the town or village to be incorporated should contain not less than 300 inhabitants was repealed by the act of April 3, 1851, so that the power to incorporate now extends to any town or village, "without regard to the population thereof." It is necessary to the exercise of this power that the application to incorporate any town or village shall be in writing, and signed by a majority of the freeholders residing within its limits, and that "it shall set forth the name, style, and title of the proposed borough, with a particular description

of the boundaries thereof, exhibiting the courses and distances in words at length, and be accompanied with a plot or draft of the same." It was decided in Borough of Little Meadows, 28 Pa. St. 256, that to show the court had jurisdiction it should appear upon the record that there was a town or village to be incorporated, and that a majority of the freeholders therein petitioned for the incorporation. It is provided in section 1 of the act of June 2, 1871, (P. L. 283,) that the application shall be signed by the petitioners whose names are attached thereto, within three months immediately preceding its presentation to the court. This provision was not considered in *Re Borough of Osborne*, 101 Pa. St. 284, and as the record did not show compliance with it, the proceedings were set aside. We regard it as settled by the cases cited that, in order to sustain a judicial incorporation of a borough, it must appear upon the record, *inter alia*, that the application for it was signed by the petitioners within the three months immediately preceding its presentation to the court, and that they were a majority of the freeholders residing within the limits of the town or village proposed to be incorporated. As it does not appear in the record of the case before us when the application was signed, the proceedings must be set aside. It would seem from the certificate of the grand jury and the decree of the court that the additional conditions prescribed by the act of June 2, 1871, were not considered. But it was suggested by the counsel for the petitioners that we might infer that the application was signed within the prescribed time from a date upon the plot which accompanied it. If we were at liberty to supply a defect in the record by an implication, we think we would not be justified in drawing the inference suggested. A date upon the draft which accompanied the petition is not sufficient ground for concluding that a condition essential to the affirmative action of the court was complied with. We discover nothing in the proceedings before the grand jury or the court which cures the defect in the record, or prevents the parties aggrieved by the decree from taking advantage of it. Decree reversed, and proceedings set aside.

(153 Pa. St. 632)

IN RE HAMMER'S ESTATE.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

LEGACIES—SPECIFIC AND DEMONSTRATIVE.

Testator, owning a farm bought originally for \$2,500, and since substantially improved, directed his executors to sell it, and out of the proceeds to pay his son R. \$3,000, "to equalize him with my two other sons, who were advanced \$3,000 each." The farm sold for only \$1,835. *Held*, that the intention to equalize must govern, and R.'s \$3,000 be made up out of the personalty.

Appeal from orphans' court, Somerset county; J. H. Longenecker, Judge.

In the matter of the estate of Solomon N. Hammer, deceased. Appeal by John C. and David M. Hammer, executors, from a decree confirming the auditor's report as to the sum distributed to R. F. Hammer, a legatee. Affirmed.

Kooser & Kooser, for appellants. W. H. Koontz and W. J. Baer, for appellee.

DEAN, J. Solomon N. Hammer, the testator, died February 13, 1890, leaving six children,—four sons (Joseph S., John C., David M., and Ross F.) and two daughters, (Mary Cauffield and Charlotte Livingston.) In his lifetime he had conveyed to his two sons, John C. and David M., farms, at a valuation, and had credited to each \$3,000 on the purchase money as an advancement. At his death he still owned the "Gindlesperger farm," for which he had paid, some 30 years before, \$2,500. This he had improved by building upon it a very substantial farmhouse, so that it is not improbable the testator fixed the value of this property by what it had cost him, instead of by what it would fetch, and thus overestimated the amount of money which would come into the hands of his executors from a sale of it. This farm, then, being the only real estate which the testator owned at his death, he makes this disposition of it in paragraph 7 of his will: "As to my real estate, my will is that the same shall be by my executors hereinafter named exposed to sale as soon after my decease, and on the best terms, as shall by them be found convenient, and out of the proceeds of such sale shall pay to my son R. F. Hammer three thousand dollars to equalize him with my other sons, John C. Hammer and David M. Hammer, who were advanced three thousand dollars each in the purchase of real estate; and I further give and bequeath to my son R. F. Hammer two thousand dollars as a special bequest." It is conceded that the special bequest of \$2,000 to R. F. Hammer was intended for Joseph, and has nearly all been paid over by his brother. It further appeared from the evidence that testator, in his lifetime, had advanced to Joseph \$600, and by item 6 of his will had bequeathed to Cordia Augusta Thomas, Joseph's daughter, \$400, thus making the sum of the whole directly and indirectly given to Joseph \$3,000. The two daughters, by advancements and bequests, each received \$1,000. The farm, after being properly advertised, and fairly offered at public sale, was sold for only \$1,835. The purchaser was R. F. Hammer, son and legatee named in the seventh paragraph of the will, and who now makes claim as a legatee to the whole \$3,000 out of the general fund. The other brothers resist this claim, alleging that the legacy, under the will, is specific, to be paid only out of the particular fund realized from the sale

of the farm. It is argued that, as the farm sold for only \$1,835, so much of the \$3,000 as is not reached by that fund must be held to be adeemed. The court below decided in favor of the claim of R. F. Hammer, and from that decree comes this appeal.

The question turns on the intent of the testator. Did he intend to relieve his personal estate from the payment of any part of this legacy? If so, it is specific, and no part of it can be paid out of other than money realized from the real estate; otherwise, it is demonstrative, and payable out of the general fund. Courts, uniformly, in such cases, lean to a construction which shall declare the legacy demonstrative, rather than specific. *Balliet's Appeal*, 14 Pa. St. 461; *Walls v. Stewart*, 16 Pa. St. 275; *Smith's Appeal*, 103 Pa. St. 561. The whole subject of specific and demonstrative legacies is so elaborately treated in *Walls v. Stewart*, supra, that repetition is useless. If there could be deduced from this will a clear intention to charge the land alone with the payment, and to discharge the personality, the appeal should be sustained; otherwise, not. From all the cases, that is the rule to be followed. The testator, in the second item of his will, directs that all his personality, which, as the event proved, amounted to about \$7,500, should be distributed as he in his will thereafter directed. He doubtless knew approximately the value of this personality. Then, in the subsequent dispositions, the intention is manifest to give each of the daughters \$1,000, and each of the sons \$3,000. He expressly says, in the seventh clause, that the intention is to equalize Ross F. with his brothers John and David, to each of whom he has advanced \$3,000; Joseph, as we have already noticed, also having, by the testator's method of distribution, got \$3,000. The primary, paramount intent, here, is to equalize his gifts to his sons at \$3,000; evidently to give Ross, who as yet has received nothing by advancement, \$3,000. Then is expressed the secondary or subordinate intent,—the direction to the executors to pay the amount out of the money realized from the farm. There is nothing which clearly shows the testator meant to charge the farm alone with the legacy, and discharge the personality, and unless this so appears the legacy is demonstrative. Doubtless, it did not occur to the testator that the farm might not sell for \$3,000. He probably thought it worth much more. Therefore, the contingency that it might sell for less was not expressly provided for, simply because, to his mind, no such contingency existed. But it did occur to him that as two of the sons had already received by advancements, each, \$3,000, and the third would, by advancement and legacy, receive \$3,000, the fourth (Ross) would not receive a like amount unless he positively and expressly said so. Hence the unqualified direction to the executors to pay Ross \$3,000 to equalize him with his brothers. True, he points out

the source of this payment, which, as it now turns out, failed to come up to his expectations; but this cannot negative the absolute, unqualified intention to equalize the sons at \$3,000. In ascertaining the intent from what the testator has said, in cases of this character, we seldom get much aid from authorities, for the reason that the words from which we must gather this intent are seldom the same. In the authorities cited and relied on by the learned counsel for appellants, (*Cryder's Appeal*, 11 Pa. St. 72, and others,) the wills interpreted contain no peremptory directions to equalize the legatees at a fixed sum, as in the will before us. If these words were absent from this will, the authorities cited would perhaps sustain the contention of appellants that this is a specific legacy; but, with them present, no authority can overthrow the manifest intention of the testator that the legatee shall have out of his estate the same amount of money as his brothers. Such being the case, the learned auditor and court below were right in holding this a demonstrative legacy. The decree is affirmed, and appeal dismissed, at costs of appellants.

(158 Pa. St. 616)

GITHERS et al. v. CLARKE et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CORPORATIONS—LIABILITY OF DIRECTORS—ANNUAL STATEMENT—DEATH OF DIRECTOR—SUING EXECUTOR.

1. Act April 14, 1868, makes the directors of an association incorporated thereunder liable for its debts if they fail to make an annual statement of the amount and character of its property and of its debts, or if they make a false statement. *Held*, that where they failed to file a statement for three months after their election, though none had been made for over a year previous, and their statement showed it solvent, though it was far from it, they would be liable, both by reason of the delay and false statement, though they were honest in their belief.

2. The directors being jointly liable, the executor of one dying before suit could not be sued with the survivors, and, dying after suit commenced against all, his executor need not be joined.

Appeal from court of common pleas, Beaver county.

Action by Benjamin Githers and others against W. D. Clarke and others, directors of the Workingmen's Co-operative Association. Judgment for plaintiffs. Defendants appeal. Affirmed.

John M. Buchanan, William B. Cuthbertson, and Moore, Moore & Reader, for appellants. Roger Cope and John Sparhawk, Jr., for appellees.

McCOLLUM, J. This is a judgment entered for want of a sufficient affidavit of defense. The defendants therein are the appellants here, and in 1890 they were directors of the Workingmen's Co-operative Association of Beaver Falls, Pa., which was duly

Incorporated in February, 1887, under the act of April 14, 1888, (P. L. 100.) By the fifth section of this act the directors were required to make an annual statement in writing, signed by a majority of them, "including the treasurer," showing the condition of the association, and setting forth the amount of capital stock; the number of shares issued, and the par value thereof; the number of stockholders, together with the greatest number of shares held by any one stockholder; the amount and character of the property of the corporation and of its debts and liabilities; and by the eighth section thereof they became liable "for all debts of the corporation" if they failed to make such statement, or if they made a false statement. In May, 1890, the association passed into the hands of a receiver. It was indebted to the plaintiffs below, and appellees here, in the sum of \$216.64 for merchandise sold and delivered during the months of March and April in that year. It was hopelessly insolvent, although two days before the receiver was appointed the directors made a statement, by which it appeared that its assets were sufficient to meet its liabilities. The appellees, having established their claim before the auditor appointed to distribute the fund belonging to the creditors of the association on settlement of its affairs, received a dividend which reduced its indebtedness to them to the sum of \$191.44, for which amount, with interest thereon from June 20, 1890, they recovered a judgment in the court below. In their declaration or statement the matters essential to the maintenance of the action were duly set forth, and these unanswered entitled them to the judgment they obtained. Inasmuch as the material averments of the statement, which are not denied in the affidavit of defense, must be accepted as true, it appears from the pleadings that the association was indebted to the appellees in the amount claimed by them; that it was insolvent on or before February 28, 1890; and that from December 31, 1888, to May 26, 1890, its directors failed to make any statement of its condition. But the appellants contend that their affidavit contained a good defense, because it averred that, while the suit was brought against all the directors, and the writ was returned *mortuus est* as to one of them, it could not be maintained without joining and declaring against his administrator with the other defendants; that a statement which "was neither false nor defective, but was made with ordinary care and prudence," was filed by them during the year they were elected directors; and that when they filed it they believed the "association was solvent, and was as so represented therein." It is enough to say of the first branch of their defense that, if the directors were jointly liable for the debts of the corporation, and one of them died before suit brought, his executor could not be

sued jointly with the survivors; and if he died after suit brought against all of them it was optional with the plaintiffs to bring in his administrator, or proceed against the survivors without doing so. Chit. Pl. 42-50; 17 Amer. & Eng. Enc. Law, p. 580, and cases cited; Dingman v. Amsink, 77 Pa. St. 114; Ash v. Guile, 97 Pa. St. 493. As to the other branch of their defense, it is quite clear that their belief that the corporation was solvent was no excuse for their failure to make an earlier statement, and that "ordinary care and prudence" in making it when they did cannot relieve them from the liability incurred by their delay. They were chargeable with knowledge of the condition of the association, and they ought to have made a true and intelligible statement of it in conformity with the act of assembly. It was a duty the association owed to the public, and the default of their predecessors should have hastened their performance of it. But they neglected to make any statement for three months, and until the association was about to pass into the hands of a receiver; and when they did make one it was deceptive. It did not set forth with reasonable particularity the "nature and character of the property of the corporation." It represented the association as solvent, when in fact it was not able to pay more than 10 per cent. of its liabilities. It may be true that the directors believed the corporation was solvent, and that its assets were as valuable as represented; but it is very evident that their belief was not warranted by the facts, nor consistent with the knowledge of its affairs which the law imputes to them. We conclude that their delay in making the statement, and the defective and misleading character of it, brought them fairly within the personal liability clause of the statute. The specifications of error are overruled. Judgment affirmed.

(158 Pa. St. 573)

LONG v. MILLER et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

JUDGMENT—REVIVAL—CONTINUANCE OF LIEN—DEED—PAROL CONDITION.

1. A husband deeded land to his wife, subject to the lien of a judgment against him. The judgment was twice revived against him, but neither time against her or her devisee, as *terre-tenant*. *Held*, that the purchaser at a sheriff's sale under a *fi. fa.* issued on such revived judgment, and levied on the land, acquired no title.

2. Act Feb. 24, 1834, § 25, (P. L. 77,) continues the lien of a judgment on the land of a deceased judgment debtor, as against his heirs and devisees, but not as against the heirs and devisees of a deceased vendee of the judgment debtor.

3. Testimony that a wife had told witnesses, after her husband had deeded land to her which was subject to the lien of a judgment against him, that she had assumed all his debts on condition that he would deed her

the land, and that he "had made a deed, and she was to pay the land out," is not such an acknowledgment by her that the deed was made on a parol condition as to annex such condition to the deed, or to set aside the deed.

Appeal from court of common pleas, Greene county.

Ejectment by John Long, as executor of Susana Long, deceased, against August Miller and Robert McConnell. From a judgment entered on a verdict for defendants, plaintiff appeals. Reversed.

E. M. Sayers, for appellant. Wyly, Buchanan & Walton, for appellees.

MCCOLLUM, J. It is admitted that both parties to this action claim the land in dispute under Samuel Long, and that it was included in his deed of 124 acres to his wife, Susana Long, made November 22, 1860, and recorded April 4, 1861. This deed was written and witnessed by Joseph L. McConnell, who was then interested in, and subsequently became the sole owner of, a judgment entered on the 3d of August, 1860, against Samuel Long and August Miller. This judgment was a lien on the land described in the deed. The consideration named in the deed was \$700, and the receipt of it was duly acknowledged therein. The appellant is a son and devisee, and the sole executor, of Susana Long, deceased, whose will was duly probated January 16, 1867, and for the purposes of this suit he may be considered as invested with the title she acquired by the above-mentioned conveyance from her husband. On a writ of scire facias to September term, 1865, the judgment hereinbefore referred to was revived against Samuel Long and August Miller, and on a like writ to September term, 1870, it was again revived against the former, who consented to be held solely liable for the amount thereof, and that the latter might be released from it. A *fi. fa.* was issued on this judgment against Samuel Long to September term, 1873, on which his interest in a tract of land which included the land in dispute was levied upon, and on a vend. ex. to December term, 1873, the same was sold to Joseph L. McConnell, who received a sheriff's deed therefor, and by his will probated February 16, 1875, devised it to his brother Robert McConnell, who is the real defendant and appellee in this action.

It is manifest from an inspection of the record that the sheriff's sale did not pass to the purchaser any title or interest which Susana Long acquired by the deed of November 22, 1860, because the original judgment was not revived against her or her devisees as terre-tenants. Neither of them was made a party in any proceeding to revive it against the defendants therein, or to continue the lien of it upon the land conveyed to her as aforesaid, although the judgment was entered 13 years and 4 months, and the deed was recorded 12 years and 8 months, before the sheriff's sale.

It is suggested, however, by the appellees, that inasmuch as Susana Long died while a judgment, by virtue of the *scire facias* issued upon it August 2, 1865, was a lien on her land, such lien was continued indefinitely, as to her devisees, by the twenty-fifth section¹ of the act of February 24, 1834, (P. L. 77.) But this suggestion comes from a misapprehension of the statutory provisions referred to, as that is applicable only to a judgment against a decedent, which is a lien on his land at the time of his death. It does not regulate the lien of such judgment on land aliened by him, nor does the death of the terre-tenant continue the lien of it upon such land. *Baxter v. Allen*, 77 Pa. St. 468; *Judson v. Lyle*, 28 Leg. Int. 140. John L. McConnell might have continued the lien of his judgment on the land conveyed to Susana Long by complying with the statutes relating to its revival; but, having allowed the lien to expire, he could not subsequently divest her title by a sale of the land on his judgment against the husband. The conveyance was not fraudulent as to him, nor could he question its validity on the ground that it was in fraud of other creditors, or that it was made by Samuel Long to his wife without the intervention of a trustee. *Hank's Appeal*, 100 Pa. St. 59; *Armington v. Rau*, Id. 165. We think it is clear that the deed, upon its face, passed the title to the grantee, which the prior lien creditor could not, after the expiration of his lien, successfully assail. Is the evidence sufficient to convert such a deed into an executory contract or conveyance upon condition? It consists of declarations alleged to have been made by the grantee to Adam Wise and Leonard Strait. Wise testified that he wrote the will of Susana Long on the 23d of November, 1866, and that she then told him "she owned the land, and at the time the old man became involved, and was likely to lose the land, and, on condition that he would make her a deed, she was to pay out for the land, for she had money coming to her from her father's estate," and that she "assumed all the debts of her husband on condition that he would make her a deed for the land." Strait testified that she said to him, "If the old man, Long, would make her a deed for the land, conditioned that she would furnish the money, and pay the land out," and that she told him "Mr. Long had made her a deed, and she was to pay the land out." It will be observed that the condition mentioned in the foregoing testimony, which we have inserted in the language of the witnesses, refers to the promise of the grantee. There is nothing in it which can be fairly construed into an acknowledgment by her that the deed was made upon a parol condition, and yet the

¹ Act Feb. 24, 1834, § 25, provides that: "All judgments, which at the death of a decedent shall be a lien on his real estate, shall continue to bind such real estate indefinitely as to the heirs and devisees of such decedent."

learned court below, upon this evidence alone, allowed the jury to find that it was so executed and delivered. If it would reasonably admit of a construction which would annex the condition therein mentioned to the grant, it is, in our opinion, insufficient to set aside the deed. It is not such evidence as is required to annul or reform a written instrument. To the extent that the rulings of the court below are in conflict with this opinion, the specifications of error are sustained. Judgment reversed, and venire facias de novo awarded.

(159 Pa. St. 395)

HANEY v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

STREET RAILROADS—LIABILITY FOR NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—INSTRUCTIONS.

1. In an action for personal injuries caused by a collision between defendant's street car and plaintiff's wagon, where the evidence as to whether plaintiff was signaled by defendant's watchman to cross in front of an approaching car or not, and whether the car was so far away as apparently to afford him ample time to cross, and whether it was running at a reckless rate of speed or not, was conflicting, the court properly refused to direct a verdict for defendant.

2. An instruction that, if there were no testimony for plaintiff that a watchman of defendant signaled him to cross the track, plaintiff would have no case, because he admitted that he saw the car approaching, and stopped in a safe place, furnishes no ground of complaint to defendant.

3. Nor can defendant complain of an instruction that if the person who plaintiff says signaled him to cross was the watchman, and did signal him, then plaintiff, who was in a perfectly safe position, could not recover, unless he acted as a prudent man would have done in attempting to cross the track.

Appeal from court of common pleas, Allegheny county.

Action by Daniel P. Haney against the Pittsburgh, Allegheny & Manchester Traction Company to recover for personal injuries. There was judgment for plaintiff, and defendant appeals. Affirmed.

The following is the assignment of errors: "(1) The court erred in charging the jury as follows, viz.: 'Were it not for the testimony in the case, on the part of the plaintiff, that a watchman of the defendant company signaled him to come across the track, the plaintiff would have no case whatever; and this, for the simple reason that he and his witnesses admit that he saw the car coming up Federal street; that he stopped in a perfectly safe place for a large two-horse wagon filled with ashes and cinders, and then attempted to cross. Without that evidence as to the signal, he would have no case whatever, because your common sense would teach you that when a man driving a heavy wagon stops, and sees a car coming, he goes at his peril if he undertakes to cross; he must wait until the car goes by. So, I say,

were it not for this evidence, the plaintiff would not have any case. But he alleges that while he was there, and while he saw the car coming rapidly, the watchman signaled to him that all was clear,—to come across; and presuming on that, that he understood his business, he undertook to drive across, and, as soon as he got far enough over, his front wheel was struck by the car, and he was thrown off and injured. It all depends on that.' (2) The court erred in charging the jury as follows, viz.: 'If it is as they say, and he was the watchman of the company, and did give the signal, then you have to determine whether the man, being in a perfectly safe position, and even though he got a signal, acted as a prudent man, under such circumstances, in attempting to cross, when in a second or two the car would have been past. If he was not acting as a reasonably prudent man would do under the circumstances, he could not recover, because he would be guilty of contributory negligence.' (3) The court erred in refusing the defendant's point, which point, and the refusal thereof, are as follows, to wit: 'That under all the evidence in the case the verdict must be for the defendant.' 'Refused, and bill sealed for the deft. F. H. Collier. [L. S.]"

A. M. Neepser, for appellant.

STERRETT, C. J. In the light of the testimony before the jury, this was clearly a case for their consideration. That introduced on behalf of the plaintiff tended to prove, in substance, that while driving a loaded two-horse wagon westwardly on Robinson street, Allegheny city, he came to the Federal street crossing, and there halted, about 10 or 12 feet east of defendant's track, on which he saw one of its cars approaching from the south, apparently at its usual rate of speed, and a considerable distance off. He was then signaled by the company's watchman to cross the track, and while in the act of doing so was struck by the car, and seriously injured. When thus signaled, the approaching car was quite a distance south of the crossing,—so far therefrom as to apparently afford him ample time to cross with entire safety. The circumstances leading up to and connected with the collision were fully detailed by the plaintiff and his witnesses. Some of the latter testified to the reckless rate of speed at which defendant's car was running. One of them, describing the occurrence, said that plaintiff "was coming down Robinson street, and he got as far as Federal street, within about twenty feet of the track. He stopped there, and the flagman on the opposite side of the street beckoned him to come across. * * * At that time there was a Rebecca street car coming down off the bridge. I suppose it was running about twenty-five or thirty miles an hour. * * * Just about that time he came to the track,

and got about half way across when the car struck him. It got so close on him he saw he couldn't get out of the way, and he swung his team off to the right, and, just as he swung his team off, the car caught him,—caught the front wheel of the wagon, and threw him off, down between the wagon and the car, and dragged him up the street, I suppose, the length of thirty or forty feet." One of defendant's witnesses—the person pointed out as the watchman who beckoned plaintiff to cross—testified that "the car was running at a proper rate of speed, about eight or ten miles an hour, and the wagon was coming in the same direction, driving along the track." He denied that he had beckoned plaintiff to cross, and his version of the occurrence differed materially from that of plaintiff's witnesses. The logic of the verdict, however, is that the jury did not entirely rely on his recollection of what occurred. It may appear incredible that an electric car should be permitted to run, on one of the most crowded thoroughfares of the city, at such a reckless rate of speed as that indicated by some of the witnesses; but, when we consider the distance to be traversed by the car from the end of the bridge to Robinson street,—nearly two squares,—it becomes evident that the car in question was running at a dangerously high rate of speed. If the defendant had exclusive right to the street, it would present a different question; but no such exclusive right is or can be claimed, and, so long as a user of the street in common with the public exists, it is the duty of street-railway companies to exercise such watchful care as will prevent accidents or injury to persons or property. The degree of care required must necessarily vary with the circumstances of each case. There was a manifest conflict of testimony as to material matters of fact bearing on the questions of negligence and contributory negligence involved in the issue. This necessarily carried the case to the jury, and to them it was fairly submitted, with instructions that were entirely adequate and free from error. It was the special province of the jury to determine, from all the testimony before them, what the facts were,—whether the injury complained of was caused by defendant's negligence, and if so, whether plaintiff himself was guilty of negligence which contributed thereto. The only assignments of error are to the instructions recited in the first and second specifications, and the learned judge's refusal to say, as requested, "that under all the evidence * * * the verdict must be for defendant." As to the instructions complained of, they were quite as favorable to the company defendant as it could reasonably ask, and to have withdrawn the case from the jury by binding instructions to find for the defendant would have been plain error. There is no merit in either of the specifications. The insuperable difficulty in defendant's way is that upon sufficient testimony,

and under proper instructions, the controlling facts were found by the jury in favor of the plaintiff. Judgment affirmed.

(158 Pa. St. 608)

TIMLIN v. BROWN et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

COAL LEASES—ROYALTY—SURRENDER OF MINE.

1. Defendant, having sunk a shaft into coal on plaintiff's land, took a 10-year lease to mine under plaintiff's whole tract at a certain royalty per bushel, to mine as a minimum 10,000 bushels each year, and, if less, to pay the royalty on 10,000 bushels. The seam became unworkable in 8 years. *Held*, that defendant must pay the minimum royalty for the rest of the term.

2. A lessee's promise to give up the mine in a good, workmanlike condition does not bind him for the value of a removed derrick, which he had at first used at the shaft, but later abandoned for a slope.

Appeal from court of common pleas, Clarion county; E. Heath Clark, Judge.

Action by E. A. Timlin against Thomas Brown and J. L. Hunter for royalties and other damages under a coal-mining lease. Judgment for plaintiff. Defendants appeal. Reversed.

W. L. Corbett and Don C. Corbett, for appellants. John W. Reed, Harry R. Wilson, and William A. Hindman, for appellee.

DEAN, J. Timlin, the plaintiff, was the owner of 15 acres of land. Brown, one of defendants, was mining coal on land adjoining, and believed the seam extended under the 15 acres. He opened negotiations with Timlin, which resulted in a parol agreement giving him the right to mine. A written agreement was entered into between Timlin and Brown & Hunter, which, although dated April 1, 1882, does not appear to have been formally executed until the close of the year. The contract, as first agreed upon with Brown alone, was for a right to mine for a term of five years from April 1, 1882, at a royalty of one cent per bushel, with a minimum of 5,000 bushels annually. After sinking the shaft, Brown took Hunter in partnership with him. The first contract was then canceled, the one sued on executed, and dated the same as the first, the royalty being reduced to half a cent per bushel, the term extended from 5 years to 10, and the minimum annual output raised from 5,000 to 10,000 bushels. It provides: (1) That Brown & Hunter shall have the right to mine under the whole 15 acres for 10 years from the 1st of April, 1882. (2) They shall pay monthly to Timlin a half cent per bushel royalty. (3) Timlin to have coal for use in his own house at cost of digging, but to be paid no royalty on that coal. (4) Timlin to get 200 bushels slack coal annually, free of charge, but to be paid no royalty on the slack. (5) Brown & Hunter, as a minimum, to mine 10,000 bushels each year, but to

have the right to mine as much more as they choose. (6) In case they fail to mine 10,000 bushels, they agree to pay for 10,000 bushels. (7) Brown & Hunter agree to give up the mine at the end of the term in good workmanlike condition. In June, 1882, Brown sank a shaft about 24 feet, and struck about 27 inches of coal. He drifted off from the bottom of the shaft 250 feet, and worked out rooms. The mine was thus operated for about two years, when, as he alleges, the roof became dangerous, and he abandoned the shaft for mining purposes. He then ran down a slope at another point, reaching coal at a short distance from where he had ceased working in the drift. From this slope defendants mined coal up to 1st of April, 1889, when the last settlement was made between them. The defendants alleged at the trial that the coal seam had then run down to less than a foot in thickness, and in consequence they ceased operations. Brown, however, admits that subsequently, on 11th November, 1889, he assigned the contract to one Case, and there is evidence that some mining was done under it in 1890. The plaintiff's demand was for the minimum royalty, \$50 per year, for the three years from April 1, 1889, the date of last settlement, up to April 1, 1892, the end of the ten-years term; also for 450 bushels of slack not delivered, worth three cents per bushel. In addition, damages for removing the derrick at the shaft, and suffering the shaft itself to fall in, were demanded.

The court instructed the jury that under their contract defendants were liable for the minimum royalty, \$50 per year, for the last three years of the term. This instruction is the error alleged in appellants' second, third, fourth, and fifth assignments. It is argued that, under the contract, if defendants prosecuted their mining operations until the seam had become so thin it could no longer be mined at a profit, they were released from their covenant to pay. This brings us to a construction of the contract. It was a sale of the coal in place under the 15 acres at the price of a half cent per bushel, to be paid monthly as the coal was mined, with right to a term of 10 years in which to mine and remove it. They further agreed to mine at least 10,000 bushels each year, but in case they failed to do so, then they agreed to pay a royalty on 10,000 bushels; that is, the contract was a sale of all the coal under the 15 acres for the minimum price of \$500. If there were more than 100,000 bushels mined within the 10 years, half a cent a bushel was to be paid on the excess in addition to the \$500. The grant is absolute of all the coal on the tract. The minimum and maximum prices are fixed absolutely. It is not a mere license to mine. This stipulation in the contract: "In case the said Brown & Hunter fail to get out the amount before stated, they agree to pay a royalty on 10,000 bushels each and every

year,"—fixes, without regard to contingencies, the liability to pay. Not only is this the obvious meaning of the contract from its words, but the evidence shows the parties themselves must have so understood it. The first contract provided only for a five-years term and a minimum of 5,000 bushels annually, but, after the shaft had struck a workable seam at a slight depth, the first contract was canceled, and the one in suit, doubling the minimum and term, was made. Presumptively, there was no uncertainty in the mind of either party about the existence of workable and marketable coal in the 15 acres; and subsequent operations, for seven years, showed the correctness of their judgment. Even then defendants assigned the lease to Case, who mined under it the eighth year. There is nothing in the contract indicating any intention to modify or relieve the defendants from their absolute obligation to pay on the contingencies of the mine proving unprofitable, or of exhaustion of the coal before the end of the term. The plaintiff protects himself against selling too cheap by stipulating, in addition to the \$500, for half a cent a bushel on the excess above 100,000 bushels, but the defendants do not protect themselves from buying too dear by stipulating for a deduction should the quantity fall short of 100,000. This is not the case of parties dealing under a mutual mistake as to the existence of the subject of a contract, where afterwards it was proved to have had no existence, as in the authorities cited by the learned counsel for defendants. Here workable coal under plaintiff's land did exist. Defendants bought it at a fixed price. Neither knew nor could know the exact quantity. Defendants, in effect, say they were mistaken in their estimate of the quantity. Instead of ten years' work, as they thought, they took out all it was profitable to mine in seven or eight. But the existence of the coal was undoubted; the quantity alone was problematical. Defendants were willing to pay at least \$500 absolutely for it. The plaintiff stipulated for more money if it should turn out there were more bushels than estimated. The cases of *Iron Co. v. Scott*, 15 Wkly. Notes Cas. 220; *McCahan v. Wharton*, 121 Pa. St. 424, 15 Atl. 615, and *Muhlenberg v. Henning*, 118 Pa. St. 138, 9 Atl. 144, are not in point. In each of these cases the covenant for a minimum annual payment was, in view of the words of the contract, the subject of it, and the surroundings, not unqualified. In *Iron Co. v. Scott*, *supra*, the existence and quality of the ore were both uncertain when the contract was entered into. The case came into this court by appeal from a judgment in the court below for want of a sufficient affidavit of defense. The affidavit averred there was neither quantity nor quality. The judgment was reversed, and the case directed to be submitted to a jury.

In *McCahan v. Wharton*, *supra*, the contract was to prospect and dig for ore; and, as soon as found in sufficient quantity to justify shipping, then in no event to pay a less royalty than 50 cents per ton on 2,500 tons each year. Sufficient ore to justify digging and shipping was not found. This was held to be a good defense to the demand for the annual minimum. The manifest intent of the parties was to make the liability subject to the contingency of finding a sufficient quantity to justify shipping. In *Muhlenberg v. Henning*, *supra*, the covenant was to mine clean, merchantable iron ore. The lessees, for nine months, made diligent search, and expended a large amount of money, and failed to find either the quantity or quality of ore specified. They alleged that on report of their failure to the lessor a suspension of the work was consented to by him. The late Justice Clark, delivering the opinion of this court, said: "The lessees were bound to prosecute the work without delay. * * * If, however, it was established by actual effort that at the time of the contract there was no ore in the land of the kind contracted for, it cannot be pretended upon any fair and reasonable construction of the contract that the lessees nevertheless were bound for the royalty, for the payment of the royalty was undoubtedly based on the assumption of the parties that ore of the quality existed there." In all these cases, the existence of the subject of the contract was unknown or uncertain, or, if it existed, the quality could only be determined by actual use. In the case before us, at the date of the contract the quantity was as well known as it could be at that time. No man ever yet knew how many bushels or tons of coal were under a tract of land until he mined it out. Faults and clay veins may exist, which cut out the seam for some part of the area. It may not be consistent in thickness; may rise higher, or thin down. But the existence of workable marketable coal under this land had been demonstrated by the lessees in sinking the shaft. The only element of uncertainty, the quantity, they took the risk of, by an unqualified covenant to pay a fixed minimum sum. The contract is like unto that in *Jervis v. Tomkinson*, 1 Hurl. & N. 195, where the lessees, knowing a salt mine, entered into a contract to mine 2,000 tons of salt every year, or pay for the deficiency. It was held immaterial, in view of the unqualified covenant, whether the salt could be profitably mined, or whether it had, during the continuance of the contract, become exhausted. We think the learned judge of the court below put upon this part of the contract the proper construction, and the defendants' assignments of error to this portion of the charge are overruled.

The court further instructed the jury as follows: "Then as to the derrick that was there, we think that whatever the cost of

the derrick itself is, and the putting of that shaft in repair by taking the debris out, is about all the plaintiff should be entitled to,—whatever the evidence shows that to be." This constitutes the subject of appellants' first assignment of error. The undisputed evidence is that defendants, when they commenced work, put up a small derrick to raise the coal from the bottom of the shaft. This method was continued for two years, when it was abandoned, and the slope adopted. The shaft was of no further use, except as an airshaft. The derrick, then, was wholly useless, and defendants had a right to remove it. While, to a certain extent, the preservation of this opening for ventilation was probably necessary to operating the mine, and would be covered by their covenant to "give up the mine in a good, workmanlike condition," under no reasonable construction were they obliged to leave there a derrick which had been abandoned more than five years before, and a wholly different method of raising the coal substituted. A derrick in no way affected the "workmanlike condition" of a slope mine, and therefore plaintiff had no well-founded claim for its value. It was error to submit this evidence to the jury.

It is argued by appellee's counsel that the jury did not allow plaintiff for this item, and, consequently, the instruction did defendants no harm. We cannot certainly know this. The claim, excluding the derrick, was for three years' royalty, and the value of 450 bushels of slack coal, amounting altogether to \$163.50. The verdict was for \$126.40. There was conflicting evidence as to defendants' liability for the slack, which was for the jury. Then defendant Brown testified to quite a number of items for which he claimed credit, such as coal got by mother of plaintiff, and actual payments made to Timlin, the whole amounting to more than \$50. All these credits were disputed by plaintiffs. The jury may have allowed a part of these, and also have put a much less value on the derrick than that fixed by plaintiff. It is enough to say the error may have wronged defendants. For that reason the first assignment of error is sustained, the judgment is reversed, and a *v. d. n.* awarded.

(159 Pa. St. 72)

In re ROAD IN LEET TP.

Appeal of BLACK.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

HIGHWAYS—ESTABLISHMENT—VIEWERS' REPORT—RIGHT TO REVIEW—DISCRETION OF COURT.

1. Petitioners excepted to the report of road viewers, and filed a petition for a review. The court appointed reviewers, but set aside their report because one of them was ineligible, and confirmed the viewers' report. *Held*, that a delay of 15 days after such order, before moving for the appointment of new reviewers on their

original petition, was not fatal, since the court, on vacating the first appointment of reviewers, should have made a new appointment on the petition which was still before it.

2. The discretionary right of the court to award an alias review under Act Feb. 23, 1870, (P. L. 228,) is limited to cases in which the petition for a review was defective, and does not extend to a case where the petition was proper, but a reviewer was ineligible.

3. Where a viewers' report states that a draft is attached, "showing course and distance of such road, and noticing briefly the improvements over which it passes," and such draft shows only the boundary lines between landowners, the report is fatally defective, since boundary lines are not improvements.

Certiorari to court of quarter sessions, Allegheny county; White, Jdgc.

In the matter of the establishment of a road in Leet township. Samuel W. Black appeals from the discharge of a rule for William T. Shannon, Henry M. Long, and others to show cause why so much of an order of the court of quarter sessions as confirmed the report of viewers should not be set aside, and why reviewers should not be appointed on a petition already filed. Reversed.

James R. Sterrett and James C. Doty, for appellant. William Yost, for appellees.

McCOLLUM, J. Under the general road laws of Pennsylvania, a review is a matter of right, provided application for it is made at or before the next term of the court after the report of the viewers is filed. In this case the report of the viewers was excepted to, the application for a review was in time, and reviewers were appointed, who reported at the next term. On the 14th day of April, 1893, their report was set aside on the ground that one of them was a petitioner for the review, the exceptions to the report of the viewers were overruled, and their report was confirmed absolutely. On the 29th of April, leave was given to file a motion to set aside or reverse the order of the 14th, and in pursuance thereof, on the 13th of May, a rule was granted to show cause why the order confirming the report of viewers should not be set aside, and why other reviewers should not be appointed on the petition previously filed. This rule was discharged by the learned judge of the quarter sessions on the ground that the petitioners were tardy in moving for it. He seemed to think that they should have presented a new petition as soon as the report of the reviewers was excepted to, and that, by their failure to do so until the exceptions were judicially passed upon, they lost their right to a review. In this conclusion there was error. The petitioners were not responsible for the mistake of the court in the appointment of viewers, nor entitled to have other reviewers appointed until the exceptions to the review were disposed of. They were not, therefore, in default prior to the 14th of April. Was there any such delay on their part after that date as deprived them of their statutory right

to review? We think not. When the report of the reviewers was set aside, the court should have vacated the old and made a new appointment, on the petition then before it. That petition was sufficient in form and substance, and it did not cease to be an application for a review because the court failed to comply with the request of the petitioners to appoint proper persons as reviewers. We are clearly of opinion that a delay of 15 days before applying for leave to move to set aside the order of April 14th is not sufficient ground for refusing to do what ought to have been done without further action on the part of the petitioners. It is not contended that under the act of June 13, 1836, an illegal appointment of reviewers on a good petition constitutes a bar to the petitioners' right to a legal review, but it is suggested that the act of February 23, 1870, (P. L. 228,) which authorizes the court, in its discretion, to "award an alias review or re-review," is applicable to this case, and fatal to their claim. We do not think so. The act of 1870 was manifestly intended to apply to York county only, but it is not necessary now to inquire whether it is a local or general act, because, by its terms, it is limited to cases in which there is a substantial or formal defect "in a petition for a review or re-review of a road." We have, therefore, a case in which the petitioners, without fault on their part, were denied their right to a legal review. The mistake of the court, hereinbefore referred to, is no justification of or excuse for its order discharging the rule to show cause.

It is alleged that the report of the viewers was defective, in that the improvements through which they laid the road were not noted on the draft or plot annexed to it. It appears that the viewers, in the body of their report, stated that they had attached to it a plot or draft "showing course and distance of such road, and noticing briefly the improvements over which it passes;" but the draft attached to and returned with the report fails to show any improvements. It is true that the names of the owners of the lands through which the road passes are written thereon, and there are marks upon it to indicate the location of the lines between their properties. But these do not constitute a compliance with the statute, which requires that the improvements shall be briefly noted upon the draft. Mere boundary lines are not improvements, but fences erected upon them; and buildings, clearings, etc., upon the lands inclosed by them, are. To satisfy the statute, there ought to be something upon the draft from which it can be discovered whether the lands are improved or unimproved. Ordinarily, if there is no reference to improvements in the draft or in the report, the presumption is that there are none; but this presumption is rebutted by the report of the viewers that they have noticed the improvements in the draft,

and in such case the omission to note them there is fatal. O'Hara Tp. Road, 152 Pa. St. 319, 25 Atl. 602.

It follows from these views that the learned court below erred in the matters complained of in the several specifications. It should have made the rule to show cause, etc., absolute, referred the report of the viewers back to them, with instructions to note the improvements, and appointed reviewers upon the petition for a review then before it. In order that such action may be taken now, the several specifications of error are sustained. Order discharging rule to show cause, etc., reversed, and procedendo awarded.

(159 Pa. St. 77)

STEIGLEDER et al. v. MARSHALL et al.
(Supreme Court of Pennsylvania. Dec. 30,
1893.)

DEEDS—RESERVATION—IDENTITY OF LAND—QUESTION FOR JURY.

A deed reserved "the six-acre field now occupied by S. and W." Separated from the rest of the property included in the deed by a brook was a field of about six acres. This was divided by a fence which cut off between it and the brook about a third of an acre, used for a house and garden, and occupied by W. The remainder S. occupied as a pasture, and W. used it to obtain water from a spring thereon, and a small part of it for yard purposes. *Held*, that whether the field reserved was merely the pasture, or that and the garden, was a question for the jury.

Appeal from court of common pleas, Allegheny county; John M. Kennedy, Judge.

Ejectment by Catherine Steigleder and others against Robert Marshall and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

John B. Chapman and Lazear & Orr, for appellants. W. B. Rodgers and C. M. Thorp, for appellees.

THOMPSON, J. The reservation in the deed of B. A. Mevey, by which he reserved "the six-acre field now occupied by Dr. William Sarver and David Welsh out of the above-described land," is the subject of contention in this ejectment. Mevey owned a farm situated upon one side of a run called "Robinson's Run," and disconnected from it, and upon the opposite side of the run, a field containing about six acres. In this field there was a fence, which at one time ran along the run, and also a second one, which fenced off between it and the run about 63.5 perches used for a house and garden. The appellees (the plaintiffs below) contended that by the reservation in the deed the field up to the run was reserved, while the appellants contended that the field up to the garden fence was reserved. The evidence shows that the whole field was a separate piece of ground detached from Mevey's farm, and was originally known as the "Six-Acre Field." Mevey's son testified substantially that it was known

as the "Six-Acre Field;" that it was separate from the other farm; that it was a piece by itself; that Welsh was living in the house and occupied the garden, and Dr. Sarver occupied the pasture field. The language of the reservation is, "the six-acre field now occupied by Doctor Sarver and David Welsh;" and, as testified, the former occupied a portion of the field for pasture, and the other the house and garden. The appellants' contention was that the portion of the field used for pasture, excluding that portion used for the house and garden, was the extent of the reservation, because there was a joint user of such portion by Welsh and Sarver, one for pasture and the other for obtaining water from a spring upon it, and a small part of it for yard purposes; and because it was fenced off from the garden and house, and thus made a distinctive field. When the grantor used the words, "now occupied by Doctor Sarver and David Welsh," it is clear they did not relate to the user of it in going to and from the spring, or that of a small piece used in connection with the house, possibly as a yard, but an actual or distinctive occupancy, such as was indicated by the use of the house and garden as such, and that for pasturage as such. He thus indicated the entire field, not to be determined by the interior fence, referred to, but by this obvious occupancy of the different parts of it by those two persons. As this piece of land was detached or disconnected from the grantor's farm, as it was a six-acre field, and as it was occupied one part by Welsh for the house and garden and the other by Dr. Sarver for pasturage purposes, it is not within the range of probability that the grantor reserved the part used for pasture only, and excepted from the reservation the part occupied by the house and garden, thus isolating a small strip of 63.5 perches. Upon the trial, without objection, the proofs were directed to the character of occupancy by Sarver and Welsh, and in view of them the court properly submitted to the jury as a question of fact whether the reservation applied to the whole of the field extending down to Robinson's run.

The appellants' first point, which was, in effect, that if the field was well marked and limited by fences on or before April 1, 1865, and contained six acres or thereabouts, and was then in possession of Dr. Sarver, that David Welsh also had possession of a part thereof at the same time, and that no other inclosure or piece of the farm described in the deed from Mevey to Mitchell and Armstrong, dated April 1, 1865, could be described by the same language or words of description as embraced in the exception contained in the said deed, then the plaintiffs are not entitled to recover, and the verdict should be for the defendants, which was affirmed by the court; and the proofs, which were directed to the occupancy of the whole field or to the part exclusive of the part used for

house and garden,—demonstrate that the question involved was one not relating to the construction of the reservation, but to the identity of the location. It was one of location, not of construction. The grantor reserved the field occupied by Sarver and Welsh, and used the words in regard to such occupancy to describe such field. Under the circumstances, the locality of the field thus occupied was a question of fact to be determined by the jury. In *Thomp. Trials*, § 1461, it is said: "A question of location or the application of the grant to its proper subject-matter is a question of fact to be determined by the jury by the aid of extrinsic evidence." Again, in section 1463, it is said: "Whether land in controversy is included within a particular grant being a question of identity, is necessarily a question of fact for a jury." There was therefore no error in submitting this question of fact to the jury, and this judgment is affirmed.

(159 Pa. St. 227)

KENNEDY v. McKENNEDY.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

WILLS—CONSTRUCTION—LIFE ESTATE.

1. Testator bequeathed to his wife all his property, to hold "absolutely in her own right for and during her lifetime, with power to dispose of the same at her own pleasure; but, in the event of her remarrying, then one-half of all the aforesaid property shall revert to my children," and, at the death of his wife, then all the property "shall be divided among my children, share and share alike." *Held*, that the wife took a life estate, and that the power of disposition did not enlarge it to a fee. *Forsythe v. Forsythe*, 108 Pa. St. 129, distinguished.

2. Testator intended a reduction of his wife's life estate one-half, contingent on her remarriage, and the determination of the other half at her death; and the fact that the contemplated contingency did not occur could not enlarge her life estate to a fee.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Ejectment by James McKennedy against Christina Kennedy. Judgment entered on a verdict for plaintiff, and question of law reserved for decision by supreme court. Defendant appeals. Question decided for plaintiff, and judgment affirmed.

T. Walter Day, for appellant. Frank I. Gosser, for appellee.

THOMPSON, J. The question in this ejectment is one which arises from a contention in regard to the estate devised by the will of Robert Kennedy to his wife Christina Kennedy, who, upon her death, devised it to her daughter, the appellant, (defendant below.) By his will he bequeathed as follows: "To my dear wife, Christina Kennedy, I bequeath all my property, personal and real, to have and to hold the same absolutely in her own right for and during her lifetime, with power to dispose of the same

at her own pleasure; but, in event of her remarrying, then one-half of all the aforesaid property shall revert to my children, share and share alike, and, at the death of my wife, then all the property that she may have inherited from me by this my will shall be divided among my children, share and share alike." The contention of the appellant is that he devised a fee to his wife, by whose will it was bequeathed to appellant, while that of the appellee is that he devised to her only a life estate. This contention is to be resolved by the intention of the testator, as evinced by the words used in his will. As the intentment is in favor of the heirs at law, it will prevail, unless the testator's will shows a strong probability that such was not his intention. An heir at law is only to be disinherited by express devise or necessary implication. There is no such strong probability in this case that such was the testator's intention, but, on the contrary, the intentment seems to be clear that he intended a life estate to his wife, with a devise over to his heirs. To his wife he bequeathed "all his real and personal property, to have and to hold the same absolutely during her life, with power to dispose of the same at her own pleasure;" and at the same time, and in the same sentence, he associated this with the direction at her death, that what she inherited should be divided among his children, share and share alike. This language clearly indicates an intention to give a life estate, and the power to dispose of the same does not enlarge it to a fee. In *Hinkle's Appeal*, 116 Pa. St. 498, 9 Atl. 938, it is said by Mr. Justice Trunkley: "A power of sale attached to an express life estate will not enlarge it to a fee. Where a testator devised land to A., 'to her sole and separate use for life,' and gave 'her as executrix, or in her own right as devisee for life, the right to sell and convey in fee simple all or any part or parts of my real estate, at such time or times, to such person or persons, and for such consideration, as she shall deem expedient,' it was decided that the devisee took an estate for life only. *Hatfield v. Sohler*, 114 Mass. 48. A testator devised all his estate, real and personal, to his wife, 'for her comfortable support and maintenance during her life, with full power and authority to dispose of the same as she may find needful for that purpose.' He gave to S. all his estate 'that may remain after the death of his wife.' The widow did not exercise the power to sell, but attempted to dispose of the estate by will to her brother. *Held*, that the widow only took an estate in the land for life, with power to sell, and that the devise over to S. took effect. *Smith v. Snow*, 123 Mass. 323." In the event of the remarriage of his wife, which did not occur, the testator here provides, "then one-half of the aforesaid property shall revert to my children, share

and share alike." His intention, it is clear, was in that contingency to reduce her life estate to one-half, and to determine it in the other half upon her death, when his children were to take. To accomplish this he provides as follows: "And, at the death of my wife, then all the property that she may have inherited from me by this, my will, shall be divided among my children, share and share alike." This language indicates that he intended the wife to take an estate for life in the property, but liable, as to one-half of it, to have it determined by her remarriage. The fact that she did not remarry, and that the contingency contemplated did not occur, cannot change the intention thus clearly expressed. As each testator, in his will, necessarily uses distinctive words from which his intention is to be deduced in its interpretation, cases of wills may be precedents for principle, but rarely for interpretation, because the words used are scarcely ever identical. It is, however, urged that *Forsythe v. Forsythe*, 108 Pa. St. 129, is sufficiently identical as to control the interpretation of the present will, but an examination of that case does not sustain this contention. In that case the testator, by his will, devised his real and personal property during her natural life to his wife, with power to dispose of the same as she may think best. No other disposition was made, and no other person was mentioned. The intention, it is manifest, was that he intended to give her absolutely his entire estate; and Mr. Justice Green, in delivering the opinion, says: "But, besides this, it is clear that the testator was disposing of his entire estate when he made his will. He says so in words. He names no other devisee or legatee, possible or contingent, than his wife, in any part of his will. He does not give her a residue after other objects of his bounty are provided for, as was the case in *Fisher v. Herbell*, 7 Watts & S. 63, but he gives her everything—his whole estate, after payment of debts—during her life, and also the power to dispose of it all as she might think best." Again, he says: "A technical power of disposal of the very substance of the testator's estate, without any limitation as to the manner or kind of disposal, is given, and there are no other words in the will which indicate an intent to restrain the act or disposition so as to be effective during the life of the widow. In these circumstances, we are not disposed to declare a meaning to the will which we think was not the meaning of the testator." In the present case the testator bequeaths his property to his wife, to have and to hold during her life, with power to dispose of the same, and in the same sentence designates the contingency when the life estate, as to a part of it, is to determine, and, upon her death, the takers of such estate as she then may have. The evident intention was not to dispose of the entire estate to the wife.

In the case above referred to the intention of the testator was to devise his entire estate to his wife, while in the present one the intention is just the opposite. As it is manifest that the testator intended to give but a life estate to his wife, this judgment is affirmed.

(159 Pa. St. 53)

LUCOT v. RODGERS.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

SURFACE WATER—OBSTRUCTING FLOW—DAMAGES.

1. To dump earth on a street cut in a hillside, so as to stop the flow of surface water in a natural channel along said street, thus soaking and loosening the ground so as to force back a supporting wall and house foundation on the lower side, is an actionable trespass.

2. Plaintiff's wall, supporting the street several feet above his lot, and his house foundation, having been shoved out of place, and the house destroyed, by defendant's wrongful obstruction of surface water, there is no error in a charge that the damages cannot be exactly calculated; that they are necessarily indefinite, and that plaintiff need only show the facts from which the jury can fairly estimate the injury done; that the cost is some evidence of value, but not conclusive; and that the measure of damages is what the improvements were worth on that particular lot, less the value of the materials remaining.

Appeal from court of common pleas, Allegheny county; J. F. Slagle, Judge.

Trespass by Eugene Lucot against Michael Rodgers. Verdict and judgment for plaintiff in the sum of \$1,400 damages. Defendant appeals. Affirmed.

The court below (Slagle, J.) charged as follows:

"This action was brought by Eugene Lucot to recover compensation for damages to his property, which he alleges was caused by the action of Michael Rodgers, the defendant. In order to recover, he must satisfy you by the weight of evidence that the damage was caused by the action of Mr. Rodgers,—the illegal, unauthorized acts of Mr. Rodgers. Then he must show you what that damage was, and, if the injury was caused by the unlawful act of Mr. Rodgers, he is entitled to recover whatever damage was occasioned thereby. The facts are these: Mr. Lucot owned a lot of ground fronting 60 feet on Elliott street, in the Thirty-Sixth ward of the city of Pittsburgh, and running back towards Steuben street a distance of 50 feet. This lot and the street itself are on a hillside. Long before Mr. Lucot owned the property, a wall had been built along the line of his property to hold up the street. Naturally, a street in a location such as that would be made by cutting into the hillside on one side, and filling it on the other, so as to make a level road. That was probably what was done here, and this wall was built for the purpose of holding up the street in its place, and protecting the lot. The theory of the plaintiff, as I understand it, both from the pleadings and the evidence,

is this: That the water coming down upon Elliott street was accustomed to flow along the gutter or drain that was on the upper side of this road, and flowed down the hillside until it reached a point some distance below Mr. Lucot's property,—some 40 or 50 feet, probably,—where it crossed the roadway into the property of Mr. Rodgers and Mr. Kim, and found its way down to Steuben street in that way, and that for 15 or 17 years water had flowed that way; that the street had been maintained in that way, although filled up from time to time and leveled off, and that his wall stood intact; that Mr. Rodgers, in 1889, threw some earth upon this street, and in 1890 threw a large quantity on the street at different times, to the extent of four or five feet over the whole way, and that he placed it at a point below his line opposite Mr. Christ's lot, in such a way that it stopped the water from flowing along the street, and made it stop in front of his property, and, this earth that was thrown on the street not being packed, the water soaked down through that earth, and loosened it; that the whole hillside—the loose earth in the street—pressed against this wall, and pushed it over; that this allowed the water to go through the lower part of the wall; that it got under his house, worked in to the lower foundation there, broke it up, and his house fell, and the wall was shoved bodily over some feet into the lot. Now, that is the theory upon which he bases his claim, and he says that this injury that was caused in this way was the result of Mr. Rodgers' putting the earth upon that street in such a way as to shut off the natural flow of the water down the hillside; stopping it, and letting it soak into the ground. In order to recover, you must be satisfied from the evidence, not beyond a reasonable doubt, but simply by the weight of the evidence, that that was the cause of the injury to the house, and that Mr. Rodgers did what he is charged with doing, namely, put that earth there in such a way as to stop the water, and let it soak in, and thus destroy the wall and the house. I do not propose to go into the testimony in reference to that matter. You have had that discussed before you.

"There are two points that I think I will call your attention to. Mr. Lucot says that this wall had stood there for a good many years, and that there had been no trouble until this difficulty occurred, and that then it came from the weight of the ground, as suggested. In answer to that, it was suggested by the evidence that in 1888 Mr. Miller had dug foundations for a house down upon Steuben street, and for walls to maintain the ground; the ground falling from Elliott down to Steuben,—a distance of about 70 feet, I think. In reference to that, it is proper to call your attention to the fact that there appears to have been no disturbance, so far as the evidence goes, in the walls or the building put there by Mr. Miller; and, if this

trouble was caused by his work, his property would have to fall first before it could affect that above. I mention that for your consideration, simply. The other point is that this weight was caused by springs in the ground. As was suggested in reply to that, the springs were there before 1889, and would naturally have caused the same difficulty before that time that they did afterwards. The point that I wish to call your attention to is this: If that ground was springy, it appears by the evidence that there was a well right upon the line of this wall, and underneath it, which was 40 feet deep. Would or would not that absorb all the springs in that immediate neighborhood, if there were any there? There is a great deal of testimony upon both sides, and I am not going to give any opinion about it. I simply thought it proper to call your attention to those two points, for your consideration.

"If, then, you find that the injury did not occur from these suggested actions, but did occur from the collection of water behind the wall of Mr. Lucot soaking into the street, then that would not be enough for him to recover, for you must also find that that was caused by Mr. Rodgers. You have heard the testimony as to that. A number of witnesses—Mr. Lucot and others—testified that Mr. Rodgers put ground there at different times,—three different times, I think Mr. Lucot testified to,—and that it amounted to some four, five, or six feet. Mr. Lucot testifies—and in that he is sustained to some extent by the testimony of one or two of the witnesses for the defense—that at the time he got that property, in 1888, the wall was above the level of the street about six inches,—from six inches to a foot,—and that it was then filled in by Mr. Rodgers until it was four feet above the top of that wall at the lower side, at the end next Mr. Christ. Mr. Lucot testified to that. As to the height, I do not remember any witnesses that denied that the earth was actually four feet above the top of the wall at the time this difficulty occurred. But Mr. Rodgers says he didn't put it there; that all he put was a few wheelbarrow loads at one time. Then he was stopped, and then he put some shale and broken stone into the wagon ruts that were made, but did not fill the ground up in any way, and at another time he possibly put a few loads on it. If he did not put the earth on that street that had the result of stopping this water, and allowing it to soak into the ground, then, of course, he is not responsible. If somebody else did it, he cannot be held responsible for it. He is only responsible for his own acts. So you will have to find, in the first instance, in order to enable the plaintiff to recover, that the damage was occasioned by the stopping of the water upon this street, and allowing it to soak in behind the wall; and, secondly, that Mr. Rodgers, either himself or by his employes, placed the earth there so as to cause the water

to stop, and cease to flow as it had been accustomed to flow along the street.

"If you find those two points in favor of the plaintiff, you will then find what was the damage. The measure of damage is simply compensation. He is entitled to compensation for the damage actually sustained. In a case like this, it is impossible to reduce the evidence to an actual calculation by the jury. From its very nature, it is indefinite; and therefore all that is required of the plaintiff is that he give you the facts from which you can fairly estimate the actual damage done, and that, having been ascertained, is what he is entitled to recover. In reference to that, cost is some evidence of value, but it is not conclusive, and sometimes it is very wide of the mark. A man may pay entirely too much for his property, or he may build a house on property which, by its very nature, its location, the surroundings, is unfit for the location, and therefore of a less value than what it actually cost. You will take into consideration, if you get to this point, the location of the property, its surroundings, and its value, as given by the witnesses. The house, it appears, was wholly destroyed. Mr. Schwartz (I think that was the name of the gentleman) testified he had been called in by Mr. Lucot, or went there in some way, to look at this house; that it was in very bad shape; but he did not at that time advise Mr. Lucot to leave, although he thought there might be some danger. In about a month afterwards, he went there, and told the plaintiff he must get out at once; that the house would fall; and he got out, and the house was taken down. In estimating the damages, you will take first the damages to the wall. This wall was pushed out, as you understand, bodily, and stands there intact, presumably,—just cut off at the base from the ground, and shoved off bodily. That it stands there intact shows it was a very well-built wall; otherwise, it would have been tossed over and broken. But that wall may have cost more than the lot was worth, and therefore the cost of it is not what he is entitled to receive, but what it was worth in that place. It might be, after the wall was built, the whole lot would not be worth as much as the wall cost. That is very possible. If so, he would not be entitled to recover the cost of putting the wall at a place where it was not worth what it cost to put it there, but only what it was worth when there. And then deduct from that what the stone and material in the wall were worth, as they appear on the ground there now. Of course, there has been no special evidence given of that, but you must estimate it. You must take that in view, and, instead of giving the actual value of the wall, give it less what the material would probably be worth. In reference to the house, do the same thing. The house, Mr. Lucot says, was worth about a thousand dollars. But it may not have been worth that

there, or it may have been worth more. Whatever it was worth, you should give, less what, in your judgment, the foundations and the material, probably, would be worth, torn down. Most of you would know whether it would be worth any more than the cost of taking down the house. He is entitled to have that lot placed in a condition such as it was before. Having estimated that, then you would find as to the damage done, and for that he is entitled to recover, if the injury was caused, as he alleges, by the stopping of the water upon the street, and allowing it to go through into his property; and if it was caused by the acts of Mr. Rodgers, the defendant.

"Counsel for defendant has submitted to the court the following points, which I will now proceed to answer: '(1) The defendant's land being located above the plaintiff's land, there was an easement or right on the plaintiff's land for the discharge of all waters which by nature rise in, flow or fall upon, his said land, and the lower land must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position.' Refused. This is a correct statement of law, but is not applicable to this case. '(2) If the jury should find from the evidence in this case that the clay or debris which the plaintiff alleges was placed on and along said Elliott street by said Rodgers did not collect any other or extra water than which was accustomed to gather in or flow on said Elliott street in front of the plaintiff's property, then, unless they find that the placing of said clay and debris on said Elliott street in front of said Lucot's property caused a new channel to be formed, whereby the said water was thrown upon the plaintiff's lands, causing damage thereto, the verdict of the jury should be for the defendant.' Affirmed, if a 'new channel' includes the soaking into and percolating through the ground. You will observe that this point says that if 'any other or extra water than which was accustomed to gather in and flow on said Elliott street' is brought there, and that no 'new channel' was caused, by which it was thrown upon the plaintiff's ground.' That means that the water was allowed to flow down the gutters, if there are any there on that street, as it had done before, and therefore there was no interference. If so, this is affirmed. '(3) If the jury should find from the evidence in this case that Michael Rodgers did throw or put clay, stone, or debris on said street, along and in front of the property of said Lucot, to the depth of five feet, in the repairing of said street so as to make the same fairly passable for vehicles or wagons, and if the jury should further find that there was a fall in said street, along and in front of the plaintiff's property on Elliott street eastwardly, of 7-10 feet in length of 150 feet, after said clay was put on, then if the water naturally falling and flowing upon said Elliott street would

soak into and through said clay, stone, and debris so placed in said street, and come out on or fall upon the lands of the plaintiff, the verdict of the jury should be in favor of the defendant.' Refused. This point asks the court to draw a conclusion from the facts, and the statement of facts is not full. If the water naturally falling upon the ground by the act of defendant caused to soak into or run upon plaintiff's land, which, except for such acts, would have flowed away, defendant is liable for the damage caused thereby. '(4) The burden of showing the cause of the damage is upon the plaintiff, and if, upon the evidence in this cause, the jury cannot fairly find the cause of the damages claimed, then the verdict should be in favor of the defendant.' Affirmed. '(5) If the jury should find from all the evidence in the case that the plaintiff's land, situated as it is, on a steep hillside, is liable to slip or slide from Elliott street towards Steuben street, then the plaintiff must satisfy the jury by the weight of the evidence that the damages were not caused thereby, but that the same were caused by the acts of the defendant or agent in casting the water on the plaintiff's land.' Affirmed. This simply means that the plaintiff must satisfy you that the damage was caused by the acts of defendant, and, if he has shown you that, it would follow that it was not caused by natural slipping. '(6) The burden of proving the damages is upon the plaintiff, and, if the jury should find that the plaintiff has failed to show such damages or measure of damages as would enable the jury to properly estimate the same, then, even if the jury should believe that the plaintiff was entitled to recover, the verdict should be only for nominal damages.' Affirmed. But this does not require exact evidence, but facts which will enable the jury to fairly estimate the damages.

"Take the case, and find such a verdict as you think the testimony will justify."

Robb & Fitzsimmons and L. K. Porter, for appellant. Chas. L. Powers, for appellee.

STERRETT, C. J. The charge of the learned trial judge is so full and accurate that further discussion of the questions of law involved in this case is unnecessary. Judgment affirmed.

(159 Pa. St. 121)

BROWN et al. v. BAILEY et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

STATUTE OF FRAUDS—PAROL EXCHANGE OF LAND—EJECTMENT—SPECIFIC PERFORMANCE—JURISDICTION OF COURT OF COMMON PLEAS—EVIDENCE.

1. A parol contract for the exchange of land, which is established by clear and indubitable evidence, and executed by an exchange of possession pursuant thereto, is not within the statute of frauds.

2. The parties to a parol contract to ex-

change land and their grantees continued in possession of the tracts received by them, respectively, in exchange under the contract, for 16 years, during which time one of such parties died, and no deeds were passed. His heirs brought ejectment in the court of common pleas to recover the tract received by the other party, and defendants set up the contract, and asked for specific performance. *Held*, that such court had jurisdiction to determine the rights of the parties, and that the orphans' court did not have exclusive jurisdiction, under Act 1834, which gives it full power to make and enforce decrees for specific performance in actions where the vendors are dead.

3. The court properly excluded evidence to show that subsequent to such exchange the persons from whom plaintiff's ancestor received his tract continuously dumped cinders on such tract, against the protest of such ancestor and his successors in title; since such evidence would tend to prove a trespass, and not a dispossession.

4. The court also properly excluded a deed by which the vendors of the tract received by plaintiff's ancestor, four years subsequent to such exchange, granted to a railroad company a right of way "so far as the same may pass over our lands."

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action of ejectment by Samuel S. Brown and Harry Brown against James M. Bailey, James W. Friend, and James Pickands. From a judgment entered on the verdict of a jury directed by the court in favor of defendants, plaintiffs appeal. Affirmed.

Both parties claimed title to the land under William H. Brown, who died in 1875. The plaintiffs gave in evidence a clear, undisputed legal title, and rested. The defendants claimed through mesne conveyances from Graff, Bennett & Co., who, as they allege, made a parol agreement with William H. Brown, in his lifetime, for the purchase of this land, and afterwards made a voluntary assignment for benefit of creditors. Their entire defense to this action, as set forth in the third item of their abstract of title, filed under the rules of court, was to the following effect: That some time in 1874 William H. Brown was the owner of certain land, of which that in dispute was a part, and Graff, Bennett & Co. were the owners of certain other lands adjoining. That in and by an agreement entered into at that time by and between these parties, respectively, the land in dispute was "transferred, set over, and delivered to Graff, Bennett & Co.," who entered into possession thereof, which possession has since continued in them and their grantees, and William H. Brown entered into possession of the river ends of the land mentioned above as owned by Graff, Bennett & Co.

Plaintiffs assigned errors as follows:

"(1) In admitting defendants' offer of testimony as set forth in the following bill of exceptions: 'Counsel for defendants propose to prove that prior to 1874 W. H. Brown was the owner of the land in dispute, and that Graff, Bennett & Co. were the owners of adjoining lands; that an exchange was made between W. H. Brown and Graff, Bennett & Co. by which Mr. Brown gave them the

land lying between high water and Carson street, the land in dispute in this case, and Graff, Bennett & Co. gave him what was known as the "river ends" of the adjoining lots owned by them, lying between the high-water line and the low-water line of the Monongahela river; that this exchange was in pursuance of a verbal agreement between the parties; that each party went into possession of the property transferred by the exchange; that Graff, Bennett & Co., and those claiming under them, continued in possession of the ground in dispute from 1874 down to the present time, have paid taxes upon it, have collected rents from the buildings upon the land in dispute, have erected valuable improvements, and exercised all acts of ownership over the land in dispute, while W. H. Brown, and those claiming under him, entered into possession of the land transferred to Mr. Brown by the exchange, and have continued in possession and exercising acts of ownership of the land so transferred to him until the present time; that this possession by each party of the land respectively exchanged and turned over to each party by the other has been adverse and exclusive from 1874 down to the present time.' Counsel for plaintiffs object to the offer as irrelevant and incompetent. We object additionally on the ground of want of jurisdiction of this court to enforce any such contract as that which the defendants offer to prove. That it is substantially an offer to prove title contrary to the provisions of the statute of frauds, and that the facts proposed to be proved under the offer would, even if true, not be sufficient to establish such title as would take the case from under the provisions of the statute of frauds; and the whole offer, if true, would be no defense to the title of the plaintiffs. Objection overruled, and bill sealed for plaintiffs."

"(4) Also in rejecting the plaintiffs' offer of testimony as set forth in the following bill of exceptions: 'Counsel for plaintiffs now offer to prove that, against the repeated remonstrances of Wm. H. Brown, and those who have succeeded him in the title to the property owned by him at the Clinton landing, Graff, Bennett & Co., up to the time of their assignment, and their successors in title, the present defendants, have continuously deposited, up to the time of bringing this suit, slag, cinder, ashes, and other refuse of their blast furnace and rolling mill on the property immediately above the property in controversy, in and upon not only the river ends of the lots, for many years owned by Mr. Wm. H. Brown, but upon property which, according to the testimony of Col. Schoonmaker, Brown was to get in fee from Graff, Bennett & Co.; that the effect of such deposits was to greatly depreciate the value of the landing as a landing by filling up not only the land itself, but the river bottom, forcing the boats and the river craft which Brown had been in the habit of moor-

ing there at the Clinton landing far out into the river, carrying a high embankment very nearly down to the commissioners' low-water line, depreciating probably about one-half the value of this landing, and rendering it almost useless for the purposes for which Brown was to get it, as understood by all the parties at the time of the alleged contract; that, as the landing stood at and for long before the bringing of this suit, the boats which Mr. Brown would have moored opposite the property in controversy, which he was to get from Graff, Bennett & Co., were moored or obliged to be moored for the greater part of the time out in the river in ordinary stages of water, where their condition was precarious and dangerous. By Mr. Patterson: Please state the purpose of the offer. By Mr. Burgwin: The purpose of the offer is to show that the defendants here have no equities to have the alleged parol contract enforced, and also to show that Brown and his successors in title have been dispossessed virtually of the land which they were to get from Graff, Bennett & Co. in exchange for the land in controversy; that that dispossession has been both by dumping cinders upon this land, from time to time, as Graff, Bennett & Co. and their successors thought proper, and also by his being forced out by cinder banks beyond the lines of low-water mark, down to which Graff, Bennett & Co. were to have conveyed to them; and generally for all such purposes as are necessary to meet the defendant's case.' Counsel for the defendants object to the offer. First. As a whole. It is an offer to prove a trespass by the defendants and their predecessors upon lands of the plaintiffs and their predecessors, for which a right of action would lie on the part of the plaintiffs or their predecessors to recover damages. Second. So much of the offer as proposed to prove dumping of cinders and other material on the property of the defendants and their predecessors is totally irrelevant, as they had a right to use that part of their property as they saw fit. Third. As incompetent and irrelevant. Objections sustained and bill sealed for plaintiffs.

"(5) Also in rejecting plaintiffs' offer of testimony as set forth in the following bill of exceptions. 'Counsel for plaintiffs now offer in evidence deed marked "Exhibit No. 4," from John Graff, James I. Bennett, and Robert H. Marshall, partners as Graff, Bennett & Co., the predecessors in title of the present defendants, to the Pittsburgh & Lake Erie Railroad Co., dated the 10th day of May, A. D., 1878, not recorded, granting to the said railroad company in the following words: A right of way as the same is now located and determined by the said company, thirty feet in width at grade, and extending in length as far as the said road may pass over our lands situated in the Thirtieth ward, city of Pittsburgh, county and state aforesaid, and being fully described as

follows, to wit: Beginning at a pin on line between lands of grantors and land of Mrs. Charles O'Neil, at a point 314 feet from the curb on Carson street; thence with the said pin as the center point 951 feet to line of Stone heirs at a point on which the center pin is given 235½ feet from the curb on Carson street. Said right of way to preserve a uniform width of 30 feet, being 15 feet on each side of the center pins, and the course of said right of way being north 60 degrees, 31 minutes west. To be accompanied by proof that this right of way granted is in part over the lands which, under the testimony of Col. Schoonmaker, W. H. Brown was to get in fee simple under the alleged contract made in 1873; and also by proof that the Lake Erie Railroad Co. is now, and has been from that time, in complete possession of this right of way, and have their tracks laid upon it, and are and have been in the actual possession of the property which the said W. H. Brown was to have received from Graff, Bennett & Co. in fee. The purpose being to show that the parties have by their grant ignored and violated the agreement which they made with W. H. Brown; and also to show that W. H. Brown and his successors in title have been dispossessed by the acts of Graff, Bennett & Co. from the land which they were to have received from them, and that the effect of this grant, and the possession taken under it, and the use made of it, has been to dispossess W. H. Brown and his successors in title from the full enjoyment, use, and operation of the land which he was to have received, and has greatly depreciated the value of the property for the uses and purposes of a landing, and for those uses and purposes for which it was acquired or proposed to be acquired from Graff, Bennett & Co. and the present defendants; and also because the effect of this deed is to prevent Graff, Bennett & Co. and their successors in title from carrying out fully and effectually the parol contract as originally made by them with W. H. Brown, that they have parted with their title, and cannot now make title to W. H. Brown and his successors in title.' Defendants' counsel object to the offer: First. Because it is unrecorded, no evidence of its delivery to the railroad company, and produced here by the successor in title of the grantors named in this deed upon notice. Second. Because, in any event, the deed purports to convey only so much of the right of way over the premises described therein as 'may pass over our lands situate in the Thirty-Third ward, city of Pittsburgh.' Third. That, even if there was competent proof of the delivery of this deed by Graff, Bennett & Co. to the railroad company, and proof that it covered the portion of the land now in dispute in this suit; that the deed offered does not purport to have been made prior to May 10, 1878, more than five years after the testimony on the part of the defendants;

shows that the contract for the exchange had been made and consummated by a delivery of possession. Fourth. As incompetent and irrelevant. Objection sustained, and bill sealed for plaintiffs."

H. & G. C. Burgwin, for appellants. D. F. Patterson and Knox & Reed, for appellees.

THOMPSON, J. The parties through whom the appellants and appellees claim title had in 1874 distinctive claims against each other, one for the use of property for boating purposes, and the other for iron sold; and at that time owned different properties, some of which were situated on the river front and others back from it. By their exchange it was concluded they could be best utilized. Accordingly they entered into a parol contract to adjust their differences and to exchange their respective properties. Brown, one of these parties, was to take the river front lots, and for them to exchange the back lots; and Bennett, Graff & Co., the other party, was to take the back lots, and for them to exchange the river front lots. This agreement was executed and consummated by the delivery of possession of the lots as agreed, but no deeds were executed and delivered. This was done in 1874, and since then Brown continued in possession of the river front property, using it in connection with his landing for boats up to the date of his death. Since then, by partition, it has been allotted to one of his heirs. Bennett, Graff & Co. have since the exchange been in possession of the back lots, collected the rents of the small buildings upon them, have filled up the low ground of them, and have paid taxes and assessments for municipal purposes against them. Notwithstanding the criticism based upon some minor differences between the testimony of Col. Schoonmaker and that of Mr. Graff, the evidence of the parol agreement for exchange was clear, precise, and indubitable; and, thus clearly established, consummated by proofs of actual possession, it was not within the statute of frauds and perjuries. In *Moss v. Culver*, 64 Pa. St. 414, it is said by Mr. Justice Agnew: "It is true, as has been often said, there is no difference between a parol sale and an exchange in regard to the requisites to take it out of the statute of frauds and perjuries. A clear, explicit, and unambiguous contract, and a taking of possession under and in pursuance of the contract, are as much requisites of a parol exchange as of a sale. But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. It has no relation to or dependence on any other subject. The evidence of possession taken of it is therefore confined to the single subject, and, if not taken in a reasonable time, or so as to make it doubtful whether it is attributable to the contract,

the parol sale is not taken out of the statute. But an exchange necessarily has a subject on each side, which stands related to the other. One is the representative of the other; so much so that the law implies a contract of warranty by the act of exchanging. If, therefore, the evidence shows a clear, unequivocal, and complete taking possession of one of the subjects of an exchange by the party owing the other subject, it strengthens the evidence of a possession taken by the opposite party of the corresponding subject. Evidence of possession that might seem weak and inconclusive in the case of a parol sale is thus made clear and convincing in the case of an exchange." In *Johnston v. Johnston*, 6 Watts, 370, it is said by Mr. Justice Rogers: "It is undoubtedly true that an agreement for the exchange of land is within the statute of frauds, and must be in writing. *Rice v. Peet*, 15 Johns. 503; *Co. Litt.* 447. But the specific execution of a parol agreement for an exchange will be decreed in equity when the agreement has been carried into effect in whole or in part. Although I do not find this point expressly adjudicated, yet it comes within the spirit of decisions which have been made in this state." In *Reynolds v. Hewett*, 27 Pa. St. 176, it was held that where there is a parol exchange of lands there must be a delivery of possession, but the evidence in reference to the time of possession will admit of greater latitude than in the case of a parol sale of land. Since 1874 until the present suit, brought in 1890, no question has been raised in regard to the agreement, and no attempt has been made to effect its rescission. Taxes have been paid, the ground improved by filling in, it may be at no great cost, and the municipal improvements have been paid. Under these circumstances, the appellants, in attempting to defeat the parol agreement, do not present themselves with any equity that would command consideration. It is said in *Sower's Adm'r v. Weaver*, 84 Pa. St. 268, by Mr. Justice Gordon: "Equity is loath to undo a gift or contract at the instance of one who has neglected to move for its rescission, until the passing years have grafted new equities upon the transaction, until the donee has grown old, and has spent the vigor of his age and the prime of his manhood in the use and improvement of a property long regarded as his own."

But it is earnestly argued that the defense goes to the enforcement of the agreement, and seeks for specific performance; and that, as Brown is dead, the court below has no jurisdiction, the orphans' court alone having exclusive jurisdiction. The appellants brought this ejectment for the possession of these lots against appellees, the vendees of the assignee of Bennett, Graff & Co.; and when they make a defense to it, based upon parol exchange, followed by possession in pursuance of it, contend that it must fail,

because it amounts to a claim for specific performance, of which the court had no jurisdiction. As the parol agreement is clearly established, and as possession was delivered in pursuance of it, and as Bennett, Graff & Co. and their vendees continued in notorious and exclusive possession, and paid taxes and municipal claims, the appellees had no reason or occasion to resort to the orphans' court, because the agreement was in fact performed. This action was brought to recover possession of the premises from appellees, alleged to be unlawfully withheld by them from appellants, and the court in which it was brought had jurisdiction to inquire into the circumstances under which such possession was obtained. But, if appellees were out of possession, as in *Myers v. Black*, 17 Pa. St. 193, and *Porter v. Dougherty*, 25 Pa. St. 405, and were seeking to recover possession by the enforcement of a contract made with a decedent, as the act of 1834 gives the orphans' court full power to make and enforce decrees for specific performance in actions where the vendors are dead, the jurisdiction of the court of common pleas in such cases would doubtless fail. Such jurisdiction by reason of the act in question attaches to the orphans' court in order to complete its jurisdiction over decedents' estates; but in this case the exchange was in the lifetime of the decedent, and was fully consummated by an adverse and notorious possession continued by Graff, Bennett & Co. and the appellees down to the present time, so that upon the death of Mr. Brown the property did not belong to him or become any part of his estate. The proofs establish clearly and indubitably an equitable title in the appellees, and, if so, they had a right to make the defense, and the court below the jurisdiction to determine it. In *Lewis v. Baker*, 151 Pa. 533, 25 Atl. 99, it is said by Mr. Justice Williams: "When the chancellor remitted them to a court of law, he meant necessarily that upon the facts disclosed by them they must wait till their possession was attacked, if it ever should be, and then set up all the facts by way of an equitable defense to such action. This they have done. After twenty years of exclusive and peaceable possession, their right to an equal, undivided one-half is at the last moment challenged by their brother in an action of ejectment. They are now in a court of law, where the decree in equity sent them. They have a right to set up any facts that make it inequitable for their brother to assert his legal title against them." In *Winpenny v. Winpenny*, 92 Pa. St. 442, in holding a first ejectment conclusive, Mr. Justice Gordon said: "By the present plaintiffs, against the same defendant, and for the same property, an action of ejectment was instituted in the year 1869, in the former district court, which resulted in a verdict and judgment for the defendant. In that suit, Joseph Winpenny claimed, as he does in the present one, the premises in dispute, under

and by virtue of a parol contract with his father, John Winpenny. The substance of the terms of that contract was as follows: The father owed the son some five hundred dollars, and in payment thereof agreed to sell and make him, the son, a deed for the property in controversy. Joseph accepted this proposition, went into possession, and has continued that possession ever since; but he never received the promised deed. On trial of the present suit the defendant put in evidence the record of the former case, together with the evidence, substantially as above stated, upon which it was tried. Thereupon the court below directed a verdict for the defendant, on the ground that the former judgment, having been rendered for Joseph Winpenny, upon an equitable title, was conclusive, and a bar to a second suit." Again, he says: "The equitable character of the contract being this established, it only remains to consider whether a single action of ejectment is conclusive of the rights of the parties. If, however, the establishment of the legal title, and its enforcement by the action of ejectment, must, under our system, be effected by what is equivalent to a decree determining the invalidity of the equity, this is not an open question. In such case the only inquiry would be, has Joseph the right to set up his equitable title as a defense? If he has such right, upon that title a court must pass, as would a court of chancery, and its judgment must be equivalent to a decree. We need not add that such a decree by a chancellor would be final and conclusive." As the appellees were denying the right to their possession of the property, their equitable defense was properly within the jurisdiction of the court in which appellants had brought their action. The defense established by the proofs was a complete bar to their right to oust them of possession, and, if so, was clearly within the jurisdiction of the court. In one breath appellants by their ejectment put them upon a defense, and deny their right to make it, alleging want of jurisdiction. The jurisdiction of the orphans' court conferred by the act in question, however exclusive it may be for certain purposes, cannot thus be successfully invoked to defeat an equitable defense, and oust a possession which equity would protect.

The exclusion of the proofs in regard to the dumping of clnders by Bennett, Graff & Co. upon the river front lot was proper, because they substantially offered to prove a trespass, and not a dispossession, and the rejection of the deed by which Bennett, Graff & Co., four years subsequent to the exchange, granted to the Pittsburgh & Lake Erie Railroad Company a right of way was also proper, because the grant was limited to the right "so far as same may pass over our lands," and would have been nugatory after the exchange became perfected. The assignments in regard to the offers of proofs in regard to

those subjects are not sustained. The appellants' abstract of title filed having furnished the information required, the third assignment of error is not sustained. Judgment affirmed.

(159 Pa. St. 303)

GUCKERT v. HACKE et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CORPORATIONS—ORGANIZATION—ESTOPPEL TO DENY.

1. Under Act April 29, 1874, requiring original certificates of incorporation, with all indorsements, to be recorded in the office of the recorder of the county where the chief operations are to be carried on, whereupon the subscribers, etc., shall be a corporation under the charter, subscribers who have received their charter, but failed to record their certificate, are liable, as partners, for company debts.

2. Acceptance of a note signed by the corporate name, from members of an alleged corporation, in payment for work done at their request, does not estop the creditor to deny the corporate existence, and sue them, as partners, for the price of the work.

Appeal from court of common pleas, Allegheny county; W. D. Porter, Judge.

Assumpsit by Frank J. Guckert against Paul H. Hacke, C. O. Hughes, J. B. George, and E. B. Gawthrop, partners doing business as the Hughes & Gawthrop Company, for material furnished and labor performed by plaintiff for defendants, in fitting up their office. Judgment for plaintiff against E. B. Gawthrop. Plaintiff appeals. Reversed.

Robb & Fitzsimmons, for appellant. Robt. S. Frazer, for appellees.

STERRETT, C. J. It is essential to the creation of a corporation under an enabling statute that all material provisions should be substantially followed; and, exemption from personal liability being one of the chief characteristics distinguishing corporations from partnerships and unincorporated joint-stock companies, it follows that those who transact business upon the strength of an organization which is materially defective are individually liable, as partners, to those with whom they have dealt. What provisions are material must be gathered from the relation of each to the purpose and scope of the act; and when, therefore, successive steps are prescribed for the creation of corporations, these must obviously be regarded as imperative. Enabling statutes, on the principle of "expressio unius est exclusio alterius," impliedly prohibit any other mode of doing the act which they authorize. They must be strictly construed. Suth. St. Const. § 454. Hence, it has been uniformly held that requirements in respect to filing charters are imperative. *Childs v. Smith*, 55 Barb. 45; *Smith v. Warden*, 86 Mo. 382; *Abbott v. Smelting Co.*, 4 Neb. 418; *Beach, Corp.* § 162. It is plain, even from a cursory reading of the act of April 29, 1874, (P. L. 73,) that recording of the certificate

"in the office for the recording of deeds, in and for the county where the chief operations are to be carried on," was intended to be made one of the conditions precedent to corporate existence. That was the last of successive steps required to be taken, and the right to begin the transaction of corporate business was made to depend on the taking of that step. "From thenceforth," the act expressly declares, the subscribers, and their associates and successors, "shall be a corporation for the purposes and upon the terms named in the said charter." One of the purposes of the act being exemption from personal liability in the transaction of business, it is obviously material that the public should have notice, and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of incorporation, and consequently of exemption from liability. It may be conceded that, had plaintiff dealt with defendants as a corporation, he would have been estopped from claiming against them in any other capacity, even though they failed to record their charter. *Spahr v. Bank*, 94 Pa. St. 429. But it is not pretended that he had any knowledge of the existence of the charter; and there was certainly nothing, either in the name under which they did business, or in their conduct, which should have put him upon inquiry. In these circumstances, he was amply justified in dealing with them as partners. It was through their default, not his, that they were so treated, and it would be manifest injustice that he should lose his admittedly honest claim.

In the absence of an express agreement, the acceptance of a note from the defendants, as a corporation, after plaintiff had performed his part of the contract, cannot operate by way of election or estoppel. The relation of the parties was fixed by their status when the original contract was made, and cannot be changed by gratuitous inference. The members of the alleged corporation were the defendants, and were not injured by the acceptance of the note. The principle which treats the acceptance of a note as additional security to, and not as satisfaction of, a mechanic's lien, (*Jones v. Shawhan*, 4 Watts & S. 257,) is, with even more justice, applicable here. It follows from what has been said that the instructions complained of are erroneous. Judgment reversed, and a venire facias de novo awarded.

(159 Pa. St. 152)

DUFF v. PATTERSON et ux.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

BONA FIDE PURCHASERS—QUESTION FOR JURY.

Whether one who took a conveyance of land reciting one dollar as consideration, but with an agreement to credit the proceeds on a judgment against the grantor, the credit to

be at least \$3,500, is a bona fide purchaser, as against a prior grantee with unrecorded deed, is a question for the jury, though the property was taken without examination thereof, or of the title, the grantee having no other knowledge of it than the representations of the grantor.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Ejectment by Levi Bird Duff against A. C. Patterson and Georgia Patterson, his wife. Verdict was directed for defendants, and plaintiff appeals. Reversed.

J. S. & E. G. Ferguson, for appellant. A. C. Patterson, for appellees.

THOMPSON, J. The substantial question in this ejectment is whether the appellant was a bona fide purchaser of the land involved, and without notice. Abrams' deed to appellant, the plaintiff below, was dated December 15, 1887, and recorded December 19th of the same year. Appellee Mrs. Patterson deduced her title, also, from Abrams; but his deed to his first vendee, Charles A. McClelland, was dated April 4, 1876, and was not recorded until June 27, 1888,—some six months after the recording of the deed to appellant. That deed, however, it is testified, was in the hands of Mr. Patterson when he examined the title for appellee, who is his wife. If appellant and appellee Mrs. Patterson were both innocent purchasers, and without notice, appellant having first recorded his deed, his title, doubtless, would prevail. The act of 1775 is sufficiently specific in this regard. After providing for the time of recording, it provides that, if a deed be not so recorded, it shall be fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration; and in *Poth v. Anstatt*, 4 Watts & S. 309, it is said by Mr. Justice Huston: "To protect the purchaser, however, against an innocent purchaser without notice, the deed must, within six months, be recorded. For his protection, in such case, recording is as essential as proof of sealing and delivery by the grantor would be to protect him against the grantor." And in *Souder v. Morrow*, 33 Pa. St. 83, Mr. Chief Justice Lowrie says: "The act of 1775 requires the recording of both deeds and mortgages, and gives the very law of this case, in fixing the penalty of disobedience. It says they shall be void against subsequent purchasers and mortgagees, if not recorded in proper time and place, unless recorded before the subsequent ones. Here the law was violated in relation to both prior and subsequent ones, but the prior one was first recorded, and therefore the condition on which it was to be void did not arise." And again: "Purchasers ought to know that they have only a conditional title, dependent on the honesty of their vendor, so long as they neglect to record their deeds. They are not safe merely because of the neglect of a former purchaser to record within six months, and of there being no subsequent deed to oppose

them, but because, among several deceived purchasers, they are first to obey the law."

In the present case the court below directed a verdict for defendant below. This was error, because the question whether the plaintiff (the appellant) was a bona fide purchaser, and without notice, should have been submitted to the jury. The contention of the appellant was that he was such purchaser, and he rested it upon the evidence that Samuel Duff held two judgments against Abrams at the time of the conveyance to appellant. One of them was for nearly \$10,000, and the other for \$3,000. That at the time of this transaction they, with interest, amounted to nearly \$20,000. That when appellant took this conveyance from Abrams he revived the larger judgment, and not the smaller one, which was to be held as a stand-off to the conveyance; and that one dollar was the consideration named in the deed, but appellant executed and delivered, when he received the deed, a paper in which he recited the delivery of the deed, and agreed to enter a credit on such judgment for the amount he might realize out of the lands. That Gen. Blakely, who represented Abrams, agreed that the deed should be taken as payment on account of the judgment for the lands, which were estimated to be worth about \$3,500. That the credit has never been agreed upon, as yet. That it ranged from \$3,500 to whatever the lands were worth. That appellant was the son of Samuel Duff, and his general attorney, who attended to his business. Appellees' contention was that the proofs established that appellant was not such bona fide purchaser without notice, and based the contention upon the testimony that the deed of Rush and wife to Abrams, by which the latter became vested with title, was not of record at the time of the conveyance to appellant. That, if appellant had made an examination of the record, he would have found such to be the fact. That the representative of Abrams called his attention to the subject of this conveyance, and he did not in any way examine the title. That he made no inquiry as to any specific deed or deeds. That he had no information of the title, except what that representative told him. That he had no knowledge of the property itself, except that which he learned from such representative. That the consideration was to be a credit on the judgment. That Abrams instructed his representative to get as much credit upon the judgment as he could. That he wanted to get a credit to the full value of the lands. That the agreement made when the deed was executed was that appellant was to take title, and was to credit what he should realize upon those judgments. That no credit has in fact been given, and therefore the transaction was not completed when appellee recorded the deed. That Abrams was insolvent, and the deed was in fraud of the rights of creditors. That, two days after the conveyance to ap-

pellant, he learned of the deed to McClelland, and then placed his deed on record. Without expressing an opinion upon which side of these contentions the weight of evidence lies, it is sufficient to say that the question whether appellant was a bona fide purchaser, and without notice, should have been submitted to the jury; and for this reason the judgment is reversed, and a venire facias de novo awarded.

(159 Pa. St. 264)

SILL et al. v. BLANEY et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

PARTITION — CONSTRUCTION OF WILL — EQUITABLE CONVERSION — UNCERTAINTY OF TITLE.

1. A will directing the sale of land only in case of necessity for the payment of debts does not constitute an equitable conversion of the land, so as to defeat partition.

2. A tenant in common with testator in land cannot defeat partition on the ground that the will constitutes an equitable conversion of testator's interest.

3. A will directing lands owned in common by testator and another to be held for the support of his family so long as its members shall remain together does not create such an uncertainty of title as to defeat partition between the family and the tenant in common.

Appeal from court of common pleas, Allegheny county; J. S. Slagle, Judge.

Action for partition by Anna G. Sill and others against David Blaney, J. C. Smith, and others. There was decree for defendants, dismissing the bill, and plaintiffs appeal. Reversed.

Magnus Pfau, for appellants. John D. Shafer, E. P. Douglass, and John G. MacConnell, for appellees.

THOMPSON, J. This bill was filed for the partition of certain real estate held by the estate of Jesse Sill, deceased, and J. C. Smith, as tenants in common, and was filed by the two surviving sisters of Jesse Sill, deceased, and the trustee appointed under his will. The testator, by his will, directs as follows, viz.: "That the land in question shall not be sold, under any circumstances, unless it should become necessary to sell the same to pay debts, without the consent of my brother and sisters; and if it should become necessary to sell the same the proceeds of the same shall be applied to the support and maintenance of the family, so long as they may remain together, and whatever is left after the separation shall be divided, share and share alike, between my brother and sisters then living;" and also "that my brother Thomas M. Sill shall collect the rents of my share of the real estate, and apply the proceeds to the support and maintenance of the family." At the time of the death of the testator, the family referred to consisted of the mother and three sisters. The mother and one of the sisters have since died, leaving surviving them the appellants, the Misses Sill, as

the family, who still live together in the residence provided for them. The scope of this bill is to effect a partition between the heirs of Jesse Sill, deceased, and J. O. Smith. The right to such partition is denied by the latter, upon the ground that the will of Jesse Sill made an equitable conversion of the real estate, and by the other appellees upon the ground that, as to the land in question, the testator died intestate.

The testator directs that this land shall not be sold, unless it be necessary to do so in order to pay debts, but only with the consent of the brother and sisters, and, in case of sale, that the proceeds shall be applied to the maintenance of the family. As there is thus no absolute direction to sell, there is no equitable conversion of the land. *Bleight v. Bank*, 10 Pa. St. 131; *Stoner v. Zimmerman*, 21 Pa. St. 394; *Anewalt's Appeal*, 42 Pa. St. 414; *Neely v. Grantham*, 58 Pa. St. 433. But the question of equitable conversion, however, concerns all the devisees, and not a stranger, and therefore the appellee Smith cannot make this an objection to bar the right to partition. *Chew v. Nicklin*, 45 Pa. St. 84.

As to the allegation of intestacy in regard to the land in question, made by the other appellees, it may be said that the testator devised by his will his entire estate, and manifestly did not intend that any portion of it should go to nephews or nieces; and therefore, as to this land, he did not die intestate.

But it is said the title here is in dispute, and there is therefore no jurisdiction to decree partition. It is true that a bill for partition cannot be successfully resorted to for the purpose of determining a disputed title. In this case, however, no attempt of this character is made. The appellee Smith has not made it, and the other appellees have not. They, at most, claim to be the heirs at law with the Misses Sill, and, as such, to hold as tenants in common with them. As the testator directed the land to be held for the maintenance of the family as long as its members should remain together as a family, an uncertainty as to those who might survive at the time of the happening of such contingency—all parties having been joined in this action—is not an uncertainty, such as would defeat partition. The appellants are in possession of this land, and if a doubt, as alleged, in regard to their title, is permitted to operate to defer partition until it is settled by an action at law, the delay would be indefinite, and its effect would practically bar partition. Such a doubt, if existing, may, however, be determined in these proceedings for partition. In the case of *Old Man's Home v. Pennsylvania Institution for the Instruction of the Blind*, 17 Wkly. Notes Cas. 171, (decided by the court of common pleas, No. 2, of Philadelphia county,) Judge Mitchell, delivering the opinion of that court in regard to the

question of determining a doubt as to title, said: "In the case now in hand, there are some peculiar difficulties. The mode of determining the title at law is by ejectment. But neither of these parties is in possession, more than the other. Upon which, therefore, shall be cast the burden of admitting itself out of possession, and recovering upon the strength of its own title, in a case which must at all times be open to some doubt?" The doubt was resolved, and partition decreed. With the two sisters, as plaintiffs, are joined the trustee, who, under the will, was appointed to collect the rents, and to apply them to the maintenance and support of the family. The will does not make him a technical trustee, but an authorized agent only to receive and collect the rents so long as the family shall remain together, and apply the same to its maintenance. He had no power to sell, and no title was vested in him; but, even if it was, it would not operate as a bar to partition. *Hayes' Appeal*, 123 Pa. St. 132, 16 Atl. 600. The bill sufficiently avers title in the heirs of Jesse Sill, deceased, in one-half of the land for its severance from the half owned by appellee Smith. Such partition can be made, and the one-half thus held, or the proceeds of the same, in case a sale should be necessary, can be decreed to be held aggregately, as in *Pheips v. Green*, 3 Johns. Ch. 302. It is therefore ordered that the decree dismissing the bill be reversed, at cost of appellees, and that the bill be restored, and partition decreed accordingly.

(159 Pa. St. 146)

KENNEDY v. BAKER et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

INFANTS—RATIFICATION—JUDGMENT—COLLATERAL ATTACK—SCIRE FACIAS—SERVICE.

1. Where an infant takes a deed, and gives back a purchase-money mortgage, and the property is sold under judgment on scire facias on the mortgage, the infant, by bringing ejectment against the purchaser, not only affirms the deed, but the mortgage.

2. A judgment cannot be collaterally attacked on the ground that the service was as though defendant was an adult while she was an infant, the records not showing her infancy.

3. In case of scire facias sur mortgage against an infant, service need not be as provided by Act 1836, § 83, in case defendant in a real action is an infant; section 36 providing that where a writ of scire facias may be issued service shall be as in case of summons in a personal action.

Appeal from court of common pleas, Allegheny county; W. D. Porter, Judge.

Ejectment by Lillian W. Kennedy against William J. Baker and others. Judgment for defendants. Plaintiff appeals. Affirmed.

William C. Moreland and Nathan A. Means, for appellant. E. P. Douglass, for appellees.

THOMPSON, J. The land involved in this ejectment was conveyed to appellant when

a minor of eight years of age, and in part payment of the purchase money she executed a mortgage upon the same. Default, having been made in the payment of the interest due upon it, a scire facias was issued, and returned as served by delivering a copy, and making known to her its contents. On June 30, 1880, a judgment was obtained by default. On July 3d following, appellant, by her father as next friend, filed a petition alleging that because she was a minor the service of the writ was void, and also the judgment by default, and praying to have the judgment opened, and that she be permitted to make defense. This was refused. Subsequently, on July 8, 1880, the land was sold by the sheriff, and purchased by the holder of the mortgage, to whom a deed was duly made and delivered. He accordingly went into possession of it, and he and those who claimed under him, including the appellees, in whom became vested all his rights, have continued so to the present time. On June 24, 1891, the appellant became of age, and on January 12, 1892, she commenced this action for the recovery of the land. These facts were subsequently found by a special verdict, and upon it the court below entered a judgment for defendant. This is assigned for error. The action of the court below rested upon the conclusiveness of the judgment upon the scire facias. The mortgage in question was for purchase money, and the return of the service does not show service upon a minor, but to all intents upon an adult. The principle that the integrity of a judgment of a court having jurisdiction, except for fraud, cannot be questioned collaterally, is so indurated in our judicial policy that citation of authority to support it would seem vain and useless iteration. The appellant, to avoid the effect of it, contends that the jurisdiction was wanting because she was a minor when the judgment was obtained, and the service gave no jurisdiction. The mortgage upon which that suit was brought was given by appellant for the purchase of the land, and simultaneously a deed for the same was executed and delivered to her. The record shows no disaffirmance of this deed, but, on the contrary, she has affirmed it by claiming title under it. She cannot affirm it, and at the same time disaffirm the purchase-money mortgage, made simultaneously. The two are but one transaction.

In 10 Amer. & Eng. Enc. Law, p. 650, it is said: "Where the infant buys land, and gives a mortgage back to secure the purchase money, the two deeds constitute one transaction, and one deed cannot be ratified or avoided without producing the same effect upon the other. This proposition is sustained by *Dana v. Coombs*, 6 Greenl. 89; *Ottman v. Moak*, 3 Sandf. Ch. 431; *Richardson v. Boright*, 9 Vt. 368; *Heath v. West*, 28 N. H. 101." In this ejectment appellant claimed title under the deed, and thus af-

firmed it, and, having done so, she has affirmed the mortgage. The scire facias upon the mortgage has ripened into a judgment. The sale has been made in pursuance of it. As such is the case, she cannot claim under the deed, and at the same time attack collaterally the judgment upon the scire facias.

In *Hartman v. Ogborn*, 54 Pa. St. 120, in which a married woman executed a mortgage that by reason of coverture was void, and proceedings upon it having resulted in a judgment and sale, in affirming the court below for entering judgment for defendant, the purchaser at the sheriff's sale, Mr. Chief Justice Woodward said: "Not only is it a general doctrine of law that the judgments of courts having jurisdiction of the matter cannot be inquired into in a collateral proceeding except for fraud in the manner of obtaining the judgment, but several points have been ruled that are specially applicable to judgments upon scire facias sur mortgage. For example, in *Nace v. Hollenback*, 1 Serg. & R. 540, the assignee of a mortgage, having obtained judgment against the mortgagor and terre tenant in a suit of scire facias, after having become the purchaser of the premises at the sheriff's sale, brought ejectment against the terre tenant, who offered on the trial to prove that the mortgage had been satisfied before the judgment, but his evidence was held to be inadmissible. In *Blythe v. Richards*, 10 Serg. & R. 261, which was ejectment by a mortgagee who had purchased at the sheriff's sale, the defendant was not permitted to show that the scire facias had not been served, nor that the mortgage money for which judgment had been recovered by default had been paid. In *Colley v. Latimer*, 5 Serg. & R. 211, we have the point directly ruled that the validity of a judgment founded upon two nulls to successive scire facias sur mortgage cannot be impeached in a subsequent ejectment. The offer there was to show that the mortgagor was in possession of the premises when the scire facias issued, and therefore was entitled to personal service. But said this court, if the judgment of the court of common pleas was erroneous, it should have been reversed on a writ of error; but, remaining in full force, this court cannot now inquire into any errors which are alleged to exist." The return of the service of the writ in the present case was regular upon its face, and, until set aside, being deemed conclusive, cannot be contradicted in a collateral proceeding. As the record shows a regular return of service, and a judgment in pursuance of it, also regular, the purchaser at the sheriff's sale had a right to assume that the essential averments thus appearing in it were true. *Levan v. Millholland*, 114 Pa. St. 49, 7 Atl. 194. This judgment of a competent tribunal, presumably with proper parties before it, with every intentment in favor of its regularity, is valid, and, until reversed or set aside, continues to be so. *Wood v. Bayard*, 63 Pa. St.

320. The fact that in this case the appellant is shown dehors the record to have been a minor at the date of service cannot be a ground for impeaching it collaterally. The remedy of the appellant was to have it set aside or reversed.

In the case of *Andrews v. Andrews*, 7 Helsk. 234, it is said: "It is insisted, however, that the parties were minors at the time of this proceeding and decree, and this is probably true; but a fact, even that of minority, cannot be shown dehors the record, to show the invalidity of a decree or judgment of a court of competent jurisdiction. The parties had their remedy by direct proceeding by a bill filed to set aside the decree, or by writ of error coram nobis, or by bill in the nature of a bill of review, but they cannot in this way, by answer, defeat the effect of the decree."

In *Smith v. Bradley*, 6 Smedes & M. 485, it is said: "But it is insisted that for the other objections pointed out the decree was void. In decrees against infants it is usual, and, indeed, generally, necessary that a day should be given after coming of age to show cause against it. *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 120; *Fountain v. Caine*, 1 P. Wms. 504; *Pomfret v. Windsor*, 2 Ves. Sr. 484. But how can an infant avoid a decree after coming of age? Only by showing errors in the decree. He cannot reinvestigate the subject-matter of the suit, nor can he redeem mortgaged premises which have been sold. *Mallack v. Galton*, 3 P. Wms. 352. But a decree for the sale of mortgaged premises, instead of a technical foreclosure, is binding on an infant, although no day be given. *Cooke v. Parsons*, 2 Vern. 429. This was a decree of that kind. It was a decree for the sale of the premises on failure to pay the money. If such decrees be binding on infants, it is clear that the failure to appoint a guardian ad litem, and the omission to take a pro confesso, are not such irregularities as will make the decree void. For these reasons the decree probably might have been reversed, but that is not now the question." Again, it is said: "It is not the mere direction of process to the sheriff which gives him power to act. He derives his power from the law, and must act in accordance with its mandate. Being his duty to return process, his returns are to be regarded as made under oath, and are sufficient to justify the court in proceeding to judgment. Whenever service is required to be made in a particular way, if the manner of service is attempted to be set out, it must show that the directions of the law have been complied with. But if a sheriff make his return general, 'executed' or 'served,' a legal service is understood; that is, that it has been served according to law. This is according to the course of the recent decisions of this court; and we see no reason why the same rule should not be applied to the returns made at an earlier day in our judicial history. By

this rule we must hold this return to be sufficient."

Appellant, however, contends that the service was void, because the act of 1836, in section 83, provides that "if any defendant in any real action as aforesaid shall be a minor service of the writ shall be upon his guardian, if he has any, and if he has no guardian then upon the next of kin residing in the county. But in every case in which any such defendant shall not have a guardian as aforesaid it shall be the duty of the plaintiff upon or after the day on which he might take judgment by default against such minor if he were of full age and before any plea pleaded or rule ever taken in the action, to make application to the court in which such action shall be brought for the appointment of a guardian of such minor in that cause; if such minor shall not have appeared by his guardian as aforesaid, and such appointment being made he shall give notice thereof to the person appointed." This section applies to real actions only, and in proceedings of partition, such as *Swain v. Safe Deposit Co.*, 54 Pa. St. 455, it was without doubt the duty of the appellant to proceed in the manner thus directed; but in the same act, in section 36, it is also provided that in every case in which a writ of scire facias may by law be issued it shall be served and returned in the same manner as herein provided in the case of a summons in a personal action; and judgment in default of appearance may be taken at the same time and in the same manner as in the case of a summons aforesaid unless it be otherwise specially provided, and in section 2 it is provided that a writ of summons shall be executed by reading the same in the hearing of the defendant; or by giving notice of its contents and by giving him a true and attested copy thereof; or if the defendant cannot conveniently be found, by leaving him a copy at his dwelling house in the presence of one or more adult members of his family; or if the defendant resides in the family of another, with one of the adult members of the family in which he resides. The act thus gives to the proceeding by scire facias the character of a personal action, and for the purpose of service stamps it as such. If so, the contention of the appellant that this action is to be treated under the act as real for the purpose of service must fail. Judgment affirmed.

(189 Pa. St. 189)

THOMPSON et al. v. McCLEARY, Sheriff, et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

RECEIVERS—RIGHT TO POSSESSION OF ASSETS.

When a company's property has passed into the hands of receivers, subsequent judgment creditors of an agent of the company cannot levy on company property formerly in his possession, on the ground that he had been

held out as a partner, but they can establish any equity in the court which appointed the receivers.

Appeal from court of common pleas, Allegheny county; J. P. Slagle, Judge.

Bill by Henry C. Thompson and Albert H. Harris, receivers of the Northwestern Hardware Company, against William H. McCleary, sheriff, R. B. Ivory, trustee, and George C. Van Kirk, trading as Van Kirk & Co., for an injunction. Injunction granted. Ivory and others appeal. Affirmed.

Hunter, Ivory & Beatty, for appellants. W. B. Rodgers, for appellees.

THOMPSON, J. The special injunction from which this appeal was taken was granted to restrain appellant McCleary, the sheriff of Allegheny county, and appellant R. B. Ivory, trustee in a certain judgment confessed by G. C. Van Kirk, trading as G. C. Van Kirk & Co., from interfering with the possession of certain goods by the appellees, as receivers of the Northwestern Hardware Company, appointed by the court of common pleas No. 3 of Philadelphia county. The bill avers that the company carried on business in Pittsburgh through G. C. Van Kirk, as its agent, whose agency, and his compensation for performing the duties as such agent, are set forth in the agreement, a copy of which is made an exhibit, annexed to the bill; that the merchandise and fixtures in the store conducted by him as such agent are the property of the Northwestern Hardware Company, and passed to the appellees, as its receivers, who were duly appointed; that G. C. Van Kirk confessed a judgment in favor of appellant R. B. Ivory, as a trustee for certain creditors; that execution has been issued upon the same, and the sheriff has taken possession of the goods.

If Van Kirk was such agent as averred, the attempted transfer of the merchandise, etc., by the confession of judgment, without any authority, might call, by injunction, into active exercise, the powers of a court of equity. But it is contended that, the Northwestern Hardware Company having permitted Van Kirk to do business under the name of G. C. Van Kirk & Co., having held out G. C. Van Kirk as a partner, and the creditors having sold goods to him as such without knowledge of the agency, and the said company having dealt with him for the sale and purchase of goods, and G. C. Van Kirk having paid all the checks and clerk hire, and having bought goods upon the faith of his being a partner of said G. C. Van Kirk & Co., the Northwestern Hardware Company, and consequently the appellees, its receivers, are estopped from denying that he was such a partner. It may be that these creditors may hereafter establish an equity which will protect them, but on July 5th, five days prior to the confession of the judgment in question, this merchandise, together with other property of the company, passed into the custody

of the appellees, who had been appointed receivers. Having done so, such possession will not be interfered with by a judgment confessed in a different court and execution issued thereon. In *Robinson v. Railway Co.*, 66 Pa. St. 162, it is said by Mr. Justice Agnew: "It [the property] was in gremio legis, in legal custody, and to permit it to be levied and sold under the process of the court of common pleas would at once raise a conflict of jurisdiction, and interfere with the right of the receiver of the supreme court to manage the property under his appointment. If the property might be taken piecemeal from the custody of the receiver, the remedy of the creditors under the mortgage would become worthless, or at least greatly imperiled. Ample authority has been cited by the defendants in error. If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver, to ask its discharge out of custody, in order that he may proceed against it. For these reasons we think the court below was right in setting aside the levy and execution." Whatever equities, therefore, the appellant trustee for these creditors may have, they can be worked out in the court appointing the receivers, and the learned judge very properly added to his decree: "This decree to be without prejudice to their right to apply to said court for the enforcement of any legal or equitable rights which they, or either of them, may have against said property." Decree affirmed, at costs of appellants.

(159 Pa. St. 346)

IN RE PENNEY'S ESTATE.

Appeal of SMITH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CONSTRUCTION OF WILL—DISTRIBUTION.

Under a will directing distribution "share and share alike," to a sister, one share; to a stepdaughter, one share; and to "each" nephew and niece then living, one share,—each niece and nephew take an equal share with the sister and stepdaughter.

Appeal from orphans' court, Allegheny county.

To an order of partial distribution under the will of Thomas Penney, deceased, John P. Penney filed exceptions, and from a decree sustaining the exceptions Olive J. Smith appeals. Affirmed.

Thomas Penney died on the 18th day of June, 1891, seised of a large amount of real estate and considerable personal property. All his brothers and sisters were dead, except his sister Martha J. Houghton, who is still living. He left, to survive him, a number of nephews and nieces, the children of his deceased brothers and sisters, and a stepdaughter, Olive J. Smith. By the sixth paragraph of his will he devises as follows: "I will that all other real estate or property

I may have at the time of my death shall be converted into cash, and that the balance that shall remain of my estate after paying the above-named legacies and funeral expenses and for a tombstone or a monument shall be distributed, share and share alike, to the following persons, if they are living at the time of my death, namely: To my sister Martha J. Houghton, one share; and to my stepdaughter, Olive J. Smith, one share; and to each of my nephews and nieces then living, one share." The executors having filed the first and partial account in said estate, showing a sum of \$19,456.97 for distribution, the question as to how the residue left after payment of debts and legacies was to be distributed under the terms of said will came up for adjudication. The court, after distributing to legacies and debts, decreed that the residue should be divided into three parts, and distributed, one-third to Martha J. Houghton, one-third to Olive J. Smith, and one-third to the nephews and nieces, by names, of the decedent. John P. Penney, one of the nephews, filed exceptions to the decree of distribution, averring that the court erred in distributing the residuary estate of said decedent to Martha J. Houghton and Olive J. Smith, each one-third, and the other third equally among the nephews and nieces, alleging that, under the terms of the will, the said residuary estate should be divided among said Martha J. Houghton, Olive J. Smith, and the nephews and nieces of said decedent per capita, in equal shares. Upon hearing, the court sustained the exceptions, and made a decree of distribution dividing said residuary estate among Martha J. Houghton, Olive J. Smith, and the nephews and nieces of said decedent per capita. Olive J. Smith, believing that the decree of distribution as originally made was correct, and that the decree should have been made per stirpes, and not per capita, appealed from the decree of the orphans' court.

James Fitzsimmons and L. K. Porter, for appellant. George E. Shaw, for appellee.

MITCHELL, J. The words of the will are, "shall be distributed, share and share alike, to the following persons, if they are living at the time of my death, namely: To my sister M., one share; and to my stepdaughter, O., one share." So far the indication clearly is of a distribution per capita. The other distributees in the testator's mind were his nephews and nieces. Had he mentioned them as a class, "nephews and nieces then living, one share," he would undoubtedly have changed the presumption to be drawn up to this point, and have indicated a division per stirpes. But, as if to avoid this very result, he inserts the dominant word "each;" and makes the bequest, "and to each of my nephews and nieces then living, one share." The grammatical meaning of this clause of the sentence does not

admit of question. The word "each" separates the class into individuals, and is equivalent to the detailed enumeration: "to A., one share; to B., one share; to C., one share;" etc.—for which it was a compendious summary. As well said by the learned court below, had the testator, after directing distribution, share and share alike, to the following persons, then "designated all of the legatees by name, there would be no room for doubt that he intended a per capita distribution." But by the use of the word "each" he did, in effect, designate them all individually, as plainly as if he had inserted their several names. This being the clear grammatical effect of his words, it must prevail, unless there is apparent elsewhere in the will a different intent. This we do not find. The appellant seeks to show such intent by showing a difference in the classification of the beneficiaries with reference to the time of distribution, that to the sister and stepdaughter being directed, "if they are living at the time of my death," while that to the nephews and nieces is to those "then living," which appellant argues means living at the time of distribution, after payment of prior legacies, funeral expenses, etc. This construction would hardly afford sufficient evidence of a different intent, on which to set aside the plain meaning of the other words; but, in fact, it cannot be sustained. The whole distribution in this clause of the will is to be "after paying the above-named legacies and funeral expenses," etc., and it is to be "to the following persons, if they are living at the time of my death, namely," the sister, the stepdaughter, and the nephews and nieces. They are all classed together, to be living at the time of testator's death, and the additional phrase, in regard to "each of my nephews and nieces then living, one share," so far from indicating that they are to take as a class, emphasizes their separate and individual character by the stipulation that each one who is to take shall be then living.

The cases cited by appellant do not afford us much light. Precedents in construing the language of wills, except as to technical or quasi technical phrases in the creation of trusts, or the limitation of estates, where they tend to become rules of property, are of little value. The same words may be used by different testators, and yet, in their context or their connection with other parts, they may have widely different meanings. Wills, like contracts, must be read according to the intent of their makers, and rules of construction are useful only as aids to the ascertainment of the actual meaning. When that is clear, no rule or method of construction can be permitted to override it. A few words, however, may be said in reference to the cases cited. *Minter's Appeal*, 40 Pa. St. 111, is really in favor of the appellee; for, though a distribution, "share and share alike, among the children

of A. and the children of M. and to my sister B.," and "that said B. and the children of my said brothers A. and M. shall have the residue of my estate, share and share alike," was held to mean a division per stirpes, it was on the ground that the two phrases, being somewhat conflicting, left the intent in doubt, and therefore weight was given to the rule of the statute of distributions, and the court added, significantly for our case: "If he meant that his nephews should be each equal to his sisters, the word 'each' would have made his meaning clear." In Baskin's Appeal, 3 Pa. St. 304, testator directed his estate to be "equally divided between all the heirs," and the court held this to mean per stirpes, because the testator had in mind the intestate laws, for the ascertainment of the persons to take, and it would therefore be presumed that the quantum of each was to be ascertained in the same way. In Young's Appeal, 83 Pa. St. 59, a direction that an estate, after his wife's death, "be equally divided between her relations and mine," and in Osburn's Appeal, 104 Pa. St. 637, the remainder "to be equally divided between the heirs of the said Henrietta * * * and the said Harry, each to share and share alike," were held to mean a distribution by classes, upon the ground that such was the testator's intent; and, in reaching that view, weight was given by the court to the use of the word "between," which grammatically suggests two objects only. We do not find anything in any of these cases that changes the view we have taken of the natural and proper meaning of the will under present consideration. Decree affirmed, at costs of appellant.

(159 Pa. St. 299)

JACKSON v. PITTSBURG, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—VERDICT BY DIRECTION.

1. Where material questions of fact are presented by the testimony, it is proper to refuse to direct a verdict.

2. Where, in an action for personal injuries, caused by defendant's negligence, the only questions relate to plaintiff's contributory negligence, and the amount of damages, if any, and the instructions as to contributory negligence are in the language of defendant's points, and so framed as to meet every phase of the testimony, defendant has no cause for complaint.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action by R. T. Jackson against the Pittsburgh, Allegheny & Manchester Traction Company to recover damages for personal injuries received in a collision with defendant's street car while attempting to drive across its tracks, and caused by defendant's negligence. From a judgment entered on the

verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

A. M. Neeper, for appellant. J. S. & E. G. Ferguson, for appellee.

STERRETT, C. J. One of the specifications of error is the refusal of the court to direct a verdict for defendant; the other is to part of the charge. The latter may be dismissed with the remark that, in charging as therein recited, the learned trial judge was fully warranted by the testimony. As to the former, it appears that material questions of fact, clearly for the consideration of the jury, were presented by the testimony, and hence submission of the same to the jury was not only proper, but necessary. To have withdrawn the case from their consideration, as requested by defendant, would have been manifest error. The instructions accompanying the submission of said questions were quite as favorable to the company as it could reasonably ask. Nearly all of them were in the very language of its first six points for charge, each of which was affirmed without qualification.

While the questions of negligence and contributory negligence were both involved in the issue, it was practically conceded that plaintiff's injury was caused by the company's negligence in recklessly running its car at a dangerously high rate of speed. This was so conclusively shown by the testimony adduced on behalf of the plaintiff that the jury could not have found otherwise without discrediting his witnesses. Moreover, the defendant virtually admitted the correctness of plaintiff's contention in that regard by putting in evidence his statement in this case, particularly that part which reads as follows: "Nevertheless, the defendant company, its duty wholly disregarding, so carelessly and negligently operated its said cars that the plaintiff heretofore, to wit, on the 10th day of May, 1892, while driving his wagon with due and ordinary care and prudence across the tracks of said company on Federal street, to wit, at the corner of Federal and Isabella streets, in the city of Allegheny, * * * was run down by one of the cars of said defendant company running over the said defendant company's west-bound track on Federal street, which said car was being run at a rapid and reckless rate of speed, to wit, at the rate of 20 miles an hour. * * * That no notice was given of the approach of said car, the bell not being rung until said car was almost upon said plaintiff." This, as stated by counsel, was "for the purpose of showing that the plaintiff had full notice of the rapid rate of speed at which the car was run, and for the further purpose of showing that before the car reached him the gong was sounded." The right of defendant company to thus prove its own gross negligence for the purpose of showing the danger to which plaintiff exposed himself in attempt-

ing to cross over into Isabella street, etc., must be conceded; but at the same time, plaintiff was clearly entitled to the benefit of the admitted or proved facts, so far as they have any bearing on the question of defendant's negligence. It is evident from what has been said that the only practically open questions in the case were those relating to the alleged contributory negligence of the plaintiff and the amount of damages to which he was entitled, if any. Both of these were questions of fact exclusively for the consideration of the jury, and to them they were fairly submitted, with full and adequate instructions, quite as favorable to the defendant company as it could ask. As to the question of contributory negligence, the instructions were in the very language of the defendant's second to sixth points, inclusive; and these points are so framed as to meet every phase of the testimony bearing on that question. The verdict and judgment are so clearly in harmony with the law and the evidence that the defendant had no reason to be dissatisfied with any of the rulings of the court below. Further discussion of the case is unnecessary. The principles of law involved are so familiar that citation of authorities is not required. Judgment affirmed.

(150 Pa. St. 165)

ROBINSON v. FLOYD et al.

Appeal of SCOTT et al.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

PARTNERSHIP—RETIRING PARTNER—NOTICE—LIABILITY FOR SUBSEQUENT INDEBTEDNESS OF FIRM—DEATH OF PARTNER—EFFECT—STATUTE OF LIMITATIONS.

1. Partners of a banking firm, who sell their interest and withdraw from the firm, cannot, by a mere publication of notice of such withdrawal in a newspaper, relieve themselves from liability for subsequent deposits by one who was a regular depositor for many years prior to such withdrawal; but a partner who gave actual personal notice to such depositor of his withdrawal, within three months thereafter, is not liable for such subsequent indebtedness.

2. Payments made by the bank to such depositor after such withdrawal will be applied first in discharge of such subsequent indebtedness.

3. If a partner gave actual notice to the depositor of his withdrawal, an action brought by the latter against all the partners, more than six years after such notice, to recover deposits due him at the time of such withdrawal, is barred as to such partner by the statute of limitations.

4. Under the partnership agreement, the partnership was not to be dissolved by the death or withdrawal of a member, and could be dissolved only by a majority vote at a meeting called for that purpose; and, if one withdrew by a sale of his interest, there was no authority given the remaining partners to make any promise, or any payment equivalent to a promise, to a creditor. *Held*, that payment of interest by the bank every six months after the withdrawal of such partner, to the depositor, on deposits due him at the time of the withdrawal, did not stop the running of the statute.

5. Since by the partnership agreement the partnership could be dissolved only by a majority vote of the members, the liability of retiring partners who gave no notice of withdrawal, for either existing or subsequent indebtedness to a depositor, was in no way affected by the death of some of the members after their withdrawal, and more than nine years before such action was brought. Thompson, J., dissenting.

Appeal from court of common pleas, Allegheny county; J. W. F. White, Judge.

Assumpsit by Samuel M. Robinson against William Floyd, Thomas Floyd, James W. Arrott, Charles Arbuthnot, C. L. Rose, James Bovard, Thomas M. Marshall, Graham Scott, H. J. Murdoch, Edward House, Joseph Walton, Archibald Wallace, Lewis Peterson, Jr., and C. F. Klopfer, as partners under the firm name of the American Bank. Judgment for plaintiff for want of sufficient affidavits of defense. Defendants Scott, Murdoch, Klopfer, and House, Wilson S. Arbuthnot and another, as executors of defendant Arbuthnot, and J. S. Wallace and another, as executors of defendant Wallace, appeal. Reversed as to defendant Wallace, and affirmed as to the others.

Negley & Millar, J. M. Swearingen, J. S. Ferguson, Geo. E. Shaw, Miller & McBride, and Geo. C. Wilson, for appellants. G. A. Jenks and C. P. Robinson, for appellee.

DEAN, J. The American Bank was a partnership, of which appellants were members, organized April 6, 1869, in a banking and brokerage business in Pittsburgh, Pa. The capital, by the partnership articles, was \$200,000, divided into 2,000 shares of \$100 each. This was all paid up, and certificates of the amounts subscribed and paid by each partner delivered. The business was transacted by a president, cashier, and a board of directors, who were elected annually. While the methods and forms of business adopted were those of a joint stock company or a corporation aggregate, still the members, notwithstanding this, were well aware of their responsibilities as partners, as is shown by the first of the written stipulations of their partnership articles, which is as follows: "And whereas, the stockholders will be individually bound for all liabilities of the company, and are therefore deeply interested in the character, credit, and responsibility of each other, it is especially agreed upon that no person or persons under a legal disability or restriction of personal responsibility, such as married or single women, minors, and those acting in a representative capacity, shall be eligible to hold stock, or to become or remain members, of said company, nor shall any one not fully pecuniarily responsible be eligible to become a member, or, being a member, to remain so." John Floyd was the first president, and was continued in office until his death, October 2, 1881. Then another president, William Floyd, was appointed to the vacancy, and the bank continued business, without interruption, down

to the 25th of November, 1887, when, because of insolvency, it went into the hands of a receiver. Of these appellants, Graham Scott, 10 shares; C. F. Klopfer, 30 shares; C. Arbuthnot, 50 shares; Archibald Wallace, 50 shares,—were original subscribers to the articles of association. Edward House and H. J. Murdoch apparently acquired their shares after the bank had commenced business, for their names do not appear among the original subscribers. Scott sold his shares to John Floyd, the president, 6th November, 1878; Klopfer sold his to John I. House, February 16, 1876; Arbuthnot his, to J. H. Sewell, 4th June, 1875; Wallace first sold 20 of his to John Shipton, then remaining 30 to John Floyd, August 30, 1879; House sold his to John I. House on the 19th of September, 1879; Murdoch sold his, in 1880, to President Floyd. Each of them, after the sale, ceased all connection with the business of the bank as partners. As has been noticed, the president, John Floyd, probably the owner of the largest interest in the bank, subscribing first for 250 shares, and afterwards purchasing others, died October 2, 1881. Others of the original subscribers had died before him. John I. House died January 8, 1879. Samuel M. Robinson, the appellee, commenced depositing in the bank 15th September, 1870, and continued depositing and checking out until the bank failed, in November, 1887. By an agreement he first was to receive 6 per cent. interest on all deposits left for six months; this continued until June, 1875, when the rate of interest was reduced to 5 per cent.; this ran until April 1, 1877, when the rate of interest was reduced to 3 per cent.; and so on to the end. The interest, at the rates agreed upon, was regularly paid him every six months up to the date of the failure of the bank, when his balance was \$21,000. He had drawn out by check, after sale by Arbuthnot and Klopfer of their shares, \$12,441.45. The receiver has paid him, in distribution of the assets, \$6,892.73. After the sale by Wallace of his shares, Robinson deposited \$5,530. On the 18th of September, 1891, almost four years after the insolvency of the bank, the appellee brought suit against these appellants, and those joined with them as partners, for the recovery of the balance yet unpaid,—\$16,369.74. As will be noticed, in the suit brought in the common pleas there are fourteen defendants. Judgment for want of a sufficient affidavit of defense was entered against all of them, but only six—Scott, Murdoch, Klopfer, Arbuthnot, Wallace, and House—prosecute this appeal. The facts tending to create liability as partners are not precisely the same as to all of defendants. The affidavit of defense by Scott admits (1) the formation of the partnership, the subscription and payment of the capital, and his membership interest to the amount of 10 shares. (2) Avers that he sold his stock, by and with the consent of the president and directors, 6th November, 1878; that the same

was transferred on the books of the company, and thereafter his connection with the bank as a partner wholly ceased. (3) That during his connection with the bank he had not held any office therein, and had no share in the management of its business. (4) That he had no acquaintance with Robinson, the plaintiff, nor any knowledge that he was a depositor. (5) That after plaintiff had made deposits, and after deponent ceased to be a member of the firm, several of the partners, at different dates, died, which deaths worked a dissolution of partnership; that this was well known to plaintiff, yet he permitted settlements and distribution of the decedents' estates without presentation of his demand, and now, nine years having elapsed since the deaths aforesaid, he and the other surviving partners have suffered irreparable damage. (6) That by reason of plaintiff's laches he is now estopped from maintaining his action, and, further, not having brought suit within six years from the time his right of action accrued, he is barred by the statute of limitations. In these particulars the other affidavits set up, in substance, the same defense. Arbuthnot, Klopfer, and House, however, further allege that they gave notice of their withdrawal at or about the time of it, by publication in Pittsburgh newspapers. Wallace alleges he gave personal notice of his withdrawal to this plaintiff within three months of the sale of his stock, August 30, 1879.

Taking the averments in these affidavits, and those not denied in plaintiff's statement, to be the truth, the American Bank was, so far as concerned creditors, nothing but a partnership composed of many individuals, among them these appellants. From time to time, some of them sold their stock and withdrew. At the time of the withdrawal of these appellants, and for years before, this plaintiff was a depositor. The partnership, when they retired, owed to him a large amount of money. He could at that time, and within six years thereafter, without question, have maintained this action for the indebtedness then existing. But by subsequent deposits the debt increased. What is their liability with reference to this increase? If plaintiff's contract relations with the bank had commenced after they had ceased to be members of the partnership, and they had given notice of their withdrawal, they are not answerable for the subsequent indebtedness of the partnership, and publication in the newspapers of their withdrawal would have been sufficient notice to him. In *Watkinson v. Bank*, 4 Whart. 482, it is said: "The question presents itself in this case, what is sufficient notice of the dissolution of a partnership, so as to discharge a partner from debts subsequently contracted in the name of the firm without his participation or assent? The rule seems to be that notice of the dissolution of partnership, given in the newspaper printed in the city

or county where the partnership business is carried on, is of itself notice to all persons who have had no previous dealings with the partnership, but, as to persons who have had such previous dealing with the partnership, it is not sufficient." In the 50 years that have passed since that decision, that rule has been invariably applied in this class of cases. So, as to the averments of Scott, Klopfer, and House, of notice by publication in a newspaper, it cannot avail as a defense here against subsequent partnership indebtedness, for this plaintiff had been a depositor from almost the organization of the bank. As to Wallace, who alleges that he gave actual personal notice to the plaintiff of his withdrawal, within three months after August 30, 1879, if that be established by proper proof, his liability for any increase of indebtedness after that date was gone. We cannot ascertain, from the statement of claim and admissions in the affidavit, what was the exact indebtedness at that time. Appellee's counsel, in his argument, undertakes to establish, from the copies of books and other evidence, that there was no substantial change after that in the total of the indebtedness; that, although plaintiff made deposits afterwards, the checks paid about equalled the amount of such deposits, and must be charged against them, thus leaving the debt about the same as when Wallace withdrew. If it be the fact that there was, by the subsequent dealings, no change in the amount of the indebtedness, then the fact of payments having been made on Robinson's checks would not lessen Wallace's liability when he withdrew. The new indebtedness having been incurred by the partnership when Wallace was not a member of it, payments made, covering the same period, would be applied in discharge of such new indebtedness. *Christy v. Sill*, (Stockdale v. Maglom,) 131 Pa. St. 492, 19 Atl. 295, and the authorities therein cited, we think, clearly rule this point in favor of plaintiff. Whether the indebtedness continued the same is a question of fact, incapable of certain determination from this record. The inferences drawn in the argument by counsel for appellee may be correct. We cannot say, however, they are indisputably warranted from the averments in plaintiff's statement, and the admissions and averments in the Wallace affidavit. But, in the view we take of this case, if there was actual notice, and defendants persist in their plea of the statute of limitations, this question is immaterial. The case must go to the jury on the question of actual notice; and this, without regard to the plea of the statute. If, then, the jury should find the fact of actual notice, the statute would avail, so far as concerns Wallace, to defeat a recovery; if they should find there was not actual notice, Wallace's case would stand on no better ground than the others. The question of actual notice was not present in the case of *Camp-*

bell v. Floyd, 153 Pa. St. 84, 25 Atl. 1033, and the cases argued with and ruled by that opinion, all of which arose out of this same partnership. Wallace swears that, when he sold his stock, he gave actual personal notice to this plaintiff, and thereafter had no further connection with the bank, and no one was authorized to act for him with respect to this business. In his denial of authority to the remaining partners to act for him, he is corroborated by the agreement or articles of copartnership. His withdrawal did not effect the dissolution of the partnership, with all the legal consequences which generally follow such an event in business partnerships. It was not a cessation of business and dissolution by consent of all the members, or dissolution by the expiration of the term fixed in the articles, or a dissolution such as finally did take place, when the receiver was appointed. In either of these cases, active management is continued beyond the date of dissolution only for one purpose,—winding up the business; that is, realizing on assets, the collection of debts due the partnership, and the payment of debts owing by it. It was not intended the withdrawal or death of a member should operate as a dissolution in fact. So far as they could, by agreement, give it a perpetual existence, that was intended. Notice these stipulations in the articles: "The company reserves the right, for any cause whatever, to dissolve its connection with any one or more of its members by a resolution of the board to that effect; and no member or members, short of a majority of the votes at a meeting called for that purpose, shall have power to dissolve the company, or cause dissolution or winding up of its affairs." Then follow most minute details of a method of compensating any party who wishes to sell his stock and withdraw, or who has been "exscinded" from membership, and then this stipulation: "And it is distinctly understood, and fully agreed upon, that no party or parties shall be able to effect a dissolution of the company by any proceedings at law or equity, but the mode or manner of any change in the parties or their interests shall be accomplished as hereinbefore provided;" that is, by a majority of the members at a meeting called for that purpose. Then it was provided, in case of the death of a stockholder, his heir or legal representative, with the consent of the board, could become a member. As between themselves, by their agreement, there could be no "dissolution," in the usual sense of that term, except by a majority vote at a meeting called for that purpose; the partnership never was to cease business and be wound up in any other way. As the agreement expresses it, a partner might, by resolution of the board, be "exscinded,"—that is, cut off,—or he might, by consent of the partnership, dispose of his interest and withdraw, or he might die; but in neither case was this

to affect the continued life of the partnership. Therefore, the distinction which the law makes between the powers of liquidating partners and surviving partners only to a limited extent is applicable here, for the remaining partners were to immediately settle up nothing with any of the creditors; otherwise, the payment of depositors would have closed the bank every time a member sold out his interest or died. In fact, under the agreement, although the financial responsibility of the partnership could be changed, the withdrawal of a member in no way impaired its paid-up capital. He did not draw his share of this out of the bank when he sold. He got his money from the buyer, who took his place as a member of the partnership.

Assuming, then, as a fact, which is disputed by plaintiff, that Wallace gave him personal notice that he had sold out and withdrawn, what knowledge is necessary to be imputed to Robinson from the fact of notice? It is not disputed by appellants that Robinson, from time to time, knew he could make no assertion of liability against Wallace for subsequent deposits, and for the existing liability his demand must be preferred within six years, unless the statute was tolled. This suit was not brought for more than nine years after the right of action accrued, and the statute is pleaded in the affidavit. To this plaintiff replies interest was paid afterwards on the balance, every six months, by the partnership, and this tolled the statute of limitations. But then plaintiff is met by this fact: As between partners, by their articles, if one withdrew by a sale of his interest, there was no authority, either express or implied, to the remaining partners, to make any promise, or any payment equivalent to a promise, to a creditor. He (the partner) had no further interest in the assets or business of the company; he could not call on them to account, nor they on him for contribution. Robinson knew, when he commenced his deposits, the bank was a partnership. Prior to the notice, Wallace's liability depended on the fact of his being a partner, and not on Robinson's knowledge of the fact; but, when he got the notice, he knew, as a fact, Wallace had been one, had sold out, and was no longer a partner. He knew, too, that there was no dissolution in fact, but only a severance of Wallace's connection as a member. He knew the bank continued in business for years afterwards, for he continued to do business with it just as before, with no change in the accounts, and no indication of a desire on the part of either depositor or bank to settle up and pay the old accounts, or to transfer them to a new partnership. He knew, as well as the bank did, it was not liquidating accounts. He probably would not have permitted his money to remain for years with the liquidat-

ing partners of a dissolved partnership, nor have deposited more money with them. If he was notified by Wallace of the sale of his interest, the necessary, reasonable inference is he knew Wallace had no further interest in the old assets any more than in the new business; that he would confer on his copartners no authority to acknowledge and promise to pay an old debt, for, as between the partners, he owed none. He knew, from the notice, that from that time Wallace disclaimed all liability for either old debts or new ones. If he intended then to stand on his legal right as against Wallace, he should, by legal method,—by suit within six years,—have enforced it. On the exceptional facts presented in this case, it seems to us the conclusion must follow, that if the notice were given, then the plaintiff knew there was no authority in the remaining partners to toll the statute, and, as he brought no suit within the six years, as against Wallace he cannot recover.

As to the other five appellants, three of them allege they gave notice by publication of the sale of their respective interests. As already seen, such notice was not sufficient to relieve them from liability. As to the two others, notice of any kind is not alleged. But as to all of them it is alleged that the deaths of John Floyd, October 2, 1881, and of others, worked a dissolution of the partnership by operation of law; that death *ipso facto* dissolved the partnership. It may be conceded this worked a change in the partnership so far as concerned its personality, and the law presumes notice of the fact of death to plaintiff. But this, in the face of this agreement, in no way affected the liability of the surviving members, for by their agreement it was not to affect the partnership, and, as to existing creditors without notice, all were surviving or continuing partners, without regard to the fact of withdrawal. Death the law presumes equivalent to actual notice. Thereafter the creditor could not hold the deceased partner's estate answerable for new indebtedness, nor, except within the statutory period, for the old. But these appellants neither died nor gave actual notice of the severance of their relations with the partnership. Nor was presumptive notice to the creditor, of the severance of one partner's connection by death, any notice to him that some of the living ones had withdrawn. As between them and this creditor, they continued to be partners, and are therefore answerable for all business transactions of the firm during their actual and presumptive membership.

The questions here raised by appellants, and now decided, were not directly passed on in *Campbell v. Floyd*, *supra*, because they were not necessary to a decision of the cause. There was no positive averment of actual personal notice to the creditor by the retiring partner of the sale of his partnership

interest; nor was the dispute between the representatives of a deceased partner and a creditor, in which case notice of the severance of the deceased partner's connection with the firm would have been presumed. As to those retiring without notice, they were held, as to past indebtedness, to be sureties for the partnership, which assumed payment of the common obligation. This was the most favorable view which could have been taken of the case for defendants on the facts in that issue, and in that view the decision was against them. That judgment was right, but it seems to us a more clearly defined ground, sustained by a long line of well-considered decisions, from *Watkinson v. Bank*, supra, down to *Clark v. Fletcher*, 96 Pa. St. 416, is that upon which we base the present judgment.

The argument of the learned counsel for appellants as to the intolerable hardship to retiring partners in holding them up to such a measure of liability, and that no partner, under such a rule, can retire with safety without a cessation of, and a complete winding up of, the business, we have fully considered. It does not seem to us that their inference of hardship is warranted by the facts in this case, or by the law applicable to the facts. In partnerships other than banking, it has always been understood that, in case of a retiring partner with the assumption of existing indebtedness by the new firm, actual notice must be given to all creditors of the old firm of the change, if the retiring partner wishes to clear himself of continued liability. The perils attending a banking copartnership, such as this, may be—doubtless are—greater than in any kinds of business. There is probably more risk incident to the care of other people's money than of one's own; but this is no reason for relaxing well-established rules of law for the protection of the public. In the case before us, a copartnership was formed by many individuals for profit. In the minds of a large part of the public, a voluntary banking partnership, with individual responsibility, is safer than one where the members are associated as a corporation. Not seldom the partnership holds out to the public, as an inducement to favor, this individual liability. On the faith of it the depositor intrusts the partnership with his money. He does this, not only on the faith of the paid-up capital, but also, it may be assumed, on the good character, business capacity, and individual wealth of the copartners. He has all these as security for the repayment of his money. It may be considerable inconvenience to the retiring partner, but it is certainly no great hardship, to hold that he shall give actual notice of withdrawal to all who have trusted the partnership because of his connection with it; otherwise, he shall remain answerable to those who have a right to believe him still a member. On such notice of with-

drawal, the creditor, if he sees proper, can also withdraw. If the partner does not give such notice, then, as he was there when confidence was reposed, he must be there when the money is wanted by the creditor. For those who desire to do a banking business, which invites the custody of other people's money, yet do not wish to subject themselves to a greater responsibility than equals their contribution to the paid-up capital, the corporation laws of the United States and of this commonwealth furnish every facility.

The judgment as to Archibald Wallace is reversed, one-sixth the costs to abide the event, and as to him a procedendo is awarded. As to the other appellants, the judgment is affirmed.

THOMPSON, J., (dissenting.) The appellants, in their affidavits of defense, invoke the protection of the statute of limitations. The dormant nature and character of the demand fully warranted them in seeking to secure from it the repose contemplated by the statute. This suit was brought by appellee against appellants, as partners doing business as the American Bank, for the recovery of money received by the bank from time to time, commencing in 1870, and upon which interest, first at 6 per cent., subsequently at 5 per cent., and finally at 3 per cent., was paid. The partnership, organized to conduct a banking and brokerage business, was formed by articles of association, in which it was provided that shares of stock were to be issued, each share to be entitled to one vote; that transfers of shares were to be made with the consent of the board of directors; and that withdrawals were to be permitted upon valuation. From the character of the partnership, each sale of stock, and the transfer of the same to the vendee, with the consent of the board of directors, practically operated to create, in each instance, a new partnership. The new firm, with its new members thus created, became liable for its debts, while the old firm continued liable for its indebtedness. The death of a member dissolved the partnership, and upon such dissolution, although some of the partners then created a new partnership to carry on the business, the members of the old firm were liable only for the existing debts of such firm, and not for those of the new firm. Appellants, who had been shareholders, sold their shares upon the following dates, and to the following persons, viz.: Charles Arbuthnot, 50 shares to J. H. Sewell, a stockholder, June 4, 1875; C. F. Klopfer, 30 shares to John I. House, a stockholder, February 16, 1876; Edward House to John I. House, September 19, 1876; Archibald Wallace, 20 shares to John Floyd, president and stockholder, August 30, 1879; Graham Scott, 10 shares to said John Floyd, November 6, 1878; H. J. Murdoch, 10 shares to said John Floyd, in 1880. Thus, at these re-

spective dates, these appellants severed their partnership relations, and their vendees became the new partners. John Floyd, the largest stockholder, died October 2, 1881. In 1887 the bank became insolvent, and in 1891 this suit was brought. The death of John Floyd, in 1881, dissolved the partnership, and its members became then liable for its debts. That was the *punctum temporis* when the statute of limitations began to run. After it thus began to run, a partner could not, by a promise, take the claim out of the statute. By the dissolution the authority to do so ceased. Even conceding that those withdrawing had not relieved themselves, as to existing customers of the bank, by a proper notice, yet the death of Floyd caused a dissolution, and certainly, as to those who had previously withdrawn, the statute then began to run, for they never became partners in the new firm that continued the business of the old. In *Reppert v. Colvin*, 48 Pa. St. 252, it is said by Mr. Justice Read: "The law is well settled that, after dissolution of a partnership, the partners cease to have any power to make a contract in any way binding on each other. The dissolution puts an end to the authority, and operates as a revocation of all power to create new contracts. Of course, a new promise, of which the original debt is only the consideration, by a partner after the dissolution of the co-partnership, will not take the debt out of the statute of limitations, so as to make the co-partners liable." It will be conceded that the statute bar can only be removed by one who has authority to do so, and that, when a partner is authorized to liquidate, he is clothed with such authority. A partner who takes the assets of his firm for the purpose of liquidating may, without doubt, make an acknowledgment or an express promise which would take a debt out of the statute. This springs from the duty he has assumed with regard to the assets, and their application to the payment of the debts of the firm. In *Wilson v. Waugh*, 101 Pa. St. 237, it is said by Mr. Justice Green: "In *Levy v. Cadet*, 17 Serg. & R. 126, and in many cases since, it was held that, after dissolution of a partnership, one partner cannot by his acknowledgment revive a partnership debt, so as to deprive the other partner of the benefit of the act of limitations. It is also true, however, that this rule is subject to the exception that one who is a liquidating partner may, after dissolution, bind his former partner by either an acknowledgment or an express promise to pay, so as to take the debt out of the statute."

When, therefore, the death of John Floyd caused a dissolution of the firm, unless the surviving partners were made liquidating partners, the statute bar continued. While the appointment of a liquidating partner need not be express or specific, it may be inferred from acts done in liquidation with the consent or the knowledge of the former

members. The authority to act as liquidating partner must, however, spring from express authorization or an implied assent. When so established, its purpose is to wind up the affairs of the firm. In the present case there is nothing to warrant the conclusion that the appellants had any knowledge of, or in any manner assented to, the appointment of any liquidating partners. When John Floyd died, in 1881, three of the appellants, for a period exceeding five years, had ceased to have any connection with the partnership, and had given notice by publication of their withdrawal, and one for a period of two years, who had given appellee personal notice of his withdrawal, and the others for over one year. They have not in any manner or form, directly or indirectly, given any authority to their former partners to act as liquidating partners, and have not expressly or impliedly assented to any liquidation by them. When he died, liquidation of the dissolved firm was not undertaken. While he had a large estate, amounting to \$250,000, which has been since distributed, no suggestion appears to have been made in regard to any liquidation. The firm succeeding that dissolved by the death of Floyd carried on the banking and brokerage business, and in no manner acted as liquidating partners of the dissolved firm. Whatever liability may have existed in regard to appellee's claim against the old firm, instead of a liquidation there was, as to the succeeding firm, a clear and distinct novation. The articles of agreement, so far from changing the law of the case, only make it more emphatic. The agreement is meant to prevent liquidation, and provide for a continuance of the business without a break, so far as customers are concerned. As to the rights of the partners *inter se* it binds them, so far as an agreement can, not to bring about a dissolution except in the way specified, but it has no such provision as to death. In such event, the agreement says, "the heir or legal representatives may, by consent of the board, become a member." Without such consent he is not a member, and with it he becomes, by virtue of it, only a member, not of the old firm, but of the new. It is manifest that the appellee so understood it, because he received interest from such new firm, and claimed a dividend from the proceeds of its assets. One of the affidavits of defense avers a novation, for it states "that, not only did the plaintiff continue to transact business with this bank for a period of eleven years after said affiant had sold all his interest therein, but, as your affiant is advised and believes, and expects to be able to prove on the trial of this case, he did this with a full knowledge of the fact that this affiant had sold and transferred his interest in said bank, as hereinbefore stated; and, after having said knowledge, the said plaintiff agreed to

leave his money with the new partnership, * * * and that the said new partnership actually paid to the plaintiff, at various times and dates after September 19, 1876, for the use by said new partnership of said money, interest at the rate of three per centum per annum; and even down as late as October, 1887, the plaintiff continued his loan of said money to the new partnership, upon the same terms, and at the same rate of interest, as he had loaned the money at and after September 19, 1876, to the said new partnership." The fact that the firm composed of persons who had been members of the old firm might eventually pay this indebtedness is no foundation for the conclusion that the partners in such firm were acting, in regard to it, as liquidating partners of the old firm. They were not appointed as such, and their action as liquidating partners in regard to this indebtedness was not known or assented to. The members of the new firm themselves, it seems, had no knowledge of it, and it is without question that the other alleged partners of the old firm (the appellants) never had any knowledge or suspicion of it. If they did not assent to the appointment of liquidating partners, clearly, as to them, none were appointed, and therefore there was no authority to remove the statute bar. Statutes of limitation are statutes of repose, and, while there may exist a natural prejudice against a resort to them, they are justly regarded as wise laws, intended to defeat dormant and stale demands, which time has stamped with suspicion and doubt. They impose no hardships, because they exact a moderate degree of diligence in the enforcement of just and legal claims. The claim in the present case properly comes within their intentment. For several years prior to 1881, appellants ceased to be partners, and in that year the partnership itself was dissolved. No liquidation took place, and no claim was made against the estate of John Floyd, who was the owner of one-half of the stock, and none made against appellants until 1891, 10 years after the dissolution, and from 11 to 16 years after they had ceased to be partners. Appellee, in the mean time, received interest from the new firm up to 1887, the date of its failure, and doubtless was in utter ignorance of any claim against them. The claim, in my opinion, has no substantial merit to support it, and the statute should bar a recovery, because, in the absence of liquidation, the partners could not remove that bar, and because the affidavits of defense contain sufficient averments denying the appointment of liquidating partners with power to do so, and their appointment is thus a question of fact, which should be sent to a jury, and be determined by it. I am therefore of the opinion that this judgment should be reversed, and a procedendo awarded.

BECHTOLD et al. v. READ et al.

(Court of Chancery of New Jersey. Aug. 16, 1893.)

EXECUTORS—SETTLEMENT AND ACCOUNTING—ALLOWANCE OF CREDITS—EVIDENCE.

1. An executor who has bought in testator's lands at a sheriff's sale thereof, and who afterwards conveys such lands, is chargeable with the purchase money, and interest thereon from the date of the conveyance.

2. Executors who join in executing a conveyance of testator's lands are jointly chargeable with the proceeds of the sales, where it does not appear how much each received.

3. Where one executor alone executes a conveyance of lands, and receives the proceeds of the sale, it is error to charge all the executors jointly with such proceeds.

4. Where an executor buys in testator's lands at sheriff's sale, and afterwards reconveys them, the amount which he paid for lands is not the measure of his liability on his accounting to the estate.

5. Executors are not chargeable with expenses incurred by them for work done in the interests of the estate.

6. On an issue whether an executor should be credited with \$518 alleged to have been paid to one R. on account of the estate, it appeared that, on the day that the check for that amount bore date, such executor paid R. \$75, for which he had a voucher; that he had an account book in which he posted all vouchers for payments on account of the estate; that he had no voucher for payment of the \$518, and that he presented no claim for its allowance till 20 years after the check was drawn. *Held*, that the master erred in crediting him therewith.

Bill by Henry Bechtold and others against Nathan S. Read and others for an accounting. Heard on exceptions to a master's report.

For facts not appearing in the report, see *Bechtold v. Read*, 22 Atl. 1085.

The following are the master's report and the exceptions filed thereto:

"In pursuance of an order of this court in the above stated cause, made on the 11th day of February, 1892, by which it was ordered that it be referred to Carroll Robbins, one of the masters of this court, to take and state an account of the executors under the last will and testament of Samuel Bechtold, Jr., deceased, with the devisees and legatees under said will, of all and singular the real and personal estate of the said decedent which has come to their hands, possession, or control as executors, and for all of such estate with which they are by law chargeable, crediting them with so much thereof as was actually disposed of in the payments of debts and the proper and necessary expenses of the settlement of the estate; and to charge the said Nathan S. Read with all moneys received by him in cash or upon the maturity of any promissory notes taken and retained by him upon the sale of any of the real estate of said testator; and to charge the said Wallace Lippincott with the amount of moneys received by him upon the maturity of any promissory notes given for the purchase of any of the real estate of said testator, and which notes came to the hands of the said

Lippincott as executor as aforesaid; and to report what lands remain unsold of said decedent's estate, and what lands were conveyed to said Lippincott at the sale under the Barnes judgment, and in whose name the title to said lands now is, and, if any portion of the said lands be now owned by bona fide purchasers, what portion; and, further, to report what lands of said decedent's estate are held by said executors, or either of them, or by any persons for them, and what lands of said estate have been sold to bona fide purchasers for valuable consideration, and what was the consideration of such sales, —I, the said Carroll Robbins, do respectfully report that, having duly notified the said parties to said suit, I was attended at my office in the city of Trenton by Edwin Robert Walker, Esquire, and William C. Mayne, Esquire, of counsel with the complainants, and by the said defendant Wallace Lippincott and Charles E. Hendrickson, Esquire, his counsel, and by the said defendants Nathan S. Read and Walter A. Barrows, Esquire, counsel for himself and said Read, on the 29th day of July, 1892, and, by adjournment from time to time, at sundry times thereafter; and that in their presence I have taken the depositions of witnesses produced before me, which accompany this report and make a part thereof, and I have considered of the matters referred to me. I have ascertained what lands were conveyed to said executors by Joseph F. Burke by deed dated January 28, 1870, and also which of said lands were conveyed by said executors, and also those of which the legal title still remains in said executors, all of which appears in detail in Schedule A, hereto annexed. And I have also ascertained what lands were conveyed by the said executors to Alexander Rhodes without consideration, and which of said lots were conveyed by him to said Lippincott, and which have been conveyed by said Lippincott to bona fide purchasers, and also those of which the legal title still remains in said Rhodes, and those of which the legal title still remains in said Lippincott, all of which appears by Schedule B, annexed hereto. And I have ascertained what lands were conveyed to said Lippincott under the Barnes judgment, as will appear by Schedule C, hereto annexed; and I also find that the said Lippincott has conveyed the greater part of said lands, if not all, to bona fide purchasers; but I am unable to report what lands, if any, remain, because most of the lands were described by lot numbers in the conveyance from the sheriff to Lippincott, and most of them were described by metes and bounds in the conveyances made by Lippincott, and the evidence does not enable me to make a satisfactory comparison. I have also ascertained what lots were comprised in the Leach mortgage, which of them were conveyed to said Read, which of them he has conveyed, and which of them he still holds the title to, as will appear particularly in

Schedule L, hereto annexed. I have also taken and stated the accounts directed by the said order to be stated, and have stated the same in schedules hereto annexed, which I pray may be considered as part of this, my report; and in taking the said accounts I have ascertained the amount of moneys received by the executors from the sale of lands conveyed by them prior to April 1, 1875, to bona fide purchasers, by taking the considerations mentioned in the several deeds made by the said executors to the purchasers, except in the case of the deed to Henry R. Lewis, in which case I found the amount actually received from said sale to have been thirty dollars, which was a fair value for the lands conveyed to said Lewis, and that the total amount received from said sales was the sum of four thousand and thirty-six dollars and fifty cents, as appears more fully by Schedule D, hereto annexed, which schedule also sets forth in detail the dates of the several conveyances and descriptions of the lands conveyed, the names of the grantees, and the places where they are recorded. And I do further find and report that the said Nathan S. Read received the proceeds of said sales, and delivered the deeds, in almost every instance, and that said Lippincott received from purchasers directly, and from the said Read on account of said sales, the sum of fourteen hundred and nineteen dollars and fifty cents, (\$1,419.50,) and the said Read retained the balance of twenty-six hundred and seventeen dollars; and I base this finding on the account filed by said Lippincott in the orphans' court of Burlington, accredited, as it is, by the subsequent action with respect thereto of the said Read in the later proceedings in said court with respect to the estate of Samuel Bechtold, Jr.; but I am unable, from the evidence produced before me, to specify accurately, in more than a very few instances, how much each of said executors received from each of said sales in particular, and therefore have not attempted to do so. And I do further find and report that a part of the said lands conveyed by said executors, as particularly set forth in said Schedule D, had been conveyed by the said decedent in his lifetime, and were not a part of his estate, to the amount of five hundred and seventy-two dollars and seventy-four cents, (\$572.74,) as will appear more particularly by Schedule E hereto annexed, which schedule also sets forth the dates of said conveyances by said Samuel Bechtold, Jr., the grantees, a description of the lands, and the places where they are respectively recorded, and the amount allowed in each instance on account thereof; but I am unable to decide from the evidence before me which of said executors received the consideration for the last-mentioned lands when conveyed, or attempted to be conveyed, by the said executors. And I do further find and report that each of said executors, Lippincott and Read, received the further sum

of two hundred dollars from the sale of lands to C. J. Schwalber on December 5, 1888.

"And in stating the account of the said Nathan S. Read individually with the said decedent's estate I have charged him with the said sum of twenty-six hundred and seventeen dollars received and retained by him as part of the proceeds of the sale of lands conveyed by the said executors as of the 1st day of April, 1875, and the further sum of two hundred dollars received by him from the said sale to Schwalber on December 5, 1888, with interest thereon from that date; and I have credited him with the sum of three hundred and seventy-one dollars and thirty-two cents, being his proportional part of the said sum of five hundred and seventy-two dollars and seventy-four cents, allowed to the executors for lands conveyed by them which did not belong to the decedent's estate; and I have also allowed him for all disbursements and allowances claimed by him, except commission as executor of the said estate, treating all debts and credits prior to April 1, 1875, as of that date, and charging interest on the balance then due from that time, and also allowing interest on all disbursements made since April 1, 1875; and I do find and report that the said Nathan S. Read is indebted to the said estate, on his individual account, in the sum of one thousand three hundred and seventy-five dollars,—all of which appears more at length in Schedule F, hereto annexed. And in stating the account of the said Wallace Lippincott individually, and jointly with the other executors, I have ascertained the amount of disbursements made by him, and I do find and report that the said Lippincott has made disbursements, and is entitled to credits and allowances, to the amount of eight thousand two hundred and fifty-three dollars and seventy-one cents, (\$8,253.71,) which appears in detail by Schedule G hereto annexed; and in making such statement I have given said Lippincott credit for all items and allowances claimed by him excepting commissions and the item of September 12, 1871, 'Judgment, Jackson, \$160.00,' in his account filed in the orphans' court of Burlington county which I find was a needless disbursement, and not made for the benefit of the estate. And in further stating the account of the said Wallace Lippincott individually with the decedent's estate I have charged him with the said sum of fourteen hundred and nineteen dollars and fifty cents, (\$1,419.50,) received by him from the sale of lands of said estate as of the 1st day of April, 1875, and the further sum of one hundred and nine dollars and eighty-five cents, (\$109.85,) as of the last-mentioned date, as the part of the consideration received by him from the Schwalber deed on December 5, 1888; and I have credited him with the sum of two hundred and one dollars and forty-two cents, being his proportional part of the said sum of five hundred and seventy-two dollars

and seventy-four cents, allowed to the executors for lands conveyed by them which did not belong to the decedent's estate; and I have also credited him with the sum of thirteen hundred and twenty-eight dollars and ninety-three cents on this account, out of the disbursements made by him, and contained in Schedule G, which balances the said account; and I do find and report that the said Wallace Lippincott is not indebted to the estate on his individual account,—all of which appears more particularly in Schedule H, hereto annexed. And I do further find and report that the said executors are jointly liable to the said estate in the further sum of five thousand nine hundred and ninety-two dollars and forty-eight cents, as will more fully appear from Schedule I, hereto annexed; and in stating the account of the three executors jointly I have charged them with the full amount of the inventory filed by them, (\$8,525.50,) and with the value of the lands conveyed to Lippincott under the Barnes judgment, which I find to have been nine hundred and eighty-six dollars, which values are particularly set forth in Schedule C, hereto annexed; and also with the value of the lands conveyed by them to Alexander Rhodes, and which are no longer held by said Rhodes or said Lippincott, which I find to have been three hundred and thirty-three dollars and fifty cents, which values are particularly set forth in Schedule J, hereto annexed; and also with the value of the lands conveyed by them to Charles Gaskill, which I find to have been two hundred and forty-nine dollars, which values are particularly set forth in Schedule K, hereto annexed; and with the value of the lots conveyed to Nathan S. Read under the foreclosure of the Leach mortgage, which I find to be seventeen hundred dollars; and with the value of the lots conveyed to Alfred P. E. Taylor, which I find to have been twenty dollars. And in ascertaining the values of said lands conveyed to Lippincott under the Barnes judgment, and by the said executors to Rhodes, Gaskill, and Taylor, I have taken the average of the values at times between 1870 and 1875, inclusive, as testified to by the different witnesses, adding interest from April 1, 1875, on the balance against the executors at that time; and in the case of the house and lot where the decedent lived, which was conveyed to Lippincott under the Barnes judgment, I have found the value thereof to have been five hundred dollars, and the value of the interest therein sold to Lippincott to have been four hundred dollars; and, as to the lands conveyed to Read under the foreclosure of the Leach mortgage, I have taken, as the value thereof, the price paid by the said Read to the sheriff at the foreclosure sale in May, 1889, which was but a short time after the executors parted with the said mortgage. And I have credited the said executors with all disbursements made by the said Wallace Lippincott over and above the part thereof

credited on his individual account, (Schedule H,) and with all the personalty included in said inventory, except the bond and mortgage of said Nathan S. Read, as having been taken and sold on executions against said decedent; and I have also credited them with the sum of four hundred and thirty-four dollars, as the loss or reduction from the inventory value to be allowed on said bond and mortgage. The several schedules hereinbefore referred to as hereto annexed and making part of this report are marked, respectively, from A to L, inclusive. All of which is respectfully submitted this 22d day of March, 1893.

"Carroll Robbins,

"Master in Chancery of N. J."

"Now come the above-named complainants by their counsel, and except and object to the master's report as filed in the above case, this twenty-fourth day of March, in the year eighteen hundred and ninety-three. First exception: For that the master has erred in not certifying in said report the prices obtained by Lippincott upon the resale of lots obtained by Lippincott under what is called in the pleadings the 'Barnes Judgment.' Second exception: For that said master has erred in not certifying in said report the gross amount of moneys thus received by Lippincott under the resale of lots obtained by him under the Barnes judgment, and charging Lippincott in his individual account therewith. Third exception: For that said master has erred in not charging the said executors jointly with the consideration expressed in their deed to Henry R. Lewis, as referred to by said master in Schedule D, annexed to his report. Fourth exception: For that said master erred in certifying in said report that said Lippincott had made disbursements to the amount of eighty-two hundred and fifty-three dollars and seventy-one cents, as detailed in Schedule D, annexed to said report. Fifth exception: For that said master erred in crediting Lippincott, in Schedule G of his report, with the sum of thirteen hundred and twenty-eight dollars and ninety-three cents, and in certifying in said report that said Lippincott is not indebted to said estate on his individual account, as set forth in Schedule H, annexed to said report. Sixth exception: For that said master erred in certifying in said report that said executors are chargeable with the value of the lands conveyed to Lippincott under the Barnes judgment, whereas the testimony shows that said Lippincott individually received all the profits on a resale of said lands to divers persons, as set forth in the testimony. Seventh exception: For that said master erred in charging said executors in said report with the lands conveyed by them to Alexander Rhodes, whereas the testimony shows that Lippincott received all the profits on this transaction by sales of these lots to divers persons, as set forth in said testimony. Eighth exception: For that

said master erred in reporting that the value of the lands obtained by Lippincott under the Barnes judgment was only nine hundred and eighty-six dollars, whereas the testimony shows that Lippincott received a much larger sum for the resale of these said lots. Ninth exception: For that said master erred in reporting the value of the lots conveyed by the executors to Rhodes at three hundred and thirty-three dollars and fifty cents, whereas the testimony shows that Lippincott received a much larger sum of money from the resale of these lots, and by reference to his own testimony he admitted that he received over one thousand dollars therefor. Tenth exception: For that said master erred in not reporting that Read acquired, under the foreclosure of what is called in the pleadings the 'Leach Mortgage,' the legal title to 513 lots, and that these lots, with the exception of thirty-seven, are still in the possession and under the control of said Read. Eleventh exception: For that said master erred in not finding the value of these thirty-seven lots reconveyed by Read as aforesaid, and charging the same against the said Read in his individual account. Twelfth exception: For that the said master erred in reporting the value of said lots at seventeen hundred dollars, and in not reporting a reconveyance of said lands should be made by said Read to the complainants, or that he held the same for the said complainants; said complainants and exceptants hereby praying the benefit and advantage of amending the decree in this cause in this behalf if it shall be necessary so to do. Thirteenth exception: For that the said master erred in measuring the values of the lots conveyed by the executors to Rhodes, Lewis, Gaskill, Taylor, and other grantees, as shown by the testimony, subsequently reconveyed to Read and Lippincott individually, as testified to by the different witnesses, as reported by said master as being the average of the values at the times between 1870 and 1875, inclusive, whereas said master ought to have certified the considerations received by said Read and Lippincott individually, as appears by their deeds in evidence. Fourteenth exception: For that the said master erred in not finding that the 109 lots on the plan of the Riverside Cottage Company, comprised in the mortgage from Burke to decedent, and alleged to have been assigned by decedent to Read, were merged by the deed of Burke to the executors, of which said Read was one, and in not finding that said Read was estopped from claiming title thereto, and that the equitable title thereof is now in the complainants. Fifteenth exception: For that the said master erred in certifying in Schedule F, annexed to his report, that Read should be charged with the sum of twenty-six hundred and seventeen dollars, being moneys received from sale of lots of the estate prior to April 1, 1875, whereas said master ought to have certified the consideration received by Read,

as recited in his deeds to divers grantees, and charging him therewith; as also in not reporting the sales made by Read individually, subsequent to April 1, 1875, and not charging him in his individual account with the proceeds thereof, as recited in his individual deeds to divers grantees. Sixteenth exception: For that the said master erred in not charging said Read with the interest on the consideration recited in his individual deeds from April 1, 1875. Seventeenth exception: For that the said master erred in crediting said Read in his individual account, being Schedule F, annexed to said report, with the following sums: \$130, \$230, \$110, \$25, and \$125.49,—being expenses for searching the records, incidental items in connection with same, and interest on same,—whereas said master ought to have certified that said expenses were not for the benefit of the estate, but were incurred by Read for his own ulterior purposes in predicated insolvency proceedings in the orphans' court of Burlington county. Eighteenth exception: For that said master erred in crediting the said Lippincott in his individual account, being Schedule G, annexed to his said report, with the sum of \$588.19, and allowance of interest thereon from April 1, 1875, for cash paid to Joseph T. Rowand, whereas said master ought to have certified that there was no evidence before him of any indebtedness to said Rowand by the estate; and for the same reason complainants except to the items as credits to said Lippincott in said Schedule G, as follows: 'Samuel Jones, \$104.50;' 'Post office, \$455.' Nineteenth exception: For that said master erred in crediting said Lippincott in his individual account, in said Schedule G, with the items of 'Judgment, Newell Fay and Van Arsdale, \$1,265,' and \$1,591 for the same, whereas that said master ought to have certified, as appears from the evidence, that said judgment of Van Arsdale was never satisfied of record, and that the judgment of Newell Fay, and the judgment of C. A. Pulte, \$831.31, as credited said Lippincott in said schedule, were one and the same, and, as appears by the testimony, no such sums were ever paid by said Lippincott, or any other of the executors. Twentieth exception: For that the said master erred in crediting said Lippincott in said schedule with the item of 'Elizabeth Toy, \$164.45,' whereas said master ought to have certified that there was no evidence of any indebtedness of the estate to said Elizabeth Toy. Twenty-First exception: For that said master erred in allowing interest on these excepted items from April 1, 1875. Twenty-Second exception: For that the said master erred in reporting that Henry Bechtold, one of the complainants, and one of the executors of the estate of Samuel Bechtold, Jr., deceased, was equally and jointly liable, as set out in Schedule I, with Nathan S. Read and Wallace Lippincott, the other executors of said estate, for the sum of fifty-nine hun-

dred and ninety-two dollars and forty-eight cents, whereas said master should have reported entire nonliability on the part of the said Henry Bechtold for said sum, or any part thereof, as the said Henry Bechtold was not an acting executor of said estate, and never received any of said moneys, or any part thereof; said complainants and exceptants hereby praying the benefit and advantage of amending the decree in this cause in this behalf, if it shall be necessary so to do. Twenty-Third exception: For that the said master erred in crediting said Lippincott in his individual account, in Schedule G, with the items under date of September 12, 1870, 'Judgment, Barnes, \$888.29,' with allowance of interest thereon from April 1, 1875, whereas the said master ought to have certified, as appears from the deed from the sheriff to Lippincott, that he paid therefor the sum of six hundred dollars, and that the items of fifty dollars paid said sheriff, and Merritt forty dollars, and 'Hugg, \$45,' were, as appears by the evidence, incurred by Lippincott for his own benefit, in an arrangement whereby he secured them under the Barnes judgment so conveyed to him by the sheriff, and this allowance and the costs of citation for a failure to file his account was not properly chargeable against the estate, on the grounds that he and the other executors of the estate were in funds sufficient to pay the Barnes judgment. Twenty-Fourth exception: For that the said master erred in crediting the said Read in his individual account, Schedule F, with the amount of the widow's exemption, to wit, \$200, and allowance of interest thereon from April 1, 1875, whereas said master ought to have certified, as appears from the evidence and testimony, that the widow's exemption was allowed and set apart for her under the Newell Fay execution. Twenty-Fifth exception: For that the said master erred in not charging the said Lippincott and Read in their individual accounts with the proceeds of sales of the lands conveyed by the executors to Babbington and Hartley, respectively, and subsequently reconveyed by Babbington and Hartley to Lippincott and Catharine Bechtold, respectively, without consideration, the said Catharine Bechtold subsequently conveying them to Mary A. Read; and in not charging the said Read and Lippincott with the amounts recited in their deeds to divers grantees. Twenty-Sixth exception: For that the said master erred in not certifying to the court the conveyances made by Lippincott of lots acquired by him by, through, or under the decedent; and in not charging said Lippincott in his individual account with the proceeds thereof, recited in the deeds from said Lippincott to divers grantees. Twenty-Seventh exception: For that the master erred in assuming that the decree of this honorable court confined him in determining the value of said lands obtained by Read and Lippincott, individually, by, through, or under the

estate, to the general values, as was detailed by the witnesses, that governed prior to April 1, 1875, whereas it is respectfully submitted that, these defendants Read and Lippincott having acquired these lands by reason of their fiduciary capacity, and in gross fraud of the rights of the complainants, the rule of equity that executors cannot make profit out of the estate would apply, and it is respectfully submitted that the decree of this court is in harmony with this rule; but complainants especially pray that, if said decree shall appear in any way to be ambiguous on this point, they may have leave to amend said decree, and that by an order of this court the said defendants Read and Lippincott be charged with the proceeds of said sales of said lots, as recited in their individual conveyances to their divers grantees."

Wm. C. Mayne, for exceptants. Chas. E. Hendrickson, for defendant Lippincott. Walter A. Barrows, for defendant Read.

BIRD, V. C. This case is now before me on exceptions to the master's report. I think the differences between the parties in this case have been occasioned chiefly by a careless expression in the opinion, or a misapplication of it in the decree. This makes it plain that, however well taken the exceptions may be to the master's report upon matters of principle, the master is not to blame for the chief exceptions, unless it be with reference to the \$569 item, for it cannot be said that upon two principal points he has not followed the decree as it may be fairly interpreted. To overcome this condition I have found it necessary to amend the decree in accordance with the views which I intended to express in the decree, as well as in my opinion. In my judgment, upon the two principal questions presented by the exceptions, there is not the slightest room for doubt as to what the law is in New Jersey. I think the executors Nathan S. Read and Wallace Lippincott should each be charged with all of the personal estate received by him, and with all moneys received by him for lands sold, which had been conveyed to them, or either of them, directly or indirectly, and which he afterwards sold to bona fide purchasers for a valuable consideration; and the amount with which he should be charged is the consideration expressed in the deed, unless it be made to appear very clearly that some other sum was the sum actually received, and should also be charged with interest upon the sum so received, from the date of such conveyance. I think the exception to the report, so far as it charges the executors, or either of them, with the actual price paid by them, or either of them, for lands conveyed to them, being lots known as the "Burke Lots," or lands conveyed under the Leach mortgage or under the Barnes judgment, is well taken. Those lands, and all others so received by them, whether from

son, the title to which they, or either of them, still holds, they hold in trust for the devisees and legatees named in the will of the testator. The master has made a mistake, in point of law and fact, in charging all of the executors with the proceeds of the sale of real estate. Henry Bechtold, one of the executors, should not have been included in that charge. This, like the former error, is manifestly chargeable to the phraseology of the decree. The true principle upon which the Read mortgage should have been charged up against the executors is to charge those who actually received the \$5,000, and to charge them jointly with the \$2,400, less the \$280 paid as commissions. This act was the joint act of all three.

Passing from these general observations, we will, for the sake of certainty, look at each exception, although in doing so we will perhaps indulge in more or less repetition. We trust, however, we shall be understood. Looking at the first exception in the face of the decree as it now stands amended, there can probably be no reasonable ground of dispute but that the exception is well taken. The title to the lands which was conveyed under the Barnes judgment was conveyed to Lippincott. He has sold said lands, or part of them, since, and received the consideration therefor. He is therefore chargeable with the consideration money, and the interest thereon from the date of the conveyance. The title to all these lands which had not been conveyed by him he holds in trust under the will of the testator. The second exception has been spoken of in what has been said as to the first. Exception 3: As I understand the facts of the case, I think that Lippincott and Read should be jointly charged with the proceeds of the sale to Henry R. Lewis. This is doing no injustice to them, since in this and in every other case where a similar question arises they can settle the claims of either against the other between themselves. The exception 4, which refers to Schedule D, I think must be a mistake in the reference. The only figures which answer to the figures referred to are to be found in Schedule G, which is spoken of next hereafter. I think exception 4 ought to be allowed. I can give no interpretation to the testimony which sustains certain items in Schedule G. The claims for various payments upon judgments does not, to the extent therein indicated, bear scrutiny. The allowances prayed by Mr. Lippincott for judgments paid seem to me to be exaggerated, when the record evidence and the oral testimony are considered. His claims are as follows:

May 7, 1870.	Judgment, Newell Fay & Van Arsdale.....	\$1,365 00
" 10, "	Judgment, Newell Fay & Van Arsdale.....	1,591 00
Aug. 10, "	Cash paid, judgment, C. A. Pulte.....	831 81
Sep. 12, "	Judgment, Barnes.....	888 29

The total of these alleged payments being..... \$4,575 60

The reason why I think this is an exaggerated statement, and must be a mistaken one, is: First, taking the records of these judgments, and making all due allowances for interest from the date of the record until the time of the payment, and the whole amount is only \$3,512.71; and, second, according to the testimony of himself, (Read,) certainly paid the Fay and Snyder judgments, in which I think that Lippincott fairly concurs, and the same conclusion is necessarily reached. It is true that Read does not speak with certainty as to the amounts of the judgments, but he speaks with decision and confidence as to the identical judgments which he discharged, and took assignment of in the name of his wife, which judgments he afterwards had canceled of record. He says, "Can't tell how I settled. I know the amount that I paid, because I received a check from Mr. Lippincott for it,—for two judgments." And when his attention is again called to it, and he is asked if he settled the Van Arsdale and Fay judgment, he answers by saying, "I settled the Fay and Snyder judgments." He says, "I think the Snyder judgment was \$700." He says, "I cannot tell what I paid for the two judgments;" and when asked, "Which judgments?" he answers, "The Newell Fay and Frederick Snyder. Q. You settled the Newell Fay judgment? A. Yes, sir. Q. And you settled the judgment held by a man by the name of Snyder? A. Yes, sir. Q. What did you pay? A. \$1,265. Q. What was the amount of the Snyder judgment? A. I can't remember; it is on the record. He says it was recovered at Mount Holly." Again: "Q. You settled the Van Arsdale judgment? A. No; I did not. Q. You said you did? A. No, sir; the Fay and the Snyder judgments. Q. I understood you to say that is the same man? A. No, sir; Newell Fay is one, and Snyder was another. Q. You settled the Fay and Snyder judgments? A. Yes, sir; and both were recovered in Burlington county." He says he thinks the Van Arsdale judgment was paid in full by Mr. Lippincott afterwards. He says he paid the Newell Fay judgment to Mr. Fay. When asked if he paid by check, he says he thinks not, but partly in cash. He says, again, Mr. Lippincott paid the Van Arsdale judgment, and gave a check of \$1,100 for the Fay and Snyder judgment. He undoubtedly meant that Mr. Lippincott gave this check in payment of the Van Arsdale judgment, which was, as appears above, \$1,106, principal and interest. He says Newell Fay came to him about his judgment, and a lawyer of Philadelphia, by the name of Pulte, had the Snyder judgment. Mr. Lippincott gave him a check to pay that judgment. Read says that Fay claimed that he had two judgments, but the official record to which he refers shows that there was but one judgment in favor of Newell Fay. He says: "I cannot tell how much I paid. I know

there were heavy interests and costs, and that those were the only judgments I paid." Hence, supposing that Mr. Lippincott advanced all the money for the four judgments, and that Read, with Lippincott's money, paid two,—that is, the Fay and Snyder judgments,—the money actually employed for that purpose, independently of what was realized by the sheriff upon the sale of goods under the Fay judgment, would be as follows:

The amount of the Van Arsdale judgment..	\$1,106 00
The amount of the Fay and Snyder judgment	1,265 00
And the amount of the Barnes judgment..	888 81

Making in all.....\$3,259 81

It is true Read thinks that in discharging the Fay and Snyder judgments he used some cash, but he is not certain as to that, and produces no vouchers in proof of it. When he received the \$1,265, the amount due upon the two judgments, including all the interest, was \$1,559.14. The sheriff had, prior to that, sold the goods of the testator under the Fay judgment, from which he realized \$196, which left actually due \$1,363.14, so that, if Mr. Read advanced any cash in procuring the assignment of these judgments, it was less than \$100. But whether he did or not is so uncertain that the court cannot allow these accountants credit for it, especially when it is established that these executors were once offered two of these judgments for several hundred dollars less than was actually due upon them. There is no rule or practice that would justify such a credit. It is altogether probable that he procured the assignments of these judgments for \$1,265, and that there appearing to be something due upon them was the reason for taking an assignment. It appears, therefore, that Mr. Lippincott claims a credit of \$4,575.60, while proof only shows actual payments of \$3,259.81; showing a claim for allowance, by way of payment on these judgments over actual disbursements, \$1,316.29. I can see no possibility of swelling these judgments, considering the amounts which they paid, according to the proofs, to the sum of \$3,500, to say nothing about \$4,575.60. The only item that may be added to increase it at all is that of sheriff's fees on the Van Arsdale judgment. Read says there was an execution issued upon that judgment, and there is a reference to Exhibit E 14 as an execution, which exhibit is not among the papers handed to me. As there is no proof of any sale under this judgment and execution, the costs could not have exceeded \$50, which was about the amount of the costs on the Fay execution, in which there was a sale. Adding this amount to the \$3,259.81, and we have \$3,309.81. The difference between this amount and \$4,575.60 is \$1,266.29. I think the judgments with which the master has credited Lippincott have been swollen by this amount, in excess of the amount actual-

ly paid by him, or by both him and Read. I think it will appear, when the account comes to be restated in accordance with the decree as it stands amended, that the fifth exception will appear to have been well taken.

Exception 6 should be allowed, because Lippincott took the title to the lands under the Barnes judgment, and as to all sales made by him to bona fide purchasers he is responsible to the estate for the consideration received, and must account therefor; and as to all those lands not so sold he holds in trust for the devisees and legatees under the will. The last observations are equally applicable to exception 7, as against Mr. Lippincott. The observations respecting exception 8 show conclusively that exceptions 8 and 9 are well taken. The price paid for land under such circumstances, by a person acting in the capacity of trustee, is no criterion as to his liability in accounting, especially in case he has made large profits therefrom. What has been said as to the title and the character in which Lippincott holds lands under the Barnes judgment is applicable to the tenth exception. Mr. Read undoubtedly holds the title to the lands which he acquired under the Leach mortgage as trustee for the heirs and devisees, unless he has conveyed the lands, or some portions of them, to bona fide purchasers. From what has been said above, it is manifest that exceptions 11 and 12 should be sustained. Exception 13 is controlled by the same principles in favor of the exceptions. Exception 14 ought to stand. From what has been said, the fifteenth exception ought to stand. The principle which moves a court of equity in such cases sustains the sixteenth exception. Mr. Read is certainly accountable for interest upon moneys which he received, —the proceeds of trust property. Under the admissions made by the counsel for the complainants before the master, I do not think that exception 17 can be sustained. According to the admission, the work was done by him as executor, and in the interests of the estate. It is very clear, also, from the nature of the work done, that it was done in and about the property or assets of the estate. The very property which was surveyed and mapped, and the title to which was searched for, is now claimed by the complainants at the hands of the defendants as trustees. The maps, surveys, and searches are the property of the estate, and belong to the devisees and legatees. The work which was so done will unquestionably inure to the benefit of the real owners of the land. There was no effort made to show that there was no necessity for the work, nor that it was improperly or unskillfully done, or that the amount paid was in any degree excessive. There seems to be good reason for sustaining the eighteenth exception. The testimony respecting the \$568.19 is very meager, and there are so many strong

presumptions against it that I do not feel myself warranted in concluding that the master is right. In the first place, on the very day that the check for this amount bears date, February 2, 1870, he has a credit in the account presented to the orphans' court for \$75 paid to Rowand. Now, the presumption is that, if he paid Rowand this larger sum on account of the estate, he would have had some voucher or memoranda thereof, as he had for the \$75. The effect of his testimony, as well as that of Mr. Merritt, is that he had an account book with an account of these payments and receipts pasted therein as vouchers for them. I do not see how he would have preserved the one against the estate, and not the other; and I do not see why he would take the voucher for the smaller sum, and not for the one more than seven times as large, in case both were on account of the estate. Another presumption, very strong indeed, arises from the fact that he stated his account in 1875, in which he must have had his \$75 item. Taking the testimony of Mr. Merritt and of Lippincott himself, and with the name of Rowand and with the \$75 item before him, I can give no credit to the idea that he had forgotten so large an item as the \$568.19. But what is still stronger in this direction is the fact that this item should escape his attention for the next 10 years. In 1885 he states his account again. Then he had all his vouchers still. Fully 15 years had elapsed since this check was given. He had the \$75 item and Rowand's name on his account, and among his vouchers he had this check, he had the bank account against which the check was drawn, and the bank book to remind him of this transaction but it never occurs to his mind until after the lapse of 20 years. I cannot but conclude that this check must have been given upon some other account. There is no proof, as in the case of the judgments, to show that Samuel A. Bechtold, Jr., was indebted to Rowand in this sum at the time of his death. Although the vouchers respecting the payments of the judgments were destroyed or lost, yet the records and other evidence produced establish the fact that the testator was indebted to the parties named upon judgments obtained against him in his lifetime. The nineteenth exception is well taken in part, as appears by what has already been said with respect to exception 4. I cannot consent to the twentieth exception. I base my conclusions as to this item upon the testimony of Mr. Merritt. He says that he is satisfied that there were receipts for all the items down to that of Thornton's, which follows this of Elizabeth Toy. I am aware that this same observation may be claimed to favor payments respecting judgments; but my criticism respecting judgments does not go to the fact that there were no payments, but to that that, taking all of the judgments, the amount actually

due upon them, including costs, interests, and sheriff fees, does not make the sum total reach the amount claimed. If there were vouchers for those items, it is very clear that the item for \$1,591 must have included something else besides a judgment. Of course, so far as the exceptions have been sustained, and the amounts credited have been reduced, exception 21 must also be sustained. The interest will be reduced by the amount which the principal is reduced. As the decree now stands, exception 22 must prevail, as to all the items enumerated in Schedule I, unless the liability of the executors with respect to the \$2,400, the amount paid to Weeks on the Read mortgage, be considered as included in Schedule I, and as to that my judgment is that they are jointly liable. With none of these matters except the Read judgment and the taking of the inventory did Henry Bechtold have anything to do. All of the property inventoried passed immediately into the hands, and under the control, of Read and Lippincott. Five thousand dollars of the money passed immediately into the hands of Lippincott, and Lippincott disbursed it. As to the twenty-third exception, my judgment is that Lippincott was entitled to credit for the whole amount thereof, but as to the amounts paid Hugg and the sheriff I can discover no proof that justifies these payments. That judgment and interest, at the time of payment, was about \$847. The whole amount credited to Lippincott is \$888, which probably includes the sheriff's charges. There seems to be no method of calculation by which \$888 can be made to appear to have been due, except by including costs of the sheriff. As to Hugg, he was a counselor at law, adversely interested, and, if Mr. Lippincott paid him at all, it must have been in order to secure the title to these lands in his own name. Exception 24 is well taken, for the reason given. I think, upon the principles above stated, exception 25 should be sustained. Lippincott and Read certainly ought to account for the moneys they received for the lands referred to. They made the sales for a consideration. They sold lands which they held in trust, and they ought to account, at least, for the moneys which they received, with interest. Exception 26 has in effect been spoken of heretofore. Clearly, all the lands which Lippincott took title to as above indicated, and which he still holds, he holds in trust, and the lands which he so holds should be reported to the court, and the proceeds of the lands which he has sold to bona fide purchasers, he should account for. Exception 27 has already been fully covered by what has been said respecting lands sold by Read and Lippincott jointly, or by what has been said by them individually, as well as what they may hold in their joint names or in their individual names.

I have taken an unusual amount of pains with this case, not only with the view of satisfying my own mind as to the proper discharge of my duty, but also in the hope that I might be able to present the case in such a light as would satisfy all the parties as to their legal rights and obligations, and, being so satisfied, to make an adjustment without further controversy. From the beginning of this case I have recognized the difficulties under which the executors have labored. Not having been skilled in the performance of a trust of this nature, they did not fully appreciate or consider the importance of preserving exact statements or accounts of the transactions. I say fully, because they—Mr. Read and Mr. Lippincott—did keep some accounts, but in a loose or careless way. Mr. Lippincott has been so unfortunate as to lose or have destroyed what accounts or vouchers he kept. Because of this misfortune he ought not to suffer, and it has been my aim, from the first, to protect him against this loss to the utmost, where there was any reasonable justification in so doing. In doing this I have not forgotten that the devisees and legatees ought not to be charged with his misfortune. I have only aimed at giving him credit for every payment that there has been any foundation for, except his own mere surmise or impression or belief. A careful reading of Mr. Lippincott's testimony will satisfy every one that his recollection is not to be relied upon in giving credits for disbursements after the lapse of so many years. He is uncertain as to almost every important transaction, where there is not something besides his mere recollection to guide him. If, after all, these executors, or any one of them, are or is conscious of suffering loss in the settlement of this estate, I can only say it is solely attributable to their or his failure to promptly perform the obligations which the law and their oath, when they entered upon the duties of the office, imposed upon them. Had they promptly proceeded, at the expiration of the five years, to make a complete and final settlement of this estate, as required by the rules and practice of the court, they would have been saved all this litigation, anxiety, sad experience, and supposed loss. At such times, and after the lapse of so many years, the court can only admit what is reasonably probable, or what has been fairly established, and is bound to charge trustees with whatever is found in their hands, and with whatever plainly ought to be in their hands or possession. This is the rule which all men agree to, and which has prompted courts of equity from the beginning. Under the circumstances of this case, I think the costs of these exceptions ought to be paid out of the estate. I will advise an order in accordance with these views.

(78 Md. 501)

BALTIMORE BREWERIES' CO., Limited, v. RANSTEAD.(Court of Appeals of Maryland. Jan. 18, 1894.)
NEGLECT—INJURIES TO PROPERTY BY WATER.

Where a company collects large quantities of water on its premises, for its own purposes, and discharges the water upon the bed of a street, in consequence of which the lot of an abutting owner is flooded, it will be liable for the injury thereby occasioned.

Appeal from superior court of Baltimore city.

Action by Lyman T. Ranstead against the Baltimore Breweries' Company for injuries to plaintiff's property through defendant's alleged negligence. There was judgment for plaintiff, and defendant appeals. **Affirmed.**

The following are prayers for instructions by plaintiff and defendant.

Plaintiff's first prayer, (granted:) "That if the jury shall find from the evidence in the cause that the defendant constructed from its brewery a sewer or tank, through which nauseous and offensive liquids were discharged, along the bed of Ridgely street, in and upon the plaintiff's lot, that then the plaintiff is entitled to recover in this action." Plaintiff's second prayer, (granted:) "The plaintiff prays the court to instruct the jury that if they find a verdict for plaintiff, under the instructions of the court, then the plaintiff is entitled to such damages as will compensate him for the loss of rent by reason of the act of the defendant's agent or agents, provided the jury believe the plaintiff has suffered said loss and injury." Plaintiff's third prayer, (granted:) "That if the jury find from the evidence that the plaintiff was the owner of, and in possession of, a certain lot of ground in Baltimore city, and that the defendant was the owner and in possession of the brewery situated near said lot, and shall further find that the defendant constructed a sewer or wooden box for the purpose of carrying off the water from said brewery, and so constructed the same as that the property of the plaintiff was flooded with water from said brewery, and said lot was thereby damaged, that then the plaintiff is entitled to recover in this case." All of which were granted. And the defendant offered two prayers: (1) Rejected. "The defendant prays the court to instruct the jury that, if the plaintiff's lot was lower than the adjoining street, the plaintiff is not entitled to recover, by reason of water flowing from the street upon his lot, unless the jury find that the quantity of water so flowing upon plaintiff's lot was increased by the discharge of an unreasonable or excessive quantity from the defendant's premises, or that the water discharged from the defendant's premises upon the plaintiff's lot was noxious or offensive." (2) Rejected. "The defendant prays the court to instruct the jury that if they find that the lot of the plaintiff mentioned in the declaration lies below the level

of Ridgely street, and that water from Ridgely street naturally flows on the lot of the plaintiff, and if they find that the defendant discharges the water used in its business into Ridgely street, and that said water is conducted, through a box trough constructed by the city authorities across Bayard street, to the line of the plaintiff's lot, and is then received in a ditch constructed by the plaintiff, or by his father, then owning the lot, to carry off water entering the lot from Ridgely street, then the plaintiff is not entitled to recover, in this suit, because of the water from the defendant's premises flowing into the plaintiff's lot, provided the jury find that the quantity of water so discharged from defendant's premises is not unreasonable or excessive, in view of the character of the locality, and provided the jury also find that the water so discharged from the defendant's lot is not noxious or offensive."

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

Chas. Marshall, Wm. L. Marbury, H. J. Bowdoin, for appellant. J. Alex. Preston and R. Ludlow Preston, for appellee.

ROBINSON, C. J. The plaintiff is the owner of an inclosed lot of ground in Baltimore city, bounded on the North by Bayard street, and on the east by Ridgely street, containing about five acres of land. The lot had been used as a cattle or stock yard, from which the plaintiff derived an annual revenue of from \$400 to \$500. The defendant company is the owner of a brewery abutting on Ridgely street, and uses from three to four hundred barrels of water daily for the purpose of cooling the beer; and in addition to this it uses from three to four barrels of water, mixed with acids and ashes, once a week, for the purpose of scouring the copper coils. All the water thus used is conveyed from the brewery to a sewer box built inside the brewery lot, and running inside the lot, about 80 feet, to the west side of Ridgely street, and then down the street, 128 feet, to a wooden box or trough built by the city authorities across Bayard street, and through this trough the water is discharged upon the plaintiff's lot. The plaintiff proved that, in consequence of this discharge of water upon his lot, it had become miry and unfit for use; and he further proved that the water was mixed with vegetable matter, the refuse grains used in brewing the beer, and was noxious and offensive. Assuming these facts to be found by the jury,—and it is upon this assumption the plaintiff rests his case,—there can be no question, it seems to us, as to the liability of the defendant. That it had no right to discharge noxious and offensive water through its sewer to the wooden trough built across Bayard street, and thence upon the property of the plaintiff, is conceded.

And it is equally clear, we think, that the defendant had no right to bring or collect upon its premises large quantities of water to be used in the manufacture of beer, and to discharge the water thus used upon the bed of Ridgely street, in consequence of which the plaintiff's property was injured, even though the water was not noxious or offensive. Having brought this water upon its premises to be used by it for its own purposes, the defendant was bound to provide proper drains or means for its escape without injury to the property of others. The whole contention of the defendant rests upon the assumption that it has the absolute right to discharge the water used by it in brewing beer upon the bed of Ridgely street, and if the plaintiff's lot lies below the level of the street, in consequence of which his lot is flooded, the defendant is not liable for the injury, unless the jury shall find that the water so discharged was unreasonable or excessive, in view of the character of the locality. The question is not whether the water discharged upon the bed of Ridgely street, the same not being surface water, was unreasonable or excessive in quantity, having in view the character of the locality, but whether the water thus discharged did in fact come upon the plaintiff's lot. Although the facts are different the principles upon which the leading case of *Rylands v. Fletcher*, L. R. 3 H. L. 330, was decided, would seem to be conclusive as to the defendant's contention. In that case the defendant, the owner of a mill, constructed a reservoir for the purpose of accumulating water, but, the supports being insufficient, the sides of the reservoir gave way, and the water percolated through some old and disused coal workings into the plaintiff's colliery; and the house of lords, affirming the court of exchequer, held that the defendant was liable for the injury sustained by the plaintiff. In the court of exchequer, Blackburn, J., says: "We think that the true rule of law is that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." L. R. 1 Exch. 265. In affirming the exchequer chamber, Lord Chancellor Cairns says: "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land be used; and if, in what I may term the 'natural user' of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place." "On the other hand, if the de-

fendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a 'nonnatural use,'—for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground, in quantities, and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril, and if, in the course of their doing it, the evil arose, to which I have referred,—the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff, and injuring the plaintiff there,—for the consequence of that, in my opinion, the defendants would be liable." Now, in this case, it was held that if one brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril; and if this be so, a fortiori, where one brings or accumulates on his land water in large quantities, to be used for any purpose he may see proper, and discharges the water upon the property of his neighbor, he will be liable for the injury thereby occasioned. And such is the case before us. The proof shows that the water used by the defendant in the manufacture of beer is conveyed from its premises by means of a sewer built by the defendant to the west side of Ridgely street, and thence down said street to a trough across Bayard street, and thence upon the land of the plaintiff. And, such being the case, there was no error in granting the plaintiff's prayers, and in rejecting the prayers offered by the defendant. Judgment affirmed.

(78 Md. 431)

KELLY et al. v. GILBERT et al.

(Court of Appeals of Maryland. Jan. 12, 1894.)

MECHANICS' LIENS—ENFORCEMENT—OTHER LIEN-HOLDERS.

On bill to enforce a mechanic's lien under Code, art. 63, § 25, which provides for sale of the property, and apportionment of the proceeds among the lienholders, though an order for sale before final decree (Code, art. 18, § 192) has been granted improvidently, and without opportunity to the other lien claimants, who are not made parties, to appear and object, yet if such order be not appealed, and the sale is duly made and ratified without objection, and, on notice by publication ordered, all the lien claimants but one come in and file their claims against the proceeds, this one cannot complain of an order making him a defendant, since there is left him no independent recourse on the property.

Appeal from circuit court of Baltimore city.

Bill by James L. and A. Frank Gilbert, trading as J. L. Gilbert & Co., against Lewis H. Robinson and others, to enforce a me-

chanic's lien. From an order making them defendants, Joseph M. Kelly and Samuel A. Martin, trading as Kelly & Martin, appeal. Affirmed.

Argued before ROBINSON, C. J., and McSHERRY, BRYAN, FOWLER, BRISCOE, and BOYD, JJ.

Jas. McColgan, for appellants. Geo. R. Willis and Ferd. C. Dugan, for appellees.

ROBINSON, C. J. The complainants having furnished to the defendant, the owner, all the lumber used by him in the erection of 10 brick dwelling houses situate on the southwest side of Madison avenue, this bill was, on the 11th of November, 1891, filed on behalf of themselves, and on behalf of all other mechanic's lien claimants, for a sale of the property to pay and satisfy said liens. It alleges that the defendant, by reason of his financial embarrassments, was unable to proceed further with the erection of said houses; that other persons claim to have mechanic's lien claims against the property, their names and the amount of said claims being unknown to the complainants; and that, in addition to these liens, certain creditors of the defendant, all of whom are named and made parties defendants, have obtained judgments against him, but that these judgments are subject and subordinate to the lien claims of the complainants, and of all other persons having mechanic's lien claims against the property. The bill further alleges that, the owner having abandoned the houses, with no one in charge of them, they are exposed to the elements, and are liable to vandalism, thereby subjecting the complainants and other lien claimants to loss and injury; and that, in view of the fact that the property must necessarily be sold to pay the lien claims against it, they pray that a receiver or receivers may be appointed to take charge of the property, and that a decree may be passed at once for the sale of the same, and the proceeds thereof may be distributed among the parties entitled, according to their respective rights and priorities. They also pray that the writ of subpoena be issued for the judgment creditors named as parties defendants. On the same day the bill was filed, defendant Robinson, the owner, appeared voluntarily and filed his answer, admitting the allegations of the bill, and consenting to the appointment of receivers, and a decree for the sale of the property; and on the same day an order or decree was passed for the sale of the property. It thus appears that both the bill and answer of the owner were filed, and the decree was passed, all on the same day, and before the other defendants had an opportunity to appear and show cause, if any they had, why a decree should not have been passed. The authority of the court to pass the interlocutory order or decree for the sale of the property in question is based upon

section 192, art. 16, of the Code, which provides that "in all cases where a suit is instituted for the sale of real or personal property, or where from the nature of the case a sale is the proper mode of relief, the court in its discretion may order a sale of the property before final decree, if satisfied clearly by proof that at the final hearing of the case, a sale will be ordered, and order the money arising from such sale to be deposited or invested, to be disposed of as the court shall direct by final decree." "The plain intent and object of this provision," we have heretofore said, "is to empower the court, in any case coming within its operation, to order a sale before the rights of the parties have been determined by final decree. The operation and effect of such an order is not to settle or adjudge the rights of the parties, but to convert the property into money when the court is satisfied that a sale will ultimately be decreed, and shall, in its discretion, consider such a course necessary for the preservation of the property, and the protection of the rights and interests of the parties litigant." *Dorsey's Lessee v. Garey*, 30 Md. 489. And we have also said "that the power thus conferred is one of an extraordinary character, and should never be exercised except in very plain and unquestionable cases. * * * And even in the most pressing cases, where it is practicable or possible, all parties who may be affected by the sale, should have an opportunity to be heard, and to show cause against it, before the order is passed. Otherwise, great injustice might frequently be done in the exercise of this power, which was intended to be exercised, not for the benefit of one party only, but for the benefit and protection of all concerned." *Cornell v. McCann*, 37 Md. 89. Now, in this case the property sold consisted of 10 brick dwelling houses, and the decree was passed solely upon a bill filed by one lien claimant, and the answer of the defendant the owner of the property, and before the other defendants against whom subpoena was prayed had the opportunity to appear and answer, although they all resided in the city of Baltimore, and within the jurisdiction of the court. We cannot agree that the bill and answer of the owner, under such circumstances, furnishes such proof as the statute requires. To so hold would be to put it in the power of one lien claimant and the owner to procure a decree by collusion for the sale of the property, to the prejudice and injury of other claimants; and, if an appeal had been taken from the order or decree for the sale of the property, we should have had no hesitation in holding that it was erroneously and improvidently passed. No appeal, however, was taken from the decree. On the contrary, the property was advertised and sold by the trustees, and the sale was duly reported, and on the 11th January, 1892, it was finally ratified, no objection to its ratification having been made

by any of the parties in interest. Further than this, notice by publication having been given by the trustees, in pursuance of an order by the court, all the mechanic's lien claimants, with the exception of the appellants, filed their claims, thereby assenting to the decree for the sale of the property, and agreeing to take their pro rata distribution of the proceeds of sale. The appellants having refused to file their claim, the complainants, on the 1st of March, 1892, filed a petition alleging that their bill was in the nature of a creditors' bill for the enforcement of their mechanic's lien claim, and that all persons holding mechanic's lien claims against the property have filed the same, with the exception of the appellants, their claim having been filed of record in the clerk's office of the superior court of Baltimore city after the filing of complainants' bill, and after the sale of the property by the trustees; and, the trustees being desirous of making distribution of the proceeds of sale among the several lien claimants, the petitioners pray that their bill may be amended by making the appellants parties defendants, and that a subpoena may issue, etc. Upon this petition, leave to amend was granted, and subpoena was issued, as prayed. In answer to this petition the appellants say that they are entitled to a mechanic's lien against the property sold; that no process was issued against them when the bill was filed, nor was any opportunity afforded them to protect their rights; that it is now too late, after the decree, and sale of the property, to make them defendants; and they pray that the order making them defendants be stricken out, and the subpoena thereby issued be quashed, in order that they may have an opportunity to proceed against the property if necessary, and in such manner as they may be advised. And this appeal is taken from a pro forma decree of the court below, refusing to strike out the order making the appellants defendants, and refusing to quash the writ of subpoena.

Now, the bill of the complainants to enforce the payment of their lien by a sale of the property was filed under section 25, art. 63, of the Code, which provides that "if the proceeding is by bill in equity the same proceedings shall be had as used by the courts of equity to enforce other liens, and the court shall decree a sale and appoint a trustee to make sale thereof, and shall apportion the proceeds of such sale among the persons entitled to liens according to their respective rights." The proceeding is in the nature of a proceeding in rem, and, when the property is sold under a decree passed in the cause, it is sold free and discharged of all mechanic's lien claims, the proceeds of sale being apportioned among the persons entitled to such liens according to their respective rights. It is proper and necessary, of course, that notice should be given to all claimants to file their respective

liens, and such notice, it appears, was given to all claimants in this case; and, if the appellants refused to file their claims, the court could have proceeded to apportion the proceeds of sale among such persons as had filed their liens. In such a case, the only remedy left to the appellants to enforce the payment of their claim was a proceeding in personam against the owner. If a claimant could enforce his lien, which is a mere statutory lien against the property, after it had been sold under a decree, no purchaser would be safe in buying the property. So, it was quite unnecessary for the complainants to have amended their bill by making the appellants parties. The fact that it was so amended furnishes no ground of complaint on their part. The order or decree for the sale of the property was, as we have said, an interlocutory order, and passed merely for the protection of the property, and for the interests of all parties concerned; and, such being the case, until that was a final decree, determining the rights of the parties and distributing the proceeds of sale, the bill was open to amendment by leave of the court. As to the question of costs, it does seem to us that the complainants (now appellees) are mainly responsible for this litigation. This bill, it is plainly evident, was filed by them with the concurrence of the owner. He knew the parties holding mechanic's lien claims against the property, and by proper inquiry their names could have been ascertained by the complainants. No such inquiry was made, and none of the lien claimants were made parties to the bill, and no opportunity was afforded them to show cause why the decree should not have been passed; and, such being the case, although we are obliged to affirm the pro forma decree appealed from, the costs ought, we think, to be equally divided between the parties. Decree affirmed.

(78 Md. 349)

PUTZELL v. DROVERS' & MECHANICS' NAT. BANK.

(Court of Appeals of Maryland. Jan. 12, 1894.)

PARTY WALL—RIGHT TO REMOVE.

A joint owner in a division wall may remove it, and erect a new one, if the work is done in a reasonable time, and the co-owner is reimbursed for necessary expense in protecting his property during the change.

Appeal from circuit court of Baltimore city.

Bill by Selig G. Putzell against the Drovers' and Mechanics' National Bank for an injunction. From a decree dismissing the bill, complainant appeals. Reversed in part.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

Richard M. Venable, Louis Putzell, and Hugo Stiner, for appellant. Bernard Carter and Jas. McColgan, for appellees.

BRYAN, J. Selig G. Putzell filed a bill in equity against the Drovers' & Mechanics' National Bank of Baltimore. It was alleged that the defendant, without right or justification, was about to tear down the rear wall of the complainant's dwelling house, and thereby render it untenable, and do him irreparable damage. The bill prayed an injunction to restrain the defendant from proceeding as alleged, and it was accordingly granted before answer. There was also a prayer for general relief. After answer the defendant moved a dissolution of the injunction. Testimony was taken on both sides, and when the cause came to final hearing the injunction was dissolved, and the bill dismissed. Complainant appealed.

We think that a statement of the material facts of the case as they appear to us will sufficiently show the grounds of our opinion, without the necessity of a discussion of the testimony of the different witnesses. Putzell, the complainant, is the owner of a leasehold interest for 99 years, renewable forever, in a lot of ground in the city of Baltimore, on the west side of Eutaw street, between Fayette and Lexington streets. He acquired this property in the year 1866. For many years before his purchase, and ever since then, there has been on this lot a substantial brick dwelling house, which extended back to its westernmost boundary. The Drovers' & Mechanics' Bank, in the year 1888, became the owner of a leasehold interest in a lot of ground fronting on Fayette street, and running back northerly to Marion street, and binding, for a portion of its easterly line, on the westernmost boundary of Putzell's lot. It is not distinctly stated in the record, but this leasehold interest is evidently for 99 years, renewable forever. The bank's lot and Putzell's lot are separated by a division brick wall, which, by the measurements proved in the case, is shown to be built partly on the ground of one of these parties, and partly on the ground of the other. This wall has been standing for a very long time, certainly for more than 30 years before the transactions which are the subject of complaint in this case. As far as we can ascertain from the testimony, Putzell's house, as originally built, had this division wall as its rear wall, but the rear wall was not built higher than the top of the division wall. In 1870, Putzell put an additional story on the back building, placing its rear wall on the top of the division wall. This division wall was used by the owners and occupants of the lot now owned by the bank for the purpose of designating the boundary line between it and the Putzell lot. There was evidence of the use of it, also, for a series of years, as a support for the frame of a grape arbor. The bank, in the year 1892, commenced the erection of a large six-story building for the purposes of its business, and in the prosecution of the

work proposed to take down the entire wall separating the two lots, and erect on the same line another wall of sufficient strength and thickness to support the new building, not encroaching on Putzell's lot, and offering to give him the benefit of the new wall as a partition wall for the benefit of any building to be erected on his lot. The question in the case is whether this action on the part of the bank would be a legitimate exercise of its rights of property.

No one seems to know when the wall in question was built. In all probability, the time was beyond the limit of living memory. There is some reason to think so from the fact that the deeds which created the leasehold interests in these lots were executed towards the close of the last century, and early in the beginning of the present. It seems to have been erected for the purpose of making the boundary between the lots, and to have been always used for that purpose. The soil of the respective owners was covered by it; and this was the use of his soil which each owner elected to make for his own benefit. Each one owned the portion of the wall which was on his own ground. There seems to have been no cessation of the use of it, in the way in which it was intended to be used,—that is, to mark the boundary line. There was no ouster of the possession of the soil. Each coterminal proprietor owns the portion of the wall which rested on his own ground, as he had continued to own it from the beginning, and he has actual and beneficial possession of the soil by reason of the occupation and use of it by means of his portion of the wall. Surely, there could not be a more distinct and unequivocal exercise of the right of ownership than to build on one's own land a house or a wall, and to use it continuously for the purposes to which it was suitable. It is hardly necessary to refer to decided cases, but one case was cited in the argument having such peculiar features that it may well be mentioned while we are considering this subject. The question was about the title to certain property in the city of London, which was occupied by a brick house. In the south wall of the house there was a stone tablet bearing an inscription which stated that when New street was widened, nearly a century before the time in question, this wall had been built by the East India Company, and that it remained their property. The house had been claimed by the plaintiffs and their predecessors in title, and occupied by their tenants, for 38 years, and during all that time there had been no acknowledgment of the title of the East India Company. Upon these facts the question of adverse possession was presented. The court, however, speaking of the inscription on the tablet, said: "It was, in truth, a statement on the wall itself that the wall, forming a substantial part of the property, had been erected by, and was the boundary

wall of, the adjoining owner, for the East India Company of course continued to be the owner of the soil of the street, although dedicated to the public. There was nothing, therefore, whatever, to lead to the presumption that any title had been gained adverse to that of such adjoining owner by adverse possession. Where there is a boundary wall, and that boundary wall remains undisturbed, and an inscription is allowed to remain on it, which states that it is the boundary wall of the adjoining proprietor, it seems to us idle to suppose that any question of the statute of limitation, or of adverse possession, or of cesser of possession could properly arise. It was therefore manifest that the wall belonged to the East India Company." *Phillipson v. Gibbon*, 6 Ch. App. 428.

We pass by the use of the wall as a support for the grape arbor, because that was significant only as tending to show an act of ownership, and we think that the ownership is fully maintained on the grounds already stated. But, although there was no amotion of the possession of the owners of the bank lot, it does not follow that Putzell had not acquired some rights to the use of the division wall. He had used this wall for more than 20 years as a support to his house; the enjoyment of it for this purpose had been notorious, peaceable, uninterrupted, and "as of right." Under these circumstances, the law considers that he had a prescriptive title to the use of it in the manner in which he had enjoyed it. It is conducive to the peace of society that claims of right which for a long time have been acquiesced in and regarded as settled should be protected by the law, and the space of 20 years has been adopted as the period for ripening claims of this description into titles. Putzell used this division wall as the rear wall of the lower part of his house, and also used it as a support for the wall of an additional story. To the extent of such use his title is clearly established. We have said that this use was not an ouster of the coterminous owner from the possession of the soil. It was an easement for the support of the rear wall of the house. By the common law, easements must be established against an owner of an estate of inheritance. Although they may arise from user, such user is regarded by fiction of law only as evidence of a grant; and, as the right claimed is of a permanent nature, it is said that the supposed grant could have been legally made only by a party who could impose a permanent burden on the servient tenement,—that is to say, by the owner of an estate of inheritance. But in this case we have no concern with this principle of the common law; and need not inquire into its application, or into seeming modifications of it. Both of the lots in question are held under leases for 99 years, renewable forever; and it is well settled that the hold-

ers of such leases have the absolute control and management of the property. They usually have, in point of fact, far more valuable interests in it than the reverser who holds the estate of inheritance. *Crowe v. Wilson*, 65 Md. 481, 482, 5 Atl. 427. The bank retained all its rights in the division wall which are not inconsistent with the enjoyment of the easement. It was bound to permit it to be used as a support for Putzell's house in the accustomed manner; but this is the limit of its obligation. It would be unreasonable to deny to it the right to improve its own property according to its interests and inclinations, provided it did not infringe the rights of other persons. In fact, the wall which it proposed to take down was insufficient to support the building which it desired to erect. If this should be taken down, and another larger and stronger one built in its stead, it would thereby exercise its own legitimate rights of property; and, if it gave to the adjoining house the same right of support in the new wall which it had in the old one, it would not injure its neighbor. This seems to us the just settlement of this controversy. Putzell may be put to some inconvenience while the building is going on, but this is one of the unavoidable consequences of living in a closely-built city. We have said that each portion of this division wall belonged in severalty to the proprietor on whose ground it stood; but, even if these proprietors had been tenants in common of this wall, the result would not have been practically different. In *Bank v. Stokes*, 9 Ch. Div. 72, Sir George Jessel cites, with marked approval, *Cubitt v. Porter*, 8 Barn. & C. 257. He quoted as follows from the opinion of Mr. Justice Bayley: "There is no authority to show that one tenant in common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy in common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction. The object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made." And in a subsequent part of his opinion he says: "As I have read the law from the statements of eminent judges, he [that is a tenant in common] has a right to pull down when the wall is neither defective nor out of repair, if he only wishes to improve it, or put up a better or handsomer one." Chancellor Kent was of the same opinion. In the following passage from his *Commentaries* (volume 3, p. 437) he assumes the right as settled: "If there be a party wall between two houses, and the owner of one of the houses pulls it down in order to build a new one, and with it he takes down the party wall belonging equally to him and his neighbor, and erects a new house and new wall, he is bound, on his part, to pull

down and reinstate it in a reasonable time, and with the least inconvenience." And from the remarks of Chief Justice Bartol in *Glenn v. Davis*, 35 Md. 219, it may be readily inferred that the opinion of this court was the same. The allegations of the bill of complaint were sufficient to give a court of equity jurisdiction, and they justified the preliminary injunction. The complainant has not proved the precise title to the wall which he alleged, although he has proved a title to a portion of it, and an interest in the other portion by way of easement. For the reasons which we have stated, we approve of the dissolution of the injunction, and to that extent the decree below will be affirmed. But the right to take down the wall is not absolute and unconditional; it is qualified in the manner which we have explained in a previous part of this opinion. The bank is bound to finish the division wall at its own expense, and to allow to Putzell's house the same right of support which it had in the old wall, and to indemnify him for the necessary expenses which he has incurred, and may incur, in protecting his property from the consequences of the removal of the old wall. For failure to do these things it would be liable to an action at law. But as a court of equity had jurisdiction of this case, although it could not give the precise relief prayed, it was proper, according to well-settled principles, to do complete justice between the parties, and thus avoid multiplication of suits in the future. It ought to have retained the bill for the purpose of settling and adjudicating any claim which may arise in favor of Putzell against the bank, in accordance with the principles which we have stated. We disapprove of that portion of the decree which dismisses the bill. Decree affirmed in part, and reversed in part, and cause remanded for further proceedings; the costs in this court to be equally divided between the parties.

(78 Md. 376)

**BALTIMORE BASEBALL CLUB & EXHIBITION CO. OF BALTIMORE CITY
v. PICKETT.**

(Court of Appeals of Maryland. Jan. 12, 1894.)

**CONTRACT FOR SKILLED LABOR—CONSTRUCTION—
EVIDENCE OF CUSTOM—DAMAGES.**

1. In an action against a baseball club for breach of a written contract of hiring, whereby plaintiff contracted with defendant "to play ball for the season of 1892 for \$3,000," the defense was that plaintiff did not exercise that degree of skill required of professional baseball players in the league to which defendant belonged, and was discharged for inefficiency. *Held*, that plaintiff could be required to possess and exercise only the ordinary skill, knowledge, and efficiency possessed and exercised by other professional baseball players.

2. Evidence of the degree of skill required of players in the National League was immaterial and irrelevant, since defendant entered into the contract in November, 1891, and did

not become a member of such league till January, 1892.

3. Evidence of a custom that all professional baseball clubs have the right, on 10 days' notice, to discharge a player who does not play satisfactorily, was inadmissible, since it would not only destroy the mutuality, but vary the terms, of the contract, which was for a definite term.

4. Plaintiff could recover the contract price, less such sums as were paid him by defendant, and also less such sums as he earned, or by the exercise of due diligence might have earned, in the line of his business, between the time of his discharge and the expiration of the contract.

Appeal from superior court of Baltimore city; Albert Ritchie, Judge.

Action by John T. Pickett against the Baltimore Baseball Club & Exhibition Company of Baltimore City for breach of contract of hiring. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BOYD, and BRISCOE, JJ.

E. N. Rich and W. S. Bryan, Jr., for appellant. John M. Gallagher, for appellee.

BRISCOE, J. This suit was brought for the alleged breach of a special contract of hiring. The contract was made and entered into by and between the Baltimore Baseball Club, of the city of Baltimore, party of the first part, and John T. Pickett, of the city of Chicago, party of the second part, and is in these words: That "the said party of the second part agrees to play ball for the party of the first part, for the season of 1892, for the sum of three thousand (\$3,000) dollars, with five hundred dollars advanced on the contract, said sum of five hundred dollars (\$500) to be considered part of the said three thousand (\$3,000) dollars above stated; salary payable first and fifteenth of each month; services to commence on the 26th of March, 1892, and end on October 31st, 1892." The appellee, the plaintiff below, entered upon the services, and performed them until the 1st day of June, 1892, when he was discharged or released. He was paid the \$500 advance money, and also four payments on account of his salary. The grounds set up for his discharge were want of skill and ability. The judgment was for the plaintiff, and the defendant has appealed. At the trial there were 10 exceptions reserved to the rejection by the court of evidence offered by the defendant, the third, ninth, and tenth of which were abandoned at the hearing. There were also exceptions to the granting of the first, fourth, and fifth prayers of the plaintiff, and to the rejection of the first, third, sixth, and eighth prayers of the defendant, and to the instruction on the part of the court. These exceptions form the basis of this appeal, and we will pass upon them in their regular order.

There were two defenses relied upon by the appellant: First. That the plaintiff did not exercise that degree of skill and efficien-

cy required of professional baseball players playing in the league or association to which the defendant belonged, and was discharged for inefficiency. Secondly. That there was a universal and well-known custom, observed by all professional baseball clubs, that the club shall have the right, on 10 days' notice, to release any player who does not come up to the requirements of his position, and play satisfactorily; that the defendant received the 10 days' notice, and was discharged.

It will be observed that the contract in this case was a special one, for a precise period, definite in its terms, and is simply an ordinary hiring under a special contract. It is entirely silent as to the degree of skill the plaintiff should possess in the business for which he was employed. In the words of the contract, "he was to play ball for the Baltimore Baseball Club, the party of the first part, for the season of 1892." Now, it is a well-settled rule that the standard of comparison or test of efficiency is that degree of skill, efficiency, and knowledge which is possessed by those of ordinary skill, competency, and standing in the particular trade or business for which they are employed; and, as the contract provided for no higher degree of skill than this, none could be required. The supreme court of Pennsylvania lays down the doctrine to be: "Where skill as well as care is required in performing the undertaking, if the party purport to have skill in the business, and he undertakes for hire, he is bound to the exercise of due and ordinary skill in the employment of his art or business about it, or, in other words, to perform it in a workmanlike manner. In cases of this sort he must be understood to have engaged to use a degree of diligence and attention and skill adequate to the performance of his undertaking. 'Ordinary skill' means that degree which men engaged in that particular art usually employ, not that which belongs to a few men only, of extraordinary endowments and capacities." *Waugh v. Shunk*, 20 Pa. St. 133. Also, *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; *Parker v. Platt*, 74 Ill. 432. This doctrine was fairly submitted to the jury by the first prayer of the plaintiff and the fourth prayer of the defendant, by which they were, in substance, told that if they found that the plaintiff did not possess and exercise the skill, knowledge, and efficiency possessed and exercised by other professional baseball players of ordinary skill, knowledge, and efficiency, and that he was discharged for such reasons, then their verdict must be for the defendant. A large number of witnesses, who had been professional baseball players for six or ten years, and who had played with the plaintiff, testified that they considered him a good player, and that he played an average good game of ball.

We pass now to the second question in the case. The contention on the part of the appellant is that the contract was made sub-

ject to a usage or custom that the club had a right to cancel the contract and discharge the player, on giving 10 days' notice, when the player is deficient in his playing. The contract is entirely silent upon this subject, and it is not admitted that the player had the reciprocal right to abandon the club or to cancel the contract when he deemed it proper or right to do so. We have carefully examined the testimony, and find a failure of proof to establish any usage. The evidence was manifestly too vague and unmeaning to warrant, upon any principles, the submission of any proposition based upon it. The plaintiff testified "that he had been playing professional baseball for the past nine years; is familiar with the rules of the game, and had signed contracts for professional clubs; that he had never signed a contract with the ten days' clause; that he never even saw one, and knew of no custom by which a player could be discharged that way. That nothing was said about it when he signed." The authorities all hold that a usage, to be admissible, must be proved to be known to the parties, or be so general and well established that knowledge and adoption of it may be presumed, and it must be certain and uniform. *Foley v. Mason*, 6 Md. 51; *Second Nat. Bank v. Western Nat. Bank*, 51 Md. 128; *Bank v. Graffin*, 31 Md. 520; *Patterson v. Crowther*, 70 Md. 125, 16 Atl. 531. But, conceding that there was sufficient evidence of the custom and usage contended for by the appellant, we are clearly of the opinion that it was not admissible to vary the terms of this special contract. The contract, as we have said, is one for a definite term of service, and binding on both parties. To admit the usage would not only destroy its mutuality, but vary its terms. The supreme court of Rhode Island, in a similar case to the one now under consideration, held that "a local usage cannot be considered a part of a contract, when it contradicts that contract." Justices Durfee and Halle, in delivering the opinion of the court, say the contract and usage cannot stand together. Either the contract must prevail, and make void the usage, or the usage must prevail, and make void the contract. The contract described in this declaration is not a contract made with reference to the usage, but against it. The contract described is to labor for a year, but the usage terminates it at will. The contract is, by the very fact of its existence, a protest against the usage, for it ceases to be a special contract the moment that the usage is made part of it. A usage which annuls such a contract cannot be given in evidence without subverting the well-settled rule that usages inconsistent with a contract cannot be given in evidence to affect it. *Sweet v. Jenkins*, 1 R. I. 147. And to the same effect is the case of *Peters v. Staveley*, (court of queen's bench,) where Chief Justice Cockburn holds that, the contract being for one week certain, the custom, even if proved, could not

control it. 15 Law T. R. (N. S.) p. 275. Also, *Smith v. Sheridan*, (Sup.) 10 N. Y. Supp. 365. The same rule has been established by this court in a number of cases. *Foley v. Mason*, supra; *Bank v. Graffin*, supra; *Fertilizer Co. v. White*, 66 Md. 452, 7 Atl. 802; *Patterson v. Crowther*, 70 Md. 125, 16 Atl. 531; *Bank v. Taliaferro*, 72 Md. 165, 19 Atl. 364. It follows, then, from this view of the case, that there was no error by the court in granting the plaintiff's fourth and fifth prayers, which were to the effect that there was no evidence of any usage by which the plaintiff could be discharged before the end of the contract period without sufficient cause, and the exclusion from the jury of all evidence offered to show the existence of such a usage. The first prayer of the defendant, relative to the existence of the usage, was properly rejected. The third, sixth, and eighth prayers of the defendant were properly rejected for the reasons we have heretofore given. The first prayer granted on the part of the plaintiff was correct, and contained the law upon that branch of the case. We have examined all the exceptions, and discover no error of which the appellant has a right to complain.

The first, second, fifth, sixth, and seventh exceptions to the admission of evidence are substantially the same, and present the question as to the degree of skill required of the plaintiff in the performance of his duty. The evidence was properly rejected because it tended to exact or to establish a higher degree of skill than that contemplated by the contract. The appellant was not a member of the National League at the time the contract was entered into, on November 14, 1891. It did not become such until January, 1892. This testimony was therefore immaterial and irrelevant.

The fourth exception was to the refusal of the court to allow the following question to be answered: "Can you tell whether or not there was any public complaint by the patrons of the manner in which Mr. Pickett filled his position?" It is unnecessary to pass upon the exception, as the witness afterwards substantially answered the question proposed, and defendant had the benefit of his answer.

The remaining exception was to the instruction of the court as to the measure of damages. This prayer instructed the jury that, if they found for the plaintiff, he was entitled to recover the contract price, less such sums as may have been paid to him, and also less such sums as he earned, or by the exercise of due diligence might have earned, in the line of his business, during the remainder of the period covered by the contract. We think this was unexceptionable, and is the law laid down by this court in *Railroad Co. v. Slack*, 45 Md. 161. Finding no error, and the whole case having been fairly submitted to the jury, the judgment will be affirmed.

(78 Md. 475)

GERMAN SAV. BANK OF BALTIMORE CITY v. RENSCHAW.

(Court of Appeals of Maryland. Jan. 12, 1894.)

PLEDGE—STOCKS—REPLEDGE—NOTICE.

1. Signature in blank of the assignment and power of attorney to bargain, sell, and transfer, on the back of stock certificates delivered as a pledge, is notice to third persons of the pledgee's lack of authority to repledge them for his own debt. *Taliaferro v. Bank*, 17 Atl. 1036, 71 Md. 209, followed.

2. Where a customer has requested a broker to carry stock for him on margin, and has furnished him cash and collateral, though the broker were empowered to repledge collateral to keep good the margin, he could only so use it as that he can at any time promptly return it to the customer when the latter pays his debt.

3. A pledgor, having paid his debt to his pledgee, need not tender its original amount to a second pledgee with notice, as a precedent to recovering from him the value of the pledge.

Appeal from Baltimore city court.

Trover by Robert H. Renshaw against the German Savings Bank of Baltimore city. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before BRYAN, McSHERRY, ROBERTS, and PAGE, JJ.

Bernard Carter, H. M. Benzinger, J. S. Calwell, and J. P. Brown, for appellant. Brune & Brown, for appellee.

PAGE, J. This is an action of trover, brought by Robert H. Renshaw against the German Savings Bank of Baltimore, to recover the value of 200 shares of second preferred stock of the East Tennessee, Virginia & Georgia Railroad Company. The only exception is to the action of the court below in granting the first, fifth, and seventh of the plaintiff's prayers, and in rejecting all of the instructions asked for by the defendant. Evidence was offered tending to prove that in January, 1891, Nicholson & Sons agreed to purchase 100 shares of Norfolk & Western preferred stock, on a margin of 10 per cent. In the interview which then took place between them, and which was the first and only one, Renshaw indorsed to them two checks for \$1,000 each, and told them he would place securities in their hands if they would make further purchases for him or "to enable them to make further purchases for him upon the credit of his securities." Upon their agreeing to this, he subsequently, through a Mr. Hoff, delivered to them 300 shares of East Tennessee, Virginia & Georgia stock, 300 shares of Texas Pacific, and \$10,000 income bonds of the Texas Pacific Railroad Company. On the 9th of January he wrote to the Nicholsons: "Send for execution blank powers, authorizing sale of collaterals. As soon as the powers reach me, I shall execute them, and return to you. * * * As I am anxious to increase my holdings in Norfolk and Western pfd., kindly wire me how many shares you are willing to carry for me on my collaterals, including the \$2,000 recently delivered to you. On the 10th the Nicholsons sent

him the stock to be indorsed by him, and in due time it was indorsed, as will hereafter appear, and returned. On the same day, Renshaw states, in his letter of that date, his purpose more specifically. He says: "These securities I wish you to hold as collaterals, for which purpose I shall be glad to execute the usual powers of attorney," etc. On a later date he mailed them 200 more shares of the Tennessee stock for the same purposes. The assignments and powers of attorney indorsed upon the certificates of stock thus placed in the hands of the Nicholsons were in blank, and in the following terms: "For value received, — have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, and assign, and transfer, unto —, the capital stock named in the within certificate, and do hereby constitute and appoint — true and lawful attorney, irrevocable for — and in — name and stead, but to — use, to sell, assign, transfer, and set over all or any part of said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute, with like full power. Dated —. [Signed] Robert H. Renshaw. Signed and acknowledged in the presence of [Signed] R. Powel Page." In pursuance of this arrangement, and the orders of the appellee, the Nicholsons, up to the 14th of January, had purchased for him 800 shares of Norfolk & Western preferred at a total cost of \$44,862.50, and had sold them again, by his direction, for the aggregate sum of \$42,025. By an account stated on May 18th, it appears that Renshaw owed them at that time \$997.25, for which they held as security all the stock and bonds originally pledged. After this date, and up to the time of their failure, the Nicholsons purchased for Renshaw 500 shares of Norfolk & Western preferred at an aggregate cost of \$26,900; and, if he be charged with this, he would be indebted to them, as appears by the account filed, \$30,241.32. But before this they had sold 200 shares of the purchased stock for \$10,975, and the residue had been passed by them to other persons as collaterals for loans made on their own account; so that none of it was then in their possession or under their control. If the cost of this purchased stock be taken from the apparent balance, there would still remain the sum of \$3,341.32 due from him to the Nicholsons. But it also appears that prior to their failure the Nicholsons had pledged for their own account the Texas Pacific bonds, and the pledgees of them, Roch & Coulter, had closed them out; so that, at the time of their assignment, on any settlement that could have been made between them, a large balance was due Renshaw. Two or three days after the failure of the Nicholsons, Renshaw made application to their trustees for his securities, but was informed by them they had been repledged, and later on he learned that, on the 15th of December preceding, the Nich-

olsonson had hypothecated 200 shares of the Tennessee stock, together with other securities, with the appellant, for a loan of \$15,000 made by the bank to them, and that the stock was still in its possession. He thereupon made demand upon the president for its return, but was told by him "that the bank was then taking measures to have it transferred to itself; that the only papers it held were the certificates for such stock, being those sued for in this case, with the printed form of transfer and power of attorney which were then on the backs of such certificates, signed by Renshaw, with a witness to such signature." At the time the stock was received by the bank, the blanks had not been filled up, and there was then due to the bank by the Nicholsons, on account of the loan, the sum of \$1,600. Renshaw did not then nor afterwards make any tender of money to the bank.

The nature of assignments and powers of attorney, such as exist here, were fully considered in the case of Tallafiero v. Bank, 71 Md. 209, 17 Atl. 1038. There Miss Tallafiero intrusted her bonds to Veazy for sale, with assignments and power of attorney executed in blank, in all respects like those under which the appellant now claims, and it was held that by no possible construction could such powers be regarded as conferring authority upon Veazy to hypothecate the bonds as security for his own debt; that the bank took them "with no better title than Veazy himself possessed, and was to be charged with notice of such facts and matters as made it reasonable that inquiry should be made into such title." See, also, 72 Md. 169, 19 Atl. 364. Applying this rule to this case, it follows that, having received this stock under these assignments, executed in blank, and conferring only a power to sell, the appellant was put upon its inquiry as to the right of the Nicholsons to pledge it for their own debt, and must therefore be charged with full notice of the contract by which they held it. And, if this be so, the appellant, having taken them as collateral for the Nicholsons' debt, acquired no better title than the Nicholsons themselves possessed. What, then, were the rights and powers of the Nicholsons respecting the stock, as against the appellee? Renshaw desired the Nicholsons to buy and carry for him stock on a margin of 10 per cent. For that purpose he placed in their hands \$2,000 in cash and certain shares of stock as collateral security. There is some evidence tending to show that the Nicholsons were to be at liberty to rehypothecate the stock to enable them to raise money to the extent of meeting the margin. Renshaw himself said to them he would place it in their hands to enable them to make further purchases for him upon the credit of his securities, though in his letter of the 10th of January he wrote that he intended them to "hold" his securities as collateral. It was, without question,

intended by the parties that the Nicholsons should use the \$2,000 to meet the margins, and it is equally clear that the parties did not intend that the Nicholsons should use the collaterals as their own property, though it may be possible that it was contemplated that they should have power to use them by way of repledge, to raise such additional sums as the margins for the increased purchases might require. However this may be, it was the right of Renshaw to have a return of his stock upon making good his indebtedness to the Nicholsons, and it was their duty so to use it that this right of Renshaw should be fully preserved. The rule in such a case is well stated in *Lawrence v. Maxwell*, 53 N. Y. 29: "Conceding the right to use the stock pledged by way of hypothecation, or otherwise, as claimed, and that it was out of the actual possession of the defendant, it was his duty at once to regain possession, and restore the same to the plaintiff. A neglect or refusal to do so gave the plaintiff an action as for a conversion of the property. It is immaterial whether the stock was hypothecated by the defendant upon a loan of money for the benefit of the plaintiff's transactions or for his own purposes. The right to use the stock pledged ceases the instant the debt is paid." *Jones, Pledges*, § 496; *Cook, Stock & S.* § 467; *Colebrook, Collat. Sec.* § 306. Under the special contract as we have stated it, therefore, the Nicholsons had no right to use the stock in such way as to subvert the right of Renshaw to a return of his pledged securities upon the payment of his indebtedness. And no evidence of usage is admissible which would destroy the contract. Usage can be admitted to interpret the language of a contract where it is obscure, but not to change its legal character, or derogate from the rights of parties, or authorize acts contrary to its provisions. *Bank v. Tallafarro*, 72 Md. 171, 19 Atl. 364; *Cook, Stock & S.* § 462, and authorities there cited; *Rich v. Boyce*, 39 Md. 315; *Kraft v. Fancher*, 44 Md. 215; *Fay v. Dray*, 124 Mass. 500. In *Transcontinental Co. v. Hilmers*, 20 Fed. 717, the plaintiff had deposited certain shares of stock as collateral security for the payment of \$1,000,000 in one year, with authority to sell and assign the collaterals on failure of the pledgor to fulfill his agreement. It was contended that the pledgor understood that the defendants, who were stockbrokers, would be obliged to hypothecate the collaterals to obtain the money. "Upon this theory," said Wallace, J., "if they had hypothecated the collaterals as his agents, or in such a way that they could be restored to him upon payment of the sum loaned on them, the defendants would not be liable for a conversion. Such a use of the stock might not be inconsistent with the intention of the parties, and would not subvert the ultimate rights of the pledgor, and if sanctioned by usage, or if within the contemplation of the

parties, would not be a conversion. But the defendants assert that, according to the understanding between them and the pledgor, they were to be at liberty to mingle the securities with their own, and raise money on them generally, as though they were their own. Such a use is utterly inconsistent with the contract of pledge. No evidence of usage is admissible which would destroy the contract. If the defendants have used the collaterals in such a manner that they could not at once regain them and restore them to the pledgor when the obligation of the latter is discharged, they are liable for a conversion." We do not mean, by what we have said, to imply that the broker is bound to return the identical stock that has been pledged, for "one share is exactly similar to and of the same value as another of the same company;" but he must be ready to return an equal quantity of the same issue. *Worthington v. Tormey*, 34 Md. 193; *Price v. Gover*, 40 Md. 111. It has already been shown that, at the time of the Nicholsons' failure, upon a proper settlement, Renshaw had fully paid his indebtedness to them, and, if this was so, was in a position to demand the return of the pledged securities, and, upon their failure to do so, was entitled to maintain an action against them for their value. With knowledge of these relative rights and duties existing between the original pledgor and pledgee, the appellant is fully chargeable, under the rule laid down in *Tallafarro's Case*, above cited. It had notice of everything of which proper inquiry would have informed it. It must be held to have known, when it received the stock, that it had been pledged to the Nicholsons under the special contract, and that Renshaw would be entitled to its return upon the discharge of his obligation. It was a taker with notice, and, as such, stands merely in the place of the pledgee, and "must restore the stock to the owner in case the pledgee would be obliged to restore it had no second sale or pledge been made." *Cook, Stock & S.* § 472. We think the cases of *Donald v. Suckling*, L. R. 1 Q. B. 618, *Johnson v. Stear*, 15 C. B. (N. S.) 330, and *Talty v. Trust Co.*, 93 U. S. 321, fully support the view we have taken of this case. In these cases the debt from the first pledgor to the first pledgee was unpaid at the time the suits were brought, and it was held the pledgor could not recover the pledge without tendering the pledgee the amount for which it was originally pledged. In the last-mentioned case, *Swayne, J.*, said: "A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes, ipso facto, the title of the second pledgee;" and, citing from *Story on Bailments*, the learned judge, in the same opinion, lays down this rule: "If the pawnee should undertake to pledge the property [not being negotiable securities] for a debt beyond his own, or to make a transfer thereof as if he were the actual

owner. It is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee." When the amount due from the first pledgor to the first pledgee is not discharged, the condition upon which the former is entitled to the return of his property has not been complied with. These cases decide that under such circumstances this condition may be met by a tender to the repledgee; and the necessity for this follows from the fact that the right of the original pledgor to have back his property can only arise upon the discharge of the indebtedness on account of which the pledge was made. It follows from what we have said that we see no error in the rulings of the court below, and the judgment must therefore be affirmed.

(78 Md. 363)

HOPKINS, Collector of Taxes, v. BAKER et al.

(Court of Appeals of Maryland. Jan. 12, 1894.)

TAXATION—SITUS OF "STOCK IN TRADE."

A merchant's stock in trade is "goods and chattels permanently located," within Const. art. 3, § 51, providing that such goods and chattels are taxable in the city or county where they are so located.

Appeal from Baltimore city court.

Action by Lewis N. Hopkins, collector of state and city taxes of Baltimore city, against Baker Bros. & Co., for state and city taxes. There was judgment for defendants, and plaintiff appeals. Reversed.

Argued before BRYAN, FOWLER, BRISCOE, PAGE, and BOYD, JJ.

Thos. G. Hayes, Jas. P. Gorter, and Wm. S. Bryan, Jr., for appellant. David Stewart and D. G. McIntosh, for appellees.

BOYD, J. This case was tried in the Baltimore city court on an agreed statement of facts. The agreement shows that Charles J. Baker, William Baker, Jr., and Charles E. Baker compose the firm of Baker Bros. & Co.; that Charles E. Baker is a resident of Baltimore city, and the other two members of the firm are residents of Baltimore county; that Charles J. Baker has a four-tenths interest, and the other two have each a three-tenths interest, in the firm. It is admitted that the place of business of the firm is on Charles street, in Baltimore city, at which place is kept the stocks of the partnership, of an average value of \$80,000; that the firm has been assessed by the appeal tax court of Baltimore city for \$80,000 on their stock, and \$750 on their horses used in their business, and taxed \$1,393.95 for state and city taxes for 1892. The appellees declined to pay those taxes, but were willing to pay on the horses which they keep permanently in the city, and on the three-tenths interest of Charles E. Baker. The question raised by the agreed state-

ment of facts and the prayers was whether taxes could be levied and collected from the whole stock of the firm, or whether only the three-tenths interest of Charles E. Baker therein was liable. The court below decided that the plaintiff was only entitled to recover the amount of taxes due for the horses and for the interest of Charles E. Baker in the whole stock of the partnership. A judgment was entered accordingly for \$432.38, with interest and costs, and the plaintiff appealed to this court.

The appellees rely upon section 51 of article 3 of the constitution of Maryland, which provides that "the personal property of residents of this state shall be subject to taxation in the county, or city, where the resident bona fide resides for the greater part of the year for which the tax may or shall be levied, and not elsewhere, except goods and chattels permanently located, which shall be taxed in the city or county where they are so located." The principal question to be determined is the meaning of the term "permanently located," as used in that section of the constitution, it being contended by the appellees that the goods and chattels composing their stock in trade are not "permanently located" in the city of Baltimore. Article 15 of the declaration of rights asserts that "every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property." Taking this in connection with the provision of the constitution above quoted, it is clear that it was contemplated by the framers of the constitution that personal property such as that referred to in this case should be taxed somewhere. If a resident of Baltimore county has personal property, carriage, and horses, for example, which go in and out of the city, without having any permanent abiding place in the city, he should pay taxes on the same in Baltimore county. The object of the constitutional provision was to insure as far as possible taxation once, and to prevent it more than once on the same property. As the situs of personal property is ordinarily the place of residence of the owner, the constitution provides that personal property shall be taxed where the owner bona fide resides for the greater part of the year; but, as that provision alone might work great hardship on the county or city where goods and chattels of the owner are permanently located, the exception was made. Goods and chattels permanently located at the residence of the owner are to be taxed there, so what might be called his "floating goods and chattels" are taxed at the place of his residence, because they have no actual situs of their own, and hence that of their owner is adopted; but such goods and chattels as compose the stock in trade of the appellees are not carried backwards and forwards between Baltimore county, or some other county, and the city of

Baltimore. As long as they are the property of the appellees, they are located in Baltimore city, and they are as "permanently located" there as such goods and chattels can be anywhere. They are not manufactured or purchased to be kept as long as they remain in existence. The separate articles constituting the stock may continue the property of the appellees for a day, a week, a month, a year, or longer, but until they are sold they remain permanently in Baltimore, and are not moved from place to place. That is clearly what is meant by "permanently located," not that the goods and chattels must remain until they are worn out, or indefinitely. The agreed statement of facts shows that the average value of the stock carried by the appellees is \$80,000, and that they were assessed for that amount. In other words, the appellees keep constantly on hand at their place of business in Baltimore city \$80,000 worth of goods and chattels in the shape of glass, etc. It may be true that \$5,000 worth of glass may be sold and shipped away to-day, and another lot of glass, worth \$5,000, may be substituted for it to-day or to-morrow, but the stock of goods and chattels of the value of \$80,000 is kept on hand,—is permanently located at their place of business. It is not necessary to itemize the stock in trade when it is assessed. The assessors examine the stock, the goods and chattels, and fix their value for taxation, just as they do the furniture or other tangible personal property at the respective residence of the appellees. If the contention of the appellees is to prevail, their merchandise cannot be taxed anywhere. No merchant expects to keep his stock permanently on hand in the sense that term is used by the learned counsel for the appellees. He expects to sell as soon as he can receive his price, and as he sells he replenishes his stock. The articles are changing from day to day, but the stock, which represents the aggregate of the goods and chattels, remains about the same. Yet can it be claimed that a merchant who resides and carries on his business in Baltimore is not to be taxed for his stock in trade? A reasonable construction must be given the constitutional provision, and we must bear in mind the object in taxing goods and chattels permanently located in the city or county where they are so located. If the position of the appellees is correct, it is possible to have hundreds of thousands of dollars, probably millions, of tangible personal property, goods and chattels, within the city of Baltimore, having the benefit of its police and fire protection from year to year, and yet not contribute one dollar to the support of the police and fire departments. Merchants transacting business in Cumberland, Hagerstown, Frederick, Annapolis, and other incorporated cities and towns in the counties, could escape all municipal taxes on their stock in trade by living beyond the corporate limits of those cities and towns, while those living within such

cities and towns must pay the municipal as well as the state and county taxes on their stock in trade. Such a construction of the law would encourage fraud. A resident of a remote county might carry a large stock in trade in Baltimore city, or on the eastern shore, without the knowledge of the authorities of the county where he resided. We recognize fully the force of the argument of counsel for the appellees that property cannot be taxed simply because it may seem inequitable to permit it to escape taxation. But when we are called upon to construe statutes or the constitution on this subject it is our duty, in seeking the true interpretation of language used, to place a reasonable construction upon it, and to bear in mind the fact that our constitution aimed to require all persons to bear their just share of the burden of taxation. This case differs wholly from those of *Hooper v. Mayor*, 12 Md. 464, and *Philadelphia, W. & B. R. Co. v. Appeal Tax Court*, 50 Md. 397, cited by the appellees. Harper was a resident of Baltimore county, and this court decided that his ship was not permanently located "within the state," and hence it could not be taxed by Baltimore city. The statute then in force required property owned by residents of this state, and not permanently located elsewhere within the state, to be assessed to the owner in the county or city where he resided. The ship was registered in the customhouse at Baltimore, but under the law of congress existing at that time she could not be registered elsewhere while the owner resided in Baltimore county, as Baltimore city was the port of entry of the district which embraced Baltimore county; and hence the fact that she sailed from the port of Baltimore city to foreign ports did not permanently locate her there if, in the language of the court in that case, "a vessel built for and actually employed in foreign trade can be said to be permanently located anywhere." The case in 50 Md. 397, supra, determined that the rolling stock of the company could not be assessed in Baltimore city, as it was not permanently located there, within the meaning of the general assessment act of 1876, which had a provision very similar to that in the constitution. The court decided that Baltimore city was not the home office of the corporation. It said, on page 416: "The engines and cars of the appellant have no abiding place or permanent location in this state, so as to become incorporated with the other permanent property of the state, and are only brought here transiently when employed in the operation of the road." The court uses as equivalent terms "abiding place" and "permanent location." In this case the goods and chattels have an "abiding place" in Baltimore city, and are "incorporated with the other permanent property" of the city. They are not simply in transitu, or temporarily located; and it is not a strained construction of the language of the constitution to determine, as we do, that the stock

in trade of the appellees is "permanently located" in the city of Baltimore, and hence liable to taxation there.

We do not deem it necessary to determine whether this stock could be taxed in Baltimore city by reason of the fact that it is owned by a firm transacting business there. We are of the opinion, however, that it is perfectly proper to assess the property to the firm, instead of to the individual members thereof according to their respective interests. There are many reasons why this should be so. The interest of the partners may vary from time to time, and, should it be necessary at any time to sell the property for taxes, it might be very inconvenient, and cause serious delay in the collection of taxes, if the interests of partners must be determined as they would likely have to be before any one would purchase. As partnership assets are liable for partnership debts before they are for the debts of the individual members of the firm, it would be proper to levy the taxes against the firm. Assessing the firm instead of the individual members will save much inconvenience to the authorities, and do no injustice to any one. It follows from what we have said that the judgment below must be reversed. Judgment reversed, and new trial awarded.

(66 N. H. 148)

MORSE v. BOSTON & L. R. CO.

(Supreme Court of New Hampshire. Grafton.
March 15, 1890.)

**RAILROAD COMPANIES—FENCES—STOCK-KILLING
CASES.**

1. Plaintiff's cattle escaped from his pasture through G.'s insufficient fence, and were turned into the highway, and abandoned by G. An ox wandered across G.'s land to defendant's railroad, and was killed by its locomotive without the engineer's negligence. *Held*, that plaintiff could not recover therefor, since, under the circumstances, defendant owed plaintiff no duty to fence against his cattle.

2. Plaintiff having left the ox on defendant's premises, it was skinned and buried, and the hide converted by defendant. *Held*, that plaintiff could not recover the value of the hide in an action of tort.

Case by Morse against the Boston and Lowell Railroad Company for killing the plaintiff's ox. There was also a count in trover. Facts found by the court. Judgment for defendant.

Smith & Sloane, for plaintiff. Page & Shurtleff and Aldrich & Remick, for defendant.

DOEL, C. J. "At common law the owner of a close was not bound to fence against an adjoining close unless by force of a prescription; but he was at his peril to keep his cattle on his own close, and to prevent them from escaping; and if they escaped they might be taken on whatever land they were found damage feasant, or the owner was liable to an action of trespass by the

party injured." *Avery v. Maxwell*, 4 N. H. 36. Under the statute of fences the landowner "is obliged to fence only as in the case of prescription at common law. The manifest object of the statute was to establish the rights and obligations of tenants of adjoining occupied closes respecting the making and maintaining partition fences; and the rights of persons not having any interest in either of the adjoining closes remain unaffected by the statute, and are to be defined and protected by the common law. * * *

At common law, when a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle but those which were rightfully in the adjoining close." *Rust v. Low*, 6 Mass. 90, 98, 99. As between adjoining owners, or those having their rights, the common-law duty of keeping their cattle on their own land is modified by statute in a limited manner and to a limited extent that do not affect this case. So far as the claim asserted by the plaintiff against the defendant is concerned, the plaintiff was bound to prevent the escape of his cattle from his pasture, not only by performing his own fencing duty, but also by compelling adjoining owners to perform theirs. Glover's statutory duty to maintain his part of the fence between his field and the plaintiff's adjoining pasture could be enforced by the plaintiff, and could not be enforced by the defendant. Gen. Laws, c. 142. The defendant is not liable to the plaintiff for the consequences of his nonenforcement of Glover's duty. Four of the plaintiff's cattle strayed from his pasture into Glover's adjoining field, through Glover's insufficient fence. If they had gone across the field into C.'s adjoining land through C.'s insufficient fence, the law of the authorities is that the plaintiff would have been liable to C. in trespass, and would have had his remedy against Glover. If they had been killed by falling down a precipice in C.'s land, the insufficiency of C.'s fence would not have made him liable to the plaintiff. In a certain sense, and for some purposes as between the plaintiff and Glover, the cattle were rightfully in Glover's field. *Roby v. Reed*, 39 N. H. 461, 465. Their entry through Glover's insufficient fence was not a trespass. But they were not there rightfully in the sense that would require C. to fence against them. *Rust v. Low*, 6 Mass. 90, 98, 99, 102; *Mills v. Stark*, 4 N. H. 512, 514. If they had passed through Glover's field into the defendant's adjoining road, without interference from any quarter, it would not be material whether the defendant was bound to maintain the whole or half or none of the fence between the field and the road. Railroads are not an exception to the rule that the duty of fencing against cattle on adjoining land is limited to cattle that are rightfully there. *McDonnell v. Railroad Co.*, 15 Mass. 564-566; *Jackson v. Railroad Co.*, 25 Vt. 150; *Woolson v. Railroad Co.*, 19 N. H. 267, 269,

270; *Towns v. Railroad Co.*, 21 N. H. 363; *Cornwall v. Railroad Co.*, 28 N. H. 161; *Chapin v. Railroad Co.*, 39 N. H. 53; *Mayberry v. Railroad Co.*, 47 N. H. 391; *Giles v. Railroad Co.*, 55 N. H. 552, 553, 555, 556. Like other occupiers and owners of land, the defendant is not liable to the plaintiff for not fencing against his cattle when they are roaming across Glover's field under such circumstances that the plaintiff would be liable to the defendant for damage caused by their passing from the field into the defendant's road. When Glover found the cattle in his field, he could lawfully have driven them back into the pasture without the plaintiff's consent, and against the plaintiff's objection, and thereafter he could have kept them out of his field by performing his own fencing duty, and compelling the plaintiff to perform his. Glover's right to drive them back arose from the necessity of the case, and not from the plaintiff's presumed consent. It was a duty as well as a right. If he had driven them north towards their pasture with due care, one of them might have strayed in another direction, and been killed by a locomotive on the defendant's road. Whether the defendant would have been bound to fence against them while Glover was carefully doing what was necessary to be done to get them out of his field is a question that need not be considered. If, under such circumstances, his neglect of the fencing duty he owed the plaintiff would impose upon the defendant a fencing duty that would aid him in avoiding some of the consequences of his own fault, the creation or transfer of fencing obligation in such a case would not sustain this action. Instead of driving the cattle back, Glover put them in his barnyard about noon, kept them there about half a day, turned them into the highway between sundown and dark, and drove them westerly in the highway across the defendant's road, and then northerly in the highway towards the plaintiff's house. It does not appear that he exercised due care, or that it was necessary for him to put them in his yard, or keep them there about half a day, or turn them into the highway between sundown and dark, or drive them towards the plaintiff's house. On the way, one of them, an ox, escaped. Returning home, after dark, Glover looked for the lost animal, but did not find it. While in the plaintiff's constructive, but in no one's actual, possession, it wandered from the highway across Glover's land to the defendant's road, where it was killed in the night by a locomotive without any fault in the engineer or fireman. Where it passed from the highway across Glover's land to the railroad there was no fence. The case does not raise the question whether the defendant would have been bound to fence against the ox if it had been in the custody of Glover as bailee until it entered the railroad, and the fact had been found that he was properly exercising a

right derived from necessity. The cause of action alleged in the declaration did not accrue from Glover's intervention, followed by his abandonment of the duty he undertook properly or improperly to perform. *Noyes v. Colby*, 30 N. H. 143; *Giles v. Railroad Co.*, 55 N. H. 552, 553, 556. The defendant was not bound to fence against the animal left by Glover to run at large in the highway, and roving thence on Glover's land without the consent or knowledge of Glover or the plaintiff. Where it entered the railroad the plaintiff was not an adjoining owner, and had not the rights of such an owner.

The plaintiff, finding the ox where it had been killed, notified the defendant, and demanded compensation for his loss. The defendant's section men, finding the ox dead, and very much swollen, skinned and buried it, and informed the plaintiff what they had done. By direction of the roadmaster, they sold the skin, and deposited the money (six dollars) in the hands of a proper officer of the company, where it remains. By leaving the carcass to become a nuisance on the defendant's premises the plaintiff compelled them to bury it. They were not bound to remove or sell the hide. Their removal and sale of it after the plaintiff abandoned it were lawful. The proceeds of the sale are to be disposed of on equitable principles, but not in this action of tort, which the plaintiff cannot maintain. *Holt v. Stratton Mills*, 54 N. H. 109, 116. Judgment for the defendant.

BINGHAM, J., did not sit. The others concurred.

(159 Pa. St. 277)

TANNEY et al. v. TANNEY.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

TENANTS IN COMMON—RIGHTS AND REMEDIES IN
TER RESE—RATIFICATION OF COTENANT'S ACTS
—ESTOPPEL.

1. Where property in the management of one cotenant is sold for taxes, and purchased by him, the purchase inures to the benefit of all the cotenants so far as it discharges the lien for taxes, and does not divest them of their interests if they elect to avoid the sale.

2. Act April 22, 1856, providing that no right of entry shall accrue, or action be maintained, to enforce any trust as to realty but within five years after such trust accrues, cannot avail such cotenant in an action by his cotenants for their share of the land, as their right in the property is an interest under the common title, in no way affected by the sheriff's sale, they having elected to treat it as a nullity.

3. Though such cotenants accepted their share of the purchase money, they are not estopped from avoiding the sheriff's deed, where their cotenant concealed the fact that he was the actual purchaser by procuring a stranger to bid in the property and convey it to him.

Appeal from court of common pleas, Allegheny county; J. W. F. White, Judge.

Ejectment by William H. Tanney and others against Lewis H. Tanney. There was

judgment for plaintiffs, and defendant appeals. Affirmed.

Geo. H. Quail, for appellant; L. P. Stone, for appellees.

DEAN, J. The parties to this suit filed a case stated, in the nature of a special verdict, for the opinion of the court. The material facts agreed upon are these: William Tanney, the ancestor of these parties, died intestate in 1857. At his death he was the owner of a lot, on which was a frame dwelling house, in the city of Pittsburgh. He left a widow, Amella Tanney, and four children, —William, Emma, Julia, and Lewis. The whole family occupied the property until 1869. At this time the children had married, and all had left the city. The property was thereafter occupied by tenants, and the rent, with consent of the children, was paid to their mother, Amella, who died 10th December, 1881. Up to January 1, 1877, this defendant, Lewis H. Tanney, had expended, in improvements, payment of taxes, and municipal liens, \$500, no part of which was repaid him by his brother and sisters, his cotenants. William Tanney, one of the plaintiffs, at the same time had also paid out \$500 for the same purposes, no part of which was repaid by the sisters. The taxes for 1878 and 1879, amounting to \$40.73, not having been paid, they were entered as a lien, *scire facias* issued, judgment had, execution issued, and the property sold at sheriff's sale. One John J. Lawrence became the ostensible purchaser at a bid of \$500, and deed was duly acknowledged to him March 12, 1881. Lewis J. Tanney, the defendant, by agreement furnished Lawrence the \$500 purchase money paid to the sheriff, and Lawrence conveyed the property to Lewis, March 24, 1881, who soon after took possession, and has since retained it. The \$500 was appropriated: To costs and taxes, \$263.22; to the widow and four children, the balance, \$236.78, the widow's share being \$78, and \$39.46 for each of the children. These plaintiffs each executed receipts dated, respectively, July 19, August 18, and August 27, 1881, for these shares. They are all alike, and this is a copy, without signature, of each one of them: "Received August 27th, 1881, of A. S. and W. S. Moore, the sum of thirty-nine and 46-100 dollars, in full of my share of balance due the heirs of William Tanney, deceased, out of the sale of real estate in Allegheny county, Pa., sold upon execution issued upon judgment No. 37, September term, 1879, in the court of common pleas of said county, No. one, D. T. D." When the money was paid, all the distributees were of full age. William, Emma, and Lewis lived at the time in Beaver county, and Julia in Cleveland, Ohio. The money was paid, and receipts given, at their homes. A. S. and W. S. Moore, who paid the money and took the receipts, were residents of Beaver county.

Up until the dates of the receipts, no one of them, except Lewis, had any knowledge of the filing of the liens or the sheriff's sale of property. As late as the latter part of 1879, at the solicitation of Lewis, all the parties had executed and delivered a power of attorney to Alderman Leslie, authorizing him to dispossess a delinquent tenant, and relet the property. Under the power he obtained possession, and rented to a new tenant, June 1, 1880, and thereafter accounted to Lewis for the rents. This action of ejectment was not begun until January 3, 1891,—more than nine years after the sheriff's sale and the payment of the purchase money. On this statement of facts, it was agreed that the court should enter such judgment "as in their opinion the law and equities of the case will warrant." The court entered judgment for plaintiffs for the undivided three-fourths of the land, subject to the payment by each plaintiff to defendant of the sum of \$39.46, the share received of the purchase money at sheriff's sale, with interest from July 19, 1881. From this judgment, defendant prosecutes this appeal, assigning for error the judgment for plaintiffs, and the refusal of the court to enter judgment for defendant.

If, without collusion, Lawrence had been a purchaser for himself with his own money, and had afterwards conveyed the lot to Lewis Tanney, Lewis would have taken a good title as against even his cotenants for the title of all the tenants having, for the debt of all, passed by regular sale to a third party, Lewis owed no duty thereafter to his cotenants with regard to it. But the purchase by Lawrence was only nominal. He merely acted for Lewis, and paid for it with Lewis' money; then reconveyed to him. The change in title was only in form; the interests of the cotenants remained the same. The deed to Lewis, if of any value, inured to the benefit of all, the same as if he had purchased the incumbrance without a sale. Each one of two or more tenants in common of land stands in a relation of confidence to his cotenants with reference to the common property. If one of them purchases an outstanding title, and undertakes to claim under it the common property as against the others, if they contest it, his claim will not be allowed, because it must be presumed that each, as regards the common interest, acts for all. The same principle is invoked as is enforced between all persons who occupy towards each other a fiduciary or confidential relation. The rule, as deduced in *Weaver v. Wible*, 25 Pa. St. 270, from the many authorities there cited, is that "community of interest produces community of duty;" and, further: "A conveyance to one of several tenants in common, or a deed to one of two devisees of the same land, shall inure to the benefit of all who came in under the same title, and are holding jointly or in common. Where several

persons have a joint or common interest in an estate, it is not to be tolerated that one shall purchase an incumbrance or an outstanding title, and set it up against the rest for the purpose of depriving them of their interests." Chancellor Kent, with great truth, remarked "that such proceeding would be repugnant to a sense of refined and accurate justice, and would be immoral, because it would be against the reciprocal obligation to do nothing to the prejudice of each other's claim, which the relationship of the parties created." All that can be demanded is contribution from each to the expense of any purchase which releases the common interest from embarrassment; and, as is said in *Ohorpenning's Appeal*, 32 Pa. St. 315: "The rule is inflexible, without regard to the consideration paid or the honesty of intent. Public policy requires this, not only as a shield to the parties represented, but as a guard against temptation on part of representatives." In *Myers' Appeal*, 2 Pa. St. 463, these were the facts: Four of the five children, tenants in common of a tract of land, gave a power of attorney to their brother, the fifth one, authorizing him to redeem land of their ancestor, which had been sold at a tax sale. The brother did not redeem, but, after the title had become absolute in the purchaser, bought it from him with his own money, in his own name, and then claimed the land to the exclusion of his cotenants. Held, that the sale was voidable at the option of the other heirs. The case before us is stronger on its facts against the defendant than the one cited, for Lewis Tanney was himself the purchaser at the sale for taxes, while in *Myers' Appeal* the purchaser was a stranger, who of his own volition had bought, and paid the consideration money out of his own pocket. That the sheriff here made the sale for taxes on a municipal lien in no way changes the application of the principle. The sale resulted from the joint default of all the tenants in common. It was the duty of all to share equally in the payment of taxes. But Lewis had immediate charge of the common property, for he procured the power of attorney for Leslie, and to him Leslie accounted for the rents up to the date of the sheriff's sale. When he purchased with his own money, the purchase inured to the common benefit,—that is, it discharged the lien for taxes, but their interests were not divested by the sale unless they ratified it. What we have said proceeds on the presumption the law raises, if Lewis had been openly the purchaser at sheriff's sale, and had taken the deed in his own name, the interests in the land would have remained the same, and the possession would have been constructively in all as tenants in common, notwithstanding the naked legal title was in Lewis.

Nor will the statute of limitations of the 22d of April, 1856, under the facts of record, avail the defendant. That act says:

v.28A.no.4—19

"No right of entry shall accrue or action be maintained to enforce any implied or resulting trust as to realty but within five years after such equity or trust accrued." These plaintiffs are not seeking to enforce an implied or resulting trust; they are demanding possession of the undivided three-fourths of their land, from which defendant wrongfully keeps them. In reply, defendant admits they once had title, but alleges by the sheriff's deed their interest was divested, and vested in him, and, if plaintiffs have any claim, it is because a trust is implied or has resulted from his purchase, and, as the action was not brought within five years, the plaintiffs are barred by the act of 1856. They answer that as to them the sheriff's deed is a nullity; their relation as tenants in common was not changed by it, for the policy of the law forbids such an attempt by Lewis to oust his cotenants from the common inheritance, especially in view of the fact that at the date of the sheriff's sale he was in the active management of the property, to whom Leslie accounted for rents and expenditures. They claim no benefit from his sheriff's deed, and aver that it cannot affect their right when they elect to avoid it. In this they are correct. If Lewis had purchased, in his own name, an outstanding, better title to the common property, he would have held it as trustee for all, and it would have been so decreed on reimbursing him their respective shares of his outlay. But he purchased no outstanding title in this case. The legal title and possession in all the tenants were indisputable from the death of the father, in 1857, until the acknowledgment of the sheriff's deed, in 1881. Each, during that time, was, with reference to the common property, constructively trustee for the others. Neither could, by a collusive arrangement with a stranger wrest from the others their interests, and appropriate the whole. The colorable sheriff's sale permitted, if not prompted, by Lewis, can be no more effective for that purpose than if he had by his voluntary deed conveyed the whole to Lawrence, and then had taken a reconveyance to himself. Nothing short of an unequivocal, hostile possession under the sheriff's deed for 21 years would have been effectual to bar the right of entry of the cotenants under the common title which came to them from their father in 1857. It is not a resulting trust. An implied or resulting trust is where land is purchased in the name of one person, and the money paid by another; or where a purchase is made by a trustee of land in his own name with trust money; or where a purchase of land is made by a partner in his own name with partnership funds; or where a conveyance has been obtained by fraud. These, and cases of like character, come under the head of implied or resulting trusts. Here, one being privy in estate, legal and equitable, with three others by a covinous device attempts to strip his cotenants of

their shares and appropriate the whole. They could, with full knowledge of the transaction, accept the purchase money and ratify it, or they could elect to treat the sheriff's deed as a mere nullity and rest on their undisputed title for their right to possession. This last, they allege, is their attitude here. The defendant replies they accepted their shares of the surplus purchase money, and are estopped now from avoiding the sheriff's deed. The facts of record must form the basis of judgment in this particular; and we concur with the court below that not only do they fail to show plaintiffs knew who was the real purchaser, but these facts show affirmatively they did not know their brother was. There can be no ratification or estoppel where the act which is set up as constituting ratification was done in entire ignorance of the material facts prompting action. Nor was there imposed upon them the duty of inquiry before accepting the money, for there was nothing to excite suspicion or to stimulate inquiry. The purchase by the brother was concealed by a method most likely to lure to inaction. A public sale to a stranger, on an execution at the foot of a debt which they knew they owed, and which had been judicially ascertained, might well move them to the conviction that their property had passed to a stranger. To say they could have discovered the facts by reasonable diligence is of no weight, in view of the circumstances. As is remarked in *Maul v. Rider*, 59 Pa. St. 167, a case in some of its features resembling the one before us: "There are few facts which diligence cannot discover, but there must be some reason to awaken inquiry, and direct diligence in the channel in which it would be successful." As they did not know the material fact here—that Lewis was the purchaser at sheriff's sale—when they accepted the money, they are not estopped from now asserting their right.

As to the alleged hardship of imposing upon one tenant in common the care of the common property, and expenditure of money in excess of his receipts, for the benefit of his cotenants who live remote from it, and are either unable or unwilling to contribute their share, and then prohibiting him from being a bidder to protect his own interests, such hardship is more apparent than real. The common property is chargeable with the common debt reasonably necessary for its preservation. Any one of the owners can insist on an equitable accounting, whereby, at the foot of a judicial decree, satisfaction can be had. Further, the court of common pleas is always open for proceedings in partition, by which the property can be divided or sold, and the proceeds in excess of equitable charges divided among the tenants in common. But neither good morals nor law will sustain this sort of proceeding on the part of one tenant in common to oust his brother and sisters from the common inheritance.

There is a fact disclosed in this case, not

by any means exceptional, to which we call the attention of the bar. Care and accuracy in the preparation of paper books is as much a professional duty as pointed and logical presentation of the client's cause. While not seldom many authorities are cited which have little or no bearing on the questions to be decided, still our duty requires of us an examination of all those which counsel point out to us as sustaining his argument. In view of this he should correctly give us the volume, page, and names of the parties in each citation. As an illustration of the unnecessary labor imposed by careless citation, in the appellees' paper book 11 cases are cited as ruling that a tenant in common is prohibited by the policy of the law from acquiring, as against his cotenants, an antagonistic title. The third case cited is *James v. Conway*, 4 Yeates, 111. There is no such case in 4 Yeates. We turned to the volume and page, and found *Rodgers v. Gibson*, a case ruling that a judgment creditor is not within the protection of the recording acts. We then turned to the names of parties in the table of cases given in the beginning of the volume, and found no case of *James v. Conway*; then to the index at the end of the book, and found, after careful examination, under the head of "Limitation of Actions," what occurred to us as a possible reference bearing on this case: "That, in case of fraud, the statute of limitations only commences to run from the time the right of action accrues." That referred to page 109. On turning to that page, we found a case of *Jones v. Rees' Executors*, one of whom is named *Conoway*, ruling that where a free negro, ignorant of his freedom, had in the early days of the commonwealth been sold as a slave, his right of action for his services, against those who fraudulently held him, accrued only when he had discovered the fraud. We infer this is the case meant, for, although the bearing of this decision on the case in hand is somewhat remote, no other in that book has any bearing on it at all. If this inference be correct, then neither the name of plaintiff, defendant, nor page is correctly given in the paper book. Of course, whether a case is in point is a matter of opinion, in which we often have occasion to differ from counsel; but the names of parties, volume, and page are facts, misstatements of which are the result of carelessness and indifference. We have a right to expect of counsel such accuracy of reference as will enable us to determine readily where the law cited by them can be found. It is our duty then to examine and consider it. Another case cited among the same 11 is *McDowell v. Potter*, 8 Barr, 19. This should be page 189. The next—*8 Watts*, 16—should be page 12. Then *Duff v. Wilson*, Pa. 442, is cited, the volume not given. There are a number of errors, all going to show either careless preparation of manuscript or indifferent proof reading, it is not material which.

The duty of counsel to secure accuracy is just as imperative in reading proof as in the preparation of manuscript. If they neglect to do either, it is often impossible for us to give their causes that critical examination their importance demands. We are led to these remarks by what seems to us a growing evil, which, on being brought to the attention of the profession, we are confident will be cured. The judgment is affirmed, and appeal dismissed, at costs of appellant.

(159 Pa. St. 430)

McHUGH v. SCHLOSSER et al.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

INNKEEPERS—EJECTING GUEST—DAMAGES.

1. In an action against an innkeeper for causing the death of a guest by putting him out of doors in a winter storm while sick, the court properly qualified a charge that, if deceased were troublesome to the guests, defendant might put him out with no needless force, by stating that such troublesome acts must be willful; that, if they resulted from sickness, defendant could only remove him in a manner suitable to his condition.

2. A charge that if deceased died of heart disease, and defendant had no reason to believe that his removal would cause his death, he cannot be held liable, though such removal may have contributed to bring it on at that time, was properly refused; but the court should have charged that defendant was bound to consider what consequences might be reasonably expected to follow the sudden exposure and abandonment of deceased in his then condition.

3. Evidence of deceased's age, health, and habits, not showing his earning capacity nor expenditures, will not support a verdict for substantial damages.

Appeal from court of common pleas, Allegheny county; S. A. McClung, Judge.

Action by Mary McHugh against John B. Schlosser and G. C. Dellenbach for torts causing the death of plaintiff's husband, A. B. McHugh. Judgment for plaintiff. Defendants appeal. Reversed.

Willis F. McCook, for appellants. John Marron, for appellee.

WILLIAMS, J. The defendants are hotel keepers in the city of Pittsburgh. McHugh was their guest, and died in an alley appurtenant to the hotel on the 2d day of February, 1891. Mary McHugh, the plaintiff, is his widow, and she seeks to recover damages for the loss of her husband, alleging that it was caused by the improper conduct of the defendants and their employees. An examination of the testimony shows that McHugh came to the Hotel Schlosser late on Friday night, January 30th, registered, was assigned to, and paid for, a room for the night, and retired. On Saturday and Sunday he complained of being ill, and remained most of both days in bed. A physician was sent for at his request, who prescribed for him. He also asked for and obtained several drinks during the same time, and an empty bottle or bottles remained in his room after he left it.

During the forenoon of Monday he seemed bewildered, and wandered about the hall on the floor on which his room was. About the middle of the day the housekeeper reported to Schlosser that he was out of his room, and sitting half dressed on the side of the bed in another room. Schlosser and his porter both started in search of McHugh, and Schlosser seems to have exhibited some excitement or anger. He was found, and the porter led him to his room. While this was being done Schlosser said to him, "You can't stay here any longer;" to which McHugh replied, "I'll git." The porter, on reaching his room, put his coat, hat, and shoes on him, and at once led him to the freight elevator, put him on it, and had him let down to the ground floor. He then took him through a door, used for freight, out into an alley some four or five feet wide, that led to Penn avenue. Rain was falling, and the day was cold. A stream of rain water and dissolving snow was running down the alley. McHugh was without overshoes, overcoat, or wraps of any description. When the porter had gotten him part way down the alley he fell to the pavement. While he was lying in the water, and the porter standing near him, a lady passed along the sidewalk on Penn avenue and saw him. She walked a square, found Officer White, and reported to him what she had seen. He went to the alley to investigate, and when he arrived McHugh had been gotten to his feet, but was leaning heavily against the wall of the hotel, apparently unable to step. The porter was behind him, with his hands upon him, apparently urging him forward. What followed will be best told in the officer's own words. He says: "I asked, 'What's the matter with this man, Mr. Powers?' He says, 'He's sick.' I says, 'He ought to have something done for him,' and at that time he fell right in the alley on his back. He had his coat open, no vest, and his shoes were untied. He had strings in his shoes, but not tied." The officer was asked if the man spoke after he reached the place where he was, and he replied thus: "He spoke to me. Somebody said he was drunk. He rolled his eyes up, and he says: 'Officer, I am not drunk. I am sick. I wish you would get an ambulance and have me taken to the hospital.' Then I ran to the patrol box." It required about 20 minutes to get an ambulance on the ground. During all this time the man continued to lie on the pavement in the alley. At length, after an exposure of about half an hour in the storm, and on the pavement, the ambulance came. He was placed on a stretcher, lifted into the ambulance, and taken to police headquarters, and thence to the hospital; but all signs of life had disappeared when he was laid on the hospital floor. The post mortem examination disclosed the fact that the immediate cause of death was valvular disease of the heart. The theory of the plaintiff was that the shock from exposure to wet and cold in

the alley had, in his feeble and unprotected condition, brought on the heart failure from which he died; and, as the exposure resulted from the conduct or directions of the defendants, they were responsible for his death. Three principal questions were thus raised: First. What duty does an innkeeper owe to his guest? Second. What connection was there between the defendants' disregard of their duty, if they did disregard it in any particular, and the death of Mr. McHugh? Third. If the plaintiff be entitled to recover, what is the measure of her damages?

The attention of the court was drawn to the first of these questions by the defendants' third point, in which the learned judge was asked to instruct the jury, in substance, that if the deceased was troublesome to the defendants, and annoying to their guests, they might rightfully put him out of their house, if they used no unnecessary force or violence. This point was refused as framed, but the learned judge proceeded to state the rule thus: "If the annoying acts were willful, the defendants could remove decedent in the manner stated in point. If, however, they were the result of sickness, although they might, under certain circumstances, remove him, such removal must be in a manner suited to his condition." This was saying that if McHugh was intoxicated, and the disturbances made by him were due to his intoxication, he might be treated as a drunken man; but if he was sick, and the disturbances caused by him were due to his sickness, he must be treated with the consideration due to a sick man. This is a correct statement of the rule. In the delirium of a fever a sick man may become very troublesome to a hotel keeper, and his groans and cries may be annoying to the occupants of rooms near him; but this would not justify turning him forcibly from his bed into the street during a winter storm. What the condition of the decedent really was went properly to the jury for determination. If they found the fact to be that he was suffering from sickness, then the learned judge properly said that, if his removal was to be undertaken, it should be conducted in a manner suited to one in his condition. The second question was raised by the defendants' fourth point, which was as follows: "If McHugh died of heart disease, and defendants had no reason to believe that he was so sick that his removal from the house would cause his death, they cannot be held responsible in this action, even though the mere incident of his removal from the house may have in some degree contributed to bring it on at that time." This was refused. It could not have been affirmed without qualification; but its refusal, without more, left the jury without any rule whatever upon the subject. The question which the defendants were bound to consider before putting the decedent out in the storm was not whether such exposure "would" surely cause

death, but what was it reasonable to suppose might follow such a sudden exposure of the decedent in the condition in which he then was. What were the probable consequences of pushing a sick man, in the condition the decedent was in, out into the storm, without adequate covering, and, when he fell, from inability to stand on his feet, leaving him to lie in the stream of melting ice and snow that ran over the pavement of the alley, for about a half hour in all, in the condition in which Officer White found him? The third question was raised by the defendants' first point. No evidence was given tending to show the earning powers or the habits of industry and thrift of the deceased. For this reason the court was asked to instruct the jury that "nothing more than nominal damages can be recovered in this action." This was refused, and the jury was told in the general charge that, as the evidence fixed his age, and gave information about his health and habits, they might from this data estimate his earning capacity, and the pecuniary loss of the plaintiff. Now, it is true, as said in *Railroad Co. v. Keller*, 67 Pa. St. 300, that since the acts of 1851 and 1855 life has a value which the law will recognize, and which the survivors who are entitled to sue may recover at law. It is true that this value is to be fixed by the jury in view of all the circumstances, and it is not necessarily limited to what is known as "nominal damages." But it is also true that when the probable earnings of the deceased are to be taken into account in fixing the damages it is the duty of the plaintiff to show the earning power of the deceased, or give such evidence in regard to his business, business habits, and past earnings, as may afford some basis from which earning capacity may be fairly estimated. *Railroad Co. v. Zebe*, 33 Pa. St. 318; *Railroad Co. v. Vandever*, 36 Pa. St. 298. The true measure of damages is the pecuniary loss suffered, without any solatium for mental suffering or grief; and the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would have gone to the support of his family. In fixing this amount consideration should be given to the age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures. *Railroad Co. v. Butler*, 57 Pa. St. 335; *Iron Co. v. Rupp*, 100 Pa. St. 95; *Coal & Coke Co. v. McEnery*, 91 Pa. St. 185. It is very clear that the refusal of the first and fourth points without explanation left the jury without any adequate instruction on the important questions to which these points related. The consequence was a verdict based on the earning power of the deceased, which the learned judge felt constrained to reduce, and which was unsupported by the evidence. It will not do to permit such a verdict without some evidence

from which the calculation of the pecuniary loss of the plaintiff may be made. The judgment is reversed, and a venire facias de novo awarded.

(159 Pa. St. 16)

OLEMINGER et al. v. BADEN GAS CO.
et al.

(Supreme Court of Pennsylvania. Dec. 30,
1893.)

OIL LEASE—STIPULATION FOR FORFEITURE—CONSTRUCTION—WAIVER.

1. A forfeiture of an oil lease containing a clause that the lessee "agrees to commence operations on the premises or forfeit this lease within sixty days, and to complete a well in five months," is effected by the noncompletion of a well within the five months, as the stipulation for a forfeiture applies to the time of completing, as well as to that of commencing, operations.

2. An oil lease contained a stipulation for a forfeiture if the lessee did not begin operations within two months, and have a well completed within five months. *Held*, that a waiver of the stipulation as to the time of completing the well was not shown by proof that the lessor consented to an extension of the time within which to begin operations.

Appeal from court of common pleas, Allegheny county; J. F. Slagle, Judge.

Ejectment by Frank J. Oleminger and another against the Baden Gas Company and others. From a judgment for defendants, entered upon a verdict directed by the court, plaintiffs appeal. Affirmed.

This was an action of ejectment, brought upon a lease, for oil and gas purposes, of the land described in the writ. The case turned upon the construction of the following clause contained in the lease: "The party of the second part further covenants and agrees to commence operations on the aforementioned premises or forfeit this lease within sixty days, and to complete a well on this lease in five months." Defendants alleged forfeiture under this clause for failure to complete a well in five months, and the court, adopting the defendants' view, directed a verdict accordingly.

Walter Lyon, Charles H. McKee, and John F. Sanderson, for appellants. John O. Thompson, for appellees.

MITCHELL, J. It is true that the right of forfeiture must be distinctly reserved, and that in cases of doubt the courts lean against such a claim. But this rule does not prevent the operation of the guiding principle in regard to all contracts,—that the intention of the parties, when ascertained, must prevail. Rules of construction are aids in arriving at the intention, and when that is clear, either with or without resort to them, the court has nothing to do but to carry it out. The general intent of the covenant in the present case, notwithstanding some little awkwardness in the arrangement of the language, is clearly enough to secure the immediate development of the land. It is,

in substance, a single covenant for a well, to be commenced within 60 days and completed in 5 months. The parties certainly did not mean that a well should be begun within 60 days, and then indefinitely stopped, with no remedy to the lessor but an action on the covenant. Such a construction would destroy the main object of the clause,—the prompt test of the land for oil purposes, and its diligent development. The gist of the covenant was to have a well finished in 5 months. The beginning in 60 days was only material as a step towards that end, and the stipulation for a forfeiture applies equally to both branches of the covenant. Any other construction would destroy its efficiency for the very purpose of its making. There was no evidence to connect the possible waiver as to the 60 days with the other part of the covenant. Even as to the 60 days, the evidence of waiver is little more than a scintilla; and, as to the other, De Witt, the original lessee, says: "The forfeiture of the lease depended upon the completion of the wells, as we understood it; * * * upon the five months;" and, again: "The conclusion was that Mr. Phillips acquiesced in the delay, and acknowledged the lease, on the assurance that there would be a well put down,—would be developed." There was therefore no question for the jury, and the learned judge was right in directing a verdict for the defendant. Judgment affirmed.

(159 Pa. St. 258)

DICKINSON v. GRAND LODGE A. O. U. W.
OF PENNSYLVANIA.

(Supreme Court of Pennsylvania. Dec. 30,
1893.)

BENEVOLENT SOCIETIES—ACTION ON CERTIFICATE OF MEMBERSHIP—EVIDENCE.

1. In an action on a benefit certificate issued by an association organized to accumulate a fund for the protection of its members in case of sickness, injury, or death, the application for membership is admissible in evidence as a part of the contract, as Act May 11, 1881, (P. L. 20,) providing that an application for life or fire insurance shall not be considered as a part of the contract unless it be attached to and accompany the policy, does not apply in such case.

2. In an action against a benefit association on a certificate of membership, on which defendant denies liability because of nonpayment of assessment, evidence is inadmissible that it was defendant's custom to reinstate members on payment of defaulted assessments, as a matter of course, if no other charges were preferred against them.

Appeal from court of common pleas, Allegheny county.

Action by Ellen M. Dickinson against the Grand Lodge of the Ancient Order of United Workmen of Pennsylvania on a beneficiary certificate. Defendant had judgment, and plaintiff appeals. Affirmed.

Following are plaintiff's second, third, fourth, and fifth specifications of error:

"Second. The court erred in refusing the evidence proposed by the plaintiff under the

following offer, to wit: 'Plaintiff's counsel proposes to prove that it was customary for the lodge, up to about this time, whenever a member was a few days behind in the payment of his assessments, if he paid them up, to reinstate him, as a matter of course, unless charges for some other cause were preferred against him. (Objected to. Objection sustained. Bill sealed for plaintiff.)'

"Third. The court erred in its answer to plaintiff's first point, to wit: '(1) That no lawful assessment has been shown to have been made by the defendant upon John S. Dickinson. Answer. Refused.'

"Fourth. The court erred in its answer to plaintiff's second point, to wit: 'That no sufficient or proper notice of the last assessments, Nos. 3 and 4, has been shown to have been given to John S. Dickinson. Therefore, there is no evidence in this case to establish the right of the defendant to avoid or forfeit the beneficiary certificate sued on in this case. Answer. Refused.'

"Fifth. The court erred in its answer to plaintiff's third point, which was as follows, to wit: '(3) Under all the evidence; the verdict must be for the plaintiff for the amount of the certificate sued on, for \$2,000, with interest from the date of the death of John S. Dickinson, June 5, 1888. Answer. Refused.'"

J. S. & E. G. Ferguson and Thos. B. Alcorn, for appellant. Young & Trent, for appellee.

STERRETT, O. J. This action was brought by the widow of John S. Dickinson against the Grand Lodge of the Ancient Order of United Workmen, a fraternal beneficial association, to recover \$2,000, evidenced by a beneficiary certificate issued by said association to plaintiff's husband on May 18, 1883, a copy of which is made part of her statement of claim. On the trial, plaintiff gave the certificate in evidence, proved the death of her husband, and rested. Defendant then introduced Mr. Dickinson's application for membership in said lodge, containing, inter alia, the following clauses: "I hereby agree, in consideration of a certificate of two thousand dollars to be issued to me by said grand lodge, to pay all beneficiary assessments lawfully made upon me by said grand lodge, not later than the twenty-eighth day of the month in which said notice of assessment was issued. I further agree that should I fail or neglect to pay any assessment or assessments, as above, within the specified time, the beneficiary certificate issued as above shall be null and void, and that myself or my legal representatives shall not be entitled to nor have any claim under said certificate." Referring to said application as part of the contract, and reciting that the \$2,000 is payable to applicant's wife at his death, the beneficiary certificate itself declares: "It is also understood and agreed

that the conditions set forth in the application for this certificate are the conditions upon which Brother John S. Dickinson is entitled to participate in the beneficiary fund of the order, and that any violation of said conditions renders this certificate null and void, and that said grand lodge shall not then be liable for the above sum, or any part thereof." Time is evidently of the essence of these stipulations as to prompt payment of assessments, and in such associations it is obviously necessary that it should be so. Testimony was also introduced by defendant to prove that assessments, payable on or before January 28, 1888, of which said applicant had due notice, were made, and that he defaulted in the payment of the same. The case was fairly submitted to the jury, with full and adequate instructions as to the legal questions involved. The verdict for defendant is necessarily predicated of their finding that plaintiff's husband made default in the payment of said assessments. Hence, it follows, according to the very terms of the contract, that the beneficiary certificate became "null and void." There is no escape from this conclusion, unless the learned judge erred in one or more of the particulars complained of.

The first specification charges error in admitting the application above referred to. This is grounded on the assumption that defendant is an insurance company, and the contract sued on is a contract of assurance on the life of plaintiff's husband, for her benefit. If this be so, the application should have been excluded, under the provisions of the act of May 11, 1881, entitled "An act relating to life and fire insurance policies," (P. L. 20.)¹ Such assumption, however, is unwarranted. The defendant is not an insurance company, but belongs to the distinctly recognized class of organizations known as "benevolent associations." The distinction between them is clearly pointed out in *Com. v. Equitable Ben. Ass'n*, 137 Pa. St. 419, 18 Atl. 1112, recently quoted approvingly in *Association v. Jones*, 154 Pa. St. 104, 28 Atl. 253. In the former, our late Brother Clark, after concisely stating the general object or purpose of an insurance company, said: "What is known as a 'beneficial association,' however, has a wholly different object and purpose in view. The great underlying purpose of the organization is not to indemnify or to secure against loss. Its design is to accumulate a fund from the contributions of its members 'for beneficial or protective purposes,' to be used in their own aid or relief in the misfortunes of sickness, injury, or death. The benefits, although secured by contracts, and for that reason, to a limited extent assimilated to the proceeds of insurance, are not so considered. Such societies

¹ The act provides that in actions on an insurance policy the application shall not be admissible in evidence as a part of the contract, unless it be attached to, and accompany, the policy.

are rather of a philanthropic or benevolent character. Their beneficial features may be of a narrow or restricted character. The motives of the members may be, to some extent, selfish, but the principle upon which they rest is founded in the considerations mentioned. These benefits, by the rule of their organization, are payable to their own unfortunate, out of funds which the members themselves have contributed for the purpose, not as an indemnity or security against loss, but as a protective relief in case of sickness or injury, or to provide the means of a decent burial in the event of death. Such societies have no capital stock. They yield no profit, and their contracts, although beneficial and protective, altogether exclude the idea of insurance, or of indemnity or of security against loss." To the class of associations thus described and distinguished from insurance companies, the association defendant clearly belongs; and hence the application for membership, setting forth the terms and conditions thereof, was rightly received in evidence. The act of May 11, 1881, has no application to contracts such as the one sued in this case.

There was no error in rejecting the offers referred to in the second specification, nor in refusing to affirm plaintiff's points recited in the third to fifth specification, inclusive. The testimony as to assessments 3 and 4 for January, 1888, notice thereof to plaintiff's husband, and nonpayment thereof, was rightly received. If that testimony was believed by the jury, it was quite sufficient to entitle the defendant to a verdict. Neither of the specifications of error is sustained. Judgment affirmed.

(159 Pa. St. 207)

STEFFEN v. SMITH.

(Supreme Court of Pennsylvania. Dec. 30, 1893.)

MARRIED WOMAN—NOTE FOR BORROWED MONEY—VALIDITY.

Act June 3, 1887, provides that marriage shall not be held to impose any disability on a married woman as to the acquisition of property of any kind "(3) for the use, enjoyment and improvement of her separate estate, * * * or (4) her right and power to make contracts of any kind, and to give obligations binding herself therefor," but she shall have the same right to acquire property as if she were a feme sole. *Held*, that a married woman was bound by her note given for money borrowed with which to purchase a residence for herself.

Appeal from court of common pleas, Allegheny county.

Action by Annie W. Steffen, as administratrix of the estate of Christian Steffen, deceased, against Henrietta C. Smith, on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

By agreement of counsel, the following special verdict was rendered by the jury, subject to the opinion of the court upon the question of law arising thereupon, therein

stated: "(1) That on the 25th day of February, 1889, the defendant, Henrietta C. Smith, was, and now is, a married woman. (2) That said Henrietta C. Smith then was in receipt of an annual income of \$2,400.00, derived from a trust estate consisting of realty and personality. (3) That on February 25, 1889, A. J. Stephenson and wife, by their deed, conveyed to Henrietta Catherwood Smith a certain piece of ground situate in the Twentieth ward of the city of Pittsburgh, in said county, the consideration therefor being \$27,500.00. (4) That the terms of said sale were \$4,000.00 cash, and the balance of \$23,500.00 was secured to the vendor by a purchase-money mortgage of the same date, recorded in Mortgage Book, vol. 473, p. 262, and payable as follows, viz.: August 15, 1889, \$3,500.00; March 1, 1890, \$5,000.00; March 1, 1891, \$5,000.00; March 1, 1892, \$5,000.00; March 1, 1893, \$5,000.00,—with interest on the balance of unpaid principal money, payable semiannually, with the usual scire facias clause in case of default of payment of principal or interest. (5) That the said real estate was a residence property, and, after purchase, occupied by the defendant and her family as such. (6) That on the same day—February 25, 1889—the said Henrietta C. Smith made and delivered and received the proceeds of the following note: '\$3,200.00. Allegheny, Pa., February 25th, 1889. Three months after date I promise to pay to the order of the Enterprise Savings Bank thirty-two hundred dollars at the Enterprise Savings Bank. Without defalcation. Value received. H. C. Smith. No. _____. Due _____. Indorsed: 'T. L. Clark, Cashier.' (7) That the said note was, before maturity, discounted by the said Christian Steffen, Jr., who has since deceased, and his estate is now administered upon by said plaintiff. (8) That said note was discounted for the purpose of borrowing money with which to purchase said piece of real estate, and \$3,000.00 of the proceeds of said note were actually so applied, with the knowledge of said bank and said Steffen, being a part of the cash payment of February 25, 1889. (9) That a mortgage bearing date February 25, 1889, for \$3,000.00, upon said property, was given by said defendant to said bank as a collateral security for the payment of said note. (10) That the mortgage given to said vendor to secure the said unpaid purchase [money] was afterwards, and before the bringing of this suit, foreclosed by scire facias proceedings, the property sold thereon, and the lien of the mortgage given to said bank was divested. If, under the facts stated, the court shall be of opinion that the defendant is liable for the amount of said note, then judgment to be entered for the plaintiff, and against the defendant, in the sum of \$3,200.00, and interest from May 28, 1889. If the court should be of opinion that the defendant is liable only for such part of the proceeds as were actually applied in said pur-

chase, then judgment to be entered for plaintiff for \$3,000.00, and interest from May 28, 1889. If the court shall be of opinion that, under the facts of the case, defendant had no power to bind herself by the contract declared upon, then judgment to be entered for defendant."

James R. Macfarlane, for appellant. John M. Goehring and S. Harvey Thompson, for appellee.

STERRETT, C. J. The contract in this case comes clearly within both the letter and spirit of the act of June 3, 1887. That act gave married women unrestricted power to acquire real estate, and to incur corresponding liabilities. It declares "that hereafter marriage shall not be held to impose any disability on or incapacity in a married woman as to the acquisition * * * of property of any kind in (1) any trade or business in which she may engage, or (2) for necessities, and (3) for the use, enjoyment and improvement of her separate estate, * * * or (4) her right and power to make contracts of any kind, and to give obligations binding herself therefor; but every married woman shall have the same right to acquire * * * property, real and personal, * * * in the same manner as if she were a feme sole." This plainly emancipated her from common-law disabilities, and authorized her to contract as a feme sole. *Adams v. Grey*, 154 Pa. St. 258, 26 Atl. 423. The unrestricted power of acquisition in trade or for necessities is conceded; but it is insisted that defendant's acquisition being within neither of these clauses, her power, and consequently her liability, were limited to that which was necessary to the "use, enjoyment, and improvement" of real estate which she already owned. This is but a narrow construction of a single clause of the act. The word "improvement," it is true, implies an existing subject, but does not control, nor even color, the meaning of the words "use" and "enjoyment," with which it is coupled. They were coupled for the sake of convenience, but were employed to express distinct and independent purposes in reference to the separate estate. The "acquisition" of lands would often be advantageous to the "use" and "enjoyment" of her separate estate, when not required for its "improvement." If the separate estate should consist entirely of personalty, circumstances might arise in which the acquisition of land would be the only available "use" and "enjoyment." It would be strange, indeed, if, when a married woman has been expressly given unlimited power to acquire real estate "in * * * any trade or business," or for "necessaries," or "to make contracts of any kind and to give obligations binding herself therefor," and "to acquire * * * property * * * in the same manner as if she were a feme sole,"

she should be unable to acquire a home for her "use" and "enjoyment." The purpose of the legislature was broad and liberal, and must be interpreted in a like spirit. With the exception of such disabilities as are particularly specified in or contemplated by the provisions of the act, married women were emancipated from their common-law disabilities, and authorized to incur contract liability as if they were feme sole; and such has been the trend of our decisions whenever questions have arisen since the passage of the act. *Adams v. Grey*, supra. As defendant is not within any of the exceptions, her liability necessarily follows, and the judgment entered on the special verdict must be affirmed.

(159 Pa. St. 468)

HARRIS v. SCHUYLKILL RIVER E. S. R. CO. et al.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

CONDEMNATION PROCEEDINGS — ACTION ON BOND — STATEMENT OF CAUSE OF ACTION.

In an action on a bond in condemnation proceedings for a right of way conditioned to be void if the railroad company should pay the damages after they had been agreed or assessed in the manner provided by law, a statement of cause of action, alleging that in proceedings to ascertain damages the railroad company fraudulently had a judgment for a certain amount entered for plaintiff, does not show a breach of condition.

Appeal from court of common pleas, Philadelphia county.

Action by Amanda G. Harris against the Schuylkill River East Side Railroad Company and the Union Trust Company on a bond. A demurrer was sustained to the statement of cause of action, and plaintiff appeals. Affirmed.

The statement alleged: That on or about November 2, 1885, the said Schuylkill River East Side Railroad Company, intending to lay its tracks over land belonging to said plaintiff, and to acquire a right of way over said land, delivered to said plaintiff, through her attorney, a bond, in accordance with the statutes in such cases made, for the sum of \$30,000, executed by said defendants to Henry G. Harris, and which is duly assigned to the said plaintiff, a copy of which is hereto attached as part hereof. That thereafter, on the 30th day of February, 1886, the said railroad company filed its petition for the appointment of viewers, etc., in the court of common pleas, No. 2, of Philadelphia, of December term, 1885, No. 773. That in said proceedings the viewers appointed under said petition on January 18, 1887, filed their report, awarding the sum of \$3,250 as damages in favor of Henry G. Harris. That from said report the said Amanda G. Harris, plaintiff herein, took her appeal. That said railroad company also elected to join in an appeal from said award of \$3,250. That, upon said appeal coming on to be heard, the

said railroad company, contrary to the statutes in such case made, improperly and fraudulently induced and procured, without the submission of evidence or a trial, an alleged agreement as to the amount of damages to be entered as a verdict, and thereon afterwards entered a judgment in favor of said plaintiff herein for the sum of \$4,193, to the great injury of the said plaintiff, whose damages greatly exceeded the said amount. That thereupon and thereby the said railroad company has failed to well and truly perform the conditions of said bond, and the same has become due and payable, and the said plaintiff claims to recover from the said defendants the sum of \$30,000. And for a further cause of action the said plaintiff declares and alleges that the said railroad company, defendants, having so given the bond of the said defendants and taken said proceedings, and said appeal having come on to be heard, and a verdict having been improperly and illegally procured to be entered, the said plaintiff having thereafter learned the facts under which the said alleged verdict was entered, and that the said company, had entered judgment, thereupon demanded of said railroad company that said verdict be set aside, and said judgment opened, and her damages determined in accordance with the law and statutes in such case provided; and the said company refused to permit her said rights to be legally determined in accordance with the law and statutes, and set up the said judgment in bar of her further recovery, whereby she was greatly injured, and the condition of said bond has been broken; wherefore the said plaintiff claims to recover of the said defendants the further sum of \$30,000. And, for a further cause of action, that the said company having, under the statutes in such case made, given a bond of said defendants, and thereupon entered upon and taken land of said plaintiff, and said plaintiff being the holder of said bond, the said Schuylkill River East Side Railroad Company has wrongfully and fraudulently delayed, hindered, and prevented the assessment of plaintiff's damages thereunder, and thereby subjected the said plaintiff to heavy, onerous, and unnecessary expenses, in addition to depriving her of her damages, to her great injury and damage; wherefore she demands judgment against the said defendants for the sum of \$30,000.

The bond provided: "Whereas, the said the Schuylkill River East Side Railroad Company has, in pursuance of law, located, fixed, and determined the route of a railroad, and a branch thereof, within the city of Philadelphia, through certain lands of Henry G. Harris, in the Thirtieth ward of the said city of Philadelphia, and desires to enter upon the lands of the said Henry G. Harris, and thereon to construct and establish the said railroad: Now, the consideration of this obligation is such that if the said the Schuylkill River East Side Railroad Company shall or

will pay, or cause to be paid, to the said Henry G. Harris, his certain attorney, successors, executors, administrators, or assigns, such amount of damages as he may be entitled to receive for the entering by the said company upon the said lands, and establishing and constructing the said railroad thereon, after said damages shall have been agreed upon by the parties, or assessed in the manner provided by law, then this obligation to be void; otherwise to remain in full force and virtue."

Defendants assigned the following grounds of demurrer: "And now, to wit, on March 15, 1893, the said above-named defendants, saving and excepting all matters of defense to the plaintiff's claim, by their attorney, William H. Addicks, demur to the plaintiff's amended statement aforesaid; and—First, because the facts set forth in the said statement and copy of bond attached fail to disclose a cause of action against the defendants; second, because the action is in assumpsit and the averments of the statement are both in assumpsit and in trespass; third, because it appears upon the face of the statement that the damages for the location and construction of the defendant's railroad were ascertained according to law in a certain proceeding between the parties in the court of common pleas No. 2 of Philadelphia county, of December term, 1885, No. 773, and the condition of the bond hereby complied with; fourth, because the facts set forth in the plaintiff's statement, so far as they are material, show that such action has been had according to law as renders the said bond void and of no effect; fifth, because the plaintiff, Amanda G. Harris, is without right to sue in her own name upon the bond under seal, delivered to Henry G. Harris, and a copy attached to the plaintiff's statement."

The court, in sustaining the demurrer, delivered no opinion.

H. G. Harris, for appellant. W. H. Addicks, for appellees.

PER CURIAM. The court below was clearly right in sustaining the demurrer and entering judgment thereon in favor of the defendants. Judgment affirmed.

(150 Pa. St. 474)

OATANACH v. CASSIDY et al.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

MECHANIC'S LIEN—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In an action to enforce a lien for materials furnished one C. as contractor for the construction of certain buildings, the owner's affidavit of defense alleged that C. "was not the contractor for the erection of the buildings, his position being merely that of a subcontractor for the plastering work only, and the materials for which this lien was filed being sold by plaintiff to said C. on the individual credit of said

O., and not on the credit of said houses, and were not furnished towards the erection and construction of such houses, so as to entitle plaintiff to a lien therefor;" that deponent did not contract with plaintiff to furnish the materials, nor pledge the credit of the houses therefor; and that he did not authorize C. to contract with plaintiff for the materials on the credit of the houses. *Held*, that such affidavit was insufficient, as being inferential and argumentative, rather than a positive averment of facts.

Appeal from court of common pleas, Philadelphia county.

Action by Adam A. Catanach against John J. Cassidy and others, as owners, and John J. Connor, as contractor, to foreclose a mechanic's lien for materials furnished. The affidavit of defense was held insufficient, and, from a judgment for plaintiff, defendants appeal. Affirmed.

The affidavit of defense was as follows: "John J. Cassidy, one of the above-named defendants, being duly sworn according to law, says that he has a just and legal defense to the whole of the plaintiff's claim. That being about to erect a number of houses in the First ward of the city of Philadelphia, including the twenty-six houses on McKean street and two houses on Second street, described in the lien filed in this case, and acting as his own contractor for the erection of said houses, he entered into an agreement in writing on July 29, 1891, with the other defendant, John J. Connor, in said lien called the 'contractor,' by which the said Connor contracted to do the plastering work on said houses, including the furnishing of the necessary materials therefor, for which the said Connor was to be paid a stipulated price per house, payable partly in cash and partly in the conveyance of a ground rent and of a certain house, a copy of said agreement being hereto annexed. That the said Connor entered upon the performance of said contract, purchasing his materials, such as lime, etc., as deponent is informed and believes, from the said plaintiff, and, when said Connor had partly finished the work on fourteen of said houses, he became embarrassed, and failed to complete his contract, or to do any more work upon the houses mentioned in said agreement; said work being completed by another plasterer, who was employed for the purpose and paid therefor; the said Connor being indebted to deponent at the time for cash money overpaid him, and for the value of the house mentioned in said agreement, which had been conveyed to him in advance of doing the work. That the said Connor was not at any time the contractor for the erection or construction of said houses; his position being merely that of a subcontractor for the plastering work only, and the materials for which this lien was filed being sold by plaintiff to said Connor on the individual credit of said Connor, and not on the credit of said houses, and were not furnished towards the erection and construction of

said houses, in such manner as to entitle the plaintiff to a lien therefor. That deponent did not enter into any contract or agreement with the said plaintiff for the purchase or furnishing of said materials, or in any wise pledge the credit of said houses therefor, nor did he authorize the said Connor or any other person to contract with the said plaintiff for said materials on his behalf, or on the credit of said houses. All of which deponent expects to be able to prove on the trial of the case. John J. Cassidy. Sworn and subscribed to before me this 18th day of January, A. D. 1893. Frank M. Malcolm, Notary Public."

David H. Stone, for appellants. Peter Boyd, for appellee.

PER CURIAM. The learned court appears to have rightly construed the affidavit of defense as argumentative and inferential, rather than a distinct and positive averment of material facts. If Connor was not in fact contractor, or if the materials for which the lien was filed were sold to him on his own individual credit, and not on the credit of the buildings, the averments should have been so distinct and positive as to leave no room for doubt as to whether they were allegations of fact or conclusions of law. There was therefore no error in treating the affidavit as insufficient, and entering judgment for plaintiff. Judgment affirmed.

(159 Pa. St. 461)

SHOE v. ZIEGLER.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

RESULTING TRUST—WHAT CONSTITUTES.

An employe of a firm, who was a son of one of the partners, mortgaged land, and then conveyed it to his wife. About the same time he began embezzling the firm's money, for which he was prosecuted criminally and civilly by the firm. The father then loaned his son money with which to employ counsel, and took from the son's wife a second mortgage on the land. Afterwards the firm obtained a judgment against the son for money appropriated. At foreclosure sale by the first mortgagee, the father bid in the land for the amount due it, plus part of the sum due on his mortgage, and afterwards obtained a sheriff's deed to it. *Held*, that the father's title was in fee, and clear of any trust in favor of the firm.

Appeal from court of common pleas, Philadelphia county.

Action by Bonaparte Shoe, surviving partner of the firm of Shoe & Chard, against Eugene Ziegler, executor of the estate of William Chard, Sr., deceased, plaintiff's former partner, to establish a trust in favor of the firm in certain real estate to which deceased had the legal title at the time of his death. From a decree entered on the report of a master in favor of defendant, plaintiff appeals. Affirmed.

The facts, as found by the master, are as follows: "Bonaparte Shoe and William

Chard, Sr., were in partnership for a number of years, carrying on the business of repairing vessels, at Camden, N. J., until July, 1885, when the affairs of the firm were wound up. At the beginning of the year 1880 they took in to their employment William Chard, Jr., who was a son of one of the partners, and who, for some time afterwards, occupied a position of responsibility and trust with the firm. Prior to his said employment on August 23, 1879, William Chard, Jr., had purchased the premises in question, the deed therefor having been recorded August 25, 1879. He obtained a loan from the Richmond Mutual Building Association, and executed a mortgage to them for \$1,600, which is dated January 24, 1880, and was forthwith recorded. A bond of indemnity in \$300 was also given at the same time to secure said loan. On February 5, 1880, the said premises were conveyed by William Chard, Jr., and wife, to Charles F. McCoy, who the same day conveyed them to Mary E. Chard, wife of William Chard, Jr. Both of these deeds were duly recorded. In the month of July, 1883, William Chard, Jr., was discharged from the employment of the firm, having been charged with embezzlement, and on August 26, 1883, he was arrested. On October 2, 1883, an action was commenced by a capias in the court of common pleas No. 4 of this county, to September term, 1883, (No. 334,) by the firm of Shoe & Chard against William Chard, Jr., to recover the moneys appropriated by the latter. On February 27, 1884, William Chard, Jr., was tried in Camden county, New Jersey, for embezzlement, and the jury disagreed. On May 22, 1884, William Chard, Jr., and Mary E., his wife, executed a mortgage to William Chard, Sr., to secure the sum of \$500, money advanced or loaned by the father to the son, stated, by one witness, to be for the payment of counsel fees in the criminal proceedings in New Jersey against the son; by another witness, for the payment of the fines of \$500 imposed by the Camden court. There is no evidence that this was not given for valuable consideration, and that it represented a like sum advanced or loaned by the father to the son. On June 24, 1884, William Chard, Jr., was again tried in Camden county, and convicted and sentenced to pay a fine of \$500. On May 10, 1886, a verdict for \$3,000 was obtained in the action in court of common pleas No. 4, above referred to, by the firm of Shoe & Chard against William Chard, Jr. On September 30, 1886, the building association commenced proceedings on this mortgage, and on December 6th, of the same year, the premises were sold under said proceedings, at sheriff's sale, to William Chard, Sr., for \$1,450, to whom the sheriff conveyed them. On December 17, 1888, William Chard, Sr., died, having made a will, dated January 21, 1886, in which he devised the residue of his estate to his executors, exonerated his children from advancements made them, and directed his executors to in-

vest the sum of \$6,000, and pay the interest thereof, clear of all debts, etc., to his son William Chard, Jr., during life, this being the only interest which the son has under said will. On January 13, 1890, an attachment execution was issued in said action in common pleas No. 4 against money in hands of the executors of said will belonging to William Chard, Jr. The pleadings in this case raise this single question: Did William Chard, Sr., when he purchased the premises in question, take title with any resulting trust for the benefit of the firm of which he had been a member?"

Henry R. Edmunds, for appellant. E. O. Michener, for appellee.

PER CURIAM. In advancing money for the benefit of his son, and securing the same by mortgage, etc., defendant's testator, William Chard, Sr., did no wrong to the plaintiff, or any one else. As bona fide holder of the security, he had an undoubted right to purchase the property in question at the sheriff's sale, and take title thereto in fee clear of any trust. There is nothing in the entire transaction to indicate anything like bad faith towards the plaintiff or the firm of which he is surviving partner. The learned master's findings of fact are clearly correct, and fully warrant his general conclusion "that the bill is without equity," and should be dismissed. An examination of the record has satisfied us that there was no error in dismissing the exceptions and confirming his report. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

(159 Pa. St. 471)

LOTT v. FRANKFORD & S. P. C. PASS. R. CO.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

RAILROAD IN STREET — SOUNDING WHISTLE — FRIGHTENING HORSES — QUESTION FOR JURY

In an action against a railway company, which had its track along a street, for injury to plaintiff's horses, they being frightened by the sounding of a whistle, it is for the jury to say whether there was an unnecessary sounding, the evidence being conflicting.

Appeal from court of common pleas, Philadelphia county; Craig Biddle, Judge.

Action by Jamison Lott, Jr., against the Frankford & Southwark Philadelphia City Passenger Railroad Company for injury to plaintiff's horses. Judgment for plaintiff. Defendant appeals. Affirmed.

Defendant's tracks were along a street, and at the time of the injury plaintiff was driving along the street towards defendant's dummy engine, which sounded its whistle, frightening the horses.

Wm. Henry Lex, for appellant. Wendell P. Bowman, for appellee.

PER CURIAM. In view of the testimony, it was clearly the duty of the learned trial judge to submit this case to the jury; and he did so in a clear, concise, and impartial charge, of which the defendant company has no just reason to complain. To have instructed the jury as requested in either of defendant's points recited in the first four specifications, would have been plain error. Instead of showing "that there was no unnecessary or wanton sounding of the whistle," etc., the testimony tended to prove quite the contrary. The defendant company's right to use Kensington avenue was not exclusive. It was in common with the public; and wherever such common user of a highway exists, it is the duty of railway companies to exercise such watchful care as will prevent, as far as possible, accidents or injuries to persons and property. In such circumstances, a greater degree of care on the part of the railway company as well as the public is required. The degree of care to be exercised must necessarily vary with the circumstances of each case. *Gilmore v. Railway Co.*, 153 Pa. St. 31, 25 Atl. 651. The testimony was also conflicting, and presented questions of fact which were necessarily for the consideration of the jury. In any view that can be taken of the case, it could not have been withdrawn from their consideration. There is nothing in either of the specifications of error that would justify a reversal of the judgment. Judgment affirmed.

(159 Pa. St. 453)

ORMSBY v. PINKERTON.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

EASEMENT—CONTINUOUS USE.

To show his right to a gate in a partition fence, and access to a hydrant in the neighboring lot, defendant may prove that the former owner of both lots put in the hydrant for their joint use, and that both before and after said owner's conveyance to defendant, 21 years before, the occupants of his lot continued to have such access.

Appeal from court of common pleas, Philadelphia county; Thomas K. Finletter, Judge.

Trespass by Henry G. Ormsby against Robert D. Pinkerton. Judgment for plaintiff. Defendant appeals. Reversed.

Joseph S. Goodbread, for appellant. Samuel E. Cavin, for appellee.

STERRETT, C. J. By agreement of parties, all title papers relating to the lots in question were put in evidence, but we have not been furnished with copies thereof. It is conceded, however, that there is nothing in the chain of title to either lot that imposes any servitude on plaintiff's lot for the benefit of defendant's adjoining lot,—nothing that gives the latter any right of way into or over plaintiff's premises, or any right to

maintain a gate in the partition fence between said lots for the purpose of access to the hydrant on plaintiff's property, or for any other purpose. But it is contended by defendant that prior to January 8, 1858, when both lots belonged to Klingler, and for many years before he parted with his title thereto, he placed a hydrant on the Wheat street lot, now owned by plaintiff, for the joint use of that and the Lancaster street lot; that in November, 1868, when Klingler conveyed said last-mentioned lot to defendant, and for many years prior thereto, the occupants thereof used said hydrant, and had access thereto through a gateway in the partition fence, and for many years thereafter continued to so use and enjoy the same, and thus a visible and continuous servitude became imposed upon the Wheat street lot for the benefit of the owner and occupants of the Lancaster street lot. It appears that the gateway referred to had been securely closed, and the alleged trespass consisted in breaking it open, so as to afford access to the hydrant, etc. The act of breaking was clearly established by the plaintiff. The defendant himself was called for that purpose, and testified, in substance, that, about a year before, he cut a gate through the fence between his property and plaintiff's, where there had always been a gate to his knowledge; that the gate had been boxed up, and that was the reason he "went there with an axe and broke it down, under the advice of counsel." In the absence of evidence to justify this admitted act of the defendant, there was no error in directing the jury to find for the plaintiff. But, for the purpose of showing that he had a right to do what he did, defendant offered to prove the several matters recited in the first specification; and the question is whether the learned trial judge was right in excluding the proposed testimony. We think not. For the purposes of this question we must assume that defendant was prepared to prove, and would have proven, substantially everything contained in his offer. He had a right to show by witnesses who, from time to time, were tenants of his property, and who had occasion to use the gate, and the alleyway on plaintiff's lot, "before and after a period of twenty-one years," that when he "bought the property the gate in the fence between his property and that of the plaintiff was open, and used for years before and years afterwards by the tenants; * * * that the hydrant was in plaintiff's yard, and defendant used it." It was well settled that a servitude or easement such as that claimed by the defendant may be created otherwise than by express provision in deed of conveyance. *Bennett v. Biddle*, 140 Pa. St. 396, 21 Atl. 363; *Id.*, 150 Pa. St. 420, 24 Atl. 738; *Gelble v. Smith*, 146 Pa. St. 276, 23 Atl. 437; *Church v. Dobbins*, 153 Pa. St. 294, 25 Atl. 1120, and cases there cited. In *Gelble v. Smith*, *supra*, it was held that where

a continuous and apparent easement of servitude is imposed by the owner of real estate on a part thereof for the benefit of another part, and the respective portions are subsequently conveyed to different persons, the purchaser of the servient property, in the absence of an express reservation or agreement on the subject, takes it subject to the easement or servitude thus imposed. It may be that the defendant's testimony will fall far short of his offer. If so, a reversal of the judgment will profit him nothing; but, as the case is presented to us, we think he is at least entitled to an opportunity of presenting his testimony. The first specification of error is sustained. Judgment reversed, and a venire facias de novo awarded.

(150 Pa. St. 465)

BORDEN et al. v. AMERICAN SURETY CO.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

FOREIGN ATTACHMENT—BAIL—EFFECT.

The effect of giving bail by a foreign attachment defendant, to dissolve the attachment and all proceedings thereon, (Act June 13, 1836, § 62,) the action thereafter to proceed as if begun by summons, extends to a default judgment entered in the attachment suit, and a rule taken to open it; so that a subsequent discharge of said rule is a nullity, and works no forfeiture of the bail.

Appeal from court of common pleas, Philadelphia county; Reed, Judge.

Assumpsit by Hamilton Borden and others, trading as Borden, Selleck & Co., against the American Surety Company, on a bail bond given in a suit by plaintiffs against the Norfolk Coal & Coke Company, a foreign corporation, in which the Pocahontas Coal Company was garnishee. Defendant demurred. Demurrer sustained. Plaintiffs appeal. Affirmed.

Sparhawk, Melick & Potter, for appellants. Henry K. Fox and Joseph S. Clark, for appellee.

STERRETT, C. J. This suit is against defendant company as surety in the recognizance of bail given to dissolve the attachment against the Norfolk Coal & Coke Company in favor of the present plaintiffs. The condition of the recognizance is, in substance, that if the company defendant in the foreign attachment proceeding shall be condemned, it will satisfy the condemnation money and costs; and, if it fails to do so, the surety will pay the same. Shortly after the judgment by default was taken in that case, but before the debt therein demanded, or any part thereof, had been paid, the said Norfolk Coal & Coke Company, defendant therein, appeared, and, upon giving the recognizance aforesaid, with the present defendant as surety, the attachment was dissolved. This was done pursuant to the sixty-second section of the act of June 13, 1836,

and the second section of the act of March 20, 1845, the former of which provides "that if the defendant or defendants in the attachment, and every one of them, shall at any time before the money paid, put in and perfect bail, * * * the attachment, and all proceedings had thereon as aforesaid, shall be dissolved, and the action shall proceed in due course, in like manner as if the same had been commenced by (summons.)" The proceedings thus "dissolved" by appearing and giving bail to the action were the attachment, the judgment by default, and the rule to open the same, etc. The recognizance was substituted for the property attached in the hands of the garnishee, and thereupon the proceeding ceased to be in rem. The plaintiffs had no further claim, either upon the garnishee or the property attached; and thenceforth, in the language of the statute, the action should have proceeded in due course, in like manner as if the same had been commenced by summons. What was subsequently done with the rule to open the judgment by default, etc., is matter of no consequence. That rule, together with all other proceedings under the attachment, fell, or, in the language of the act, was "dissolved," the moment the attachment was dissolved by giving bail to the action. The case was then in a position for the plaintiffs to proceed and establish their claim against the original defendant. Theretofore it had not had its day in court, as contemplated by the act. The attachment served on the garnishee, etc., had the effect of compelling it to appear and enter bail. This, we think, is the plain meaning of the act, and is in harmony with other provisions thereof which authorize the nonresident defendant in foreign attachment, after judgment against the garnishee, to come into court within a year and a day, disprove or avoid the debt recovered against him, or discharge the same with costs, and have restitution of the goods or effects, or the value thereof, attached and condemned, etc. It follows, therefore, that the learned court was right in sustaining the demurrer to plaintiffs' statement, and the judgment should not be disturbed. Judgment affirmed.

(150 Pa. St. 492)

STAMBLER v. ORDER OF PENTE.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

MUTUAL BENEFIT INSURANCE—PROOF FOR SICK BENEFITS.

The jury may find that by retaining, without objection, an application for sick benefits, accompanied by proofs of disability, the society has waived verification of the physician's certificate.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Annie Stambler against the Order of Pente for sick benefits. On appeal from the magistrate's judgment for plaintiff,

there was a verdict and a judgment for plaintiff. Defendant appeals. Affirmed.

J. Howard Morrison, for appellant. Jacob Singer and Emanuel Furth, for appellee.

STERRETT, C. J. This case was taken into the court below by appeal from the magistrate's judgment rendered June 28, 1892. It was clearly shown on the trial that plaintiff became disabled by sickness on March 17, 1892, and so continued for about six weeks. She was continuously under the care of her physician from March 22d until April 27th. On April 6th, application for two weeks' sick benefits was made, in due form, and honored by the defendant. On May 4th, another application was made, for the next succeeding three weeks' benefits. This was also in due form, except that the physician's certificate does not appear to have been sworn to by him. The blank form of jurat was neither filled up nor signed. So far as appears from the testimony, this application and accompanying proofs of disability were retained by the defendant without notice to plaintiff of any objection thereto on that or any other ground. It does not appear that any such notice was given before this suit was brought. If the defendant intended to object to the omission referred to, prompt notice thereof should have been given, so that plaintiff might have had an opportunity of correcting the same. Anything short of that would be a departure from the principles of good faith and fair dealing which should always characterize the conduct of beneficial associations towards their own members. While such associations are in some respects unlike insurance companies, there is every reason for holding them to the rule applicable to notice and proofs of loss under ordinary insurance policies. As stated in *Gould v. Insurance Co.*, 134 Pa. St. 588, 19 Atl. 793, that rule is: "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company should promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him, to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver." The good faith of the plaintiff, and the meritorious character of her claim, are clearly shown by the testimony in this case. In his clear and concise charge, the learned trial judge instructed the jury that, while verification of the physician's certificate by his own oath, was a condition of plaintiff's contract, it was one which the defendant might waive; and, in view of the testimony, he submitted to them the question whether it had or had not been waived in this case. There was no error in that. The testimony as to defendant's conduct in receiving and retaining the application and proofs of disability

without objection, etc., was sufficient to justify submission of the question to the jury; and their verdict is evidently predicated of the finding that strict compliance with the condition was in fact waived. That effectually disposes of the only defense that was relied on. Further consideration of the specifications of error is unnecessary. Neither of them is sustained. Judgment affirmed.

(150 Pa. St. 489)

McLAUGHLIN et al. v. McLAUGHLIN.
(Supreme Court of Pennsylvania. Jan. 22, 1894.)

ASSUMPSIT—BOARD OF CHILD—PLEADING.

A complaint for money as due plaintiffs for the support of defendant's child, alleging that the support was estimated at a certain rate per week, but not that plaintiff agreed to pay, nor that the support was reasonably worth, such sum, is sufficiently answered by an affidavit of defense alleging that defendant never agreed to pay any board, nor did plaintiffs demand any, but, on the contrary, refused to charge any, wherefore, defendant, recognizing his obligation, made presents to the plaintiff wife far exceeding the value of the board, as charged, and that, while the child was with plaintiffs, defendant paid for its clothes and other necessities.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Edward and Mary McLaughlin against John A. McLaughlin. Judgment for plaintiffs on the pleading. Defendant appeals. Reversed.

Charles H. Downing, for appellant. Amos H. Evans and Robert J. Wright, for appellees.

STERRETT, C. J. This suit was brought to recover \$664 and interest alleged to be "due and owing" to the plaintiffs "for the support and maintenance of George B. McLaughlin," defendant's infant son. It is not averred in the statement that there was any express contract for the boarding, maintenance, etc., of the child, nor is it averred that said services, etc., were reasonably worth the sum per week claimed therefor. The averment is: "The said six hundred and sixty-four dollars is estimated by charging the price and sum of three and a half dollars per week for a period of one hundred and eighty-nine weeks and five days, being the time said infant was in charge of the said plaintiffs." This cannot be regarded as an averment that "the support and maintenance" of the infant was reasonably worth the amount claimed therefor. The statement is therefore defective, in that it does not sufficiently set forth a good cause of action. In the absence of any averment of contract relation, whereby the defendant agreed to pay any specific sum, or that the "support and maintenance" of his infant child were reasonably worth the amount claimed, or some other sum, the defendant was not

bound to answer. But, assuming that he was, we think his affidavit of defense is quite sufficient to carry the case to the jury. After denying that he ever "contracted or agreed to pay any board for said child," the defendant avers that plaintiffs never demanded any, "but, on the contrary, refused to receive or charge any board," in consequence of which he, recognizing his obligation to them for their kindness, etc., made presents, etc., to Mary McLaughlin, one of the plaintiffs, for exceeding "the value of the board of said child, as charged in the statement filed." He further avers "that, during the time the child was with the plaintiffs, he furnished and paid for all of its clothes and other necessaries." Further comment is unnecessary. We think the learned court erred in entering judgment for want of a sufficient affidavit of defense. Judgment reversed, and a procedendo awarded.

(159 Pa. St. 500)

In re KNIGHT'S ESTATE.

Appeal of FRIENDSHIP LIBERAL LEAGUE.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

CHARITIES—VALIDITY OF BEQUEST.

"The Friendship Liberal League" was incorporated for the improvement of its members by the dissemination of "scientific truth" by means of music, literature, lecture, and debate; held meetings on Sundays; and was wholly dependent for funds on gifts and contributions. There was evidence that it "opposed all isms," that Christian and infidel were alike eligible to membership, and that a Sunday evening lecture against Christianity was followed by a debate in the same spirit. *Held*, that a bequest to such league was "for religious uses," and void, under Act April 26, 1855, where made less than one calendar month before testator's death.

Appeal from orphans' court, Philadelphia county.

From a decree disallowing a bequest to the Friendship Liberal League under the will of Joshua L. Knight, deceased, the league appeals. Affirmed.

Charles S. Keyser, for appellant.

WILLIAMS, J. The only question raised by this appeal is whether the bequest made by the testator to the Friendship Liberal League is a bequest for religious or charitable uses. If it is, it is invalid, under the provisions of the act of April 26, 1855, for the reason that the will in which it appears was made less than one calendar month before the testator's death. It is therefore unnecessary to inquire whether this society is a purely public charity, within the meaning of the tax laws, or whether its tenets are Christian or pagan in their character. If, in any sense of the word "religious," this society is a religious organization, money given for its use is given for a religious use. In all Chris-

tian countries the word "religion" is ordinarily understood to mean some system of faith and practice resting on the idea of the existence of one God, the creator and ruler, to whom his creatures owe obedience and love. "Charity" is understood to refer to something done or given for the benefit of our fellows or of the public. In this statute both words are used in their most comprehensive sense. A bequest to aid in establishing the worship of idols, or disseminating the principles on which such worship may be defended, would be within the mischief at which the statute was directed as truly as a bequest to an orphan asylum or a Christian church, and ought to fall for the same reason. Looked at from a Christian standpoint, it might be said that such a bequest was irreligious and immoral, that it was unworthy to be treated as a charity, and that its tendency was positively hurtful. This might be true from the point of observation occupied by an impartial humanitarian or patriot. But in its broadest sense religion comprehends all systems of belief in the existence of beings superior to, and capable of exercising an influence for good or evil upon, the human race, and all forms of worship or service intended to influence or give honor to such superior powers. It is in this sense of the word that we speak of the religion of the North American Indians, the religion of the fire worshipers or the ancient Egyptians. A bequest in aid of any such system would therefore be a bequest for a religious use, within the meaning of the act of 1855. If this was not so, the most exalted form of religion, that calculated to do the most good in the world, would fall within the prohibition, simply because of the fact that its excellence was so generally felt that its religious character was never questioned. On the other hand, the lowest forms of fetish worship would escape the prohibition, because their folly and immorality were such as to make civilized men and women turn from them with aversion, and deny to them any religious character. The act of 1855 would, by such an interpretation, be made to favor the worse, at the expense of the better, forms of religion and religious worship. It may be conceded that the league does not fall within the narrower meaning of the word "religious." It does not claim to be a Christian organization, but it represents, nevertheless, the belief of its members about religion, and their practices as to the observance of the Sabbath, and similar subjects. It is an organization that has about it no element of personal or corporate gain. It has no capital stock, and, of course, no stockholders. It transacts no secular business that affords an income. It is wholly dependent for funds upon the contributions gathered up at its meetings, and the gifts of members and sympathizers. Its meetings seem to be held on Sunday. Its objects, as stated in the articles of incorporation, are the social, intellectual, and moral welfare of its members, and the dissemina-

tion of "scientific truths." The means employed for the attainment of these objects are "literature, music, lecture, and debate." These statements, like the name of the organization, are vague, and carry no definite ideas with them. The testimony is equally obscure. One witness testified that "the league was not intended to propagate any ideas, religious or otherwise," but on cross-examination he gave it a more militant character. He said "it was opposed to all isms." Another witness, who had attended one of the Sunday evening lectures, said: "It was a lecture against the Christian religion. A discussion followed in the same spirit." A third witness testified that the object of the league was "the investigation of truth," and that a Christian or infidel would be alike eligible to membership. This is all the light we have upon the distinctive objects of this organization and its views of "scientific truths." It is too dim to enable us to say more than that it appears to represent, and to have been organized to represent, and disseminate, such notions of social duty, morality, and religion as its members possess. Some would characterize such an organization as irreligious, and as immoral in its tendencies. Others might speak of its members as seekers after novelty, who, like the Athenians, spent their time, on Sunday at least, in trying to hear or to tell some new thing. It is not necessary to fix with precision the views, the practices, or the influence of this body of men and women. It is enough to know that the league is, in effect, their church, and that its services are intended to give expression to their peculiar views about religion, and in some way to aid in the social, intellectual, and moral elevation of themselves and others. Money given to such an organization is given for a religious use, within the meaning of the act of 1855. The orphans' court reached a correct conclusion, and the decree appealed from is affirmed.

DEAN, J., dissents.

(159 Pa. St. 495)

CITY OF PHILADELPHIA v. MEIGHAN.
(Supreme Court of Pennsylvania. Jan. 22, 1894.)

MUNICIPAL CORPORATIONS — PAVING CONTRACT — COMPLIANCE — INSTRUCTIONS — ASSESSMENT FOR CURBING — WANT OF NOTICE.

1. In an action on a municipal claim, to the use of a contractor, for paying in front of defendant's lot, a charge that plaintiff could not recover if the contract was not complied with, and that it was a question of fact on all the evidence, was proper.

2. Where no notice was given to defendant to set the curb, he should be allowed the difference between what the city charged and what it might have cost him to get it done.

Appeal from court of common pleas, Philadelphia county; Thayer, Judge.

Scire facias sur municipal claim of the city of Philadelphia, to the use of John M.

Mack, against John Meighan, for paving the cartway of Ruth street and curbing along defendant's lot. From a judgment for plaintiff, defendant appeals. Affirmed.

The defendant pleaded issuably, and at the trial presented, in defense, testimony to the effect that the work was done in an inferior manner; that the foundation for the pavement was "rotten rock," an inferior material, instead of bar sand, as required by the specifications in the contract, and that the result was that the bricks—at the time of the trial, only two years after the work was done—had become so loose that they would sink when a wagon passed over them, and, if the wheel touched one end of a brick only, the other end would jump up; that rats were left where cart wheels had gone; and that the bricks were so loose that they could be picked out with the toe of the shoe.

This was vigorously denied by the plaintiff's witnesses, and, of course, the issue thus formed was for the jury. The defendant's complaint, however, is that it was not left to the jury under a fair and adequate charge. The defendant called six witnesses to the condition of the street and the character of the material used, and the plaintiff, in rebuttal, called five, all of them at some time interested in the job, either as contractors, city officials, or vendors of the material. Plaintiff submitted no points, but defendant submitted seven points, which, with the answers thereto, appear at the head of the following charge of Thayer, P. J., to the jury: "About all that I think it necessary to do, in this case, is for me to instruct you upon certain points which have been presented by the defendant's counsel. In doing that, I apprehend I shall say everything that is necessary to be said in regard to the whole of the case. '(1) A defendant in a suit upon a lien for a municipal assessment may show in defense that the work was done in an inferior manner, and that the price charged was more than the value thereof.' I affirm that point. '(2) While the law does not hold the contractor to proof of strict, literal compliance with the terms of his contract, upon pain of forfeiture of his right to recover, it does require of him substantial compliance.' I affirm that point. '(3) The question of whether the use plaintiff has substantially complied with his contract is to be determined by the jury, under the evidence; that is to say, the jury must find whether the pavement furnished is such as ought, honestly, to have been furnished, under the contract, and such as will reasonably serve the purpose thereof. Slight and immaterial variations do not affect the plaintiff's right to recover, but variations which affect either the usefulness of the pavement at the present, or its durability, so as to render it less serviceable in the near future, must be treated as variations from substantial compliance with the contract.' I affirm that point. '(4) If the jury find that, by failure to perform

the work in the manner provided by the contract, (either from the use of inferior material, or from any other cause of which there is evidence,) the pavement is now, or will become in the near future, practically worthless, the verdict must be for the defendant.' I affirm that point. '(5) If the jury find that, for reasons stated in the preceding point, the pavement, while not entirely worthless, is of a substantially inferior character, so that there are defects, either manifest now, or reasonably to be expected in the near future, which lessen the value of the pavement, the defendant is entitled to such deduction as will compensate him for the existence of such defects.' I affirm that point. I will go further, and say that, if the contract was not substantially complied with, the plaintiff cannot recover in this case at all. '(6) The use plaintiff cannot recover an excessive price for his work, nor for any part of it. The verdict must therefore, in any event, be limited to what, under the evidence, the work is reasonably worth.' Answer. The plaintiff is entitled to recover the contract price here, if the contract was substantially complied with. If not, the plaintiff can recover nothing. '(7) If the jury find that no notice was given the defendant to set the curb, the use plaintiff cannot recover for that item of his claim.' I refuse that point. In the event of want of notice, the law is that the defendant is entitled to be allowed the difference between what the city charges him and what he might have got it done for himself. He is not to get the city's curbing, which they paid for, for nothing. It is altogether a question of fact, for you. The defendant contends that this pavement was not well laid, and that the plaintiff did not substantially comply with the contract. You have heard all that has been said on that subject. You have heard, on the other side, what the officers of the department thought of it. It seems they approved of it, and one of the officers swears that he gave notice to the defendant about the curbing; that it was left at the defendant's office. If it was left at his office, that is a good service of notice, although he did not get it. With regard to the character of the pavement, you are to attend, not only to the defendant's evidence upon that subject, but also to what is said by the plaintiff's witnesses, who are the officers of the city, who inspected this work. They not only approved of this work, and certified the plaintiff's bill, but they come here to-day, and say that the work was well done."

"Assignments of error: (1) The court below erred, in that the tendency of the general charge was to give undue prominence to the testimony offered on behalf of the plaintiff, and to present inadequately that offered on behalf of the defendant. (2) The court below erred in its answer to defendant's seventh point, which point and answer are as follows, viz.: '(7) If the jury find that no

notice was given the defendant to set the curb, the use plaintiff cannot recover for that item of his claim.' Answer: 'I refuse that point. In the event of want of notice, the law is that the defendant is entitled to be allowed the difference between what the city charges him and what he might have got it done for himself. He is not to get the city's curbing, which they paid for, for nothing.'"

Robert H. Neilson, for appellant. E. O. Michener, for appellee.

PER CURIAM. We find nothing in this record that requires a reversal of the judgment. Judgment affirmed.

(55 N. J. L. 615)

BITTLE v. CAMDEN & A. R. CO.

(Court of Errors and Appeals of New Jersey.
Jan. 18, 1894.)

RAILROAD COMPANIES — LIABILITIES FOR NEGLIGENCE IN GIVING STATUTORY SIGNALS.

1. A railroad company is bound to use ordinary care and prudence in giving statutory signals of the approach of its trains towards a station and crossing, and in passing them, or wherever, at any given point, such signals are allowed or required to be given; and negligence in the exercise of its right and duty in this respect is actionable negligence.

2. The court will take judicial cognizance that the blowing of a whistle is one of the signals used in operating and running a railway train, and that it is authorized and required in approaching stations and crossings, and in passing them; yet, if it be done negligently, wantonly, or maliciously, such negligence, wantonness, or maliciousness is actionable if injury results therefrom.

Magie and Van Syckel, JJ., dissenting.
(Syllabus by the Court.)

Error to supreme court.

Action for personal injuries by George W. Bittle against the Camden & Atlantic Railroad Company. There was judgment of non-suit, and plaintiff brings error. Reversed.

John W. Wescott, for plaintiff in error.
Samuel H. Grey, for defendant in error.

LIPPINCOTT, J. The plaintiff below, who is also the plaintiff in error, sued the Camden & Atlantic Railroad Company to recover damages for personal injuries. The evidence on the part of the plaintiff shows that the accident out of which the injuries to the plaintiff arose occurred at Berlin, in the county of Camden, on March 23, 1891, about 5 o'clock in the afternoon. The plaintiff was, with a horse and wagon, engaged near the station at Berlin in unloading manure from a freight car of the defendants on a side track, and carting the same to a field not far away. On one of these trips he had loaded the wagon with manure, and had gotten off the car to drive away with his load to the field, when his attention was called to the fact of an approaching train on its way from Philadelphia to Atlantic City.

The load on the wagon was nearly a ton in weight, and his horse was a young and spirited animal, but one which, to a considerable extent, by the evidence, had been accustomed to cars, and not ordinarily scared by them. He was, with his horse and wagon, about 75 yards away from the main tracks, near a siding upon which the freight cars holding the manure were standing, which siding ran nearly parallel with the main track on which the passenger train was approaching, and the roadway or other way upon which he was to drive with his load ran about parallel with these tracks, and in the same direction in which the train was going. The evidence shows that from this point he could not be seen by the engineer of an approaching train until the train came nearly or about opposite to the point where he was engaged. When the plaintiff's attention was called to an approaching train he took hold of the head of his horse, and was in the act of leading him along this roadway in which he was to go on his way to the field; and, while doing this, the train, which was somewhat behind time, came along and passed the station at a high rate of speed. The evidence on the part of the plaintiff does not show that the whistle blew, or the bell rang, before this point was reached. The evidence on the part of plaintiff, in substance, shows that as the train came to this point the engineer leaned out of the cab window, looked at the plaintiff holding his horse by the head, and then suddenly reached up and opened the valve, and blew a loud, shrill whistle, which so frightened the horse that it became entirely unmanageable, and the plaintiff, in his efforts to control it and prevent it from running away, was very seriously injured. The situation, by the evidence, appeared to be that there is an east-bound and a west-bound main track passing this station. The station faces the north, and the main tracks are in front of the station. Some short distance west of the station, Taunton avenue, a public highway, crosses the tracks at right angles. Immediately at the station, Jackson street, a public highway, crosses the tracks at right angles. About 100 yards east of the station there is also another crossing, called "Bishop's Crossing," also a highway; and still further east, nearly a half mile away, there is another crossing, called "Bishop's Road." Back of the station, on the south side, nearly 75 yards away, was the side track on which the car load of manure was standing, from which the defendant was loading his wagon. The side track was nearly parallel with the main track, deflecting a little to the south.

Upon the manner in which the whistle was blown, the plaintiff testifies that, when his wagon was loaded, he got off the car on the ground, and took the horse by the head, and started out away from the car to go to the field with his load, when his attention was

called to the approaching train; that the Jackson street crossing is at the end of the station. This was the point opposite which the plaintiff was holding his horse; and he says: "I didn't think of them blowing the whistle there, because he was just beyond the crossing when he blew the whistle, and he was looking with his head out of the cab window, and saw me, and he was smiling; and he just reached up and pulled his whistle, as I call it, 'wide open,' and the instant he done that she jumped." In another place in his evidence he says: "As soon as he saw me he reached right up and pulled the whistle," and that he never heard a shriller whistle in his life; that it was "a great deal louder than the usual whistle, and that it was so blown for two hundred yards;" and he further says, so far as his hearing was concerned, the whistle did not blow until the train was just beyond the crossing at Jackson street, opposite the point where the plaintiff was with his horse and wagon, and that the whistle has never since been blown at this point; and that, at the time it was blown in this manner, there was nothing on the track ahead to provoke such a whistle. It may be well said that there exists, if this evidence be true, a question whether there was not only negligence, but wantonness, on the part of the engineer in blowing this whistle as he did. Mr. Minnard, a witness, who lives opposite, and about 70 feet from, the station, a little beyond the easterly end, testifies that he was back of his house when he first heard the locomotive whistle, and that it sounded like a cattle call, and he supposed it was such, and started around the end of his house, when his wife met him, and told him that a horse was running away; that there was no way of measuring the sound of the whistle, but that it was a cattle call,—a loud, shrill whistle; that it was a great many times louder than the ordinary blow on approaching a station, or what they used to blow on approaching. He thought somebody was on the track, and he started, supposing some one was on the track. The train was running at such rate of speed that, before he got around his house, it was a mile and a half away. He then describes the efforts of the plaintiff to control the horse, and that he would not have attempted its control for all the horses in the county. Harry Beckly, another witness, whose attention was called to the matter when the horse started, and while he had no occasion before that time to note the particulars, testifies that he saw a man have his head out of the cab window, and that he blew the whistle. He described it as being louder than usual, but otherwise took no note of it, except that the whistle did not blow till the engine was opposite the house of Mr. Minnard. Arthur W. Robinson, a witness, was unloading a freight car next to the car from which the plaintiff was unloading; described the whistle as "a long, loud blow;"

that "it was an uncommonly loud blow,—loud and long;" and that he never heard a train blow in that place before. This witness states that he heard no whistle blow upon the approach of this train towards the station and crossings there. William Boardly, a witness, described the whistle as a "real loud blow;" that it was a quick, loud blow,—louder than he had heard before; that when the whistle "burst out," as he describes it, he looked up, and saw a man hold of the whistle, with his head out of the cab window; that he was looking towards the plaintiff, and that he looked as if he was laughing. Harry Bittle swears that the whistle has not blown at this place since. There is much other evidence on the part of the plaintiff as to the situation of the crossings,—the number of them, and the distance apart,—the location of the main tracks, and the side track upon which the freight car stood. There is some evidence to show that the engineer, on approaching this station, could not see the plaintiff in the position in which he was with his horse and wagon, but at the point where the witnesses identify this unusual blowing of the whistle there appears to have been no difficulty in this respect. The plaintiff, with his horse and wagon, was in plain view of the engineer, or other person in the cab, looking from the cab window. At the close of the evidence the defendant moved a nonsuit, which was granted on three grounds: First, that the blowing of this whistle at this place where it was blown was not an unlawful act of the defendant, in view of statutory authority in this respect, and that the company was authorized to blow the whistle in this place; and, secondly, that there was nothing peculiar about the blowing of the whistle which made it unlawful, or constituted the manner of its blowing actionable negligence; that the only question raised upon this point was whether the whistle blown was the one ordinarily to be blown at this crossing or place, or whether it had an audibility which to one witness created the idea that there was something on the track ahead of the train, and whether the distinction between those two degrees of whistling constituted actionable negligence. The trial court held that these were questions of law, and to be determined by the court, and they were determined in favor of the defendant. Besides these two points, the further finding of the court was that, even if the engineer was negligent, still there existed contributory negligence on the part of the plaintiff; that, if there was negligence on the part of the engineer, still that negligence was shared by the plaintiff, in that the engineer saw all that could be seen, and saw nothing more than the plaintiff knew himself; or, in other words, he saw a man who thought he had his horse under management, leading the horse in a manner which ordinarily does give a man such control. So that if there was a mis-

take in judgment—if there was negligence in the judgment—on the part of the engineer, it was negligence which was fully shared by the plaintiff. If, therefore, there was negligence, the negligence of the engineer and the plaintiff was identical. Both thought, and had a right to think, the same thing, except that the plaintiff knew what he was thinking about, and the engineer could not know what the plaintiff thought; and that it was a case in which, whatever the negligence of the engineer, he borrowed it from the plaintiff, and he was no more nor less negligent than the plaintiff, and their negligence resulted from precisely the same failure to foresee exactly what the horse would do under such blowing as the whistle might give at that place, and under the circumstances. Upon these grounds the trial justice at the circuit nonsuited the plaintiff.

Upon a review of this case, the conclusion is that, under the statute authorizing the points and distances at and for which either a whistle shall be blown or a bell rung, the defendant had the right to blow this whistle at this point. The statutory signal was required here, and by force of the statute, considering the proximity of these crossings to each other, it became the duty of the defendant to ring the bell or blow the whistle, and continue to do so until the engine had crossed the three first streets or highways named, and their duty was performed when either the whistle was so blown or the bell so rung; and such duty, if properly performed, could not be made the source of complaint, whatever might be the results; but to fully comply with such statutory duty, and free itself from fault, the defendant was compelled to commence the blowing of such whistle at the point provided by the statute, and continue it over the space provided. Now, there is evidence here on the part of the plaintiff—and considerable of it, too—that neither the bell was heard to ring, nor the whistle to blow, until the point of accident was reached. If this be true, the defendant did not comply with the statutory requirements as to warning signals in approaching these crossings, and it is difficult to perceive why this element of negligence in this case should not have been submitted to the jury. *Revision*, p. 910, § 8. The plaintiff in this case, under the circumstances in which he was placed, might perhaps be well entitled to this warning. *Railroad Co. v. Leaman*, 54 N. J. Law, 202, 23 Atl. 691. Then, again, if no whistle was blown until Jackson street crossing was reached, as appears by some of the evidence, and then there was a sudden call, no previous warning being given, the question arises whether also this fact, so far as it affects the plaintiff, should not have been submitted to the jury, upon the inquiry as to the existence of negligence of the defendant in the performance of its duty to the plaintiff. But these considerations do not appear

to have entered into the holding of the trial justice upon the motion to nonsuit, and are not deemed necessary to be discussed in this review.

Thus, while the legal right to blow the whistle at this point may be conceded, yet it does not by any means follow that this right could be exercised in a negligent, heedless, or wanton manner by the servants of the defendant, resulting in an injury to the plaintiff; and this, as the case is presented, appears to be the difficulty. The question here is whether this whistle was so negligently, needlessly, or wantonly blown as to have caused this injury to the plaintiff. Abstractly, this question, in any given case where an inference of this character may be reasonably drawn from the evidence, should be committed to the jury for its decision, and not assumed by the court. It is not necessary to repeat the circumstances of the accident. One fact upon the evidence seems to be clear, whether the whistle was blown or not, or continuously or not, before the point of accident was reached, and that is that the engineer, while apparently looking at the plaintiff, who, with his horse and wagon, was in full view, holding his horse, or leading him in the usual manner along the way provided, reached up and gave to his whistle an extra force of sound, shrill and loud,—louder and shriller than ever was heard before. It is described as a cattle call by one witness,—a call which is usually made when cattle are upon the track ahead of the train, or a call by reason of some sudden danger. This accident was apparently the result of this manner of sounding this whistle. There is no evidence in the case at this point that such a sounding of the whistle was called for by any danger to the train whatever, from obstructions ahead of it on or near the track. The plaintiff with his horse was in no situation of danger, and it must be said with some degree of emphasis that, upon the evidence as it stood at the close of the plaintiff's case, there was every appearance of negligence and heedlessness, if not wantonness, in the act of blowing this whistle in the manner in which it was blown. It must be that the defendant is bound to use reasonable care and prudence in giving statutory signals of the approach of a train, or its existence, at any given point where such signal may be allowed or required. Negligence in the exercise of a lawful right is actionable if it causes injury. It is no excuse or justification that an act occasioning injury was itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. *Railroad Co. v. Barnett*, 59 Pa. St. 259. This is quite aside from the question whether blowing at this point could do any good or not. It was their legislative duty to blow the whistle, and it cannot be said that legal injury can arise from the proper performance of

this duty; but the pregnant question always is whether, under all the circumstances of the case, reasonable care has been used in the exercise of legislative right and the performance of the legislative duty. A negligent exercise of the right, or the negligent performance of the duty, can in no event be excused. *Bradly v. Railroad Co.*, 2 Cush. 539; *Linfield v. Railroad Co.*, 10 Cush. 562; *Wakefield v. Railroad Co.*, 37 Vt. 330. In *Railroad Co. v. Singer*, 78 Pa. St. 219, the case was that the plaintiff was driving his horse parallel with defendant's tracks, and the horse was frightened by the whistle. The court reversing said: "If the court below had left it to the jury to find negligence from the use of the whistle the second time, if they believed it to be so used, provided the engineer saw, or with proper care might have seen, the plaintiff's wagon, and that his horse was becoming unmanageable, there would have been no error." There were two blasts of the whistle in this case cited, and the court allowed the jury to say whether the first blast was negligent. In this case there was no question of the right to use the whistle at the point at which it was used. The question was whether it was used in a negligent manner. *Hill v. Railroad Co.*, 55 Me. 438, is a case nearly in point with the case in hand. There a horse was standing at the depot, the train started, and the engine driver blew a sharp, loud blast, which frightened the horse. The defendant had legislative authority to blow the whistle there, but the question of whether there was negligence in the manner of blowing the whistle was left to the jury. In *Culp v. Railroad Co.*, 17 Kan. 475, the declaration charged that a negligent blowing of the whistle was the cause of the injury. On demurrer it was held actionable. To the same effect may be cited the case of *Railroad Co. v. Dunn*, 52 Ill. 451. While a railway company is entitled by law to run its train along a street it is not liable for damages caused by the horses of a traveler taking fright at the necessary blowing off of steam from one of its locomotives; but, if the steam was blown off negligently, it would be liable. *Hahn v. Railroad Co.*, 51 Cal. 605. Under our statute in this state, the court will judicially know that the blowing of a whistle is one of the signals used in running a railway train, and that it is authorized and required; yet, if it be done negligently or wantonly, such negligence or wantonness is actionable. 1 *Thomp. Neg.* 351, and cases cited; *Railway Co. v. Harmon*, 47 Ill. 298; *Railroad Co. v. Starnes*, 9 Heisk. 52. So, in case of the sounding of a steam whistle with a loud noise when it was unnecessary, (*Id.*) where it was a negligent act, (*Railroad Co. v. Dunn*, 52 Ill. 451,) and where it was done in a spirit of wanton playfulness, (*Railroad Co. v. Starnes*, 9 Heisk. 52;) and, so far as the adjudicated cases go, the question whether the act was one of negligence or of

wantonness or malice is of little import, save as to the measure of damage.

Reference has been made to these few cases on the subject of the care to be exercised in giving even the statutory signals, to show that this specific character of negligence has been a subject of adjudications. It, of course, cannot be at all denied that there may be such negligence, heedlessness, or wantonness in the sounding of railway whistles, even at the places where it is authorized and required to sound them, as to be entirely actionable. While no liability attaches for damages for these acts so long as they are exercised in accordance with statutory authority with ordinary care, yet liability ensues when they are done negligently or wantonly. The rule obtains generally that a master is not answerable in damages for the wanton and malicious acts of his servant; yet this immunity is not generally extended to railroad corporations, whose servants are intrusted with such extensive means of doing mischief. Accordingly, it has been established that if such servants, while in charge of the company's engines and machinery, and engaged about its business, negligently, wantonly, or willfully pervert such agencies, the company must respond in damages; and this is the principle deducible from the authorities upon this subject. Applying these principles to the facts and circumstances of this case, it leads to the conclusion that the jury should have been permitted to pass judgment upon the question whether this whistle was blown in such a negligent, willful, or wanton manner as to be actionable.

Turning to the question of whether the plaintiff was guilty of contributory negligence in this case, it seems very difficult to determine upon what ground such contributory negligence can be imputed to him. Neither by his own act, nor any act of his uniting with the act of the engineer in blowing this whistle, can want of care be attributable to him. It would appear that he was then, so far as his own case goes, exercising every care which a prudent man could exercise. He was in a place, and on a way, where he had the legal right to be,—in fact, at a place provided by the defendant for him to be in the business of unloading freight from its own cars; and he was on the very grounds prepared by the company for this use, and engaged in an occupation perfectly legal and proper, and one which was of advantage to the defendant. On learning of the approach of the train, although without hearing any statutory signal, he exercised care in placing himself in a position in which he would be most conveniently able to control his horse in case the exercise of such control was needed, and he used every endeavor possible to so control it and avoid injury; and in the discussion of this question it is assumed that he was guilty of no act of negligence in endeavoring

to control and save from injury the horse which he had in charge. And, while no opinion can perhaps be passed here as to the conclusion or inference to be drawn from these facts, yet for the purposes of this case it would appear as if the inference of ordinary care and caution to avoid injury is the most reasonable one, and, at all events, not so clearly otherwise as to deprive the jury of the right to pass on it. Upon this question of whether a nonsuit, upon either of these grounds here discussed, should have been granted, the rule of law to apply has often been enunciated in this court, and there is but little need of referring to more than one or two cases. It is by applying these general rules to each particular case that a safe conclusion can be reached. The chief justice, in *Railroad Co. v. Matthews*, 36 N. J. Law, 531, (in this court,) speaking to the question whether the plaintiff, by his want of ordinary caution, produced the damage, says: "It is sufficient for all useful purposes to say that the evidence on this subject is open to fair debate, and leaves the mind in a state of some doubt on this question whether the driver of the horses which were destroyed exercised, or not, that degree of care which his legal duty exacted. This being the case, the judge would not have been justified in taking this question from the jury. Such a course is proper only when the absence of caution is apparent, and is in reason indisputable." This general doctrine has been universally adopted; and in *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167, Mr. Justice Garrison, (in this court,) as alike applicable to the defendant upon alleged proof of negligence, and to the plaintiff upon alleged proof of contributory negligence, declares that "when, in an action for negligence, the standard of duty can be predicated as matter of law, the only question for the jury is whether the conduct of the defendant fell short of that standard. If, from the facts in evidence, two inferences as to the defendant's conduct may legitimately be drawn, one favorable, and the other unfavorable, to its negligence, a question is presented which calls for opinion of the jury." Passing over the many decided cases adhering to this doctrine, the latest expression on this subject is by Mr. Justice Magie, (in this court,) in *Railway Co. v. Block*, (N. J. Err. & App.) 27 Atl. 1067, where, in speaking of the power to direct a nonsuit or verdict, he says: "The power to direct a verdict is identical with, and rests upon the same foundation as, the power to nonsuit." When in such cases the trial judge is requested to nonsuit or direct a verdict, his duty is, as is well expressed by Lord Chancellor Cairns in *Railway Co. v. Jackson*, 3 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to the jury; but if, from facts established, negligence

may reasonably and legitimately be inferred, it is for the jury to find whether, from those facts, negligence ought to be inferred. In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred by the jury. It follows that, if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judges must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury. *Moebus v. Becker*, 46 N. J. Law, 41; *Railroad Co. v. Shelton*, (N. J. Err. & App.) 26 Atl. 937; *Crue v. Caldwell*, 52 N. J. Law, 215, 19 Atl. 188. Applying these principles to the case here upon review, the trial judge should have submitted the question of the defendant's negligence, and the question of the plaintiff's contributory negligence, if it was alleged that any existed, to the jury. I shall therefore vote for a reversal of the judgment of nonsuit, and for a venire de novo.

MAGIE and VAN SYCKEL, JJ., dissent.

(56 N. J. L. 6)

**MECHANICS' MUT. LOAN ASS'N v.
BOARD OF CHOSEN FREEHOLD-
ERS OF MERCER COUNTY.**

(Supreme Court of New Jersey. Nov. 10, 1893.)

**TRESPASS—ACTION AGAINST COUNTY BOARD—
PLEADINGS.**

1. To a count that the board of freeholders built a wall stopping up a private way a demurrer will not lie on the ground that, as the board was engaged in a public work, it is impossible; there being no basis for such a contention, as the fact of their being so engaged does not appear in the declaration.

2. If such fact be a defense, it must be pleaded.

(Syllabus by the Court.)

Action in trespass by the Mechanics' Mutual Loan Association against the board of chosen freeholders of the county of Mercer for obstructing a private way. Heard on demurrer to the declaration. Demurrer overruled.

Argued June term, 1893, before BEASLEY, C. J., and DIXON, MAGIE, and GARRISON, JJ.

Edward W. Evans and Wm. M. Lanning, for plaintiff. E. R. Walker and G. D. W. Vroom, for defendant.

BEASLEY, C. J. This case stands before the court on a general demurrer to the several counts contained in the declaration. The object of the defense in thus pleading was to raise the question whether the county was responsible for the building of a wall that stopped up a way that was appurtenant to certain property of the plaintiff. The theory

of the defense was that the county, in building this obstruction, did so in the performance of a public duty, and therefore, upon general principles, was not liable for the changes resulting. But this contention has no basis in this record, for it nowhere appears that the defendant, in doing the acts set forth, was in any measure in the performance of any public function. All that we know upon this subject is that the defendant obstructed the plaintiff's passage-way; consequently the defendant is presented to the court, as it plainly appears, in the character of an ordinary trespasser. In the present aspect of the case it is impossible for the court to inject into it the circumstance that was assumed in the argument that these officers of the county were in this matter discharging a public obligation. If such a fact exist, and if it be important to the issue, it must be brought before it by a replication. Let the demurrer be overruled.

(56 N. J. L. 41)

TUNISON et al. v. SNOVER.

(Supreme Court of New Jersey. Nov. 10, 1893.)

REFERENCE — WHEN PROPER — BREACH OF WARRANTY—CONSENT OF PARTIES.

In an action on the case for damages for breach of a warranty in a sale of peach trees, brought in the circuit court, an order of reference was made, and upon the referee's report that there was such a contract of warranty, and that it had been broken, and determining the damages of plaintiff, judgment in his favor was entered. Upon error, *held* (1) that the cause was not one in which matters of account were in controversy, and the order of reference was not within the authority conferred by the provisions of section 177 of the practice act; (2) that, as the consent of parties did not appear, the order of reference was not within any authority conferred by the common law or the provisions of section 3 of the "Act for regulating references and determining controversies by arbitration," (Revision, p. 34;) and (3) that the judgment on the referee's report could not be sustained.

(Syllabus by the Court.)

Error to circuit court, Hunterdon county.

Action by Elisha Snover against Jeremiah Tunison and Garret I. Stryker for breach of warranty. From a judgment for plaintiff entered on the report of a referee, defendants bring error. Reversed.

Argued June term, 1893, before the CHIEF JUSTICE, and DIXON, MAGIE, and GARRISON, JJ.

Voorhees & Cotter and Chauncy H. Beasley, for plaintiffs in error. William H. Morrow and H. B. Kerr, for defendant in error.

MAGIE, J. The action was in trespass on the case, commenced before the adoption of the fourteenth and fifteenth rules of this court, respecting the style of actions. The declaration was upon a warranty of the quality and character of peach trees sold by plaintiffs in error to defendant in error. It averred a breach of the warranty, and demanded

damages therefor. The plea was the general issue. The record shows that the issue so joined was once ineffectually tried, the jury disagreeing, and that, at the next term, the court ordered that "all matters of difference between the parties in this cause be submitted and referred to John L. Connet, to state and report an account between the parties, and the amount that may be due from the defendants to the plaintiff," and that "said referee find separately whether there was such contract, * * * and a breach thereof, as is set out in plaintiff's declaration, and that he also find the amount of the damages sustained," etc. The record further shows that the referee so appointed afterwards reported that there was a contract of warranty by defendants to plaintiff, and a breach thereof, and that plaintiff had sustained damages by reason thereof to the amount of \$748.68. The court below thereupon confirmed the report, and entered judgment for the damages reported. Thereupon this writ of error was brought.

The first assignment of error is directed at the action of the court below in ordering a reference of the issue, and entering judgment upon the report of the referee. By the provisions of section 177 of the practice act, (Revision, p. 875,) courts are empowered *ex mero motu* to refer causes in which "matters of account are in controversy." Parties to such a cause may, by timely dissent, secure the trial by jury to which they are entitled. But the authority to refer is limited to the class of causes specifically described. In causes of that description, power to refer exists, whatever may be the issue on the record, and the test is the character of the claim. *Gopsill v. Hervey*, 34 N. J. Law, 435. But the cause now before us was obviously not of the class specified in these sections of the practice act. It was an action for breach of warranty, and sought to recover unliquidated damages. It is argued that plaintiff, to establish his damages, would be obliged to prove the amount and value of the crops from the trees he got, and compare the same with such crops as would have been produced by trees answerable to the warranty. *Wolcott v. Mount*, 36 N. J. Law, 262, 38 N. J. Law, 496. If this be admitted, such evidence would not be of matters of account, nor would its admission bring the action within the class specified. The reference, therefore, was not within the authority of the practice act.

By the provisions of section 3 of the "Act for regulating references and determining controversies by arbitration," approved April 15, 1846, (Revision, p. 34,) which is in substance the same as the act of like title passed December 2, 1794, (Pat. Dig. 141,) any pending cause may be referred by rule of court. This seems to be a regulation of the power in this respect possessed by courts under the common law. But it is entirely settled that the power to refer causes either at common law

or under the last-named act arises only upon the submission and consent of the parties to the cause. 2 Tidd, Pr. 743; 2 Sell. Pr. 246; *Paulson v. Halsey*, 38 N. J. Law, 488. No court can make such an order *ex mero motu*.

The record proper shows no submission by or consent of the parties to a reference of the cause. There is, therefore, nothing which appears to warrant the making of such an order. Moreover, by the outbranches of the record, brought here by certiorari, it does appear that both parties dissented from the order. Under such circumstances, the order has no warrant of authority from the common law or the act last cited. The order of reference was therefore wholly without authority, and the judgment entered on the report of the unauthorized referee is erroneous, and must be reversed. This result renders unnecessary any consideration of other matters urged in argument.

(56 N. J. L. 263)

STATE (DODD, Prosecutor) v. BOARD OF
POLICE COM'RS OF CITY OF
CAMDEN.

(Supreme Court of New Jersey. Jan. 5, 1894.)

POWERS OF POLICE COMMISSIONERS — WHO MAY
QUESTION CONSTITUTIONALITY — DISMISSING
CHIEF OF POLICE—JUDGMENT.

1. A chief of police cannot, in proceedings to try him for official misconduct, attack the constitutionality of the law creating the board of police commissioners, under whom he serves, and who are trying him.

2. Where, upon the trial, such board finds him guilty of four charges, and sentences him to dismissal from the police force, upon such findings as to all the charges, and three of them are adjudged by this court to have no rational basis to support them, upon the case as presented to this court, the judgment of dismissal will be set aside; and thereafter the board may proceed to sentence him upon the charge proved, or may open the case before them for both sides to introduce new testimony, and may, after hearing the same, proceed to render judgment upon all the evidence as to each of the written charges served upon the chief, and upon which he is to be tried.

(Syllabus by the Court.)

Samuel Dodd having been dismissed from the office of chief of police by the board of police commissioners of the city of Camden, he prosecutes certiorari to review the judgment of dismissal. Judgment set aside.

Argued June term, 1893, before DEPUE, LIPPINCOTT, and ABBETT, JJ.

D. J. Pancoast, for prosecutor. Alfred Hugg, for defendant.

ABBETT, J. The writ in this case brings up for review the proceedings of the board of police commissioners of the city of Camden in trying, convicting, and dismissing Samuel Dodd, chief of police of Camden, upon the following charges: "(2) On two occasions one Ralph Bond, a police officer, was reported to Samuel Lee, a lieutenant of police, as having been drunk while on police duty, and, notwithstanding such report, the said Bond

is still retained on the police force, the said chief having made no charge against him." "(4) Discharging, or permitting the discharge of, prisoner John O'Keefe from custody, without bail or hearing. (5) Not exercising such control over the police force as to command their respect and obedience to his lawful commands; using vulgar, profane, and indecent language in presence of the force. (6) Neglecting and refusing, for the space of about three months, to produce the prisoners before Harry B. Paul, police justice, for hearings under the law, after the said police justice had been duly qualified to act as such justice."

The prosecutor seeks to raise the question of the constitutionality of the act creating the board, and giving them power over the police force of the city of Camden. If this question was still open for discussion, it cannot be raised by the prosecutor. *Ayers v. Newark*, 49 N. J. Law, 170, 175, 6 Atl. 659. The board had power to try the chief of police, and, if he had been guilty of misconduct, it had power to remove him from office. There must, however, be a legal and substantial basis shown for his removal, upon which the commissioners acted within their authority. The court will not, however, weigh the evidence on the facts presented. *Id.*, 49 N. J. Law, and 6 Atl. Whether the evidence is weak or strong, it is sufficient if it formed a rational basis for the judgment against him. *Devault v. Mayor*, 48 N. J. Law, 433, 435, 5 Atl. 451.

There is no proof presented to this court that the conviction and dismissal were for political reasons, as alleged in the fifth reason.

The prosecutor had charges alleged against him in writing, signed by two of the board. This will be sustained, under the authority of *Ayers v. Newark*, 49 N. J. Law, 172, 6 Atl. 659. The causes alleged, if true, showed incapacity or misconduct with reference to his official position, or disobedience to some just regulation established for the department. He had a public trial upon these charges, after due notice, and was represented by counsel. Witnesses were called, and examined and cross-examined, on both sides, and the board adjudged him guilty. These proceedings, and their result, are therefore controlling upon this court, upon the authority of the cases cited, if there was evidence (whether weak or strong) which "formed a rational basis for the judgment against him." The evidence upon the second charge, in our judgment, did not show a rational basis for finding him guilty thereon, because the prosecutor swears (and his testimony is not contradicted) that he did report to the mayor the first charge made against Ralph Bond, as to his being drunk while on police duty, and, as to the second like charge against Bond, he says that he investigated the charge, and found that it was not true. The evidence of the prosecutor himself shows, on the fourth

charge, that he released O'Keefe,—either Michael or John O'Keefe,—and it charged he did so without lawful authority. It is clear that he had no authority to release this man, unless, as he claims, rule 33 applies to this case. This rule provides that, "in case of persons found violating the provisions of any city ordinance, they will be brought to the city hall, and, if court be in session, will be sent before the police justice at once; but should court not be in session, and the prisoner be a resident of this city, it will be the duty of the chief to take the name and address of the prisoners, and direct them to be in court at its next session following. In the case of nonresidents arrested on such charge, they will be detained till court opens, or admitted to bail." The prosecutor did not bring himself, by proof, within this exception, and, if the proof had shown that it was John O'Keefe that had been released there would have been a rational basis for his conviction upon this charge. It would seem, however, from the record, that it was Michael O'Keefe that he released, and no charge had been alleged against him in writing, charging him with improperly releasing Michael O'Keefe. He was entitled to such notice, to put him on trial therefor. In reference to the fifth charge, there is evidence upon which their finding of guilty can be supported under the cases cited. Isaac Shreeve testified that he heard the chief of police use vulgar, profane, and indecent language in the presence of others; that he has heard him use oaths in the presence of the force; that he has done it to him. George W. Day also testifies to his use of profane language. The chief, when examined, did not say that he never swore in the presence of the force. All that he was asked was if he was accustomed to swear in the presence of the force. On page 30 he was asked: "You are not in the habit of using profane language before your force, or any other place?" He answered: "I may sometimes, but not in the discharge of my duties." When asked if he was in the habit of using profane language, etc., he said: "No; I may sometimes, but don't do it very much." Under the rule laid down by the supreme court in the cases cited, this evidence formed a rational basis to find him guilty of the latter part of the fifth charge, and we have no power to say that the finding was based upon insufficient evidence, contrary to the proofs in the case, as alleged in the fourth reason. The evidence shows that the chief was sick, and another officer was in charge during the time referred to in the sixth specification, and there is therefore no rational basis upon which this charge can be supported. If the board had only found the prosecutor guilty of the charge of using vulgar, profane, and indecent language in presence of the force, as stated in the fifth charge, we would, under the cases, have been compelled to dismiss this writ; but the board found the chief

guilty upon all four of these charges, two of which, in our judgment, have no rational basis to support them, for lack of evidence, either weak or strong; and, as to fourth charge, it cannot be supported because the prosecutor was served with a written charge for improperly releasing John O'Keefe, when the attempted proof related to Michael O'Keefe, another individual. The board had power to punish the prosecutor for violation of duty or improper official conduct by dismissal or by a less severe sentence. In inflicting the severest punishment possible for them under the law, the board based their judgment upon their finding that the chief was guilty of all four of the offenses charged. This judgment of dismissal was based upon conclusions which cannot be supported as to three of the charges in the case as presented to us, and must therefore be set aside. This disposition of the case will leave the board free to take up the trial at the point where the testimony closed, and allow it to render such judgment on the charge proved as shall be just and proper, or the board may open the case, and let in further testimony on either side as to any of the written charges served upon the prosecutor, and thereafter render any proper judgment authorized by the proofs.

(56 N. J. L. 22)

LOVEGROVE v. KUSER et al.

(Supreme Court of New Jersey. Nov. 20, 1893.)
ACTION ON BOND—SUFFICIENCY OF DECLARATION.

A declaration upon a bond given under "an act for the collection of demands against ships, steamboats and other vessels," should set forth the particular circumstances which, according to that act, entitled the plaintiff to a lien upon the vessel.

(Syllabus by the Court.)

Action by Thomas G. Lovegrove against Anthony R. Kuser and others on a bond. Heard on demurrer to declaration. Demurrer sustained.

Argued June term, 1893, before MAGIE, REED, and DIXON, JJ.

Mr. Garrison, for plaintiff. Mr. Beasley, for defendants.

DIXON, J. This is a demurrer to a declaration upon a bond purporting to have been given by the defendants to the plaintiff under section 12 of "An act for the collection of demands against ships, steamboats and other vessels," approved March 20, 1857, (Revision, p. 586.) Certain requisites of a declaration on such a bond are prescribed by section 15 of the act, which provides that the creditor shall in his declaration state his demand, "alleging the work to have been done, or the materials or articles furnished, or the expenses incurred, at the request of the master, owner, agent or consignee of such vessel, as the case really was, averring that the claim therefor was a subsisting lien on such vessel at the time of the ex-

hibition thereof, as hereinbefore provided." These words, "as hereinbefore provided," evidently refer to the first section of the act, which declares under what circumstances a lien shall exist, and they require that those circumstances shall be averred in the declaration according to the truth in each case. Such an averment is necessary, not only because of the language of the statute, but also because of the general rule of pleading, according to which, not conclusions of law, but the facts that warrant the desired conclusion, must be set forth. The requisite circumstances under the act (Supp. Revision, p. 427) are, so far as they relate to this case, that a debt shall have been contracted by the master, owner, agent, or consignee of a vessel within this state on account of materials or articles furnished in this state for or towards the building, repairing, fitting, furnishing, or equipping such vessel. It having been decided that under this law the debt need not have been contracted within this state, (Baeder v. Carnie, 44 N. J. Law, 208,) it follows from the language employed that the vessel must have been within this state, as well as that the articles must have been furnished in this state. The declaration demurred to fails to comply with these requirements in several particulars. It does not aver that the person at whose request the articles were furnished was the master, owner, agent, or consignee of the vessel; nor that the articles were furnished for or towards the building, repairing, fitting, furnishing or equipping of the vessel; nor that the vessel was within this state at the time. The pleader has confined himself to the assertion of a conclusion of law that the debt was a subsisting lien on the vessel. These defects, or some of them, are covered by the causes of demurrer assigned, and because of them the defendants are entitled to judgment, unless the plaintiff is willing to pay costs, and amend his declaration.

(56 N. J. L. 56)

McNAMARA v. NEW YORK, L. E. & W. R. CO.

(Supreme Court of New Jersey. Dec. 16, 1893.)

JUDGMENT—ENTRY NUNC PRO TUNC—LIEN—INTEREST—EXECUTION—PRACTICE.

1. Whenever delay in entering a judgment is caused by the action of the court, judgment nunc pro tunc will be allowed as of the time when the party would otherwise have been entitled to it, if justice requires it.

2. By Sup. Ct. Rule 40, whenever a rule to show cause for a new trial shall be discharged, the party entitled to judgment shall be allowed to enter judgment final nunc pro tunc as of the time when judgment nisi was taken; the execution shall be indorsed to the effect that interest shall be recovered as of the date of the judgment nisi, but the date of the actual entry of the rule for final judgment shall be expressed therein.

3. Judgment entered nunc pro tunc as of a prior day will not be a lien on lands as of that time. Judgments become a lien upon lands only from the time of the actual entry of the

judgment, and the date of such actual entry should be stated in the minutes.

4. If execution be issued on a judgment nunc pro tunc, the command of the writ will be to levy on the lands, tenements, and hereditaments whereof the defendant was seised at the time of the actual entry of the judgment.

5. A judgment creates no lien on goods and chattels. Goods and chattels can be reached only by an execution, and the execution will not bind goods and chattels but from the time the writ is delivered to the officer to be executed.

6. The proper practice under rule 40 is to enter judgment nisi on the coming in of the postea, although the trial judge has previously granted a rule to show cause.

(Syllabus by the Court.)

Action for personal injuries by John F. McNamara against the New York, Lake Erie & Western Railroad Company. Heard on motion for judgment nunc pro tunc on a verdict for plaintiff. Motion granted.

Argued June term, 1893, before DEPUE, VAN SYCKEL, and REED, JJ.

Collins & Corbin, for plaintiff. Cortlandt & R. Wayne Parker, for defendant.

DEPUE, J. This was an action of tort to recover damages for personal injuries caused by negligence in operating the defendant's railroad. The case was tried at the Hudson circuit, and resulted in a verdict for the plaintiff. The verdict was rendered January 6, 1893, and on the 16th of January the judge who tried the case granted a rule to show cause why the verdict should not be set aside. In the regular course of proceeding the postea would have been filed and judgment entered thereon at the term of February, 1893. Entry of final judgment was suspended by the rule to show cause. The argument on the rule to show cause was brought on at June term, 1893, and by the decision of the court at November term, 1893, the rule was discharged. After the argument of the rule to show cause, and before the same was decided, the defendant was declared to be an insolvent corporation by a decree of the United States circuit court, and a receiver appointed. Application is now made for leave to enter judgment nunc pro tunc as of the term of February, 1893.

By the common-law practice, judgment nunc pro tunc could not be entered without special leave of the court, and it is undoubtedly true that usually the occasion for entering such a judgment was where the death of one of the parties has occurred pending the proceedings. *Railway Co. v. Ackerson*, 33 N. J. Law, 33. But it by no means follows that, even under the common practice, the granting of leave to enter such a judgment should be confined to cases where the death of one of the parties has intervened. The principle on which this practice rested, and which controlled the court in granting leave, is, as was stated by the court in *Craven v. Hanley*, Barnes, Notes Cas. 255, that the party must not suffer by the court's taking time to consider. In *Den v. Tomlin*, 18

N. J. Law, 15, Mr. Justice Dayton stated the principle in these words: "It is a rule of practice as well as of common justice that the action of the court shall not be permitted to work an injury to the party." In *Hess v. Cole*, 23 N. J. Law, 116-125, this court held that when a delay in giving judgment, caused by the court, affects the rights of the parties, the court, when necessary to effect justice, will order the judgment to be entered nunc pro tunc as of the term when the matter was submitted to them. From the earliest times it has been the practice to allow judgments to be entered nunc pro tunc whenever the interest of justice so requires, and the delay in entering judgment has been due to the action of the court, saving the rights of third parties which have intervened. *Freem. Judgm. c. 3*, §§ 56-58. The rights of third parties are adequately protected in this state by statute. By the second section of the act concerning judgments a judgment is not a lien upon lands but from the time of actual entry of such judgment on the minutes or records of the court, (*Revision*, p. 520;) and the date of actual entry of judgment must be stated in the minutes, (*Patterson v. Loughridge*, 46 N. J. Law, 139.) Our practice in this respect conforms to the practice of the English courts under the statute of 4 & 5 W. & M. c. 20, §§ 1, 3; and when leave is given to enter judgment nunc pro tunc it is ordered that it be docketed as of the time when the judgment is actually entered. 2 Tidd, Pr. 948. Nor does the judgment, when entered, whatever relation it may have, affect the goods and chattels of the defendant. Goods and chattels can be reached only by execution, and, by statute, execution does not bind goods and chattels but from the time the writ is delivered to the officer to be executed. *Revision*, p. 392, § 18. The plaintiff would have had his judgment in the regular course of practice before the receiver was appointed, if there had been no delay incident to the granting and the hearing of the rule to show cause. The verdict he recovered has been sustained. Judgment entered at this time as of a prior day cannot, under the statutes referred to, have relation as a lien upon the defendant's property prior to the date of actual entry; and, if execution be issued thereon, the command of the writ will be to levy upon the lands, tenements, and hereditaments whereof the defendant was seised at the time of the actual entry of the judgment. The defendant's property is in the hands of the receiver, and under the control of the federal court. We think that if the plaintiff will derive any benefit in the administration of the affairs of the company by having his judgment nunc pro tunc, he is entitled to that advantage. Collection of interest from the date of judgment nisi by an indorsement on the execution would, in this case, be impracticable. An execution, if issued, would be of no avail against the defendant's property.

Thus far this application has been considered as if it depended exclusively on the common-law practice. But after the decision in *Railway Co. v. Ackerson* this court adopted rule 40, which provides that "whenever a rule to show cause why the verdict of a jury should not be set aside and a new trial granted shall be allowed, if the rule to show cause shall afterwards be discharged, the party entitled to judgment shall be allowed to enter judgment final nunc pro tunc as of the time when judgment nisi was taken, and the execution thereon shall be indorsed to the effect that interest thereon shall be recovered as from the date of the judgment nisi, but the date of the actual entry of the rule for final judgment shall be expressed therein." Corbin's Rules, p. 51. Under this rule the allowance of judgment nunc pro tunc is no longer in the discretion of the court. The party is entitled to it as a matter of right. Let judgment be entered in conformity with the rule. It may be added that the proper practice under this rule is to enter judgment nisi on the coming in of the postea, although the trial judge has previously granted a rule to show cause. Granting a rule to show cause suspends only the final judgment.

ATKINSON v. FARRINGTON CO.

(Court of Chancery of New Jersey. Jan. 13, 1894.)

REFORMATION OF INSTRUMENT—MISTAKE.

A bill of sale, the consideration of which is recited to be the payment of certain items of indebtedness of the seller, one of which is put down as \$1,370, will not be reformed on the ground of mistake, so as to provide that, if the item was not that amount, the difference should be paid to the seller; the scrivener having testified to drawing the instrument as directed by both parties, the seller having had an opportunity to examine it, and his testimony as to what the contract was being denied by the purchaser.

Suit by Maurice R. Atkinson against the Farrington Company.

George E. Clymer, for complainant.
Knowles & McGown, for defendant.

GREEN, V. C. The primary object of this suit is to reform a bill of sale between the parties, on the ground that it does not truly set out the contract actually made between them. On demurrer, the bill was held on the grounds that the bill alleged that the scrivener knew the true terms of the agreement, and, if he intentionally drew it incorrectly and had it executed, it was a fraud; if he unwittingly did so, it was a mistake. It will thus appear that it is incumbent on the complainant, as the very foundation of his suit, to prove that the writing does not, in fact, embody the agreement as made between himself and Mr. Farrington. This is the very essence of the alleged mistake. Courts of equity will relieve against mistakes, and correct and reform instruments; but, when

such relief is sought from deeds or other writings, the mistake must be clearly proved. It must also appear that the alleged mistake is as to a fact not only not known to the party, but which he could not, by reasonable diligence, have ascertained. *Graham v. Berryman*, 19 N. J. Eq. 29-35; *Burgin v. Giberson*, 26 N. J. Eq. 72. The authorities all require that the parol evidence of the mistake and of the alleged modification must be most clear and convincing,—in the language of some judges, "the strongest possible," or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence, but only upon a certainty of the error. 2 Pom. Eq. Jur. § 859. The bill of sale signed by the complainant recites: "For and in consideration of the sum of one dollar," etc., and "the assumption of the liabilities of the party of the first part, as set forth in Schedule A, hereto annexed as a part hereof, by the" defendant, as the consideration for the sale and transfer of the stock in trade of the M. B. Atkinson Printing Company. In Schedule A, under the head of "Mortgages," there is entered, "Whitlock press, \$1,370." There was not in fact so much due on that press by some \$200 or \$300. Complainant claims that the agreement was that in such case he was to have the difference, and that it should have been so stated in the bill of sale. There is a sharp conflict in the evidence of Mr. Atkinson, the complainant, and Mr. Farrington, who acted for the defendant company. The latter swears positively that such was not the agreement. The good faith or accuracy of the scrivener is attacked by the bill. It, however, appears that there is not the slightest ground for a charge of fraud, and that the gentleman who drew the bill of sale acted on the instructions he received from both parties; that the complainant not only had the opportunity to examine the paper, but that it was fully explained to him before its execution. This court cannot interfere in such a case.

(33 N. J. E. 241)

LUTZ v. LUTZ.

(Court of Chancery of New Jersey. Jan. 13, 1894.)

DIVORCE—SUPPLEMENTAL PETITION—SUBSEQUENT ACTS OF ADULTERY.

Where condonation is interposed as a defense to an action for divorce on the ground of adultery, petitioner may file an amended petition charging defendant with acts of adultery subsequent to the alleged condonation, and subsequent to the commencement of the action.

Petition by Christian Lutz against Louisa Lutz for divorce. Petitioner moves for leave to file a supplemental petition. Motion granted.

Abner Kallsch, for petitioner. R. Coleman, for defendant.

GREEN, V. C. Application is made by the solicitor of petitioner for leave to file a supplemental petition for the purpose of charging adultery committed by the defendant subsequent to the alleged condonation, by the petitioner, of the previously charged act of adultery, and subsequent to the commencement of the suit. It is undoubtedly the rule, in general, that leave will not be granted to file a supplemental bill or petition setting up subsequent acts of adultery, (*Milner v. Milner*, 2 Edw. Ch. 114;) and this proceeds on the ground that the acts charged—each of them—constitute a cause of action, and that there is no dependence of one upon the other. This rule, however, does not apply in this case, for there is a direct connection between the original cause of action and that contemplated by this application. Condonation is conditional forgiveness of a matrimonial offense, which may be destroyed by the commission of another matrimonial offense, even of a lesser degree. The condition is that the one forgiven will treat the injured one with conjugal affection and kindness, and any violation of this condition will revive the cause of action which was before forgiven. When condonation is interposed as a defense, it is an answer to this that the condition inherent in the condonation has been broken by the commission of a subsequent matrimonial offense; and so there is a direct connection between the two alleged offenses. If not pleaded, it might be justly objected to on the ground of surprise. If it had happened before the commencement of the suit, it might be incorporated by amendment, but, if after, can be introduced by a supplemental bill or petition. The motion should be granted.

(55 N. J. L. 11)

DODSON et al. v. TAYLOR et al.

(Supreme Court of New Jersey. Nov. 9, 1894.)

AMENDMENT OF PLEADINGS—NEGOTIABLE INSTRUMENTS—RELEASE OF SURETY—NOTICE OF DISHONOR TO HEIRS OF DECEASED INDORSER.

1. If it be faulty to declare against trustees under a will as devisees simply, the fault is formal and amendable.

2. If a primary debtor gives to his creditor additional security for the debt, trusting that thereby the creditor will be induced to refrain from pressing for immediate payment, and the creditor accepts such security, but does not agree, either expressly or by implication, to extend the time for payment, one who was surety for the original debt will not be thereby released.

3. If, at the maturity of commercial paper, the indorser is dead, and there are no personal representatives, or none can be discovered by reasonable diligence, then notice of dishonor should be addressed to the indorser, at his last place of abode. But when there are personal representatives, and they are known, or discoverable by due diligence, then notice must be given to them, or one of them.

4. Notice of dishonor, given in any of the modes above indicated, will bind the heirs and devisees of the indorser.

5. Notice of dishonor should describe the dishonored paper with such particularity as will apprise the person to whom it is given of the instrument in question.

(Syllabus by the Court.)

Action by Weston Dodson and others against Mary A. Taylor and others, heirs of James Taylor, deceased, on promissory notes. Judgment was ordered for plaintiffs, and defendants obtained a rule for a new trial. Rule discharged.

Argued June term, 1893, before the CHIEF JUSTICE and MAGIE, GARRISON, and DIXON, JJ.

John H. Backes and Edward H. Murphy, for plaintiffs. Wm. M. Lanning and G. D. W. Vroom, for defendants.

DIXON, J. This action was brought by Weston Dodson et al. against the heirs and devisees of James Taylor, deceased, upon eight promissory notes made by Isaac Davis and indorsed by said Taylor, dated, respectively, May 9, 1887, May 20, 1887, May 25, 1887, June 8, 1887, July 2, 1887, July 19, 1887, August 6, 1887, and August 15, 1887, each payable four months after its date at the Mechanics' National Bank in Trenton. James Taylor died August 17, 1887. At the trial in the Mercer circuit before Mr. Justice Scudder without a jury, he found due to the plaintiffs on these notes the sum of \$13,427.02, and ordered judgment in their favor for that amount. The defendants now have a rule that the plaintiffs show cause why the finding should not be set aside, and a new trial granted.

The defendants' first contention is that the plaintiffs should have been nonsuited because Isaac Davis, George Price, and James Severs are described in the declaration as devisees, simply, while, under the will of James Taylor, they are devisees in trust for his grandchildren. Probably, this omission to indicate the nature of their estate is not a legal fault, (2 Chit. Pl. 469, note,) but, if it be, it is purely formal, and was rightly treated at the trial as the subject of amendment.

The second ground upon which a new trial is asked is that by force of a certain contract between the plaintiffs and Isaac Davis, the maker of the notes, and others, the defendants, who stand only in the stead of James Taylor, the indorser, were discharged. The following is a copy of the contract:

"Agreement.

"Agreement made this first day of March, eighteen hundred and eighty-eight, between Weston Dodson, Truman M. Dodson, and Charles M. Dodson, partners, trading under the firm name of Weston Dodson & Company, of the first part, and the Davis & Dowd Pottery Company, Isaac Davis, John

O'Dowd, and William P. O'Dowd, of the second part. Whereas, the said party of the first part holds and owns the promissory notes of the said Isaac Davis, indorsed by James Taylor, deceased, late of Chambersburg, New Jersey, as follows, viz.:

Note due Sept. 12, 1887 (bal.)	\$ 800	Interest to date	\$ 22 16
Note due Sept. 28, 1887 (bal.)	1,350	Interest to date	23 16
Note due Sept. 28, 1887 (bal.)	1,000	Interest to date	26 16
Note due Oct. 11, 1887	750	Interest to date	17 46
Note due Nov. 8, 1887	1,275	Interest to date	34 46
Note due Nov. 22, 1887	1,000	Interest to date	31 46
Note due Dec. 9, 1887	1,175	Interest to date	16 06
Note due Dec. 18, 1887	1,225	Interest to date	22 42
	\$10,075		\$194 52
	208 06	Protests	18 52
	\$10,283 06		\$208 06

"And whereas, it is desired by the parties of the second part that the time for the payment of the moneys due on said notes should be extended, the said Davis & Dowd Pottery Company having agreed with the said Isaac Davis to assume his indebtedness thereon: Now, therefore, these presents witness that in consideration of the premises, and of the sum of one dollar to them in hand paid by the party of the first part, the receipt whereof is hereby acknowledged, the said parties of the second part agree with the said party of the first part as follows, for themselves and their respective heirs, executors, administrators, and successors: The said Davis & Dowd Pottery Company agrees to give to the said party of the first part its promissory notes, indorsed by the said Isaac Davis, John O'Dowd, and William P. O'Dowd, as follows, viz.: One note, dated March 1, 1888, for thirty-four hundred dollars payable two months after the date thereof; another note of the same date for thirty-four hundred dollars, payable three months after date; and another note of the same date for thirty-six hundred and forty-five dollars and eighty-six cents, payable four months after date. And it further agrees that, as each of said notes shall fall due and become payable, it will pay ten per cent. of the amount due on such note in cash, and will give the parties of the first part a note similarly indorsed for the balance of the moneys due on such note, together with legal interest on such balance for the time when such note shall run, which time shall be not more than four months.

And it further agrees that, as each of such renewal notes shall fall due and become payable, it will pay ten per centum of the amount due thereon in cash, and give its note, similarly indorsed, for a like time, for the balance of the moneys due thereon, with interest thereon for the time such note shall run; and so on, it will continue to partly pay and renew such notes until all the moneys due and to grow due thereon shall be fully paid, in the manner above set out. And the said Isaac Davis, John O'Dowd, and William P. O'Dowd agree with the parties of the first part that they will severally indorse each note to be given under this agreement to the said parties of the first part by the said Davis & Dowd Pottery Company, and to stand responsible for the full payment of the moneys due and to grow due thereon to the parties of the first part, their executors, administrators, and assigns. And it is further understood and agreed, by and between the parties hereto that the notes first above specified to be given by the said Davis and Dowd Pottery Company to the party of the first part, and indorsed as aforesaid, are to be given further to secure the payment of the said sum of ten thousand two hundred and eighty-three dollars and five cents, due, as aforesaid, on the day of the date of these presents, together with interest thereon for the term of ninety-five days, such interest amounting to the sum of one hundred and ninety-two dollars and eighty-one cents, making in all the sum of ten thousand four hundred and forty-five dollars and eighty-six cents, and that all such renewals thereof are to be given for the like purpose. And it is distinctly stipulated and agreed that they shall, and the parties of the first part expressly, hereby, reserve the right to hold the said notes indorsed by the said James Taylor, deceased, together with all their rights on such notes and indorsements, against the said Isaac Davis and the representatives, heirs, and devisees of the said James Taylor, deceased, both at law and in equity, including the right to collect the moneys due and to grow due on the said notes from the estate and assets of the said James Taylor, deceased, in whosever's hands the same may be found. And the parties of the first part agree to accept the notes above mentioned to be given by the said Davis and Dowd Pottery Company, and indorsed as aforesaid, and the said renewals thereof, provided that upon the failure of any of the parties of the second part to carry out the terms of this agreement by making and indorsing such renewal notes, making such cash payments thereon, and by doing all other things herein mentioned to be done by them, the parties of the first part, their executors, administrators, or assigns, may, at their option, at any time, and without notice, terminate this agreement, and proceed to the immediate collection of the moneys due and to grow due on the said notes as fast as the said notes shall fall due and become pay-

able, anything herein contained to the contrary notwithstanding.

"In witness whereof, the said Davis and Dowd Pottery Company has caused its president to sign his name hereto, and affix the common corporate seal of said company, and the other parties hereto have signed their names and affixed their several seals, the day and year first above written.

"Witness: Weston Dodson. [L. S.]

"Josiah Bachman. Truman M. Dodson. [L. S.]

"Wm. C. Taylor. Charles M. Dodson. [L. S.]

[Seal.] "Davis & Dowd Pottery Co.

"Isaac Davis, President.

"Jos. K. Jones. Isaac Davis. [L. S.]

"John O'Dowd. [L. S.]

"William P. O'Dowd. [L. S.]

The defendants insist that this contract amounted to a valid agreement between the plaintiffs and their primary debtor to extend the time of payment of the debts now in suit, and hence released the sureties, the defendants. But a careful perusal of this contract will disclose that it contains no stipulation for an extension of time. While it recites that the parties of the second part desire such extension, and it may be assumed that they entered into the new arrangement with that object in view, yet the plaintiffs did not thereby fasten upon themselves any legal obligation to grant an extension, but, on the contrary, sedulously guarded against any possible inference of such an obligation, by expressly reserving the right to hold the notes indorsed by James Taylor, together with all their rights on such notes and indorsements, both at law and in equity. Looking at the whole instrument, it is clear that the plaintiffs were to accept the new notes to be given by the parties of the second part, not in lieu of, or suspension of, the old notes, but in addition to them, as a further security, and that the parties of the second part trusted, not to any legal change in the rights and remedies of the plaintiffs on the old notes, but to such indulgence as creditors are likely to exercise when they feel assured of ultimate payment. The case seems on all fours with *Insurance Co. v. Wilkinson*, 35 N. J. Eq. 180, and must be decided in accordance with that precedent. This contract did not discharge the defendants.

The next reason urged for the granting of a new trial is that proper notice of nonpayment was not given. By a comparison of dates already mentioned, it will be seen that James Taylor, the indorser, died before the maturity of any of the notes. On October 31, 1887, after the maturity of the first four notes, and before the maturity of the last four, his will was proved in Mercer county, and letters testamentary were issued to the executors named therein, one of whom was Isaac Davis, the maker of the notes. The only evidence of notice of nonpayment given to bind the indorser is contained in the notary's book, which (the notary being dead) was deposited in the office of the clerk of

Mercer county, where the notary last resided, and became evidence of the facts legally recorded therein, by force of the statute. Revision, p. 899, §§ 11, 12. The following show the records with regard to a note maturing before and one maturing after probate; and the other records are similar, mutatis mutandis:

"City of Trenton, N. J., Sept. 23, 1887. Mess. Weston Dodson & Co.: Please take notice that a promissory note made by Isaac Davis for fourteen hundred dollars, in favor of James Taylor, dated Trenton, N. J., May 20, 1887, payable four months after date at the Mechanics' National Bank at Trenton, and indorsed by you, (payment having been demanded and refused,) was this day protested for nonpayment, and the holder looks to you for payment thereof. Joseph H. Hough, Notary Public."

"The above is a true copy of the notices which I sent to the maker and indorsers of the promissory note, the protest of which is recorded on the opposite page, by depositing them in the Trenton post office this day, at 7:20 o'clock P. M., with the postage prepaid, directed as follows:

"Upon Isaac Davis, Trenton, N. J.

"James Taylor, Clinton St., Chambersburg, Trenton, N. J.

"Mrs. Mary A. Taylor, Clinton St., Chambersburg, Trenton, N. J.

"Mrs. Sarah M. Price, Trenton, N. J.

"Mrs. Mary E. Severs, Trenton, N. J.

"Wm. F. T. Lawton, } Inclosed to

"Mary A. T. Lawton, } George Lawton,

"Ella F. T. Lawton, } Chambersburg,

"Thomas T. Lawton, } Trenton, N. J.

"Weston Dodson & Co., Bethlehem, Pa.

"Received and payment demanded at 3:40 o'clock, P. M. Joseph H. Hough, Notary Public.

"City of Trenton, N. J., Nov. 22, 1887. Mess. Weston Dodson & Co.: Please take notice that a promissory note made by Isaac Davis for nineteen hundred dollars, in favor of James Taylor, dated Trenton, N. J., July 19, 1887, payable four months after date at the Mechanics' National Bank at Trenton, N. J., and indorsed by you, (payment having been demanded and refused,) was this day protested for nonpayment, and the holder looks to you for the payment thereof. Joseph H. Hough, Notary Public."

"The above is a true copy of the notices which I sent to the maker and indorsers of the promissory note, the protest of which is recorded on the opposite page, by depositing them in the Trenton post office this day, at 5:47 o'clock, P. M., with the postage prepaid, directed as follows:

"Isaac Davis, Trenton, N. J.

"Isaac Davis, Exr. of James Taylor, Dec'd, Trenton, N. J.

"James R. Severs, Exr., &c., of James Taylor, Dec'd, Trenton, N. J.

"George S. Price, Exr., &c., of James Taylor, Dec'd, Trenton, N. J.

"Weston Dodson & Co., Bethlehem, Pa.

"Received and payment demanded at 3:30 o'clock P. M. Joseph H. Hough, Notary Public."

Counsel for the defendants read these records as stating that every notice mailed was addressed at its heading to "Mess. Weston Dodson & Co." We do not so read them. We understand them to mean that a notice like the one set out was addressed to each person named at the foot of the record, just as that notice was addressed to "Mess. Weston Dodson & Co." We therefore find in the record evidence that, with regard to each note maturing before probate of the will of James Taylor, the indorser, notice was mailed, addressed to him, and directed to his last place of residence; and, with regard to the notes maturing after probate, notice was mailed, addressed, and directed to each of his executors, at the residence of each. This method of giving notice was in every instance correct. When the indorser is dead, and there are no personal representatives, or none can be discovered by reasonable diligence, then notice of dishonor should be addressed to the indorser, at his last place of abode. *Stewart v. Eden*, 2 Caines, 121; *Bank v. Birch*, 17 Johns. 25; *Linderman's Ex'rs v. Guldin*, 34 Pa. St. 54; *Edw. Bills & N.* 631; *Daniel*, Neg. Inst. § 1001. But when there are personal representatives, and they are known or discoverable by due diligence, then notice must be given to them. *Bank v. Blake*, 22 Pick. 206; *Smalley v. Wright*, 40 N. J. Law, 471; *Story*, Prom. Notes, § 310; *Edw. Bills & N.* 631; *Daniel*, Neg. Inst. § 1000; *Chit. Bills*, 295. But, as to the notices sent to the executors, the defendants object that they did not afford the necessary information, because they referred to the notes as being "indorsed by you," i. e. the person addressed. The law requires that the notice should describe the dishonored paper with such particularity as will apprise the person to whom the notice is given of the instrument in question. *Howland v. Adrain*, 30 N. J. Law, 41; *McGeorge v. Chapman*, 45 N. J. Law, 395. The present notices correctly stated every other particular of the notes, including the fact that they were drawn in favor of James Taylor, and added that the holder looked to the executors of James Taylor for payment. This would, I think, fairly apprise these executors, conscious that they had not themselves indorsed the notes, that they were to be held as executors on the indorsement of their testator. Certainly to Isaac Davis, one of the executors, and the maker of the notes, complete information must have been afforded by the notice, and due notice to one of several executors is sufficient. *Shoenberger's Ex'rs v. Savings Inst.*, 28 Pa. St. 459; *Story*, Prom. Notes, § 310; *Edw. Bills & N.* 631; *Daniel*, Neg.

Inst. § 1000. We consider the notices sufficient in substance, and properly given. The rule to show cause should be discharged.

(66 Vt. 21)

DOUGLAS v. JAMES.

(Supreme Court of Vermont. Addison. Dec. 11, 1893.)

WILLS—CONSTRUCTION—DEVISEES—CHILDREN—LIMITATION OVER.

Testator gave his property equally to his children living at his death, for life, thereafter to their children; conditioned if "any child shall have died" previous to his death, leaving children, the share of such child shall go to the child's children, provided, if any of his children should die after his death, without children, the share of such child should be equally divided among his other children. *Held*, that the term "child" in the clause before the proviso included grandchildren, and the term "shall have died" included deaths before the making of the will, so that, a grandchild of testator having died before the making of the will, leaving a child and a mother, such child would, on the death of his grandmother, after testator's death, without other descendants, take the share of his grandmother.

Exceptions from Addison county court; Ross, Chief Judge.

Ejectment by Julius P. Douglas, administrator, against Curtis H. James. Judgment pro forma for plaintiff. Defendant excepts. Reversed.

Button & Button, for plaintiff. Stewart & Wilds, for defendant.

ROWELL, J. The part of the will that we are called upon to construe reads as follows: "I give, devise, and bequeath all the remainder of my estate, real and personal, in equal shares, to my children who may be living at the time of my decease, during their respective natural lives, and after their respective deaths in equal shares to their respective children; and if any child shall have died previous to my decease, leaving children, the share of such child shall go to his or her children in equal shares; provided, that if any of my said children shall die after my decease, without children, the share of such child shall be equally divided among my other children in the same manner as my other estate." Polly Hurd, the defendant's grandmother, was a daughter of the testator, and long survived him, and died without children; her daughter, Salome James, the defendant's mother, having died before the will was made. The demanded premises were set off to Mrs. Hurd for life, and she possessed them till her death, and the defendant has possessed them since; and the question is whether he is entitled to them under the will.

In the first place, the testator gives life estates to his children that survive him, remainders to their children. Had he stopped here, none of his grandchildren would take except the children of his surviving

children. But he goes on to say that, "if any child shall have died previous to my decease, leaving children, the share of such child shall go to his or her children in equal shares." It is claimed that the words "any child," as here used, relate equally to the testator's descendants of either degree named in the previous clause, and include grandchildren as well as children, and therefore include the defendant's mother; that the words, "the share of such child shall go," etc., mean that the share such child would have taken if living "shall go," etc.; that the words of the proviso, "if any of my said children shall die after my decease, without children," favor this construction, as the words "without children" should be construed to mean without having had children, or without issue; and that, therefore, the defendant takes. We recognize the rule that in construing wills the word "children" is deemed to have been used in its popular sense,—that is, as signifying descendants in the first degree,—and that this sense is not to be enlarged so as to include more remote descendants, unless it appears that such was the intention of the testator. But this rule must be considered with due regard to the other rules of construction applicable to the case, and such construction adopted as will best effectuate the testator's purpose as disclosed by the will when read in the light of the attendant circumstances. Another rule is that, although an intention to disinherit an heir, even a lineal descendant, when it clearly appears, must be carried out, yet such intention will not be attributed to a testator when he uses language capable of a construction that will not so operate. A majority of the court thinks that the words "any child" in the clause next before the proviso mean any child of either class of children previously named,—that is, any of the testator's own children or any of the children of his children; that is, any of his grandchildren. It is true that the verb "shall have died," being in the second future tense, grammatically considered, points not to what had taken place when the will was made, as the death of the defendant's mother had, but to what might take place thereafter and before the testator's death; but we do not think that the verb was here used in its strict grammatical tense, but as referring to what had already taken place when the will was made, as well as to what might take place thereafter and before the testator's death; and that the words, "the share of such child shall go," etc., mean the share such child would have taken if living shall go, etc. This enlarged sense of the word "child" is favored by the word "heirs," used in regard to the disposition of whatever might remain of what was given to the widow, which, it is provided, "shall go to the heirs," etc., "according to the provisions hereinafter stated for the disposition of the

remainder of my estate." Indeed, the whole tenor of the will on this subject is to the effect that it was the intention of the testator that the remainders limited upon the respective life estates to his children should go to the children of each life tenant, or to their descendants, as the case might be; and on failure or for want of both, to his own children. This construction lets the defendant in, while any other construction disinherits him; and, besides, this is equality, at which the testator seems to have aimed. Judgment reversed, and judgment for the defendant.

(66 Vt. 33)

MOORE et al. v. WILDER et al.
(Supreme Court of Vermont. Caledonia. Nov. 7, 1893.)

WATER POWERS—DEEDS—HORSE POWER RESERVED.

1. A deed of a water power, "except sufficient to operate the mills on the east side of the river, which is limited to 100 horse power," reserves only so much as may be needed, not exceeding 100 horse power; not that amount in any event.

2. A deed reserving 100 horse power of water, reckoning "from top of the dam to the lowest practical point the wheel can be set," is to be construed in view of the situation of the wheels now and at the date of the contract, the character and expense of the business, and the benefit to be derived from a change.

3. A contract dated May 6, 1881, referring to a book whereof one edition bears date 1873 and another 1881, the latter containing a letter dated from Guatemala, April 10, 1881, must be construed subject to a finding of fact as to which edition was contemplated.

Exceptions from Caledonia county court; Ross, Chancellor.

Bill by Moore & Roy against O. T. and H. A. Wilder to settle water-power rights and for damages. Bill dismissed pro forma. Orators appeal. Reversed.

Smith & Sloane, for orators. J. J. Wilson, for defendants.

TAFT, J. The issues presented in this case require the construction of a deed under which the defendants claim title. The orators conveyed to one J. G. Moore certain premises in Barnet on the westerly side of the Passumpsic river, with all the water power of said river, "except sufficient to operate the mills on the east side of said river, which is limited to 100 horse power, to be determined by the James Leffel & Co. Wheel Book, reckonings to be made from top of dam to the lowest practical point the wheel can be set." About one year after such conveyance, James G. Moore conveyed the same premises, with the same exception, to the defendants. It is the clause above cited that the court are called upon to examine and construe.

1. The first question is, how much water is excepted from the water power of the river? The words are, "except sufficient to operate

the mills on the east side of the river, which is limited to 100 horse power." This language is plain; is not ambiguous; is not susceptible of two constructions; is "sufficient to operate the mills, limited to 100 horse power"—that is, not exceeding that amount. If 50 horse power is sufficient to operate the mills, that is all that is reserved. The orators can use no more than sufficient for that purpose, limited to 100 horse power, restricted to that amount, confined within the limits of that quantity. If 50 horse power is sufficient, of what use to the orators is another 50 horse power, which must run to waste?

2. The next question is as to the construction of the clause which reads that the power is "to be determined by the James Leffel & Co. Wheel Book." There were in evidence before the master two of the James Leffel & Co. Wheel Books, one of the date of 1873 and the other of the date 1881. At what time in 1881 the latter was issued is not shown by the report. It may have been prior to the date of the deed, May 6th, and it may have been later. If at the date of the deed the book of 1881 was not in existence, or, if in existence, the parties were ignorant of it, it is clear it could not have been in the minds of the parties in making their contract, unless, knowing of its proposed issue, they had reference to it, as books are sometimes advertised, as "in press," and they contracted with reference to it. It is not probable from the evidence that Exhibit F was published at the date of the deed, May 6, 1881, for it bears the imprint of an Ohio press, and contains a letter dated at Coban, Guatemala, April 10, 1881. It is possible that the book may have been published, and the parties have had it, when the deed was executed. We cannot determine it from the evidence, although it is referred to, as it is a question for the master, and not for the court. The wheel book which must determine the rights of the parties under the deed is the one which the parties had in mind when they entered into the contract, and, if they had none in mind, then the wheel book which James Leffel & Co. were using at the time of the contract. These facts must be determined by the master. It appears that he used the book of 1881, but arbitrarily, and without reference to the rules above stated, which we think should govern the rights of the parties in respect to which book should be used. The defendants' exception in this respect was well taken.

3. The third point is in regard to the clause in the deed as to determining the quantity of water excepted, 100 horse power, "reckonings to be made from top of the dam to the lowest practical point the wheel can be set." In construing the word "practical," the master took into consideration the location and situation of the wheels as they are now and were at the date of the deed and of

the lease, the character of the business and expense, and the benefit to be derived from such change. We think the first part of this citation from the master's report, taking "into consideration the location and situation of the wheels," implies that he considered them with reference to the bed and banks of the river, and we think the master was correct in considering the elements stated by him, in determining what was meant by the word "practical" in the contract, for such are the considerations that ought to govern a prudent man in determining what would be practical in locating and setting a wheel, i. e. what would be practicable, reasonable, feasible. The construction that we give to the contract, as above stated, will require a further reference to the master to determine the real matters in controversy between the parties; and, as the master may have erred in using the wheel book of 1881, such error, if any, would permeate all his findings in regard to the amount of water which the orators had a right to use, and which they actually did use. For this reason the question of damages is not considered. The case was brought to this court "to have the reservation construed," and, as the construction we give the deed requires further proceedings in the court of chancery, the decree is reversed, and cause remanded.

(66 Vt. 26)

WYMAN et al. v. WILCOX'S ESTATE.

(Supreme Court of Vermont. Bennington. Oct. 20, 1893.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON.

R. L. § 1002, forbidding the surviving party to a contract to testify thereof in his own favor, is not abridged by section 1004, permitting, in actions of book account, the party living to testify for himself as to the handwriting and date of the charges, so far as to admit a nephew's statement of account against his deceased uncle, of dealings extending over the 15 years they had lived together, up to the uncle's death, in connection with the nephew's testimony that no books of account had been kept between them, and that the statement was drawn by his attorney, under his direction and from his memory, after letters granted on his uncle's estate.

Exceptions from Bennington county court; Munson, Judge.

Appeal from the commissioners of claims against the estate of A. J. Wilcox, deceased, in the matter of the claim of J. R. Wyman and another. Judgment for the administrator. Claimants except. Reversed.

From the report of the auditor it appeared that the plaintiffs were brothers, and partners in all their business transactions, including those with the intestate. The intestate was their uncle, and lived on a farm near them during his lifetime. The intestate died in 1879, and for some 15 years previous to that date there had been considerable dealing between the plaintiffs and the intestate.

tate, in reference to which no books of account had been kept by either party. Upon the trial of the cause before the auditor the plaintiffs offered a paper marked "Exhibit 1," which contained, in debit and credit form, a statement of account between themselves and the intestate. This statement consisted of six items of debit and seven items of credit, extending over a period of about 14 years. The plaintiffs testified that this paper was in the handwriting of their attorney, and had been drawn up by him since the decease of the said Wilcox, and after the appointment of the administrator and the commissioners upon his estate. The plaintiffs further offered to show that said paper was made by their attorney in their presence and by their direction; that the items, dates, and amounts were put down as was directed; that they then had not, and never had, any other book of account, and that the entries on said paper were the original or first entries of those transactions in reference to which the entries were made; and that they had no regular book on which they kept accounts with the said Wilcox or any one else. They also offered, in connection with this testimony, said paper writing as evidence. The testimony and paper were excluded by the auditor, and the plaintiffs excepted. Upon the trial the plaintiffs introduced a specification of their account, consisting of seven items of charge and seven items of credit, showing a balance due of \$603.62, and introduced evidence in reference to these several items. Among other things, it appeared that in 1871 the plaintiffs and intestate began removing lumber from a lot of land of which they were tenants in common, and from which they removed lumber during that and the succeeding year. These operations were carried on under an agreement that the parties were to share in the expenses and profits in proportion to their respective interests in the land. The evidence tended to show, and the referee found, that each of the parties contributed their proper shares towards the expense, but was unable to find what portion of the avails of the lumber the parties respectively received. One claim of the plaintiffs was for a considerable amount of this lumber, claimed to have been received by the intestate, Wilcox, in excess of his share. The evidence in reference to all the items in the plaintiffs' specifications, and to all items of deal between the parties, was so meager and unsatisfactory that the auditor was unable to make, and did not make, any finding in reference to any one of these particular items, or in reference to any items of deal between the parties. The plaintiffs, however, introduced several witnesses, who testified that the intestate had said to them, shortly before his death, that he was indebted to the plaintiffs in the sum of about \$400, and from this testimony the referee found that at that time the intestate was

indebted to the plaintiffs in the sum of \$400, which sum was to be diminished by an item of \$10 in favor of the intestate, which accrued subsequent to that time. One John Wyman was permitted to testify, under the objection of the plaintiffs. The said Wyman testified as to one of the items in the plaintiffs' specifications, in reference to which the referee declined to make any finding upon the testimony. The plaintiffs excepted to the report of the auditor—First, because the auditor excluded Exhibit 1; second, because the auditor received the testimony of John Wyman.

Batchelder & Barber, for plaintiffs. J. C. Baker, for defendant.

TYLER, J. It appears by the referee's report that the plaintiff J. R. Wyman offered himself as a witness, produced Exhibit No. 1 as his book account, and testified that it was in the handwriting of his attorney, who drew it up after the decease of Wilcox, and after the appointment of the administrator and commissioners upon his estate. The plaintiff then offered the writing as a book of original entries, and proposed to testify that the plaintiffs had no other book, and that the entries upon the paper were made from their recollection. If the paper and offered evidence were admissible, they were made so by section 1004, R. L., which is as follows: "In actions of book account, and when the matter in issue and on trial is proper matter of book account, the party living may be a witness in his own favor, so far as to prove in whose handwriting his charges are and when made, and no further." The ruling of the referee deprived the plaintiffs of no legal right. The witness could not have testified further without exceeding the statutory limits. If he might testify as proposed, it was not by virtue of the section of the statute above referred to. Section 1002 is a direct inhibition upon the witness testifying. It provides that, when "one of the original parties to the contract or cause of action in issue and on trial is dead, * * * the other party shall not be admitted to testify in his own favor." It was said by Weazey, J., in *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258, that it was the intention of the statute, after the disqualification of interest was removed, to preserve equality in evidence between parties to contracts, so that, when controversies arose over them in court, the representatives of a deceased party would stand on the same footing with the survivor. The writing was properly excluded. As was said by Peck, J., in *Lapham v. Kelly*, 35 Vt. 195: "It was not such a book, kept in the regular course of business, as to be admissible as evidence per se, independent of the testimony of the party tending to prove the correctness of the entries of the transaction in dispute." It was a memorandum, made by himself,

of a fact about which he was precluded by the statute from testifying. *Parris v. Bellows' Estate*, 52 Vt. 351. The defendant's counsel claims that the partnership matters could not be adjusted in this form of action. The finding of the referee did not involve a settlement and statement of the partnership accounts. He finds that each partner paid his proportionate share of the expenses, but that he was unable to find the quantity or value of lumber sold, or the amount received by each partner from sales. He finds that the intestate received and had the avails of a certain \$400 note given to the firm for lumber, and that there were other sales, but that the evidence did not disclose the manner in which the proceeds were divided. The referee finds, from the admissions of the intestate to third persons, that he in fact owed the plaintiffs \$400, and that the item of \$10 for labor performed by the intestate for the plaintiffs shortly before his death was performed under an agreement with them that the amount should apply on what he owed them. Whether the admitted indebtedness arose from the \$400 note, or from the \$200 which the plaintiffs loaned Wilcox in the year 1885, and which he had not paid, or partly from both items, does not appear. The referee found that business relations had existed between the parties, and that the intestate had admitted that he owed the plaintiffs \$400. He did not find, and it was not necessary to be found, from what transaction the indebtedness arose. It was found upon competent testimony that a short time before the death of the intestate he was indebted to the plaintiffs in the sum of \$400. From this sum, upon the facts reported, the credit item of \$10 should be deducted. The referee finds no fault from the testimony of John Wyman from which an inference of law can be drawn, and that testimony is immaterial. Judgment reversed, and judgment for plaintiffs for \$390 and interest.

(66 Vt. 1)

STATE v. WILKINS et al.

(Supreme Court of Vermont. Chittenden.
Sept. 16, 1893.)RAPE—EVIDENCE—DISCLOSURE—REPUTATION—
INSTRUCTIONS.

1. On a trial for rape, there being testimony that the persons committing the assault made use of certain expressions, evidence is admissible that later in the evening expressions of a similar character were heard coming from unknown persons, at a point midway between the place of the assault and the house where defendants claimed to have passed the evening.

2. Conversation between prosecutrix and one of her assailants after the outrage could not be objected to as not made in the hearing of the others, where the evidence shows that they were near enough to have heard.

3. It appearing that prosecutrix made no complaint of the rape on her till several days after, though she saw her sister and mother the same night, and that she first told it to the chief of police, when she was called as a wit-

ness in a prosecution against her assailants for assault on her escort, it was permissible, as explaining her apparently unnatural conduct in telling him and saying nothing of it theretofore to her folks, for her to testify that he was to act as her interpreter, and that she supposed she was obliged to tell the whole story.

4. Prosecutrix's escort having on the next morning after the assault said that one of defendants was not among the assailants, it was permissible for him to state that he said so that he might not frighten him, and cause him to flee, and to show that he subsequently pointed such defendant out to the officers.

5. On a prosecution for rape, the fact that defendants did not run away is not admissible to show innocence, they having been arrested and let out on bail for an assault on prosecutrix's escort, and no charge of rape having then been made.

6. Defendant's testimony that he was not seen crossing a certain bridge on a certain day an hour after he claimed to have arrived at his work, could not be reinforced by evidence as to his habit of going to work by a certain route.

7. Evidence that defendant was in the habit of singing with his sister at their home every evening had no tendency to show that he was there at a particular time one evening.

8. The answers to questions by defendant's counsel as to defendant's reputation and character having been too broad, and tending to convey a wrong impression to the jury, it was proper for the state, in rebuttal, to ask questions as broad as those of defendant's counsel, to dispel any wrong impressions arising from the answers.

9. The court, after instructing that a defendant always had the right to give evidence of previous good character, and to have it considered whether, if he had borne such a character, he would be likely to commit a crime, stated that the jury should consider, with reference to the young men of this class, whether they would be likely to bring their good character to bear in reference to this very crime if an opportunity presented itself. *Held*, that no invidious distinction was drawn against defendants on account of their rank or station.

10. In place of a requested instruction that prosecutrix's failure to complain tended to show that she had not been raped, the court stated that it was a circumstance to be considered by the jury; that, ordinarily, a woman would speak of it to her near friends, but that it was to be weighed with reference to the circumstances; that her age, her being with her intended husband, and any other circumstances, were to be considered with her omission to disclose; that it was for the jury to say what weight should be given to that fact; that usually failure to complain bore on the question of consent; that the jury should say whether there was evidence of consent; that, if so, it would seem that she was false in saying that she was held, and that she was struggling. *Held*, that though the requested instruction was incorrect, the court, having undertaken to state the rule of evidence, was bound to do so correctly; and that, while her failure to make disclosure was a circumstance which bore on the credibility of her testimony, it might well have been understood that this was relevant only to the question of consent, as to which there was no evidence, the defense being an alibi.

11. In place of a requested instruction that absence of bruises or marks of violence on the person of prosecutrix was evidence that there was no such assault or struggle as she testified to, and that she was not raped in the manner alleged, the court charged that absence of marks was a fact for the jury to consider; that different persons would act differently in the same circumstances, depending on their presence of mind; that the jury should weigh the testimony with reference to human actions and experience, and say whether this girl, being

grasped and held as she said she was, could have done much, being frightened, overpowered, or for some other reason thinking it was useless. Held that, the testimony being that she struggled for many minutes, and was several times thrown on the ground, the charge was not applicable to the evidence, and might be understood to leave the jury to account for the absence of bruises by her being unable to make resistance.

Taft and Thompson, JJ., dissenting.

Exceptions from Chittenden county court; Ross, Chief Judge.

Wilkins and Blow were convicted of rape, and except. Reversed.

J. E. Cushman, State's Atty., and Seneca Haselton, for the State. Henry Ballard and J. A. Brown, for respondents.

TYLER, J. The evidence of the state tended to show that Mary Pratt, on the evening of October 5, 1890, came to the city of Burlington from the village of Winoski by horse car with one Albert Gonyeau, to whom she was then engaged to be married, and whom she married a few days later; that they started to return to her home in Winoski, walking along the highway called the "Lower Road," until they reached the southeasterly corner of Athletic Park, in Burlington, where they turned from the lower road to pass along the easterly end of the park to go towards another highway running nearly at right angles with the first and leading past the park to and across the railroad track, intending to go to the home of Mary, on Winoski flats, by way of the railroad track; that by the last-named route they could reach their destination by traveling a considerably less distance than by the lower road. The evidence of the state further tended to show that there was a gate for the passage of teams located in the easterly end of the park, and that, after Gonyeau and Mary had passed the gate, then partially ajar, going towards Winoski, the respondents, Wilkins and Blow, and one Philip Bedard, simultaneously came out of the park through the gate in a menacing manner; that one of them, in the presence of the other two, said to Gonyeau, "Get out of here, you! * * *" that a struggling then ensued, during which two of the assailants respectively armed themselves with a piece of board and scantling, Gonyeau being struck upon the head with the scantling, which cut through his hat, and inflicted a wound upon his head; that during the struggle Mary started to run away from the scene of the affray in the direction they had just come, whereupon one of the assailants struck her in the chest, and clinched her, throwing her upon the ground; that Gonyeau frequently shouted "Police!" during the entire time he remained at the park, which he estimated to be from 5 to 10 minutes; that he was powerless to repel his assailants, and, believing that he must soon be overpowered, ran to William Couture's house, situate on the lower road, and

3,600 feet distant, leaving Mary struggling with her assailant, who threw her upon the ground; that Gonyeau immediately returned to the park from Couture's, running the entire distance, and bringing with him a party of men and boys and a special policeman, Brunell; and that Gonyeau and the party searched the interior of the park to find, if possible, Mary and the assailants, but without avail. The state's evidence further tended to show that after Gonyeau had thus left the park, and before his return thereto, the three persons seized Mary, and each in turn against her will ravished her while the other two held her, one by the arms and the other by the legs; and that as soon as liberated Mary went to the house of her sister's husband, one Edward Laundry, living on North Winoski avenue, in Burlington, and westerly from the horse-car barn, and that she and Laundry soon started on foot for Winoski. The evidence also tended to show that the three persons were the respondents, Wilkins and Blow, and Bedard. The evidence of the state further tended to show that the crime was committed about half past 7 in the evening of October 5th; that Bedard, Wilkins, and Blow on the following day each admitted being together from about half past 6 till about half past 8 o'clock that evening at the house of one George Wilkins, and the respondents so testified, and that they were together till about 10 o'clock, and that they were not at Athletic Park at all that evening. The respondents, as part of their defense, set up an alibi, and introduced evidence tending to show that they and Bedard were all three at the house of one George Wilkins, father of the respondent Frank Wilkins, which was on Hyde street, from about 5 minutes past 7 till about 25 minutes past 8 o'clock that evening, and that Wilkins and Bedard were there from about 6 o'clock, and thus stated and claimed in their opening statement to the jury before any evidence was introduced by either party. The evidence of the state tended to show that a few minutes past 7 o'clock on that night, Bedard, Wilkins, and Blow were seen by one Eber Johnson and wife, who lived on Hyde street, but a short distance from the park, passing by and around their house, and going in the direction of the park; that about 12 to 15 minutes past 7 o'clock several persons, including one Charles Spaulding, saw three young men at the intersection of Hyde street with North Winoski avenue, which was lighted by an electric light, standing but a short distance from the intersection; that the junction of the streets is nearly opposite the southwesterly corner of the park, and nearly opposite "Spaulding's Hide House," so called, which is about 540 feet from the corner of the park where Gonyeau and Mary turned from the lower road, and that the horse-car barn herein referred to is about 570 feet from Hyde street corner on North Winoski avenue, and westerly therefrom; that the

three persons were soon after seen starting from Hyde street corner along the lower road towards the southeasterly corner of the park, and were soon thereafter seen by Gonyeau and Mary, coming behind them, near the southeasterly corner; that Spaulding recognized and spoke to Bedard near the hide house; and that the three persons were recognized by Gonyeau and Mary as the three persons who sprang out of the gate. There was no direct evidence introduced by the state tending to show where Bedard, Wilkins, and Blow went after the commission of the crime till about half past 8, when they were seen on Hyde street, coming from the direction of their homes, near the intersection with North Winooski avenue; that from there they went directly to the horse-car barn, situate about 570 feet westerly from the corner, where they remained a short time, then went to the vicinity of Trick's meat market, and returned to the horse-car barn, and remained till about 10 o'clock. But the claim of the state on argument from the whole case was that after the commission of the crime the respondents and Bedard went to the hill on the south side of and separated from the park by the lower road, (upon which elevation were the Catholic cemetery and the old French church; the cemetery being bounded by Winooski avenue, or lower road, and westerly by Hyde street,) and from thence to the house of Wilkins, which was southwesterly therefrom on Hyde street.

1. The testimony of Gonyeau, Brunell, and others as to hearing shouts by unknown persons from the vicinity of the old Catholic church on the evening of the alleged rape was properly admitted. The expressions were of a similar character to those made by the assailants of Gonyeau and the Pratt girl at the park earlier in the evening, which tended to show that they were made by the same persons. The old church was in the direction of Wilkins' house, in which the respondents claimed to have passed that evening. The evidence tended to show the direction which the assailants took after the outrage had been committed. The statement claimed by the state to have been made by respondent Wilkins next day to the witness Davis was that he had heard from one West that a rape had been committed, and that it was said that the boys ran up the hill afterwards. The evidence was not admitted as a part of the *res gestae*, but as a circumstance, in connection with other evidence, tending to identify the respondents as the guilty parties.

2. The state's witness Mary Pratt testified that she knew and recognized respondent Bedard, and that he spoke to her after the outrage had been committed. Respondents' counsel objected that the testimony of the witness did not show that the conversation between herself and Bedard was in the hearing of the other two respondents. A reference to the exceptions shows that this

objection was not well founded: "Q. Who came through the gate with you? A. Bedard. Q. Where were the other two? A. The other two entered the gate also. Q. When you came through the gate with Bedard, as you say, did you come to where the electric light was shining? A. Yes, sir. Q. Where did the others come to? A. They came,—the three. Q. When you came into the electric light, did you recognize any of the boys? A. Yes, sir. Q. Which one did you recognize? A. Bedard." The witness then stated what Bedard said to her. We think the evidence clearly tended to show that the witness and the three respondents were all in each other's presence, so that Wilkins and Blow were near enough to have heard the remarks of Bedard to the witness, and were presumed to have heard them. *Boutelle v. Insurance Co.*, 51 Vt. 4.

3. It was stated in the opening argument of respondents' counsel that the state's witness Mary Pratt made no complaint of the rape upon her to any person until the following Tuesday, when she made it to the chief of police, Dumas, and that from this fact it would be claimed that no rape had in fact been committed. It appeared in evidence that she made no complaint to her sister, to whose house she went immediately after the alleged outrage, nor to her mother when she reached home, and she testified without objection that she told the chief of police the next Tuesday what had been done. She had testified that she did not tell her sister because she was ashamed to tell her. Then, as explaining this apparently unnatural conduct in first telling the chief of police, she was asked why she told him, and she replied that he was to speak for her as her interpreter; that he asked her; and because she had to tell him for the court. It was as much as to say that from shame she had kept the matter secret until she was called into court, when she was compelled to and did tell the whole truth. It was but fair to the state to permit her to give these reasons to prevent an improper use being made of the fact of her silence until that time, and of her then telling her story. She merely gave a reason for her previous silence, which was permissible. *State v. Niles*, 47 Vt. 82, is full authority for the admission of this evidence.

4. There was an apparent contradiction in the testimony of Gonyeau, he admitting on cross-examination that on the next morning after the assault he did say that Bedard was not in the crowd at Winooski, when he had claimed that he recognized him in that crowd. Gonyeau had assigned as a reason for saying that he did not recognize Bedard in the crowd that he did not wish to alarm him, and cause him to flee. To meet the claim that might be predicated upon the admission of Gonyeau it was clearly admissible to show that he subsequently pointed out Bedard to the officers, who arrested him,

acting upon Gonyeau's recognition. In *State v. Dennin*, 32 Vt. 158, the respondent, to weaken the force of the evidence of certain witnesses who had testified to his identity with the criminal, introduced evidence tending to show that these witnesses had testified less pointedly at a preliminary examination. It also appeared that the same witnesses, directly after the commission of the crime, asserted positively the identity of the respondent with the person they saw commit the offense and caused his arrest. It was held that this evidence was admissible to rebut the effect of the evidence of the respondent as to their inability to recognize him. The evidence was proper for the purpose for which it was introduced. On any ground it would have been proper for the officers to have testified that they arrested the two respondents upon their being pointed out by Gonyeau as two of the persons who assaulted him.

5. It appeared that the respondents were, on the Monday following the assault, arrested for an assault upon Gonyeau. It was offered to show that upon this charge they were released upon furnishing bail in the sum of \$50, and that they returned to their work, and did not run away. These were irrelevant facts, and were properly excluded. The facts that they had been arrested, and were out on bail, and did not run away, were not admissible in their favor as tending to show innocence, for they were in the custody of the law. The legal presumption is that their bail had them in such durance as to be able to produce them in court. *Worthen v. Prescott*, 60 Vt. 68, 11 Atl. 690. It has sometimes been held that when a person accused of a crime had an opportunity to escape, and declined to avail himself of it, the fact might be admitted in evidence in his favor; but in this case the respondent had not been accused of the crime with which he is now charged when he was admitted to bail, and it was not stated in the offer that his bailor gave him an opportunity to escape. In *People v. Rathbun*, 21 Wend. 518, cited on the respondents' brief, Cowen, J., declared strongly against the admission of such evidence, and said that at the most it was a declaration in the respondent's favor, a mere assertion of his innocence.

6. The witness Gonyeau testified that about 8 o'clock on the next morning after the rape, while at Winooski village, he saw two men coming across the highway bridge, which crosses the Winooski river between Burlington and Winooski, and that he recognized them as two of his assailants of the night before. It was claimed by the state that one of the persons so seen was respondent Blow. It appeared that Blow lived with his father in Burlington, and worked in Winooski, arriving there about 7 A. M., and returning at night after his day's work was done. Blow testified that he went alone to his work that morning, leaving home at about half past 6,

and arriving at the shop where he worked from 5 to 15 minutes before 7, and that he did not go by the highway bridge, but by the railroad bridge. He testified that he did not cross the highway bridge that forenoon with any other person, and that he usually returned home at night by that bridge. His counsel asked him the question whether he had been in the habit of going by the way of the railroad bridge, morning and night, which was excluded. Evidence as to the respondent's habit in going to his work by one route could not reinforce his testimony that on this day he was not seen crossing the highway bridge an hour after he claimed to have arrived at his work. There was no conflict between his testimony and that of Gonyeau as to the time when he went to his work on that morning, nor as to the route by which he went. The question was whether he was seen crossing the highway bridge in company with another person at a later time that forenoon. On this point he claimed to be clear in his recollection. The evidence was properly excluded.

7. The same reasoning applies to the seventh exception. The evidence offered relative to Wilkins' ability to sing, and his habit of singing while his sister played accompaniments upon the organ, was wholly immaterial. It might have been true that he was in the habit of singing with his sister every evening, and that he in fact sang with her on that evening, yet that fact had no tendency to show that he was not absent from the house at the particular time in question. The state introduced no evidence tending to contradict Wilkins' claim that he was at the Wilkins house during a considerable portion of that evening.

8. The questions put to witnesses by respondent Blow's counsel in respect to the respondent's reputation and character, and the answers thereto, were too broad, and might have conveyed a wrong impression to the minds of the jury. As was said by Barrett, J., in *State v. Arnold*, 50 Vt. 731, the evidence was "designed to operate beneficially to himself, the respondent, as a matter of fact, as showing the unlikelihood of his having done the act charged against him. In this view, it was proper to show the fact to be not as he testified." In this case it was proper for the state to ask questions in rebuttal as broad as those propounded by the respondent, in order to dispel any wrong impressions that might arise from the answers to the latter. In *Com. v. Sacket*, 22 Pick. 394, it was held that when the respondent introduced evidence of his good character prior to the commission of the crime charged, the government might prove that subsequent to that time his character had been bad, on the ground that the descent from virtue to vice was, in general, gradual; and the fact that a defendant sustained a bad character after the commission of the alleged crime would tend

to rebut the claim of prior good character; that it was proper to submit it to the jury, to have such weight with them as it was entitled to.

9. The court, in substance, instructed the jury that a respondent always had a right to put in evidence in his favor his previous good character, and to have it considered whether, if he had borne such a character, he would be likely to commit a crime. This was a compliance with the general rule of law, and is as stated in *State v. Daley*, 53 Vt. 446. If by the subsequent remark, "You will consider, with reference to the young men of this class, whether they would be likely to bring their good character to bear in reference to this very crime if an opportunity presented itself," an invidious distinction was intended against the respondents on account of their rank or station, as their counsel contend, it was, of course, error. But it seems clear that the court only meant to have the jury consider just what safeguard previous good character would be to such men as the respondents were when tempted to commit crimes.

10. The respondents, among other requests, requested the court to charge the jury as follows: "The fact that the witness Mrs. Gonyeau made no complaint or disclosure that she had been outraged and raped to her sister, whom she saw within a very short time—perhaps one-half hour—after it was claimed to have been done, nor to her mother nor father, whom she saw on the same evening, and with whom she was living and staying at this time, nor to anybody till the second day after, when she told it to the witness Dumas, an entire stranger, for the first time,—the fact of such omission to make any complaint about it is evidence which tends to show that no rape was committed." Upon this point the court instructed the jury that it was a circumstance to be considered by them; that ordinarily a woman, having had such an offense committed against her, would speak of it to her near friends,—make some complaint,—but that anything of that kind was to be weighed with reference to the circumstances and the surroundings; that her age, her expectation to be soon married, her being with her intended husband, and any other circumstances were to be considered in connection with her omission to make disclosure; that it was for the jury to say what weight they would give to that fact; that usually the failure to make complaint bore somewhat upon the question whether the prosecutrix consented or not, because, if she consented, she would not be as likely to disclose; that the jury should take the case and all the surroundings, and say whether to their minds there was any evidence that the prosecutrix consented; that, if so, it would seem that she must be false in saying that she was held,—that she was struggling. To the charge upon this

point, and to the refusal of the court to comply with the request, the respondents excepted. The request did not embody a sound proposition of law. The failure of a prosecutrix to make complaint does not directly tend to show that the alleged crime was not committed. It does bear directly upon the credibility of her testimony. But the court undertook to state the rule of evidence upon this subject, and was bound to state it correctly. Judge Woodruff, in *Bacdo v. People*, 41 N. Y. 265, said that the reason for the admission of the declarations of the prosecutrix is that it is so natural as to be almost inevitable that a female upon whom this crime has been committed will make immediate complaint to her mother or other confidential friend, and that her failure to do so would be strong evidence that her affirmation on the subject was false. In *Higgins v. People*, 58 N. Y. 377, *Church, C. J.*, said that any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape is a circumstance of more or less weight, depending upon the other surrounding circumstances; that there may be many reasons why a failure to make immediate complaint should not discredit the witness; that there is no iron rule on this subject; that the rule is founded upon the laws of human nature, which induce a female to complain at the first opportunity. In the nature of the case there can be no invariable rule. When the prosecutrix becomes a witness, the fact that she made disclosure immediately after the alleged crime is admissible in corroboration of her testimony. On the other hand, her silence is a circumstance that tends to discredit her story. In *State v. Knapp*, 45 N. H. 148, it is said that how much the delay in making the complaint ought to weigh against the prosecution must depend upon the circumstances of each case. *State v. Niles*, 47 Vt. 82. Lord Hale said that this accusation is easily to be made, hard to be proved, and harder to be defended by the party accused, notwithstanding his innocence. It is stated in all the works upon criminal law that the credibility of the testimony of the prosecutrix must be left to the jury upon the circumstances of fact by which it is attended, and, among others, whether "she presently discovered the offense, and made search for the offender," or whether she concealed the injury for any considerable time after she had an opportunity to complain. In this case the respondents were on trial for an atrocious crime, committed, as the state's evidence tended to show, with great brutality. The prosecutrix was an important witness. A case could not be made out without her testimony. The credibility of her story must be submitted to the jury with all the attending circumstances. It appeared that she had gone directly from the scene of the assault to the house of her sister, but made no dis-

closure to her; that in company with her sister's husband she started for her home, and with him met her father and lover on the way, but made no complaint to them, nor to her mother when she arrived home, nor to any one until the following Tuesday, when she was called into the police court as a witness in a prosecution which Gonyeau had instituted against two of the assailants for the assault upon him, and told the chief of police of the outrage upon her, supposing she was then obliged to tell the whole story. The respondents were entitled to have the jury instructed that the silence of the prosecutrix, and her neglect to have any steps taken for the arrest of the criminals on the night of the outrage, were circumstances which bore upon the credibility of her testimony; that these circumstances were to be considered by the jury, and, unless explained, they made weight against the prosecutrix's story. The attention of the jury was directed to the reason assigned by the prosecutrix for her silence, but we do not find in the charge a clear statement of the effect generally to be given to a failure to make disclosure. It is possible that expressions in the charge upon this subject would have amounted to a compliance with the rule had the court omitted what it said about consent. The information was for rape, and the state's evidence tended to support it. The defense was an alibi. The respondents testified that they were not at the park that evening, and introduced evidence tending to show that they were at another place. Therefore the question of consent to the alleged act of the respondents did not arise, and the charge in this respect was not applicable. It is, indeed, essential to the crime of rape that the act be done without consent; but in this case there was no claim of consent. The jury might well have understood from the charge that the fact of not complaining was relevant only to the question of consent, and that, as there was no evidence of consent, the silence of the prosecutrix had no significance.

11. The respondents further requested the court to charge that "the testimony of the witness Dr. Peck, that a careful and thorough examination of the person of the witness Mrs. Gonyeau, of her limbs and hips, failed to disclose any bruises or marks of violence of any kind upon her, is evidence which tends to show that no such assault upon her, or such struggles with her assailants, as she testifies to, could have taken place, and is evidence which tends to show that she was not outraged and raped in the way and manner alleged; that such evidence of the witness Dr. Peck tends to impeach the testimony of the witness Mrs. Gonyeau, and also is evidence which tends directly to show that no such outrage and rape could have been committed in the way and manner that she says that it was." Upon this

subject the court instructed the jury that the absence of marks was a fact for them to consider; also what a young girl would do in the circumstances, if it were true, as she claimed; that different persons would not act in the same manner in the same circumstances; that when a crisis came some persons were without much presence of mind, and would not know what to do, while others would have their presence of mind sharpened, and would do the most vigorous thing; that in the case of a fire some persons would do the most judicious things, while others would act foolishly; that the jury must weigh the testimony with reference to human actions and experience, and say whether this girl, being grasped and held, as she says she was, could have done much, being frightened, overpowered, or for some other reason thinking it was entirely useless. To the charge upon this point as given, and to the refusal of the court to charge as requested, the respondents excepted. Gonyeau had testified that while two of the party were assaulting him the third seized hold of the prosecutrix, and threw her upon the hard ground, about the middle of the large entrance gate; that the struggle between her and her assailant continued about 10 minutes, and was going on when he ran for help; that they had got some 5 feet inside the gate during the struggle; that she was continually trying to get up, and get away from him,—one of them; he could not distinguish which,—did get halfway up, and then fell upon the ground several times. The prosecutrix testified that while two of the party were assaulting Gonyeau she was engaged in a violent struggle to resist the third, and get away from him; that, after Gonyeau left, all three seized her, and finally outraged her, she all the time struggling and resisting with all her strength; that during the struggle she was twice thrown upon the ground. She did not claim that there were any marks upon her person as the result of the struggle, except one upon her chest, caused by a blow which the first assailant gave her when she tried to run away. Dr. Peck examined her carefully two or three days afterwards, and found no bruises or marks upon her except the one upon her chest. The charge upon this subject was not applicable to the evidence. The jury might well have understood that they were at liberty to conjecture that the prosecutrix was so overcome with fright that she had so far lost her consciousness that she was unable to make resistance, which might account for the absence of bruises and marks upon her. This was a state of facts not claimed by the prosecution.

The exceptions are sustained in respect to these two errors in the charge, judgment reversed, verdict set aside, and cause remanded for a new trial.

ROWELL, MUNSON, and START, JJ., concur.

TAFT, J., (dissenting.) There was no error in the admission or rejection of evidence. If there was a sound legal proposition in the requests, it was complied with. The exceptions taken to the charge as given upon the subjects of the requests were general, pointed out no error, and, our authorities all agree, should not avail the respondents. Had any of the errors now claimed been pointed out before the jury retired, they would have been corrected undoubtedly, or the question been distinctly ruled upon.

THOMPSON, J., (dissenting.) There was no error in the admission or rejection of evidence. I cannot concur in the holding that the exceptions show error in the charge of the court upon the subject-matter of the two requests to charge quoted in the opinion of the majority. The respondents were not entitled to have the requests, as drawn, complied with. There was no error in what the court said on the subject-matter of the requests. If it should have said more upon this phase of the case, there was no exception to the failure of the courts to charge further. I also agree with TAFT, J., that, if there had been error, the exceptions to the charge were too general to avail the respondents.

(7 Del. Ch. 42)

In re HARRIS.

(Court of Chancery of Delaware. Nov. 23, 1893.)

**INQUISITION OF LUNACY — CONTROL OF PROPERTY
PENDING PROCEEDINGS — EQUITABLE JURISDICTION—PRACTICE.**

1. The court of chancery in this state, by special legislative grant, has jurisdiction of alleged lunatics from the very inception of the process by which their sanity or insanity is finally and definitely ascertained, and has the power to suspend or supersede the control of the supposed insane person over his property ad interim.

2. During lunacy proceedings the presumption of sanity must remain in abeyance, so far as it relates to the temporary restraint of the personal liberty of the supposed insane person.

3. When petitioned to restrain a supposed insane person from control over his property during the pendency of lunacy proceedings, the court of chancery should not examine into the case more than is necessary to move it to grant the order for the protection of the alleged lunatic's person and estate, and therefore counter affidavits negating the allegations contained in the sworn statements of the petitioner will not be heard.

4. The petition for a restraining order is but collateral to the proceedings in lunacy, and dependent upon them for its foundation, and the affidavits upon which the lunacy proceedings are founded may be used in aid of this application.

5. The sworn statements in the petition for a restraining order, containing a statement that the respondent has parted with several thousand dollars without receiving a visible equivalent therefor, is prima facie evidence of the incompe-

tence of the respondent to govern himself and manage his estate, and justifies the court of chancery in granting an order suspending his control over his property during the proceedings in lunacy.

(Syllabus by the Court.)

Petition by Sarah D. McPhail for a provisional order as to the control of the property of Charles Harris, a supposed insane person, pending proceedings in lunacy. Order granted.

Smithers, Ridgely, Pennewill & Hughes, for petitioner. Spruance, Bradford & Penington, for respondent.

WOLCOTT, Ch. Sarah D. McPhail, on the 2d day of October, A. D. 1893, presented a petition, as the niece of Charles Harris, of the town of Dover, in Kent county, and the state of Delaware, representing that he was insane, and by reason thereof wholly unfit to govern himself or manage his estate, and praying that a writ may be issued to inquire into the same by a jury. To this was annexed her affidavit as to the truthfulness and correctness of the allegations therein set forth, as were also the affidavits of Drs. Wilson and Downs, in which they declared that they were both acquainted with the said Harris, and, to the best of their judgment and belief, he was insane, and narrated the facts and circumstances by which such unsound state of mind was rendered manifest. On the same day the chancellor ordered a writ de lunatico inquirendo to be issued, in accordance with the prayer of the petitioner, directed to the sheriff of Kent county, returnable at chambers, December 7, 1893. On the 20th day of October, A. D. 1893, the said Sarah D. McPhail, as the niece and one of the nearest blood relations of the said Charles Harris, presented another petition, reciting therein the said proceedings in lunacy, and alleging—First, that he is the owner of a large personal property, consisting of bonds, stocks, and other securities, which he has for more than 20 years kept in the custody of the Fidelity Insurance, Trust & Safe-Deposit Company, of the city of Philadelphia, in whose management he has had the most implicit confidence; second, that notwithstanding such confidence the said Harris was recently induced by those with whom he is exclusively surrounded to take means to withdraw his effects and papers from the said company, and to that end had executed one or more letters of attorney; third, that he is in the exclusive control and keeping of persons who have, by reason of his mental and physical incompetence, acquired absolute dominion over him, and who are seeking, through the influence thus acquired, to obtain possession of his estate and effects for their own private purposes, and who have already, by the same means, succeeded in obtaining from him large sums of money, to the extent of several thousand dollars, for their own private uses, and who will continue to do so, to the waste and destruction

of his estate, unless a provisional order should be made, restraining the control of the said Harris over his property pending the said insanity proceedings. The respondent, by his solicitors, on the 25th day of October, A. D. 1893, on the day set for the hearing, filed an answer, under oath, to the last-named petition, in which he admitted all the facts set forth therein in relation to the stocks, securities, etc., owned by him, and then being kept by him in the Fidelity Insurance, Trust & Safe-Deposit Company, of the city of Philadelphia, but denies that it ever had the management thereof. He also admits or avers that after full consultation with his counsel alone, on the 2d day of October, A. D. 1893, he instructed them to prepare a letter of attorney authorizing and empowering the Equitable Guarantee & Trust Company, a corporation of the state of Delaware, to receive from the Philadelphia company all his personal effects in its control, and to invest in such good and safe securities as said attorney should deem proper, all moneys belonging to the principal of his estate which it might receive. He further says that the instructions thus received were embodied in a letter of attorney, and by him executed the following day, which, with the key to the deposit box, was delivered to the said Delaware company. He alleges as a reason for this action his advanced age and physical infirmities, and the annoyance to which he had been recently subjected by reason of certain litigation in the state of Pennsylvania respecting his said property, deposited as aforesaid with said Philadelphia company, and also his desire of having his property brought into Delaware, where he resides, and expects to reside during the residue of his lifetime, so as to avoid the expense, delay, and complication in the settlement of his estate in Pennsylvania in case he should die leaving said property in the custody of said company. He denies that he has, since the commencement of the said proceedings in insanity, executed any letter of attorney, other than the one before mentioned, or that any other letter of attorney whatsoever, executed by him, is now held by any person or corporation. He also denies that he was ever induced, under the influence of any person or persons, to withdraw all his effects from the said Philadelphia company, and avers that said letter of attorney was his voluntary act, and was made by him with the approval and under the advice of his counsel. He also disclaims any desire or intention to revoke said letter of attorney, or to make any other, except so far as may be necessary to execute the powers intended to be conferred upon the said Delaware company. The respondent also avers that there is no reasonable ground to apprehend that any loss, waste, or injury to his estate will occur during the pendency of the said proceedings in insanity, or at any other time, by reason of the said letter

of attorney. He denies that he is mentally incapable of governing himself or managing his estate, or that he is or has been in the custody, control, or keeping of any person or persons whatsoever, or that any person or persons has or have acquired dominion or undue influence over him for any purpose whatever.

I have stated the facts quite fully, as shown by the petition and answer, in order that the points of agreement and disagreement between the two may the more clearly appear, and the weight of the facts be more correctly estimated. The question to be determined is whether the relief prayed for should be granted, in the light of the foregoing statement of facts. The object sought to be attained by the petitioner is to hold the property of the alleged lunatic in statu quo until the termination of the proceedings in lunacy previously instituted. That the power to do this, or something which would be substantially the same, resides in this court, when a proper case is presented, has ceased to be a subject about which there can be any serious controversy. Chancellor Kent, in *Re Wendell*, 1 Johns. Ch. 600, and Chancellor Williamson, in *Re Dey*, 9 N. J. Eq. 181, of this country, and Lord Eldon, in the case of *Ridgeway v. Darwin*, 8 Ves. 66, and Hardwicke, in *Re Heli*, 3 Atk. 634, in England, unequivocally recognized this doctrine, to the extent in which it is claimed in this case. But it does not depend upon the authority of adjudged cases, for it is founded in the authority of reason as well as precedent. If there were no power to suspend or supersede the right of a person supposed to be of unsound mind to manage and control his property during the interval between the issuance and execution of a writ of insanity, it would many times, partially if not wholly, fail of its purpose, for during that time he might waste, squander, destroy, or otherwise dispose of it, especially if it consisted of bonds, stocks, securities, and certificates of indebtedness, which pass by delivery or assignment. After the waste or destruction of his property, of what use would it be to prosecute the writ to a finality, and obtain the appointment of a trustee,—the medium through which the court exercises a permanent control over the person and property of those who have been adjudged to be non compos mentis by due course of law? Clearly, none, so far as the preservation of his estate is concerned, if it consisted of personal property, for it would be out of reach of the trustee, or placed in a situation that would make restitution impossible, without protracted and expensive litigation. While it is true that this court, by virtue of its inherent and general powers, can take cognizance of the acts and persons by which the alleged lunatic may be fraudulently and unfairly deprived of the possession of his property, it goes without saying that such a remedy is manifestly inadequate, not to say,

in many cases, absolutely fruitless. A preventive remedy, when it can be employed, is more effectual for the protection of human rights than one which is merely corrective in its operation and effect. The former stands between the wrongdoer and those who are liable to become his victims. The latter simply proposes to restore that which has been taken, or to imperfectly compensate in damages for the loss or injury sustained. The old adage, "An ounce of prevention is worth a pound of cure," illustrates with peculiar force the relative or comparative efficiency of these remedies, as applied to persons whose mental condition is in progress of judicial inquiry.

It was urged by one of the solicitors for the respondent that as the English court of chancery had no jurisdiction over the persons and property of nonadjudged lunatics, as such, and as the chancellor of England had jurisdiction only of that class of persons as the representative of the king, as *parens patriae*, by means of his sign manual, the chancellor of this state, whose general powers are inherited from the English court of chancery, cannot by virtue thereof assume the care and supervision of such persons, unless brought within one or more of the well recognized heads of equity jurisdiction. This is true. Neither does the court of chancery in this state possess this special authority as a part of its original, inherent, equitable jurisdiction. It is derived from the legislature, just as the chancellor of England derived it from the king by virtue of his sign manual. This court occupies the same relation, under chapter 49 of the Revised Code, to those persons who are *non compos mentis*, as the representative of the people, as the chancellor of England does, to the same class of persons within his jurisdiction, as the delegate of the crown. So that the proceedings to inquire into the alleged insanity of any person are not initiated in this state by the chancellor by means of a special power not included in the general powers of his office, as it is in England, but by the court of chancery itself, by a direct legislative grant. Therefore, the court of chancery assumes jurisdiction of alleged lunatics, who have not been so adjudged, from the very inception of the process by which their sanity or insanity is finally and definitely ascertained. This view of the matter strengthens rather than weakens the position already taken, for, as just observed, this power is conferred upon the court, and not devolved upon the chancellor, in the nature of an *ex officio* duty. While this court, under the provisions of the statute just referred to, cannot assume the permanent and exclusive custody of a supposed insane person until he is so found by a jury, yet he is, in a limited sense, during the pendency of lunacy proceedings, its ward, around whom it is bound to throw the arm of protection. For persons thus situated, if insane, that is not unfrequently one of the

most critical periods during the continuance of their mental disorder, in which the most unremitting vigilance is necessary for the protection, especially, of their estates. And if the court is powerless to act, however apparent and imperative the necessity, the legislature would stand convicted of the folly of conferring jurisdiction over a matter, and at the same time withholding the means of executing the beneficent purpose for which it was given. It will not do to say that the presumption of sanity stands in the way of the exercise of this humane power, for it, like the presumption of innocence, must sometimes remain in abeyance, so far as it relates to the temporary restraint of personal liberty,—the one, for the good of the person; the other, for the good of the people,—before either shall have been rebutted by the production of satisfactory and competent evidence.

But two of the solicitors for the respondent admit the existence of such a wise, conservative power, but they strenuously deny that such a case has been presented as to provoke or call it into activity. They insist that something more than the bare allegations of the petitioner, supported by her affidavit, is necessary to justify the affirmative action of the court in respect to her prayers and requests, namely, the production of additional and corroborative affidavits. They further intimate that the respondent should have the privilege of submitting counter affidavits negating the allegations contained in the sworn statements of the petitioner. Such a course would necessarily raise an issue of fact, involving the mental capacity of the alleged lunatic, and necessitate the decision of the very matter which the sheriff is commanded to inquire into by the oaths of 12 good and lawful men. To weigh testimony submitted on both sides, whether it be much or little, and then decide according to the preponderance thereof, would be assuming the functions of the jury, and determining in advance the issue of fact which the law has wisely confided to their judgments. The controversy out of which this application grows should not be subjected to examination, any more than is necessary to move the court to grant an order for a writ of insanity, and such other orders that look to the protection of the alleged lunatic's person and estate. Each party has a right to insist that his or her status before the jury shall not in any wise be affected by any decision that may be made by this court in any intermediate or preliminary proceeding. A cautionary step like this, intended only for the preservation of the alleged lunatic's property, should not, in my opinion, be allowed to take on the character of an adverse proceeding, for, if it were, it would inevitably end in the decision of a question forbidden by both the letter and spirit of the law.

Since, then, the power to suspend or su-

persede the control of a supposed insane person over his property ad interim is lodged in this court, the next inquiry that naturally arises is, what amount of ex parte proof or authenticated facts is necessary to call it into exercise. The solicitors for the respondent contended that the petition and affidavits upon which the proceedings in lunacy were grounded are no part of this proceeding, and, though matters of record in this court, they could not be used in support thereof. The latter is but an incident or outgrowth of the former, and therefore has no independent origin or existence. It has all the characteristics of a dependent or secondary life. If there had been no writ of insanity, this application would have no foundation, and the petitioner would have no standing in this court; and any order that may be made now will ipso facto determine with the return and confirmation of the inquisition. The same result would follow in case the writ, at any intermediate stage, should be quashed, or otherwise suppressed. If this proceeding is only subservient to and dependent upon the other proceeding, and through it derives its vitality from the same conditions, I can see no reason why the affidavits upon which it is founded cannot be used in aid of this application. While the allegations contained in those affidavits, assuming them to be true, only prove the incapacity of Mr. Harris to govern himself or manage his estate, or a condition of mind that renders him susceptible to the alleged overmastering influences which constitute the ground of the petitioner's fear and complaint, yet it is a fundamental fact, that must appear, by ex parte proof, as prima facie true, before the petitioner could be heard at all upon this or a similar application. Whether or no some proof outside of the petitioner's affidavit should have been made as to the extent of such influence, and the exercise or attempted exercise thereof for a dishonest and fraudulent purpose, in order to obtain the desired relief, it is not necessary for me now to decide. "Sufficient unto the day is the evil thereof." The allegation of the petitioner in regard to the wrongful getting of a part of the respondent's money is, for the purposes of this case, practically admitted to be true by his irresponsible and evasive answer in respect thereto. It is alleged in the petition "that the mental and physical condition of the said Charles Harris is such as that he is wholly incapable of governing himself or managing his estate; that he is in the exclusive control and keeping of persons who have acquired absolute dominion over him, and who are seeking, through the influence they have acquired over him, to obtain possession of his estate and effects for their

own private purposes, and who have already succeeded in obtaining from him large sums of money, to the extent of several thousand dollars." This is a very material allegation, which could not have failed to challenge the attention of the respondent's solicitors; and, to avoid the effect of admitting the truth of any part thereof, it should have been explicitly answered by an express denial in every particular, or by way of confession and avoidance. The answer fully denies every essential part of the allegation, except that which relates to the obtaining from the respondent large sums of money by the persons with whom he is surrounded. To this the answer is wholly silent or irresponsible. Silence or evasion as to a material allegation in a bill or a petition of this kind is always construed into an admission of its truth. It may be urged that the denial of the respondent's mental incapacity to govern himself or manage his estate, and of his being under the control, influence, or dominion of any person or persons for any purpose whatever, deprives the act of obtaining money from him of any wrongful or immoral significance. This would be true, if his mental faculties possessed their usual vigor. He would then have a right to do as he pleased with his money, without interference from any quarter whatever. But the affidavits, which are a part of this case, allege an entirely different state of facts, which must prevail against the allegations in the respondent's answer, where there is a material conflict. Now, the prima facie incompetence of the respondent to govern himself and manage his estate, in connection with the fact that he has parted with several thousand dollars without receiving a visible equivalent therefor, justifies this court in granting an order suspending his control over his property until the return and confirmation of the inquisition in lunacy.

Before closing, however, I desire to say that the conclusion at which I have arrived cannot in any way be construed as an expression of a lack of confidence in the integrity or prudence of the counsel for Mr. Harris in advising the execution of the letter of attorney constituting the Equitable Guarantee & Trust Company his attorney in fact, or in any other respect. I have no doubt that they have been sincere in all that they have done, and, if the letter of attorney were irrevocable, the securities would be perfectly safe in the hands of said company; but the recognition of the power to make such an instrument would be a recognition of the power to revoke it at any time, and to execute another, thus leaving the funds or securities of the respondent exposed to the danger of loss or destruction apprehended by the petitioner.

(18 R. I. 334)

BENNETT et al. v. HOWARD.

(Supreme Court of Rhode Island. Oct. 16, 1893.)

APPOINTMENT OF ADMINISTRATOR.

The fact that a person is unduly intimate with a distributee of an estate is no ground to refuse his appointment as administrator, where the distributee has no other interest in the estate.

Gardner Howard was appointed administrator of the estate of Charles W. Pierce, deceased, by a decree of the probate court of the town of Foster, and Samuel Bennett and others petition for new trial. Denied.

The objection to the appointment set forth in the reasons of appeal was, in substance, that the appellee was not a suitable person to administer, because he would unjustly favor one of the distributees, between whom and himself an improper intimacy existed.

Charles H. Page and Franklin P. Owen, for appellants. Ziba O. Slocum, for appellee.

PER CURIAM. The record does not show that the distributee with whom it is alleged that the appellee is intimate has any claim as a creditor against the estate of the intestate, or any interest in it other than as a distributee. This being so, no reason appears which would enable the appellee to favor her at the expense of the other distributees. As it does not appear that the rights of the appellants would be in any prejudiced by the appointment of the appellee, we think that testimony as to specific acts of adultery between the appellee and the distributee referred to, or of his intimacy with her, was irrelevant, and that the court below did not err in excluding it. The appellants' petition for a new trial is denied and dismissed.

(18 R. I. 374)

In re JAMIESON et al.

(Supreme Court of Rhode Island. Oct. 17, 1893.)

CONSTRUCTION OF WILL—LEGACIES—CHARGE ON PROCEEDS OF LAND.

Testator bequeathed \$200 each to her two children, and devised her real estate and the residue of her personalty to her husband. She left no personal estate, and what real estate she left was subject to a mortgage, which was foreclosed after her death. *Held* that, the legacies not being charged on the estate, the husband took the surplus proceeds of the mortgage sale free from any claim by the legatees.

Petition by William J. Jamieson and others for the construction of a will.

Stephen A. Cooke, Jr., and Louis L. Angell, for devisee. Charles H. Page and Franklin P. Owen, for legatees.

MATTESON, C. J. This is a case stated for the opinion of the court. The petitioners are interested in the construction of the will

of Catherine Jamieson, late of Providence, deceased. The will bears date January 17, 1881. Its material portions are as follows: "I give, devise, and bequeath unto my two children, Elizabeth and Mary Jane Ellison, the sum of two hundred dollars each. I give, devise, and bequeath unto my husband, William J. Jamieson, his heirs and assigns, all my real estate, together with the rest and residue of my personal property, of every kind and nature." The testatrix, at her decease, left no personal estate from which the legacies given in the first clause quoted can be paid, but died seised and possessed of certain real estate, subject to a mortgage, conveyed to her prior to the execution of her will. Since her decease the mortgage has been foreclosed. After deducting from the proceeds of the mortgaged estate the amount due on the mortgage and the expenses of foreclosure, a balance remains of \$309.38. The legatees claim that their pecuniary legacies should be paid to them from this fund, while William J. Jamieson, the devisee of the real estate, denies their right to any part of the proceeds of the real estate, and claims that he took it free from any lien or charge for the payment of such legacies, and that such proceeds are to be considered as real estate, and not as personal property for the payment of the legacies. We are of the opinion that the devise of the real estate was not subject to a charge for the payment of the legacies. The will contains no express charge of them on the real estate; nor does it contain language from which we can raise an implied charge, as we might if the devise had been merely of a residue. *Gould v. Winthrop*, 5 R. I. 319; *Lapham v. Clapp*, 10 R. I. 543; *Potter v. Brown*, 11 R. I. 232; *Larkin v. Larkin*, 17 R. I. 461, 23 Atl. 19. It is evident that at the making of her will, which was several years prior to her death, the testatrix deemed her personal estate to be amply sufficient for the payment of these legacies, for she not only devised all her real estate to her husband, but added a gift of the rest and residue of her personal property. The mortgage on the real estate devised having been foreclosed since the death of the testatrix, the proceeds of the sale, over and above the amount of the mortgage and expenses of foreclosure, are to be treated as real estate, and as the property of the devisee, William J. Jamieson.

(18 R. I. 335)

BECK et al. v. ASHKETTLE.

(Supreme Court of Rhode Island. Sept. 27, 1893.)

RECEIVERS—PETITION BY CREDITORS.

On a petition for the appointment of a receiver for an insolvent debtor, the secured as well as the unsecured indebtedness must be computed, in determining whether the petition is filed by creditors "holding not less than one-fifth of the debts in amount," as required by Pub. St. c. 237, § 13.

Petition by Vere W. Beck and others for the appointment of a receiver for William C. Ashkettle, an insolvent. Denied.

Herbert B. Wood and William Fitch, for petitioners. Joseph C. Ely and Herbert Almy, for respondent.

MATTESON, C. J. This is a petition under Pub. St. R. I. c. 237, § 13, for the appointment of a receiver of the estate of William C. Ashkettle, an insolvent debtor. The testimony shows that the respondent's indebtedness, which is unsecured, amounts to \$2,598, of which there is due to the petitioners \$551. The residue of the respondent's indebtedness, which is unsecured, is a judgment for \$2,047 in favor of Alexander Grant, who is also the holder of a note of the respondent for \$6,000, secured by mortgage of a house and lot. The house and lot cost about \$9,500. The writ in the suit in which the judgment in favor of Grant was obtained was served by attachment of the mortgaged house and lot. The purpose of the present proceeding is to vacate this attachment, to the end that the debtor's property, outside of the mortgage, may be equally distributed among his creditors. The statute¹ requires, in order to maintain the petition, that it shall be filed by one or more of the creditors of the debtor, holding not less than one-fifth of the debts in amount. The aggregate of the debts held by the petitioners exceeds one-fifth of the unsecured indebtedness of the debtor, but is much less than one-fifth of his indebtedness, if the mortgage note for \$6,000 is to be reckoned. The question presented is whether the \$6,000 is to be reckoned as a part of the respondent's indebtedness, in computing the one-fifth of the debts necessary to sustain the petition. We are of the opinion that the \$6,000 must be reckoned. The statute does not except from the creditors entitled to file a petition a creditor whose debt is secured. We cannot hold that the claim of such a creditor is to be excluded from the computation without legislating into the statute an exception which it does not contain. To the extent that a creditor holds security for his claim, it is virtually paid. We can see no reason why, to that extent, he should be permitted to interfere with or control the interests of other creditors, whose claims are unsecured. On the contrary, we think the interests of justice and the policy of the statute would be best subserved if a creditor whose claim is secured were excluded from those entitled to maintain the petition. But we do not feel warranted by these considerations in interpolating into the statute a provision to that effect. It follows, as the \$6,000 is to be reckoned, and as the claims held by the petitioners do not amount to one-fifth of the respondent's indebtedness, that the petition must be denied and dismissed.

¹ Pub. St. c. 237, § 13.

(18 R. I. 402)

SOUTHWICK v. PROBATE COURT OF MIDDLETOWN.

(Supreme Court of Rhode Island. Nov. 14, 1893.)

PROBATE OF WILL — PERSON UNHEARD OF FOR SEVEN YEARS—SUFFICIENCY OF NOTICE.

1. Under Pub. Laws, c. 298, providing that when notice of intention to apply for letters of administration, or to prove the will of a person who has not been heard from for seven years, has been given, his will may be proved, and letters of administration granted, as if he were dead, notice of intention to apply for letters of administration affords sufficient basis for an application for the probate of the will.

2. Such notice need not specify the time and place for carrying out the intention.

(Syllabus by the Court.)

Appeal from probate court.

The probate court of Middletown admitted to probate an instrument purporting to be the will of Alfred W. Southwick, deceased, and Catherine Southwick appeals. Affirmed.

Patrick J. Galvin and Charles Acton Ives, for appellant. Nathan W. Littlefield and William P. Sheffield, Jr., for appellee.

MATTESON, C. J. This is an appeal from a decree of the probate court of Middletown, admitting to probate an instrument in writing purporting to be the last will and testament of Alfred W. Southwick. The case was tried at the March term, 1893, of the supreme court for the county of Newport. Evidence was adduced of the death of Alfred W. Southwick, and that notice had been given by the appellant of her intention to apply for letters of administration in accordance with the provisions of Pub. Laws, R. I. c. 298, passed April 18, 1882, as follows: "Sec. 1. Section 8 of chapter 184 of the Public Statutes is hereby amended so as to read as follows: 'Section 8. Whenever it shall be proved to the satisfaction of the court of probate of any town that any person domiciled in such town at the time of his departure, has left his home and not been heard from directly or indirectly for the term of seven years, and that a notice of intention to apply for letters of administration or to prove the last will and testament of such person has been published for three months in each issue of some newspaper in the city of Providence, and also in each issue of some newspaper in the county in which he was domiciled, and been posted for three months in three or more public places in said town, and that such other notice as the court may deem best has been given to the relations and heirs, the last will and testament of such person may be proved and letters of administration may be granted on such person's estate as if he were dead. The notices shall contain a brief description of such person, his age, name and such other characteristics as shall identify him, and no distribution of his estate shall be made until three years after the administration has been granted under the provi-

sions of this section." The appellant objected to the admission and sufficiency of the notice, so given, as a basis of a proceeding for the probate of the will, and, her objection being overruled, excepted to the ruling. The jury found that the instrument was the last will and testament of Alfred W. Southwick. The appellant thereupon filed this motion for a new trial.

In support of the motion the appellant contends that, as the notice was of an intention to apply for letters of administration, it affords no basis for an application for the probate of a will; and, further, that, even if this be not so, the notice was insufficient, because it specified no time and place for carrying out that intention. We do not think that these contentions can be sustained. The language of the statute is in the alternative,—that whenever it shall be proved to the satisfaction of the court of probate that a notice of intention to apply for letters of administration or to prove a last will and testament has been published, etc., the last will and testament of the person may be proved, and letters of administration may be granted on his estate, as if he were dead. Evidently, the sole purpose of the statute was to give publicity to the fact of the intention to institute proceedings for the disposition of the estate of a person who had left his home, and not been heard from for the period specified in the statute, to the end that such person, if living, might have notice of such intention, and make known the fact that he was alive before the action contemplated had been taken. This purpose would be as effectually accomplished, whether the notice be of an intention to take out letters of administration or to apply for the probate of his will, and therefore it seems to us that notice in either form, the statute being in the alternative, is sufficient to warrant the action of the court of probate, whether it be the granting of letters of administration, or the probate of a will. The statute does not require that the notice of intention should specify the time and place for carrying out the intention. Its purpose, for aught that we can see, would be as well fulfilled without such specification as with it. Other statutory provisions require that, when application has been made to the probate court, notice of the application shall be given of the time at which the court will proceed with its consideration. Appellant's motion for a new trial denied and dismissed, with costs.

(18 R. I. 286)

SWEET v. WOOD et al.

(Supreme Court of Rhode Island. Oct. 18, 1893.)

PARTNERSHIP—CONTRACT—WHEN WITHIN SCOPE OF FIRM'S BUSINESS—INSTRUCTION—VERDICT—WHEN DISTURBED.

1. Where horses are necessary for carrying on the business of a firm in the ordinary way,

the hiring of a horse for such purpose by one of the partners is within the scope of the partnership business.

2. In an action against a firm which used horses in carrying on its business, there was evidence that one of the partners hired the horse, and stated that it was for the use of the firm. Defendants requested the court to charge that a partner could not, without authority of the other member of the firm, bind it on an implied contract, not connected with its business, or for its benefit. *Held*, that the court properly added the qualification that, if the partner declared when he hired the horse that it was for the benefit of the firm, it would be responsible.

3. Where there is evidence to support the verdict, though conflicting, it will not be disturbed, unless it is clear that the jury made a mistake, or were swayed by passion, partiality, corruption, prejudice, or sympathy, so that their verdict is strongly against the evidence.

Action by Angell Sweet against R. S. & F. W. Wood to recover for the use of a horse alleged to have been hired of plaintiff by defendants. There was a verdict for plaintiff, and defendants petition for a new trial. Denied and dismissed.

Willard B. Tanner and Edward L. Gannon, for plaintiff. Samuel S. Stone and Edward F. Lovejoy, for defendants.

MATTESON, C. J. The defendants petition for a new trial on the ground of erroneous rulings, and also because the verdict is against the evidence. The testimony shows that the defendants, as copartners, were engaged in keeping a general store in Burrillville, and that they had occasion to use horses in carrying on their business. The plaintiff testified that Frank W. Wood, one of the defendants, came to him, and stated that they (the defendants) were in need of a horse, and would like to get him to use for a few days; that he consented to such use; and that said Wood thereupon took the horse away. This, however, was denied by Wood, who testified that he asked the plaintiff for the use of the horse for one Walden in his laundry business, and that, with the plaintiff's permission, he took the horse to Walden's stable; that Walden continued to use the horse for several months, to the plaintiff's knowledge; that the plaintiff, at different times, took the horse from Walden's stable, and returned him there when he had done using him. The defendants requested the court to instruct the jury that, if they found that the hiring of the horse was not necessary for the carrying on of the partnership business in the ordinary way, the firm was not prima facie liable for the hiring by one partner alone. The request was refused, and the defendants excepted.

We think the request was properly refused. As the use of horses was necessary for carrying on the partnership business in the ordinary way, the hiring of a horse for that purpose was clearly within the scope of the partnership business. The rule is too well established to admit of question that the acts, admissions, and declarations of a partner during the existence of the partnership, while

engaged in the transaction of its business, or relating to matters within its scope, are evidence against the firm. 17 Amer. & Eng. Enc. Law, 1077, and cases cited in note 2. It was wholly immaterial whether, as a matter of fact, the hiring of a horse was or was not necessary for carrying on the business of the firm in the ordinary way; for being within the scope of the partnership business, and therefore within the authority of one partner to bind the firm, the firm would be bound by the declaration of the partner that the firm needed the horse for the transaction of its business, whatever the fact might be.

The defendants also requested the court to instruct the jury that one partner could not, without authority from the other member of the firm, bind it on an implied contract, not in any way connected with its business, or for its benefit. The court gave the instruction, with the qualification that, if the partner declared when he hired the horse that it was for the benefit of the partnership, it would be responsible. To this qualification the defendants excepted. We think the instruction requested, in view of the testimony, was erroneous, and that the qualification of it was correct. The request was erroneous, in that it assumed, contrary to the evidence, that the hiring by one partner was unauthorized by the other. It was not unauthorized by the other, because, as we have seen, it was within the scope of the partnership business, and one partner is the agent of his copartner in all matters within the scope of the partnership business. As such agent, his declarations are sufficient to bind his copartner, whether in accordance with the fact or not.

The verdict is supported by the testimony of the plaintiff. Though this testimony is denied by that of the defendant Frank W. Wood, and though there are circumstances which may or may not, according to the view taken of them, tend to corroborate the testimony of the latter, it is the province of the jury to judge of the credibility of the testimony, and to determine its weight. Unless it is clear that they have made a mistake, or have been swayed by passion, partiality, corruption, prejudice, or sympathy, so that their verdict is strongly against the evidence, the intervention of the court is unwarranted. Defendants' petition for a new trial is denied and dismissed.

(18 R. I. 411)

NEWPORT WATERWORKS v. SISSON
et al.

(Supreme Court of Rhode Island. Nov. 22, 1893.)

EQUITABLE CONVERSION—CONTRACT TO SELL LAND
—RIGHTS OF DEVISEES.

After the execution of a contract for the sale of land the vendee is the equitable owner, and the interest of the vendor is converted into personality; and hence, on his death, the pur-

chase price belongs to his residuary legatees, and not to the persons to whom he has specifically devised the land, though they will be compelled to execute a deed to the vendee.

Bill by the Newport Waterworks against Elbert A. Sisson and others for specific performance. Decree for complainant.

William P. Sheffield, for complainant.

STINESS, J. This is a bill for the specific performance of a contract for the sale of land made by Edward Sisson, late of Portsmouth, deceased. Shortly after making the contract, Edward Sisson died, leaving a will, in which he devised the land in question to his son, Elbert A. Sisson, for life, and upon his death in fee to the children and issue of said Elbert. After other gifts and devises, he gave the residue of his estate equally to said Elbert and his widow, Mary G. Sisson. Elbert Sisson has two minor children living, who, with the widow and son named above, are respondents to the bill. The questions are whether there has been an equitable conversion into personality of so much of the real estate thus devised as is embraced in the agreement, so as to pass the purchase money to the residuary legatees, and who are the parties to convey title. We think it is clear that there has been a conversion. The will speaks from the death of the testator. At his death he had sold the estate in question, and, although a deed had not been given, the vendee was the equitable owner in case of an exercise of its option to purchase under the contract. When the title is given, it relates back to the date of the contract, the vendor and his heirs or devisees holding the legal title meanwhile as trustees for the purchaser. This result rests upon the familiar principle that equity regards that as done which is agreed to be done; or, as stated in *King v. King*, 13 R. I. 501, "In equity, property will be treated as being already what it was intended to become." *Siter's Appeal*, 26 Pa. St. 178; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Hawley v. James*, 5 Paige, 318. See, also, *Story, Eq. Jur.* (12th Ed.) §§ 789, 790, 1212; 1 *Pom. Eq. Jur.* (2d Ed.) § 368, and cases cited. The contract evidences the fact that the testator intended, if the complainant should so choose, to dispose of his land and to receive the purchase money. He must therefore equally have intended that his will should not operate upon the land, with its remainder in fee to these grandchildren, but upon the purchase money only, as a part of his residuary estate. Thus it is said in *Kerr v. Day*, 14 Pa. St. 112: "It is settled that an estate under contract of sale is regarded as converted into personality from the time of the contract, notwithstanding an election to complete the purchase rests entirely with the purchaser; and, if the seller die before the election be exercised, the purchase money, when paid, will go to his executors as assets." To the same effect is *Farrar v. Win-*

terton, 5 Beav. 1, where a testatrix made a will, devised real estate, and afterwards sold it, but the purchase was not completed until after her death. It was held that the purchase money belonged to the personal representatives, and not to the devisees of the testatrix, notwithstanding her lien on the estate for the purchase money, and notwithstanding a statute (1 Vict. c. 26, § 23) "that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death." The point of the decision is that she could not devise the real estate at the time of her death, because she was no longer the equitable owner thereof. But, in the case of a contract to sell land, the legal title remains in the vendor until the contract is executed. This title may descend to heirs or be devised, and, if the vendor dies before the title passes, a bill for specific performance will lie against the heir or devisee. *Moore v. Burrows*, 34 Barb. 173; *Judd v. Mosler*, 30 Iowa, 423; *Watson v. Mahan*, 20 Ind. 223; *Newton v. Swazey*, 8 N. H. 9; 3 Pom. Eq. Jur. § 1261; 2 Warr. Vend. p. 743. In the present case, therefore, upon payment of the purchase money to the executors, the devisees under the fourth clause of the will may be required to convey the legal title to the complainant, and the money so received will pass to the residuary legatees under the sixth clause of the will. A master may be appointed to make conveyance for the infant respondents.

(13 R. I. 276)

PECKHAM v. ASHHURST.

(Supreme Court of Rhode Island. Oct. 9, 1893.)

REAL-ESTATE BROKERS—COMMISSIONS.

1. A broker, employed to sell land, who, after obtaining an offer, which is declined, again resumes negotiations with the purchaser on the basis of his offer, by direction of the principal, is the effective agent in bringing about a sale afterwards made, and is entitled to his commissions, though the negotiations were concluded through another person, to whom the principal paid the commission.

2. The fact that the broker reported to his principal that an offer of \$16,000 for the land had been made, instead of \$15,000, does not affect his right to a commission, where, as a result of his negotiation, a sale for the smaller sum was made.

Assumpsit by E. Truman Peckham against Elizabeth K. Ashhurst for services as a broker in the sale of real estate. There was a verdict in plaintiff's favor, and defendant petitions for a new trial. Denied.

Charles E. Gorman and Patrick J. Galvin, for plaintiff. William P. Sheffield, for defendant.

v.28A.no.5—22

PER CURIAM. The court is of the opinion that there is sufficient evidence to support the verdict. It appears from the testimony of the plaintiff, which, in view of the verdict, for the purpose of the present proceeding, is to be regarded as true, that, during the summer of 1888, he, as broker, carried on negotiations between the defendant and a Mr. Bancroft in relation to the sale by the former to the latter of a parcel of real estate; that these negotiations finally terminated in an offer by Bancroft of \$16,000 for the land, which was declined by the defendant; that subsequently, on or about October 3, 1888, the defendant sent for the plaintiff, and informed him that she had concluded to take the \$16,000 for the land; that thereupon the plaintiff called on Bancroft, and told him that the defendant had decided to let him have the land for that sum; that Bancroft was then about to remove from Newport to Washington, and said to the plaintiff that he was not prepared to talk about real estate at that time, but would write him when he got to Washington. The case also shows that Bancroft, after his removal to Washington, wrote to one John Peckham, instead of the plaintiff, through whom the negotiations between Bancroft and the defendant were continued, with the result that on October 16, 1888, an agreement for the sale of the land was consummated. Assuming the facts to be as stated, it is evident that the plaintiff must be regarded as the effective agent in bringing about the sale. He it was who communicated to the purchaser, at the instance of the defendant, her desire to reopen the negotiations; and though Bancroft, for some reason which does not appear, chose to continue the negotiations through some other person than the plaintiff, and the defendant saw fit to treat with that other person instead of the plaintiff, the fact still remains that the plaintiff was the instrument through whom the resumption of negotiations which ended in the sale was brought about. In the absence of a special contract, the production of a purchaser able and willing to purchase on terms satisfactory to the seller entitles a broker to his commission. The earlier negotiations between Bancroft and the defendant had been carried on by the plaintiff. Though these had terminated without a sale, yet, on the resumption of them, and especially when the defendant had recognized the plaintiff's agency as continuing by employing him as the medium for reopening them, his right to his commission on consummation of the agreement for a sale became complete. The defendant was not at liberty to avail herself of the plaintiff's services, and then decline to pay his commission. Had the negotiations been continued by Bancroft after the plaintiff had notified him of the defendant's desire to reopen them directly with the defendant, and the sale consummated between them, instead of through the instrumentality

of another person, the plaintiff would nevertheless have been entitled to his commission. *Murray v. Currie*, 7 Car. & P. 584; *Chilton v. Butler*, 1 E. D. Smith, 150; *Morgan v. Mason*, 4 E. D. Smith, 636; *Stillman v. Mitchell*, 2 Rob. (N. Y.) 523; *McClave v. Paine*, 49 N. Y. 561; *Jones v. Adler*, 34 Md. 440; *Hanna v. Collins*, 69 Iowa, 51, 28 N. W. 431; *Edw. Brok. & F.* §§ 111, 112. The fact that the defendant concluded the negotiations with the purchaser through another person, to whom she has paid a commission, instead of making the sale herself, does not take away the plaintiff's right to his commission. The fact that there was a misunderstanding between the plaintiff and Bancroft as to the amount of the latter's offer for the land—the plaintiff reporting it to the defendant as \$16,000, while Bancroft alleges it was but \$15,000—appears to us immaterial. The minds of the seller and purchaser met in the agreement for a sale of the land for the latter sum as the result of a renewal of the negotiations. As already stated, it is the production of a purchaser able and willing to purchase, and the consummation of the agreement for a sale on terms satisfactory to the seller, which give the right to the commission on the price obtained. Defendant's petition for a new trial denied, and dismissed, with costs.

(18 R. I. 707)

ELLIOTT v. NEWPORT ST. RY. CO.

(Supreme Court of Rhode Island. Nov. 8, 1893.)

CARRIERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against an electric street-railway company for personal injuries, plaintiff's evidence showed that he was riding on the footboard of the motor car; that, in reaching into his pocket for change, he was knocked from the car by contact with a trolley pole, and was run over by the trailer; that the distance from the footboard to the trolley pole was only ten and a half inches; that he had passed eight poles safely, but did not know of the proximity of the poles, as his back was turned towards them, and as he had never before ridden over the line. *Held*, that it was a question for the jury whether plaintiff was guilty of contributory negligence.

Action by William Elliott against the Newport Street-Railway Company for personal injuries. Verdict directed for defendant. Plaintiff petitions for a new trial. Granted.

Patrick J. Galvin and Charles Acton Ives, for plaintiff. Darius Baker, David S. Baker, Jr., and William C. Baker, for defendant.

MATTESON, C. J. This is an action of trespass on the case to recover damages for personal injuries alleged to have been sustained by defendant's negligence. The case was tried at the March term of the supreme court for Newport county. When the testimony on the part of the plaintiff had been submitted to the jury, the court directed

a verdict for the defendant. The plaintiff thereupon excepted to the direction, and filed this petition for a new trial.

The testimony shows that the plaintiff was injured September 1, 1892, while riding on one of the defendant's electric cars in Newport. The facts attending the injury were these: The plaintiff boarded the car a few minutes past 8 o'clock in the evening, at the foot of Touro street, on Spring street, with the intention of riding to Morton Park, in the southern part of the city. The car was an open one, with seats running crosswise, and with steps or footboards on each side lengthwise of the car. This car had in tow another car. All the seats in both cars, and also the platforms, were filled with passengers, and passengers were standing on the footboards. The plaintiff took a position on the footboard of the first car, on the left hand or easterly side of the car as it was going south, between the second and third seats from the rear end of the car, standing with his face turned towards the opposite side of the car, and holding onto the two stanchions supporting the roof of the car on either side of him. Instead of standing on the footboard, the plaintiff might have stood, if he had seen fit, between the seats inside of the car. Shortly after the car had started, while the plaintiff was reaching for his money to pay his fare, he was thrown from the car by coming in contact with a trolley pole, fell to the ground, and was run over by the wheels of the car in tow. No objection was made by the conductor to the plaintiff's standing on the footboard, nor was he warned that there was any danger in doing so. Between Touro and Franklin streets the defendant's track ran close to the curbstone on the easterly side of Spring street. The cars were propelled by the trolley system. Between Touro and Franklin streets the poles supporting the trolley wire were located on the edge of the curbstone, so that the distance from the rail to the inner side of the pole varied from 26 to 28 inches. The distance between the inside of the poles and the outer edge of the footboard of a passing car varied from 10 to 12 inches; the distance in the case of the pole by which it is alleged the plaintiff was struck being 10½ inches. The plaintiff did not know of the location of the pole at the point where he was injured. He did not notice any poles from the time he got onto the car until he was struck, and could not have seen them, in the position in which he stood, because they were behind him. He had never ridden over that part of the defendant's road prior to the accident, and was familiar with the street only as he had occasionally driven through it. From the point where the plaintiff got onto the car, to the point where he was thrown off, the car had passed eight poles, that by which the plaintiff was struck being the ninth.

The question raised by the plaintiff's ex-

ception is whether, on these facts, the court was justified in directing a verdict for the defendant. To have warranted the direction it must have clearly appeared,—so clearly that the court could say as a matter of law,—either that the defendant was not negligent, or that the plaintiff was guilty of negligence which contributed to the accident. We do not think that either of these propositions was sufficiently clear to warrant the court in taking the case from the jury, and directing a verdict for the defendant. Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers. *Tuller v. Talbot*, 23 Ill. 357; *Meier v. Railroad Co.*, 64 Pa. St. 225; *Railway Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667; *Railroad Co. v. Derby*, 14 How. 468, 486. It is a matter of common knowledge that railway companies daily undertake to carry, as did the defendant on the occasion in question, passengers greatly in excess of the seating capacity of their cars; that they stop their cars and take on passengers so long as there is standing room on platforms or footboards, and collect fares from those on platforms or footboards as well as from those within the cars. Ought not the defendant, in view of the rule prescribing the duty of carriers of passengers, to have foreseen the possible danger to which passengers on the footboards of its cars might be exposed by a slight turn of the body sidewise, or by a slight inclination of it backward, in consequence of the proximity of its track to its trolley pole at the point where the plaintiff was injured? We think so. *Railway Co. v. Williams*, 140 Ill. 275, 29 N. E. 672; *Railway Co. v. Higgs*, 38 Kan. 375, 16 Pac. 667; *Gray v. Railroad Co.*, (Sup.) 15 N. Y. Supp. 927; *Lehr v. Railroad Co.*, 118 N. Y. 556, 23 N. E. 889.

But the question which has been chiefly argued is whether, on the facts recited, it sufficiently appeared that the plaintiff was guilty of contributory negligence to justify the direction of the court. The defendant concedes that it is not negligence in se for a passenger to ride on the footboard of an open car, but contends that, as the outside of a car is obviously more dangerous than the inside, it is incumbent on any one who rides there to exercise care commensurate with the danger. This proposition is doubtless correct. But we do not assent to the defendant's further contention that, if the passenger is injured while riding on the footboard, it is *prima facie* his own fault. Undoubtedly, by the law of this state, the burden is on him who sues for an injury to show that he was in the exercise of due care, and the question whether he was in the exercise of due care is to be considered with reference to the fact that he was riding in a dangerous situation.

But the question of contributory negligence is generally for the jury, the exceptions being where the facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or where the standard of duty is fixed, or the negligence is clearly defined and palpable. *Clarke v. Lighting Co.*, 16 R. I. 463, 465, 17 Atl. 59; *Chaffee v. Railroad Co.*, 17 R. I. 658, 663, 24 Atl. 141. A passenger who rides on the footboard of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there,—such, for instance, as injury from passing vehicles, or by being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car, and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railway company has undertaken to carry on the footboard of its car is bound to anticipate and be on the lookout for, unless, indeed, it appears that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the footboards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road. *Railway Co. v. Lee*, 50 N. J. Law, 435, 439, 14 Atl. 883. The testimony does not show that the plaintiff knew of the close proximity of the defendant's track to its trolley poles. Moreover, the accident occurred in the evening, when, on account of the darkness, the danger of being struck by the pole would not be so apparent as in the daytime. Nor does the testimony show that the posture of the plaintiff on the footboard was an unusual one, or any movement of his which would naturally expose him to danger. The defendant's counsel argues that it is a necessary inference from the fact that he was struck that he was leaning backward at a considerable angle. The plaintiff's testimony was that he was in the act of taking his fare out of his pocket. The defendant's counsel, in argument, stated that the plaintiff illustrated his testimony by raising his arm as though to take his money out of his vest pocket. If this be so, the plaintiff's elbow, as he stood with his back to the trolley poles, would naturally project several inches beyond the line of his body, and a slight inclination would suffice to bring it into contact with a pole only ten and a half inches from the edge of the footboard. The fact that the plaintiff had already safely passed eight poles gives probability to the theory that the accident was due to the lifting of his arm in the manner stated. Plaintiff's petition for a new trial granted.

(18 R. I. 338)

DRAPER v. MONROE.

(Supreme Court of Rhode Island. Nov. 1, 1893.)

DEED—DESCRIPTION—ADVERSE POSSESSION—SUFFICIENCY OF EVIDENCE—COLOR OF TITLE—NEW TRIAL.

1. The owner of lots on O. street, which was platted as adjoining lot 90, but which was actually laid out and opened 50 feet west of such lot, deeded such lot to D. by number, but added to the description a clause to the effect that the street was the west side thereof. D. deeded the land fronting on the street, 50 feet deep, and bounded on the east by his land, to defendant, and subsequently deeded lot 90 to plaintiff. *Held*, that the deed to D. covered lot 90 and the strip, 50 feet wide, between such lot and the street, and that the deed to defendant covered such strip, but no part of lot 90.

2. In ejectment by plaintiff for lot 90 under his deed from D., defendant testified that he supposed his deed from D. covered lot 90, and that he fenced and planted such lot, but did not testify that he had ever claimed title to the lot to the knowledge of D. or his grantee, (plaintiff,) or had done any act which would charge them with knowledge of such claim, or would be inconsistent with permissive occupation. *Held*, that the trial court properly found that defendant had failed to show that his occupancy of the lot amounted to a disseisin of D., which would bar plaintiff's action.

3. Defendant was not entitled to a new trial for mistake in not introducing in evidence his deed from D. under which he claimed title to lot 90, since the deed, on inspection, would not show title in him, and its introduction could not change the finding.

Trespass and ejectment by Lucy A. Draper against Henry H. Monroe. Defendant petitions for a new trial. Denied.

Richard B. Comstock and Rathbone Gardner, for plaintiff. Nathan W. Littlefield and Walter R. Stiness, for defendant.

STINESS, J. The defendant asks for a new trial upon the ground of mistake in supposing that a deed, under which he claims title to the estate in question, had been put in evidence at the trial, when in fact it had not. The deed being now produced for our own inspection, we are of opinion that the petition should be denied, for the reason that the deed could not have affected the decision of the case. The action was trespass and ejectment. The plaintiff put in deeds which made out her claim of title, and called the defendant as a witness, to show his occupation of the land, who testified that he bought the lot in question, fenced and planted it, and had been in possession of it since 1866 or 1867. Other testimony on the part of the plaintiff was to the effect that the defendant had only been in possession of a small portion of the lot, covered by a henhouse, since some time between 1870 and 1880. The defendant's testimony showed only that he supposed he had bought the lot of the plaintiff's predecessor in title in 1866. This was a mistake. It arose in this way: The lots were a part of a plat of land whereon Ocean street was marked out as adjoining the plaintiff's lot. Ocean street, as actually laid out, opened, and used, was 50 feet west of the

platted location. The owner of the plat, Josiah King, sold 69 lots on the plat, including lots on both sides of Ocean street, to Edward R. Mitchell in 1845. Mitchell then sold three lots by plat numbers, adding to the description the words, "Ocean street being on the west side thereof." Two of these lots—one on Summer street, and the other on Winter street—were deeded to Lucian Draper in 1852, who in 1866 sold to the defendant a lot bounding southerly on Summer (now Colfax) street, 50 feet; westerly on Ocean street, 75 feet; northerly by other land of the grantor, 50 feet; and easterly by other land of the grantor, 75 feet. No reference was made to the plat, other than that it was a portion of the land conveyed to the grantor by a deed in which the plat was referred to. As the only lot, according to numbers on the plat, which Draper owned on Summer street, was lot 90, the defendant claims that he bought that lot; but this cannot be the effect of the deed. Mitchell, so far as appears, owning the land on both sides of Ocean street, sold not only lot 90, but all the intervening land to Ocean street, for, unless something appears to qualify such a description, the boundary on a street will be deemed to be the street as opened and actually used. *Aldrich v. Billings*, 14 R. I. 233. Practically, Mitchell added the land in the street, as shown on the plat, to lot 90, up to the line of Ocean street as opened and used. All that land, assuming that Mitchell had the right to convey it, came to Draper, who then sold the strip of 50 feet from Ocean street to the defendant. Draper's deed to the defendant does not purport to convey lot 90, but its terms expressly exclude it, and bound the defendant's lot easterly on Draper's land. The defendant therefore has no record title to the lot.

There is no plea of adverse possession in this case; but the defendant claims that, by reason of his occupation of lot 90, Draper was disseised, and so could not afterwards give a title to his grantee. The question, then, is whether the evidence, aided by the deed, would show a disseisin to bar the plaintiff's action. We think not. The question before us is not the effect of a holding for 20 years, but simply the question of a disseisin. It is essential to a disseisin that there should be an entry with the intention to usurp the possession, and oust the true owner of his freehold. As Kent says: "There was a distinction between dispossession and disseisin, for disseisin was a wrong to the freehold, and made in defiance and contempt of the true owner; it was an open, exclusive, adverse entry and expulsion,—whereas dispossession might be by right or by wrong; and it was necessary to look at the intention in order to determine the character of the act." 4 Kent, Comm. *482. The mere fact of occupation of a vacant lot, without anything to show that such occupation was, or was intended to be, adverse, is not

sufficient to create a disseisin. Judge Story said, in *Ricard v. Williams*, 7 Wheat. 59: "The law will never construe a possession tortious unless from necessity; on the other hand, it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful; and this, upon the plain principle that every man shall be presumed to act in obedience to his duty until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence as to its origin, it will be deemed lawful and coextensive with the right set up." So, also, in *Doe v. Thompson*, 5 Cow. 371, it was said: "Disseisin is an estate gained by wrong and injury; and therein it differs from dispossession, which may be by right or wrong. The defendant was bound to show this tortious seisin affirmatively." The defendant in the present case testified that he supposed he bought lot 90, and had fenced and planted it, although the plaintiff testified that there was nothing on the lot except a henhouse, until after Mr. Draper died. It did not appear when the defendant's supposition that he bought this lot arose; but, however it may be, he did not testify that he had ever claimed the title to the lot to the knowledge of Draper or his grantees, or had done any act which would charge them with knowledge of such claim, or which would be inconsistent with a permissive occupation. The lot was vacant, and it is a significant fact that the defendant did not build his house upon it, but built it on the land covered by the description in his deed under the construction we have given to it, and upon the very land marked on the plat as Ocean street. Accordingly, upon the principle above stated, the court found upon the question of fact that there was not sufficient evidence of an adverse possession. For aught that appeared, the defendant's occupation might have been with permission of the plaintiff's predecessors in title instead of being adverse to them. The production of the deed could not have changed this finding of fact. It would not have shown title in the defendant, nor anything more than a mistake in supposing that he bought the lot in question; a mistake which, so far as appears, may not have arisen at the time of the purchase, which had been confined to his own mind, and which had not developed into any such claim of right, or intention to usurp the title, as would amount to a disseisin. The doctrine of disseisin is not one now to be extended. Under the feudal system, of which this is a relic, when title to land was not evidenced by recorded deeds, and the occupant rendered the service due, and was recognized by the lord of the manor as one of the *parces curiae*, possession carried a presumption of right to which it is not entitled under a registry system. Possession *quo animo* has therefore come to be the test of a disseisin,

and to work an ouster of lawful title this should appear by strict proof. As this did not appear from the evidence in this case, and would not be made apparent by the introduction of a deed of other land, which is the only mistake alleged as a ground for a new trial, we think the petition for a new trial should be denied.

(18 R. I. 389)

In re VAN HORNE et al.

(Supreme Court of Rhode Island. Oct. 26, 1893.)

TRUSTS—SALE BY TRUSTEES—POWER OF LEGISLATURE TO AUTHORIZE—TITLE OF PURCHASER—RE-INVESTMENT OF PROCEEDS.

1. Testator devised his house to a church for a parsonage, providing that if the church suffered the premises to go to decay, so as not to be fit for the minister's family to live in, for one year, the town should take possession, and dispose of them for the benefit of its poor. *Held*, that such corporation, with the concurrence of the town authorities, when authorized by an act of the general assembly, could convey such property for the purpose of investing the proceeds in a house lot better situated for a parsonage, and that the purchaser would not take it charged with the equity of seeing that such proceeds were invested, and that the title to such lot was taken for the same purposes and held under the same trusts as the property sold, as provided by such act.

2. The act of the general assembly authorizing such church to sell and convey by good and sufficient deed the devised premises, and invest the proceeds in a house lot more eligibly situated for a parsonage, to be held by the church for the same purposes and under the same trusts and conditions as the devised estate, was a valid exercise of legislative power.

3. The church, in order to retain its estate in the lot purchased, must proceed, within one year from the purchase, to build a suitable parsonage, since a neglect so to do would be tantamount to allowing the devised premises to go to decay, so as not to be fit for the minister's family to live therein for a year.

Petition by Mahlon Van Horne and others for an opinion of the supreme court, under Pub. St. c. 192, § 23.

MATTESON, C. J. This is a petition for an opinion. The case stated is as follows: The Second Baptist Church and Society in Newport has entered into a contract in writing with Mahlon Van Horne to sell and convey to him, by a good and sufficient deed to vest in him a good and clear title, free from all incumbrances, a certain parcel of land, with the dwelling house and other buildings and improvements thereon, situated in Newport, and particularly described in the petition. Van Horne by the same agreement, binds himself to purchase the property, provided the vendor can make a good and clear title to it. Both parties are ready to carry out the agreement, but the purchaser has doubts as to the validity of the title. The facts on which the validity of the title depends are these:

Constant Taber, formerly of Newport, deceased, died seised of the estate. His last will and testament, dated November 19, 1819,

which, with a codicil thereto, was duly admitted to probate, contains a clause as follows: "Item. After the decease of my wife, I give, devise, and bequeath unto the abovenamed church and society the mansion house wherein I now live, together with the lot and all the buildings thereon standing, and the privileges and appurtenances thereunto belonging or in any wise appertaining, for a parsonage house; and I direct that the corporation of said society keep the said house and premises in good, tenantable repair, suitable for the minister whom they shall appoint and set over them, and his family, to live in. The occupying of said house shall be considered to be to the said minister, free and clear from all incumbrances whatever, besides the six hundred dollars, as his salary, which the said corporation or society is to make up without any deduction whatever. But in case that the said church or society shall suffer said premises so to go to decay, as not to be fit for their minister and family to live in, for one year, then and in that case my will is that the town council of the town of Newport take possession of said house, lot, and buildings thereon, and dispose of the same, in such a way and manner as they may think proper, for the support and comfort of the poor of said town of Newport." The Second Baptist Church and Society derives its title under this devise. The wife of the testator died before him, and on his decease the Second Baptist Church and Society entered into possession of the property, and has since kept the dwelling house and premises in good, tenantable repair. Of late years, however, the minister of the church has not resided there, on account of the remoteness of its situation and the change which has taken place in its surroundings; but the church and society have let the property from time to time, and applied the rents for the benefit of the minister, in accordance with the trust. The church and society, wishing to buy a lot and to erect a new parsonage nearer to its church, and more eligibly located, applied to the general assembly, by petition, for leave to sell the land devised to it as stated; and the city council of Newport, (the town of Newport having been incorporated as the city of Newport,) by a resolution passed March 26, 1887, concurred in the prayer of this petition, with the proviso "that the proceeds of sale be invested in another estate for a parsonage, to be held for the same purpose and on the same trusts and the same conditions as those which relate to, affect, and limit the estate sold." The general assembly, at its January session, 1892, passed an act as follows:

"An act authorizing the Second Baptist Church and Society in Newport to sell certain real estate in Newport.

"It is enacted by the general assembly as follows:

"Section 1. The Second Baptist Church and Society in Newport is, with the concurrence

of the board of aldermen of the city of Newport, fully authorized and empowered to make sale of and to convey by good and sufficient deed the estate given and devised to the said society by Constant Taber in his last will and testament, situate on the south side of John street in said city of Newport, for a parsonage, and with the like concurrence of the said board of aldermen, to invest the proceeds of the said sale in a house lot more eligibly situated for a parsonage for the said church and society, to be held by said church and society for the same purpose and upon the same trusts and conditions which they held the estate hereby authorized to be sold.

"Sec. 2. This act shall take effect upon its passage."

The question submitted is whether the Second Baptist Church and Society can, with the concurrence of the board of aldermen, convey a good title to the property to a purchaser, free and clear from all trusts. It maintains that it can, while Van Horne insists that a purchaser would take the property charged with the equity of seeing that the purchase money is invested in a house lot more eligibly situated for a parsonage for the said church and society, and also that the title to such lot is taken for the same purpose, and held on the same trusts and conditions, as the estate sold is held under the will of Constant Taber; and, further, that inasmuch as the limitation in the will by which the town council of Newport is authorized to take possession of and dispose of the property was in case that the said church or society and corporation shall suffer the premises so to go to decay as not to be fit for their minister and his family to live in for the space of one year, that the general assembly cannot change the trusts in the will so as to apply the same to a house lot; and, further, that as the principal purpose and trust disclosed in the will was to keep the mansion house in tenantable repair, suitable for the minister and his family to live in, the general assembly could not authorize a sale, and alter the provisions of the trust, to apply it to a house lot, even if there was a building purchased with the lot, suitable for a parsonage for the minister of the church and society.

The first question thus made is whether or not a purchaser would take the title subject to the equities suggested. We think the question must be answered in the negative. The act provides that the sale and conveyance, and the reinvestment of the proceeds, shall be with the concurrence of the board of aldermen, the successor of the town council. The Second Baptist Church and Society and the board of aldermen, as trustees, represent all persons interested in the trusts. The general assembly very properly left the protection of the interest of their respective cestuaries to the trustees. The effect of the act, assuming it to have been a valid exercise of

legislative power, in case of a sale in accordance with its terms, then, is to divest the land sold of all trusts, and consequently to absolve the purchaser from all obligation with reference to the reinvestment of the proceeds; such reinvestment being left entirely to the Second Baptist Church, with the concurrence of the board of aldermen. This brings us to the question, was the act a valid exercise of legislative power? We think it was. The primary object which the testator had in view in the devise of his mansion house and lot to the church and society was to provide a suitable abode for the minister who might for the time being be settled over the church. He did not foresee that with the lapse of time, and the changes incident to human affairs, the property might cease to be useful for the purpose intended, and therefore he did not insert in his will a power to the church and society to sell and convey the property so held in trust, and to reinvest the proceeds in another house and lot, better adapted to the use of the trust. In this state of facts, the trustee, with the concurrence of the city council of Newport, has invoked the authority of the general assembly for a sale, which it is not unreasonable to suppose the testator would have provided for, if he had anticipated that the necessity would arise. The legislative action deprives no one of his property, but merely divests the trusts affecting one parcel of land, and transfers them to another parcel, better adapted to the purpose of the primary trust; and this with the concurrence of the trustee of the secondary trust which will arise in case of the determination of the estate of the primary trustee under the limitation in the devise. Similar legislative action in the case of lands of infants, insane persons, persons non compos mentis, and others, who for some reason have been unable to act for themselves, has frequently been taken and sustained. Such action is held to be legislative rather than judicial, and not being prohibited by the constitution, and having been long exercised by the legislature, is regarded as within its constitutional competence. *Taylor v. Place*, 4 R. I. 324, 332-334; *Thurston v. Thurston*, 6 R. I. 296, 302; *Lyman, Petitioner*, 11 R. I. 157; *Sohler v. Hospital*, 3 Cush. 483, 487; *Clarke v. Hayes*, 9 Gray, 426; *Sohler v. Trinity Church*, 109 Mass. 1; *Leggett v. Hunter*, 19 N. Y. 445; *Williamson v. Berry*, 8 How. 495, 537. In *Sohler v. Trinity Church*, supra, it was held that whenever church property is held in trust for the general purposes of a religious society and cannot otherwise be conveyed, the legislature has constitutional power to authorize the trustees to convert their real estate into personalty, in order that the avails may be reinvested, or otherwise appropriated to the purposes of the trust.

Again, this court is authorized by Pub. St.

R. I. c. 178, § 7, whenever the sale or conveyance of any trust estate shall become necessary or expedient, in its discretion, upon a suit in equity, to decree such sale and conveyance, and the investment, reinvestment, and application of the proceeds thereof, upon such security, and in such manner as shall best effect the objects of the trust, and be most safe and beneficial for all interested therein. This power has frequently been exercised by the court. As such a power is not inherent in the jurisdiction of the court, not being of a judicial nature, it is difficult to see how, unless the general assembly itself possesses the power, it could confer it on the court. As the general assembly had power to authorize the sale as stated, and as the effect of that sale will be to divest the land sold of all trusts affecting it, and therefore to absolve the purchaser from the duty of seeing to the reinvestment of the proceeds, we do not see that he is concerned with the questions whether such proceeds can properly be reinvested in another house and lot, or in another lot merely, or whether the action of the general assembly authorizing the reinvestment in another lot, more eligibly situated for a parsonage, instead of another house and lot, is such a change in the trusts of the will as the general assembly could not make. As, however, the questions have been raised, it may not be amiss for us to give our opinion in relation to the matter. The primary object of the trust, as we have seen, is to provide a suitable abode for the minister who for the time being may be settled over the church. The act of the legislature has provided for a reinvestment of the proceeds of the sale in a house lot more eligibly located for a parsonage, to be held on the same trusts and conditions as that authorized to be sold. The trustee, therefore, in order to retain its estate in the lot purchased, must proceed to build, within a year from the purchase, a parsonage suitable for its minister and his family to live in; otherwise, its estate in the lot will be liable to be determined by the limitation in the devise. The purpose of the trust being to provide a suitable abode for the minister and his family, a neglect to build such a parsonage within the period limited would be tantamount, in contemplation of the trust, to allowing the mansion house originally devised "to go to decay, so as not to be fit for their minister and family to live in," for the same period, since the minister and his family could not live on the lot till the erection of the parsonage. We are of the opinion that the Second Baptist Church and Society in Newport can, under the authority of said act of the general assembly, and with the concurrence of the board of aldermen of said city, as provided in said act, make a good title to the land in question, free from all trusts.

(18 R. I. 405)

VAILL v. TOWN COUNCIL OF NEW SHOREHAM.

(Supreme Court of Rhode Island. Nov. 14, 1893.)

APPEAL BOND—AMENDMENT.

1. Pub. St. c. 64, § 11, which requires one appealing from the decision of a committee or town council in laying out a highway "to give bond to the town to prosecute his appeal," is not complied with by giving a bond to the town council.

2. On appeal from a decision of a town council laying out a highway, a bond running to the town council instead of to the town, as required by Pub. St. c. 64, § 11, is defective in substance, in that it is given to the wrong party, and hence is not amendable either under the statute of Jeofails, or under the judiciary act, (chapter 15, § 4,) permitting amendments in defects or want of form.

3. After the expiration of the time limited by Pub. St. c. 64, § 11, for filing a bond on appeal from the decision of the town council in laying out a highway, the court of common pleas cannot permit the appellant to file a new bond nunc pro tunc to take the place of one radically defective, filed within the proper time.

Exceptions to court of common pleas, Newport county.

Exceptions by Abby E. Vaill to the dismissal by the court of common pleas of an appeal taken by her from a decision of the town council of New Shoreham in laying out a highway. Overruled.

William P. Sheffield and William P. Sheffield, Jr., for appellant. Francis B. Peckham and Christopher E. Champlin, for appellee.

TILLINGHAST, J. The facts set out in the bill of exceptions are as follows, viz.: Abby E. Vaill, through whose land a highway was laid out by the town council of New Shoreham in 1892, being aggrieved by the action of said town council in the premises, desired to appeal therefrom to the court of common pleas then next to be holden at Newport, at the May term thereof, 1893. She filed an appeal bond for this purpose, which ran to the "town council of the town of New Shoreham," and thereupon carried her case to said court of common pleas, where, on motion of appellee, it was dismissed for want of a sufficient bond. Previous to said dismissal the appellant moved the court for leave to amend said bond so that it should run to the town of New Shoreham, instead of the town council thereof, which motion was overruled, on the ground that the court had no power to allow such an amendment to be made. The said appellant also moved for leave to file a new bond bearing the same date as that of the one in question, running to said town of New Shoreham, to be taken nunc pro tunc, which motion was also overruled on the same ground; to all of which said rulings the appellant duly excepted, and now brings her case to this court to test the correctness of said rulings.

The first question which arises therefrom

is as to the sufficiency of said appeal bond. Pub. St. R. I. c. 64, § 11, provides that "if any person, through whose land a highway or driftway is laid, shall be aggrieved by the doings of the committee or town council, he, his heir or devisee may appeal to the next court of common pleas to be holden for the county in which such highway or driftway is located, giving bond to the town to prosecute his appeal, and producing an attested copy of the whole proceedings to such court, and filing his reasons of appeal with the clerk of the court, ten days before the sitting thereof." It is clear that the giving of the bond in question was not a compliance with the requirement of the statute, and hence, the bond being essential to the effectiveness of the appeal, the case was properly dismissed, unless the court had power to either allow the bond to be amended as suggested, or else to permit a new bond to be filed nunc pro tunc, as offered by appellant. And first, then, had the court below any power to permit the bond in question to be amended? Or, to state the question differently, was said bond amendable in the manner suggested? We think not; for the appeal provided for, being a purely statutory proceeding, must be taken in the manner provided by the statute, or else the court obtains no jurisdiction, and the proceeding is a nullity. See *Santom v. Ballard*, 133 Mass. 484; *Henderson v. Benson*, 141 Mass. 218; *Moore v. Ellis*, 18 Mich. 77; *Dowell v. Caruthers*, 26 Kan. 720; *Clapp v. Freeman*, 17 R. I. 384, 22 Atl. 1022; *Kenyon v. Probate court*, 17 R. I. 652, 24 Atl. 149. The bond required by the statute is a bond to the town, while that which was given was to the town council. It was not, therefore, defective in form merely, but in substance, in that it was given to another party than the one prescribed by the statute, which was practically the same as giving no bond at all; and to have allowed such a bond to be amended, as requested, would have been equivalent to allowing the filing of a new and different bond from the one which was filed. This court has uniformly given a liberal construction to our statute of Jeofails by permitting any imperfection, defect, or want of form in the pleadings and process to be amended whenever it could properly be done, to the end that the real question or questions in controversy might be determined, and justice administered, (*Ellis v. Appleby*, 4 R. I. 462, 469; *Mathews v. Morrison*, 13 R. I. 309; *Hawkins v. McNeal*, 16 R. I. 386, 17 Atl. 172; *Hudson v. Fishel*, 17 R. I. 69, 20 Atl. 100; *Eaton v. Case*, 17 R. I. 429, 22 Atl. 943;) a practice of which we all approve. But it goes without saying that, in order to enable the court to exercise the large discretionary powers conferred upon it by said statute, there must be something before it upon which to graft an amendment. In the case at bar there was really no bond to amend, and hence no amendment could be

made thereto. In *Thayer v. Farrell*, 11 R. I. 305, Durfee, C. J., in construing the statute relating to amendments, said: "The power is large, but not unlimited. It authorizes the amendment of defects, not the substitution of a new action." But the appellant contends that, even if the statute of jeofails above referred to is insufficient to enable the court to allow the amendment proposed, section 4 of chapter 15 of the judiciary act is broad enough for that purpose. Said section is as follows: "All pleadings which contain the essential averments, according to the rules of the common law or the practice of this state, shall be held good, notwithstanding the omission of immaterial matter or prescribed forms; and the court may at any time permit either of the parties to amend any defect in the process or pleadings, with or without terms, in the discretion of the court, or in pursuance of general rules." We fail to see that this statute enlarges the power conferred upon the court by the former provision.

Had the court below power to permit the appellant to file a bond *nunc pro tunc*, as offered? We think not. The filing of the bond at the time and in the manner prescribed by the statute above recited is the basis of the jurisdiction of the appellate court, and hence, unless the record shows that the bond has been thus filed, the court is powerless, except to dismiss the proceeding. *Elliott*, App. Proc. § 374, and cases cited; *Turner v. Quinn*, 92 N. C. 501. And to allow a new bond to be filed would be to permit an appeal to be taken at a time and in a manner not provided for by the statute. We do not think the cases cited by counsel for the appellant go to the extent of holding that where a statute expressly provides that the bond shall be given to a designated party, and where, as matter of law, the giving of the bond is essential to the jurisdiction of the appellate court, that court has power, in the absence of express authority or of some practice peculiar to the jurisdiction to that effect, to allow a bond given to another party to be so amended as to make it conform to the statute. We will briefly consider the cases cited in support of the appellant's motion. *Wiser v. Blachly*, 1 Johns. Ch. 607, was a bill in equity against a guardian and the surety on his bond, charging waste and insolvency, and praying for an account. The bond given by the surety was taken in the name of the people instead of the name of the infant, as prescribed by the statute. The chancellor held that it was within the ordinary jurisdiction of that court to correct such mistake by holding the party according to his original intention, and to consider the bond as taken to the infant. That was a very different case from the one before us, and particularly in that it was one where the surety was seeking to take advantage of a mistake in his own bond, given for the benefit of the infant; and, whether the bond

was amendable or not, he was clearly estopped from setting up such a defense. As said by *Elliott*, (App. Proc. § 363:) "The question as to the validity and effectiveness of a bond assumes a different form in a case where the obligors seek to escape liability from that which it wears in a case where the appellee appropriately and opportunely demands a bond properly worded and executed. The cases are radically different, and are governed by very different rules. It is obvious that an appellee who properly and duly demands a bond executed in conformity to the requirements of the law occupies a very different position from that occupied by parties who seek to defeat a recovery upon the bond. Defects not available to defeat a recovery on the bond may be sufficient to entitle an appellee to a new bond." In *Irwin v. Bank*, 6 Ohio St. 81, the court held that it had power to allow the filing of a new appeal bond by the appellant, the one first filed not being in compliance with the statute. But this was done under a statute much broader than ours, and one which clearly permits a new bond to be filed. In *Wilson v. Allen*, 3 How. Pr. 369, the "undertaking," which is equivalent to our appeal bond, not being in conformity to the statute, the court permitted the same to be amended in matter of substance, under a provision of the Code, which authorized the court "at any time, in furtherance of justice, to amend any pleading or proceeding, by correcting a mistake in any respect." In *Shelton v. Wade*, 4 Tex. 148, it was held that where an appeal bond was objected to merely for informality or insufficiency it was within the discretion of the court to refuse to dismiss the appeal if the appellant would perfect the bond, and also that when the bond was for too small an amount the appellant might be permitted to file a new bond. But an examination of the case shows that the bond in question was not void, but simply defective, and capable of being amended. The decision in *Adams v. Null*, 5 Watts & S. 363, was based upon a rule of court which required the appellee, if the recognizance given was bad, to call on the appellant for a good one; and, this being done, the court had power, under said rule, to permit the appellant to file a proper recognizance *nunc pro tunc*. In *Cunningham v. Hopkins*, 8 Cal. 33, it is held that where a mere defective undertaking has been *bona fide* given, and the appellant will file a good one before the case is submitted, the court will allow him to do so. The cases of *Catlett v. Brodley*, 9 Wheat. 553; *Brobst v. Brobst*, 2 Wall. 96; *Seymour v. Freed*, 5 Wall. 822; *Edmondson v. Bloomshire*, 7 Wall. 306; *Bigler v. Waller*, 12 Wall. 142, 149,—are not pertinent, for the reason that under the rules and practice of the supreme court of the United States, in which they were all decided, a prayer for an appeal, and its allowance by the court below, constitutes a valid appeal though no bond

is given; the bond being allowed to be given with effect at any time while the appeal is in force; that is to say, the taking of security below, under the provision of section 1000, Rev. St. U. S., is not essential for jurisdiction, as such security can be given in the supreme court. See Rev. St. U. S. § 1007; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 361; *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559; *Davidson v. Lanier*, 4 Wall. 447.

The counsel for the appellant further contends that, as it was evidently the intention of the appellant to give the bond prescribed by the statute, the town council took the same as trustee for the town, and hence that the bond, as it stands, is sufficient; but he cites no authority in support of this contention, nor have we been able to find any. In the absence of any proof to the contrary, it is to be presumed that the appellant intended the bond to be for the benefit of the party to whom it was given. But, even though it was intended to inure to the benefit of the town, it was not such a bond as the statute requires, as we have already said, and hence did not have the effect to remove the case to the appellate court. See *Garrett v. Shove*, 15 R. I. 538, 9 Atl. 901; *Murray v. Peckam*, 15 R. I. 297, 3 Atl. 662; *Andrews v. Beane*, 15 R. I. 451, 8 Atl. 540; *Purple v. Purple*, 5 Pick. 226.

A motion for a new trial appears among the papers in the case, but, as it has not yet been argued, we express no opinion thereon. Exceptions overruled.

(18 R. I. 378)

DAIGNEAULT v. CITY OF WOON-SOCKET.

CHOQUETTE v. SAME.

(Supreme Court of Rhode Island. Oct. 11, 1893.)

EMINENT DOMAIN—DAMAGES—EVIDENCE.

1. The report of the commissioners appointed to ascertain the value of lands taken by a city to establish a system of sewage is not admissible in evidence on appeal by the land-owners from the commissioners' assessment of damages.

2. In condemnation proceedings, evidence as to the value of high land remote from that sought to be taken, which is low, meadow land, is inadmissible.

Proceedings by the city of Woonsocket for the condemnation of land for sewerage purposes, as authorized by Pub. Laws, c. 1003. After the commissioners appointed by the city council to assess damages had made their report, Godfrey Daigneault and Cyrille Choquette filed their petitions for an assessment of damages by a jury, and their petitions were heard together. There was a verdict adverse to them, and they petition for a new trial. Granted.

James M. Ripley and Edwin Aldrich, for petitioners. Walter I. Ballou, for respondent.

PER CURIAM. The court is of the opinion that a new trial must be granted. The report of the commissioners was clearly inadmissible. *Ennis v. Railroad Co.*, 12 R. I. 73. The ostensible reason for which the report was admitted was to show the date of condemnation; but this does not appear either in the report itself, or in the memoranda on it. Moreover, the date of condemnation, or the date when the title to the land vested in the city of Woonsocket so as to entitle the appellant to the value of it, was a question of law for the court, and not a question of fact for the jury, and depended on the time of the service of the notice on the party of the taking of his land. *P. I.* 1891, c. 1003, §§ 2, 3.¹

The court is also of the opinion that, on the record as it stands, the testimony as to the value of the Ronian land was improper by reason of its remoteness from the land in question and its dissimilarity to it, in that the Ronian land was high land, while that in question was low, meadow land. It has been suggested that there were other cases tried in connection with the present cases, and that some of the land involved in those cases lay near to the Ronian land, and was

¹ The second section of said act is as follows: "Sec. 2. Whenever the owner of any tract or tracts of land or of any estate, right, or interest therein, which shall be adjudged by the city council of said city to be necessary for the purpose aforesaid, shall refuse to convey the same to the said city, or cannot agree with said city upon the price thereof, the city council of said city, in joint convention of both branches thereof, shall be authorized to appoint five suitable persons, not owners of nor interested in said land, who shall notify such owner of their appointment, and the purposes thereof, and after giving said owner an opportunity to be heard, and being unable to agree with him upon the price of said land, or of his estate, interest, or right therein, as aforesaid, shall decide upon the valuation of the same, and report such valuation in writing to the city council of said city, in joint convention of both branches thereof, together with a description of said tract or tracts of land by metes and bounds, and a list of all persons owning any estate, interest, or right therein, so far as they can be ascertained by said committee, and a statement that the tract or tracts of land, or the estates, interests, or rights therein set forth and described, are taken in pursuance of the provisions of this act, which statement shall be signed by the mayor of said city. Said report, if received and approved by the city council, shall, together with the statement aforesaid, be filed in the office of the city clerk of said city within ten days of the date of the mayor's signature to said statement, and upon the filing of said report and statement, and the giving notice thereof in the manner hereinafter provided to the owner of said land, or of any estate, interest, or right, as aforesaid, therein, the title to said land shall vest in the city of Woonsocket, in fee simple, free from all incumbrances and servitudes whatsoever, for the purpose of establishing a system of sewerage in said city; and if any less estate, interest, or right than the fee simple shall be required and taken, then the same shall vest in said city for the said purpose." The third section provides for notice to the owners of lands so taken, and prescribes the manner in which such notice shall be given.

of a similar character; but the record, as made up, does not disclose these facts, and therefore we cannot take cognizance of them.

the members thereof, to show cause why a writ of certiorari should not issue.

Samuel R. Honey, for the State.

(18 R. I. 331)

**STATE v. BOARD OF ALDERMEN OF
CITY OF NEWPORT.**

(Supreme Court of Rhode Island. Oct. 12,
1893.)

CERTIORARI—WHEN LIES—EVIDENCE.

1. On petition for certiorari to review the proceedings of a board of aldermen acting in a judicial character, parol evidence is inadmissible, except as to facts on which their jurisdiction depends.

2. Under a statute giving them authority to prepare a jury list, (Judiciary Act, c. 7, § 7,) the board of aldermen of Newport prepared and adopted a jury list, the record of the proceedings being: "A list, submitted by the committee appointed to prepare and submit the same, of persons qualified to serve as jurors, in accordance with section 7 of the judiciary act, is made out and adopted." *Held*, that it must be presumed that the board acted in accordance with its duty, as prescribed by the statute, in making such list, and that certiorari will not lie to review its action on a petition alleging that the committee had, with some changes, adopted a former list prepared under prior statutes, and that this list was adopted without examination by the board or by individual members other than the committee.

Petition by the state for certiorari to review the action of the board of aldermen of the city of Newport in making and adopting a list of inhabitants for jury service. Denied.

The petition which was preferred by the attorney general alleges that the board of aldermen of the city of Newport, on the 1st of August, 1893, in the pretended discharge of the duty imposed upon them by the judiciary act, (chapter 7, § 7,) adopted, as a list of persons inhabiting said city who were qualified to serve as jurors, a list of persons which was not in fact a list of persons whom said board thought well qualified to serve as jurors, and who, in the judgment of said board, were persons having the qualifications required by said act, but was in fact a list of persons prepared by two members of the board, as a committee appointed for that purpose; that the committee, in making up said list, adopted a list of persons qualified to serve as jurors under statutes in force prior to the passage of the judiciary act, made up and adopted by the board when such statutes were in force, but striking out the names of certain persons who had become disqualified by the change in the law, and such others as said committee saw fit to omit; that said lists were not at any time or place read to the board, nor examined by it or the members thereof, (other than the committee,) and that said board did not, either as a board or as individuals, (except said committee,) at any time or place exercise its or their judgment upon said jury lists. The petition prayed for a citation to the board of aldermen, and

PER CURIAM. The petitioner has not satisfied us that a case is made in the petition, sufficient to entitle him to a citation. Certiorari lies to review the proceedings of an inferior court, or of boards, commissioners, or officers acting in a judicial character. It operates directly on the record, and hence parol evidence is inadmissible except in relation to facts on which the exercise of jurisdiction by the inferior court, board, or officer depends. *Dexter v. Town Council*, 17 R. I. 222, 21 Atl. 347; *Lonsdale Co. v. Board of License Com'rs*, 18 R. I. —, 25 Atl. 655. In the present instance it is conceded that the board of aldermen of Newport had jurisdiction, under chapter 7, § 7, of the judiciary act, to make a list of all such persons inhabiting the city of Newport as they should think well qualified to serve as jurors, etc. The rule is well established that, if an inferior court has jurisdiction, every intendment is to be made to support its judgment. *Roe v. Superior Court*, 60 Cal. 93; *Buckmyer v. Dubs*, 5 Bin. 29; *Gibbs v. Alberti*, 4 Yeates, 373; *Stafford v. Williams*, 4 Denio, 182; *Hatch v. Christmas*, 68 Mich. 84, 35 N. W. 833; *State v. Kempf*, 69 Wis. 470, 34 N. W. 226; *State v. Judge*, 39 La. Ann. 619, 2 South. 385. The principle applies equally to statutory tribunals as to courts, and, on certiorari to review the proceedings of commissioners, boards, or other officers, the presumptions are all in favor of their rightful action, and of their proceeding in a manner authorized by law. *State v. Manitowoc County Clerk*, 59 Wis. 15, 16 N. W. 617; *People v. Hadley*, 76 N. Y. 337, 341; 2 Spelling, Extr. Relief, § 2030. Tested by these principles, we are of the opinion that the action of the board of aldermen of Newport in the making of the jury list, as set out in the copies of the records of their proceedings annexed to the petition, must be sustained for the purpose of the present inquiry.

The vote of July 6, 1893, directed that a committee of two be appointed to prepare a jury list, as required by the new judiciary act, etc. The record of August 1, 1893, is: "A list, submitted by the committee appointed to prepare and submit the same, of persons qualified to serve as jurors, in accordance with section 7 of chapter 7 of the judiciary act, is made out and adopted." It is not unreasonable to infer that the board of aldermen had before them a list of the inhabitants of Newport liable to do jury duty, from which the persons possessing the qualifications required by said section 7 were to be selected; and that, before adopting the report of the committee, they, as was their duty, compared the names returned by the committee with the other names on this list, and considered the qualifications both of

those whose names were returned by the committee and those whose names were not returned; and that, as the result of their consideration, they adopted the names returned by the committee as of the only persons possessing, in their judgment, the qualifications required by said section 7. If it is not unreasonable to infer that the board of aldermen proceeded in this manner, we are bound to presume that they did, since, as we have seen, every intendment is to be made in favor of their action in a manner authorized by law. Motion for a citation denied.

(18 R. I. 416)

STATE v. FISKE.

(Supreme Court of Rhode Island. Dec. 7, 1893.)

DISORDERLY CONDUCT—COMPLAINT—DEFINITENESS.

A complaint charging one with behaving in a noisy, disorderly, and indecent manner, without any specification as to the acts complained of, or even that they were in a public place, is insufficient for uncertainty.

Exceptions to court of common pleas, Kent county.

Thomas W. Fiske was convicted of disorderly conduct, and excepta. Exceptions sustained.

Charles J. Arms, for the State. Nathan W. Littlefield, Walter R. Stiness, and Dennis J. Holland, for defendant.

TILLINGHAST, J. The complaint in this case charges that the defendant "was found behaving in a noisy and disorderly and indecent manner, and did assist, encourage, and promote the same to be done by others, to the annoyance and disturbance of a portion of the peaceable inhabitants of the town of East Greenwich, against the ordinances of the said town."¹ At the trial of the case in the court of common pleas the defendant moved that the complaint be quashed on the ground of duplicity, and also for uncertainty in charging the offense, which motion was overruled, whereupon the defendant was tried, and found guilty as charged. The defendant then moved in arrest of judgment on the same ground as above stated, which motion was also overruled, to each of which said rulings exception was duly taken. The case is now before this court on exceptions

¹As follows: "Ordinance VII, § 1. Every person who shall commit any nuisance, or who shall be found quarrelling, fighting, revelling, screaming, or wantonly making a false alarm or cry of fire, or otherwise behaving in a noisy, disorderly or indecent manner in this town, to the disturbance or annoyance of the peaceable inhabitants thereof or any portion of them, or shall aid, assist, encourage or promote the same to be done by any other person or persons, shall, on conviction thereof, be sentenced to pay a fine of not less than two dollars nor more than twenty dollars, or be imprisoned not exceeding ten days in the state's jail in the county of Kent."

to said rulings, and also to the ruling of the court excluding certain testimony offered by the defendant at said trial.

We think the complaint is insufficient on the ground of uncertainty. It fails to inform the defendant of the particular offense for which he is to be tried, in that the language used, while following that of the ordinance, does not so far individuate the offense as to give the defendant proper notice of what it really is. In *Began*, Petitioner, 12 R. I. 309, this court, while holding that the word "revel" had a precise and definite meaning, yet intimated that it might be necessary, in connection with the other charges in the complaint, which were quite similar to those in the case now before us, to particularly set forth the circumstances connected with the disorderly and indecent conduct set forth in the complaint. We think that to merely charge one with "behaving in a noisy, disorderly, and indecent manner," without any specification as to what constituted such behavior, or even that it was in a public place in said town, is too vague and indefinite to answer the requirements of criminal pleading. *State v. Smith*, 17 R. I. 371, 22 Atl. 282, and cases cited; *McJunkins v. State*, 10 Ind. 140; *Bell v. State*, 1 Swan, 42.

As we are of the opinion that the complaint is insufficient for the reason above given, it is unnecessary to consider the other exceptions. Exceptions to the overruling of defendant's motion in arrest of judgment sustained, and judgment arrested.

(159 Pa. St. 451)

COMMONWEALTH ex rel. SMATHERS et al. v. TAYLOR et al.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

SCHOOL DIRECTORS—ELECTION BY WARDS IN BOROUGHS—CONSTRUCTION OF STATUTES—REPEAL BY IMPLICATION—QUO WARRANTO—JUDGMENT.

1. A judgment will be reversed on appeal for a patent defect of jurisdiction, where the record shows a petition for quo warranto and a judgment of ouster, without any intervening answer, plea, demurrer, or proceedings of any kind.

2. The misplacing of the quotation marks in the title of a supplemental act is not a substantial inaccuracy, and does not vitiate where the sense is clear.

3. Act May 14, 1874, § 4, which directed "the election of an equal number of councilmen and school directors in each of the wards of boroughs," was impliedly repealed by Act May 10, 1878, which constituted the wards separate districts for the election of councilmen, but expressly excepted school directors, and required them to be elected by a "concurrent" vote of the wards.

4. So much of Act May 10, 1878, as requires the election of school directors by a concurrent vote of the wards, is impliedly repealed, and Act May 14, 1874, § 4, is re-enacted and extended, by Act Feb. 16, 1883, which recites Act May 14, 1874, § 4, as originally enacted, re-enacts its terms, and provides that "each ward shall elect not less than one nor more than three school directors."

5. Act Feb. 16, 1883, is not affected by Act

May 13, 1880, which is supplemental to the act of 1874, quotes again the fourth section thereof, without notice either of its repeal by the act of 1878, or of its re-enactment and extension by the act of 1883, and enlarges the power of the courts to increase the number of councilmen and school directors after the original decree dividing the borough into wards, and fixing the number of ward officials.

Appeal from court of common pleas, Clearfield county; David L. Krebs, Judge.

Quo warranto proceedings on the relation of W. J. Smathers and others to test the right of H. A. Taylor, J. I. Brockbank, M. T. Vogle, A. L. Cole, D. H. Butler, Morris Smith, John Miller, and James Harris to hold office as school directors in the borough of Du Bois. From a judgment of ouster, defendants appeal. Reversed.

The following is the opinion of Krebs, P. J., in the court of common pleas:

"Petition of sundry citizens contesting the election of certain persons as school directors at the February election of 1892. The only avowed purpose in calling up this contest and its accompanying proceeding—the application for a writ of quo warranto—is to obtain an opinion from the court upon the question whether the school board is to be elected by each of the four wards in said borough voting separately, or whether the whole board is to be elected by the concurrent vote of all the wards. A determination of this question requires a careful review of the legislation affecting the division of boroughs into wards. The first act of the legislature, since the adoption of the constitution of 1874, upon this subject, is that of the 14th May, 1874, (P. L. 159,) and is entitled 'An act to prescribe the manner by which the courts may divide boroughs into wards.' The first section vests the court of quarter sessions with authority to divide boroughs into wards, and to erect new wards out of parts of two or more adjoining wards, and to alter the lines of two or more adjoining wards, etc.; the second section points out the mode of division; and the third section relates to the confirmation of the report, and provides for proceedings of review. Then comes the fourth section, which is in these words: 'That when said report shall have been confirmed by the court, it shall at the same time, decree the election of an equal number of councilmen and school directors in each of the wards, in such manner, however, as not to interfere with the terms of those heretofore elected.' It will be observed that neither did this section of the act of 1874, nor the act of 17th February, 1876, (P. L. 6,) undertake to erect the several wards into separate election districts, and the vote of the borough remained to be computed as the vote of a single election district. Whatever the intention of the legislature may have been in the use of the words, 'decree the election of an equal number of councilmen and school directors in each of the wards,' the powers conferred upon the court by the act of 1874, and the act of

1876, supra, did not authorize the court to erect the wards into separate election districts; and the election of councilmen and school directors, as a legal consequence of this, remained, as before, to be elected from the borough as a single election district. This situation remained unchanged as to the particular mode of election, except as will be hereafter noticed, until the approval of the act of the 10th May, 1878, entitled, 'A supplement to an act entitled "An act to prescribe the manner in which the courts may divide boroughs into wards," approved the fourteenth day of May, Anno Domini one thousand eight hundred and seventy-four.' The first section of this act of 1878 provided that, where a borough is divided into wards in accordance with the provisions of the act of 1874, 'every such ward from and after such division shall be a separate election district and annually thereafter shall elect not less than one nor more than three members of borough councils, and shall elect such other public officers as are authorized in borough wards and election districts under the existing laws: Provided, however, that in every such borough there shall be elected a burgess, assistant burgess, two justices of the peace, three auditors, high constable, and six school directors, who shall be chosen by the concurrent votes of each ward, and their election shall be ascertained and declared by the joint certificate of the judges of elections as hereinafter provided: And provided further that school directors and the other officers who shall be chosen by the concurrent vote of said wards shall be chosen for such terms as are now provided by existing laws.' The second, third, fourth, and fifth sections are not material to the determination of the question before us, but the sixth section is, as it provides in these words: 'And so much of said act as is inconsistent herewith is hereby repealed.' This has reference to the act of 1874, supra, and nothing more. The first section of the act of 1878 and the fourth section of the act of 1874 are inconsistent, and, by the very terms of the repealing clause of the act of 1878, the fourth section of the act of 1874 is repealed and supplied by the first section of the act of 1878. But it is vigorously contended that the act of 1878 is unconstitutional, for two reasons, viz.: That the title to the act is insufficient, and in violation of the third section, art. 3, Const. 1874; and also because the act is in effect an amendatory one, and in violation of the sixth section, art. 3, Const. 1874. The first reason is not well founded, and it has been clearly ruled by the supreme court in a number of cases, of which *State Line & J. R. Co.'s Appeal*, 77 Pa. St. 429, *In re Borough of Pottstown*, 117 Pa. St. 538, 12 Atl. 573, and *Millvale Borough v. Evergreen Ry. Co.*, 131 Pa. St. 1, 18 Atl. 993, are examples. In each and all these cases the rule of construction adopted is that where the sub-

ject of the original act is sufficiently expressed in its title, and where the provisions of the supplement are germane to the subject of the original, the true rule is that the subject of the supplement is covered by the title, which contains a specific reference to the original by its title, and declares it to be a supplement thereto. This third section, art. 3, Const. 1874, is an exact rescript of the third section, art. 3, Const. 1838; and all the authorities are to the same point, both before and since the constitution of 1874.

"This brings us to the second point of the contention, which necessarily implies that a supplement to an act of assembly is no more than an amendment of the act. What is the legal acceptation of the two words, 'amendment' and 'supplement'? Do they mean one and the same thing, either in their ordinary and common acceptation, or in the law? Ordinarily, when we speak of amendment, we refer to the correction or change in some particular of something fully existing or intended to have force, but rendered uncertain because of want of clearness of expression, or error in statement, or omission of something intended to be embraced therein. When we speak of a supplemental act we intend something added to,—something new; and in legislation we mean, by a supplement to an act already in force, to add to it something not contained in the original, but which new and added legislation is nevertheless germane to the subject of that already in force. An examination of the three hundred and seventeen statutes passed at the session of the legislature of 1891 shows that there were thirty-five reciting that they were amendments in the title, five that recited they were supplements to amend, and in the body of the act are found to be strictly amendatory acts within the definition given, and eight which are recited to be supplements to acts in force. In each act which recites that it is an amendment, the change in legislation accomplished by its passage is to change the phraseology of the act, or alter it in some minor particular, by omitting something contained in the act amended. The acts reciting that they were 'supplements to amend' are exactly of the same force, and no doubt this recital grew out of an excess of caution on the part of the draughtsmen of the act. But in the eight acts styled 'Supplements,' contained among the statutes of 1891, is enacted some of the most important legislation now on our statute books, and in each instance the supplement enlarged, or added new legislation, germane, however, to the subject upon which the former act to which it purported to be a supplement had already legislated. The purpose of the sixth section of article 3, Const. 1874, was to remedy the evil of enacting important new and vicious matter under the cloak of an amendment of some existing or repealed statute. Judge Cooley, in commenting upon a precisely similar provision in the constitution of

the state of Michigan, says this: 'The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the comparison, failed to become apprised of the changes made in the law. An amendatory act which purported only to insert certain words, or substitute one phrase for another, in an act or section, which was only referred to but not published, was well calculated to mislead the careless as to its effect, and was perhaps sometimes drawn in that form for the express purpose.' See *People v. Mahaney*, 13 Mich. 497. But the objection does not apply to an act purporting in its title to be enacted for the purpose of adding to former legislation on the same subject-matter. If an act which purports to be a 'supplement' is to be treated as an amendment, it is a remarkable fact that it has not been discovered before this time, especially in view of the twelve sessions of the legislature, and the large amount of important legislation placed upon the statute books, since the adoption of the constitution of 1874, by supplemental acts. We cannot adopt this view now, and decline to declare the act of 1878 unconstitutional. The acts of 1874 and 1878, *supra*, have recently been before Siminton, J., of the common pleas of Dauphin county, upon other points; and the constitutionality of the act of 1878 does not seem to have been questioned, and yet the point before the learned judge was vitally involved in the act of 1878. *Com. v. Pattison*, 49 Leg. Int. 492. The election of school directors by the concurrent vote of the several wards, computed as set out in the third section of the act of 10th May, 1878, must be accepted as the law, unless this act of 1878 is modified or repealed by the act of 16th February, 1883. This act is entitled 'A further supplement to the act approved 14th May, A. D. 1874.' 'Entitled an act to prescribe the manner in which courts may divide boroughs into wards, and to provide for a ward representation upon school boards in said boroughs.' It will be observed that the recital of the title to the act of 1874 in the title to the act of 1883 is an error. The act of 1874 does not purport to create or 'to provide for ward representation.' But the act does not contain an express repealing clause, and as it is an amendment only of the fourth section of the act of 1874, which, we have seen, is expressly repealed by the act of 1878, it cannot repeal the act of 1878 by implication unless it is in legal effect a re-enactment of this section of the act of 1874, and the provisions re-enacted of the act of 1883 are so inconsistent with those of the act of 1878 that both cannot stand. But, in order to have the effect of a re-enactment of the fourth section of the act of 1874, this must appear in the title of the act itself. It does not so appear, and it cannot have the effect of repealing the inter-

vening statute of 17th February, 1876, (P. L. 6,) and the act of 10th May, 1878, *supra*. Rogers v. Iron Works, 17 Wkly. Notes Cas. 444. No greater force and effect can be given to the act of 13th May, 1889, (P. L. 193,) than to the act of 1883, *supra*. It neither recites that it intends to re-enact the fourth section of the act of 1874, nor does it repeal the act of 1878 by any express provision, and the rule of construction laid down in Rogers v. Iron Works, *supra*, prevents any repeal by implication.

"This leaves but the act of 17th February, 1876, to be considered, and its legal force in connection with the act of 1878. It was argued that no practical effect could be given to the act of 1878, because it provided only for the election of school directors, and, as there were four wards in the borough of Du Bois, no equal representation by wards could be had; but if the act of 1876 is in force, and the acts of 1876 and 1878 are construed in *pari materia*, no difficulty remains. It will be observed that the act of 1876 is a supplement to the act of 1874, and adds to that statute by conferring upon the court the power to fix the number of councilmen and school directors, where the number of wards are such that they cannot be equally divided between the wards, to and not exceeding such numbers as will enable the court to make an equal apportionment of the same among the respective wards. The statute is in force, unless repealed by implication by the statute of 1878, for the repealing clause of the statute of 1878 cannot possibly be construed to have express reference to anything preceding, except to the statute of 1874. Repeals by implication are not favored. This rule is so well settled it needs but to be stated now, without citing authorities to sustain it; and it becomes the duty of the court to construe the acts of 1876 and 1878 so that they both may stand, if it can be done, so as to give force and effect to both in the spirit and purposes for which they were passed. The act of 1876 does not fix the number of school directors. It provides for their distribution equally, however, among the wards in the borough, with power in the court to make the apportionment, and, if necessary, to increase the number to such as will enable the equal apportionment to be made. The act of 1878, it is true, fixes the number at six, and at that time Du Bois borough was not yet organized. In this respect alone the act of 1878 apparently conflicts with the act of 1876. The provision for election by the concurrent vote of all the wards does not conflict with the provisions of the act of 1876 for the apportionment of members to the several wards, as both provisions can be enforced. The apportionment under the act of 1876 affects the residence of the members of the school board only, and secures ward representation and concurrent voting under the act of 1878, gives a voice to the people

of the whole borough in the selection of the members from all the wards, and enables them to reject objectionable and improper nominations from the wards. Thus the two statutes may stand, and force and effect be given to both.

"If this be good law, then the only thing necessary to give force and effect to the existing statutes is to modify the decree of the court heretofore made as to the number of school directors to be elected from each ward. Had our attention been properly directed to the difficulties before we made the increase in the original order, much bitterness of feeling and contention would have been avoided. Counsel have no right to present applications to the court, and ask for decrees, without pointing out the statutes upon which they base their applications in proceedings that are unusual. It is true the court probably is expected to remember all the statutes that the legislature has seen fit to adopt; but it does not, and, in the hurry and press of official duty in a district like ours, the court has a right to expect that counsel will share a portion of the labor. This is not said with reference to this case particularly, but only as an example of many cases that come before us. Upon a presentation of a petition for the purpose, we will modify the decree as to the number of school directors from that of three in each ward to that of two in each ward, in accordance with our views of the law as above expressed. So far as the result of our conclusions affect the contested election and the proceedings for a writ of quo warranto, we think that the present status should remain until the ensuing February elections. In the mean time the proper decree can be entered, apportioning the directors to the several wards; the costs upon the contested election case (No. 64, May term, 1892) and the quo warranto proceedings (No. 179, May term) to be paid out of the school funds."

Thos. H. Murray, Cyrus Gordon, and A. L. Cole, for appellants. W. C. Arnold, for appellees.

MITCHELL, J. We would be compelled to reverse this judgment for irregularity. It has nothing to stand on. The record shows a petition for quo warranto, and judgment of ouster, without any intervening answer, plea, demurrer, or proceedings of any kind. No doubt this was an oversight, resulting from the fact that the three proceedings,—by contested election, by quo warranto, and by bill for injunction,—all having the same object, ran along concurrently, and were treated practically as one; but the error is one that leaves a patent defect of jurisdiction on the face of the record, and cannot be overlooked.

But beyond this the judgment is wrong in substance, and based on an erroneous view of the law. The confusion in reading the

statutes upon the subject of the election of school directors in the wards of boroughs arises mainly from the fact that the fourth section of the act of May 14, 1874, is re-enacted and extended by the act of February 16, 1883, without reference to its previous repeal by the act of May 10, 1878. The difficulty, however, is not insuperable, as the legislative intent is clear. The act of May 14, 1874, (P. L. 160,) by its fourth section directed "the election of an equal number of councilmen and school directors in each of the wards," etc. This contemplated a separate election by each ward. Not only is that the natural meaning of the language used, but it is what is generally to be presumed, in accordance with the universal American system that the representative shall be elected by the constituency which he is to represent; and therefore if he is, under the law, to be a ward representative in the school board of the borough, he is presumably to be elected by the voters of the ward. Such, moreover, was the prior law under the general public school act of May 8, 1854, (P. L. 617,) which in section 2 declares that, in school districts composed of cities or boroughs divided into wards for school purposes, each ward shall elect a separate board of directors. Whether this intent of the fourth section of the act of 1874 was inoperative by reason of the failure of that act to make any provision for constituting the wards separate election districts, as the learned judge below seems to have thought, we are not required to consider, as the necessary authority was supplied by the act of May 10, 1878, (P. L. 51.) This act, however, while providing for separate ward elections of councilmen and other officers, expressly excepted school directors, and required them, along with the burgess, auditors, etc., to be elected by a "concurrent" or joint vote. The act, though entitled "A supplement to the act of 1874," contained no express repeal of any part of it, but only the general provision that so much as was inconsistent with its own provisions should be repealed,—a consequence which would have followed without expression. It did repeal the fourth section of the act of 1874 by virtue of the repugnancy between the system which it prescribed and that prescribed by the prior act. The objections to the constitutionality of the act of 1878 are well answered by the learned judge below, and we are content to rest that question on his opinion; but we do not think the result follows that this part of the act of 1878 is still the law. That depends on the effect of the subsequent legislation. The act of February 16, 1883, (P. L. 5,) is a further supplement to the act of 1874. We do not find the inaccuracy in the title noted by the learned judge below to be substantial. It consists merely in the misplacing of the quotation marks, which, like other parts of punctuation, do not vitiate when the sense is clear. Prop-

erly punctuated, the title is "A further supplement to the act, approved the 14th day of May, A. D. 1874, entitled 'An act to prescribe the manner in which the courts may divide boroughs into wards,' and to provide for a ward representation upon school boards in said boroughs." Thus, properly read, the difficulty in regard to the title disappears. The act is a supplement to the act of 1874, and is so entitled. Constitutionally, therefore, it may contain anything that is germane to the subject of that act. *Millvale Borough v. Evergreen Ry. Co.*, 131 Pa. St. 1, 18 Atl. 903; *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484, 21 Atl. 982. The further explanatory phrase, "and to provide for a ward representation," etc., directs attention to the particular part of the subject of the former act which the supplement is intended to deal with. The act then, in express words, amends section 4 of the act of 1874, reciting it as originally enacted, without any reference to its repeal by the act of 1878. This, however, does not in any wise affect the validity or the force of the new enactment. The recital of section 4 is followed by a clear re-enactment of its terms; and then, as if to avoid any possible ambiguity, it is provided that "each ward shall elect not less than one nor more than three school directors." The act does not contain any express repeal of prior acts, nor, as already said, any notice of the effect of the act of 1878 upon the section which it re-enacts. But the result is the same as if it did so. It is a clear and unqualified expression of the legislative purpose to establish a system of ward representation, and necessarily supersedes all previous systems. It repeals so much of the act of 1878 as provides for the election of school directors by a joint vote in the wards, in the same way, and for the same reason, that the act of 1878 repealed section 4 of the act of 1874,—because the two systems are irreconcilable, and therefore the latest must prevail. There is no difficulty or doubt about this result, or the validity of the statute by which it is produced. The act of 1883 is the existing law on the subject, and, so far as any prior acts conflict with it, they must give away. The act of May 13, 1889, (P. L. 193,) is a further supplement to the act of 1874, and again quotes the fourth section of that act as originally passed, without notice either of its repeal by the act of 1878, or of its re-enactment and extension by the act of 1883. No difficulty, however, arises from this fact, as there is no repugnancy between the two acts. That of 1889 enlarges the power of the courts so that they may increase the number of councilmen and school directors after the original decree dividing the borough into wards and fixing the number of ward officials. The terms and effect of the act of 1883 are not in any wise affected by this change. Judgment reversed.

(159 Pa. St. 453)

GORMLEY et al. v. CAMPBELL et al.

(Supreme Court of Pennsylvania. Jan. 15, 1894.)

Appeal from court of common pleas, Clearfield county; David L. Krebs, Judge.

Bill by T. G. Gormley, Frank Hutton, U. S. N. Crouse, M. I. McCreight, A. W. Vosburg, Henry Lose, Jacob Miller, and R. A. Logan, as the board of school directors of Du Bois borough, to enjoin George B. Campbell, A. L. Cole, G. L. Griffin, W. S. Luther, William Rowe, J. I. Brockbank, D. C. Sharp, R. M. Boyles, K. Bothel, and J. G. Harris from acting as a board of school directors; to enjoin defendant Bothel, as president, and defendant Cole, as secretary, of such board, from issuing warrants on the treasurer of the borough; to enjoin D. E. Hibner, as treasurer of the borough, from paying any such warrants; and to enjoin G. M. Alcorn, as collector of the borough, from collecting taxes on duplicates for school taxes, issued by such board. From a decree for complainants, continuing a preliminary injunction, defendants appeal. Reversed.

Thos. H. Murray, Cyrus Gordon, and A. L. Cole, for appellants. W. C. Arnold, for appellees.

MITCHELL, J. As this bill was founded upon and merely ancillary to the proceedings on quo warranto in *Com. v. Taylor*, 23 Atl. 348, (opinion filed herewith,) it must fall with the reversal of that judgment. Injunction dissolved, and bill dismissed, with costs.

(159 Pa. St. 508)

In re PEPPER'S ESTATE.**Appeal of COMMONWEALTH.**

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

DESCENT AND DISTRIBUTION—COLLATERAL INHERITANCE TAX.

Testator gave his estate to his collateral kindred and to strangers to his blood, and, to avoid a contest of the will, the legatees paid testator's son a portion of the estate. *Held*, that such portion was not taxable under Laws 1887, p. 79, providing that all the estate of a decedent passing by will to collaterals shall be taxed.

Appeal from orphans' court, Philadelphia county; Hanna, Judge.

Settlement of the estate of Edward Pepper, deceased. Decedent gave all his estate to collateral kindred and to strangers to his blood, and, to avoid a contest of his will, they gave his son a portion of the estate. The register of wills, in assessing the collateral inheritance tax, refused to allow any deduction for the amount paid to the son. David Pepper, the executor, appealed to the orphans' court, which corrected the appraisal, and allowed the deduction, and the commonwealth appeals. Affirmed.

The following is the opinion of Hanna, P. J., of the orphans' court:

"The collateral inheritance tax is imposed, by the act of 1887, only upon such portion of the estate of a testator or intestate as passes at his death to the persons, etc., other than lineal descendants or ancestors de-

scribed in the act. In this case, if the will was allowed to stand, the entire estate is liable to the tax; but the only son of testator, and to whom no bequest was made, for the reasons stated in the will,—that he was already amply provided for, filed a caveat to contest the validity of the will. After some testimony had been taken, an agreement of compromise was entered into between some of the legatees and the caveator, whereby they authorized the executor to pay to him a certain sum out of the bequests to them in settlement of the controversy, and in consideration thereof the caveator agreed to withdraw the caveat, discontinue all proceedings, and that the will should be admitted to probate, etc. The question now arises whether the legatees are liable, not only to the collateral tax upon the balance of their legacies, but also to that upon the amount they agreed to pay the caveator in compromise and settlement. We have reached the conclusion that under the most favorable construction of the act, so far as respects the contention on behalf of the commonwealth, they are not so liable, and for the reason that the amount paid the caveator was never received by them as legatees, and under the act it is only so much of the estate which actually passes to them by virtue of the will that is liable to the tax. It will readily be seen, if the contest instituted by the caveator had been successful, he would be entitled, under the intestate law, to the entire estate, and freed from the tax. But, instead of further litigation, he accepted a portion of the estate, relinquished his claim to the balance, and thus, of course, reduced the amount passing to the legatees; and in fact, to the extent of the amount he received, the will is a nullity; so that all the legatees take is the amount of their bequests, after deducting the sum paid the caveator, and this they concede is subject to the tax. This, we think, is the proper construction to be placed upon the act of assembly. A contrary view would not only be inequitable, but work a hardship upon legatees and distributees, and surely it was never contemplated thus to impose a double burden; and, it may be suggested, the compromise is infinitely more to the interest of the commonwealth than if the terms of settlement were reversed, viz. the will set aside, the entire estate received by the caveator, and then he had paid the legatees, as a gratuity, the amount they now receive. No tax whatever would then be paid. And, as shown in *Kerr's Estate*, 2 Pa. Dist. Ct. R. 535, the payment to the caveator 'simply reduced the estate afterwards passing to volunteers, with the same effect as if the reduction had been caused by the payment of debts, or if the payment or surrender had been the result of a suit terminating in favor of the claimant.' The appeal is sustained, and the appraisal for taxation corrected."

Page, Allinson & Penrose and W. U. Hensel, Atty. Gen., for appellant. John S. Gerhard, for appellee.

PER CURIAM. All that is necessary to be said on the questions presented by this record will be found in the opinion of the learned president of the orphans' court. For reasons therein given, we think there is no error in the decree complained of. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 512)

In re KERR'S ESTATE.

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

DESCENT AND DISTRIBUTION—COLLATERAL INHERITANCE TAX.

Where testatrix gave a portion of her estate to a stranger of her blood, and the latter, to compromise a contest of the will by testatrix's heirs, gave them a portion of the estate, such portion was not taxable, under Laws 1887, p. 79, providing for the imposition of a specified tax on an estate passing by will at the owner's death to persons other than lineal descendants or ancestors.

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

Settlement of the estate of Mary J. Kerr, deceased. One Mrs. Palmer left all her property to Mrs. Kerr, and the heirs at law and next of kin instituted proceedings to contest the will. After the death of Mrs. Kerr, her heirs at law and next of kin compromised with the heirs at law and next of kin of Mrs. Palmer, by which compromise the former withdrew all claim to portions of the estate. In assessing the collateral inheritance tax on Mrs. Kerr's estate the register of wills declined to make any deduction by reason of the property surrendered under such compromise, and from the decision her administrator appealed. The orphans' court sustained the appeal, and corrected the appraisal, and the commonwealth appeals. Affirmed.

The following is the opinion of **PENROSE, J.**, of the orphans' court: "Collateral inheritance tax can only be imposed in the cases specified by the statute, viz. upon real or personal estate passing at the death of the owner, 'either by will or under the intestate laws of this state, or * * * transferred by deed, grant, bargain, or sale, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer,' to the persons, etc., made subject to such tax. No liberality of construction can extend the language of the statute so as to make it include either moneys paid to extinguish the title of persons claiming adversely to the decedent whose estate is liable to taxation, or property surrendered by way of compromise to the persons so claiming,

and thus never forming part of the decedent's estate at all. Such persons are neither legatees or devisees, heirs or next of kin, nor are they grantees, etc., under assignments or transfers made or intended to take effect after the death of the bargainer. The allowance or compromise of their claims simply reduces the estate afterwards passing to volunteers, with the same effect as if the reduction had been caused by the payment of debts, or as if the payment or surrender had been the result of a suit terminating in favor of the claimant. It was conceded at the argument that the tax was paid upon the entire estate of Elizabeth S. Palmer, the original testatrix; and the question now presented only affects the tax chargeable against the estate of Mary J. Kerr, her residuary legatee and devisee. The validity of the will was impeached, and only so much of Elizabeth S. Palmer's estate as remained after the recognition of the rights of those who claimed under the intestate laws became the estate of her beneficiary. No more than this is taxable as the estate of the latter. The appeal is sustained, and the appraisal for taxation corrected in accordance with this opinion."

W. U. Hensel, Atty. Gen., and Page, Allinson & Penrose, for appellant. J. Rodman Paul and Biddle & Ward, for appellee.

PER CURIAM. We deem it unnecessary to add anything to what has been so well said by the learned judge who delivered the opinion of the orphans' court. For reasons given by him, we think the decree should not be disturbed. Decree affirmed, and appeal dismissed, with costs, to be paid by appellant.

(159 Pa. St. 487)

SHAW v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

MUNICIPAL CORPORATION—DEFECTIVE STREET—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against a city for personal injuries caused by a defective street, the evidence is such that, if believed, the jury could not do otherwise than find that those charged with the duty of keeping the street in repair were grossly negligent, an instruction to find for defendant is properly refused.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Action by William Shaw against the city of Philadelphia for personal injuries caused by a defective street. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

Chas. F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellant. Albert E. Peterson, for appellee.

PER CURIAM. This suit was brought to recover damages alleged to have been caused

by the negligence of the city in permitting Fifty-Second street, at the point in question, to remain in a dangerous and unsafe condition for public travel. The testimony is such as to leave no doubt as to the alleged negligence of the defendant. If believed by the jury, as it doubtless was, they could not do otherwise than find that those who were charged with the duty of keeping the street in proper repair were grossly negligent. The case was clearly for the jury. The only errors assigned are the refusals of the learned trial judge to affirm defendant's points. The first of these asked binding instructions to find for defendant. To have affirmed that would have been plain error. The other two points were rightly refused. There is nothing in the record that would justify a reversal of the judgment. Judgment affirmed.

(159 Pa. St. 504)

BENNER v. WEEKS.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

SALE—ACTION BY SELLER AGAINST THIRD PERSON—WHEN MAINTAINED.

Where the purchaser of personal property places the money necessary to pay therefor in the hands of a third person for that purpose, the seller may recover of such third person the contract price of such property.

Appeal from court of common pleas, Philadelphia county.

Action by A. Penrose Benner against John Hart Weeks to recover the contract price of a certain tombstone erected by plaintiff at the instance and request of Kate Scanlan. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

Assignments of error: "(1) The learned judge erred in charging the jury as follows: 'If you find from the evidence that Mr. Weeks had \$38 in his hands, which this woman had put there, and had been set aside by her for the payment of this tombstone, then your verdict should be for the plaintiff for that amount.' (2) The learned judge erred in charging the jury as follows: 'The mere fact that Mr. Weeks had some money belonging to this woman Scanlan would not of itself make him liable to this plaintiff, or would not entitle the plaintiff to a verdict. Under the circumstances of this case, if you find from the evidence that Mr. Weeks had \$38 in his hands, which this woman had put there, and had been set aside by her for the payment of this tombstone, then your verdict should be for the plaintiff for that amount; but if he had money of hers which was not set aside for that purpose, but was simply holding money of hers generally, then the defendant is entitled to a verdict, because in that case the plaintiff would have to get a verdict against this woman, and attach whatever moneys were in his hands.' (3) The learned judge erred in not withdraw-

ing the case from the jury. (4) The learned judge erred in not giving the jury binding instructions to find a verdict for the defendant."

Horace Haverstick, for appellant. Francis S. Cantrell, for appellee.

PER CURIAM. This case hinged on questions of fact which were fairly submitted to the jury in a clear and concise charge, of which the defendant has no just reason to complain. The testimony was quite sufficient to warrant the submission, and the only inference that can be drawn from the verdict is that all the material facts were found in favor of the plaintiff. The main question was whether Mrs. Scanlan placed in defendant's hands \$38 to pay for furnishing and setting up the tombstone which, at her request, was procured by the plaintiff. The jury must have found that she did. There was no error in charging as complained of in the first and second specifications. It would have been error to have withdrawn the case from the jury by directing them to find for the defendant. Judgment affirmed.

(159 Pa. St. 506)

TALCOTT v. OPPENHEIMER.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

Appeal from court of common pleas, Philadelphia county.

Action by James Talcott against J. D. Oppenheimer, in which there was a judgment for plaintiff. Afterwards plaintiff's attorney marked such judgment to the use of Jacob Singer, who subsequently satisfied the same. Thereupon plaintiff filed petitions and entered rules to show cause why such marking to the use of Singer and such satisfaction should not be stricken off. From a judgment discharging such rules, plaintiff appeals. Dismissed.

John F. Keator and J. S. Freemann, for appellant. Jacob Singer and Emanuel Furth, for appellee.

PER CURIAM. If it be true, as alleged by plaintiff, that his attorney of record had no authority from him to sell the debt in judgment in this case, and mark the same to the use of Mr. Singer, he was entitled to the relief contemplated by his rule of October 1, 1892; but, if said attorney was authorized by him to do so, he has no reason to complain of anything that was then or subsequently done. As presented to us, the record is manifestly incomplete, and not in such a shape as to enable us to properly dispose of the question referred to. There is nothing now before us that would justify a reversal of the proceedings complained of. Proceedings affirmed, and appeal dismissed, at appellant's costs, but without prejudice to his right to appeal from the order of March 6, 1893, discharging said rule of October 1, 1892.

(159 Pa. St. 477)

FOSTER v. CARSON et al.

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

MORTGAGE—NOTICE OF ASSIGNMENT—PAYMENT.

The assignment of a mortgage on the margin of the record does not charge the mortgagor with notice of the assignment, and payment by him to the assignor discharges the debt, unless he has actual notice of the assignment.

Appeal from court of common pleas, Allegheny county.

Scire facias on a mortgage by William Foster against Robert J. Carson and others, in which there was a verdict for plaintiff, and a question of law reserved. From a judgment entered for defendants non obstante veredicto, plaintiff appeals. Affirmed.

W. K. Jennings and W. S. Thomas, for appellant. L. L. Davis, for appellee.

STERRETT, C. J. On the trial of this scire facias, it appeared, among other things, that the mortgage in suit was executed and delivered by the defendant Agnes J. Carson to Mary Speelman, who assigned the same, on the margin of the record thereof, to A. C. Jarrett, of which assignment the mortgagor had actual notice. The bond accompanying the mortgage was also assigned, by indorsement thereon, to said Jarrett, and a certificate of no defense, executed and acknowledged March 28, 1888, was delivered to him. On May 22, 1888, said Jarrett assigned, on the margin of said mortgage record, "to plaintiff, his heirs and assigns, seven hundred dollars of the moneys secured by the mortgage, with interest from January 26, 1888." The same day, this assignment was noted by the recorder on the back of the mortgage. The mortgagor had no actual notice of the assignment to plaintiff until after she had paid said Jarrett the entire mortgage debt, except the sum of \$200, etc. A verdict was taken in favor of the plaintiff, subject to the opinion of the court on the question of law reserved. The facts above stated are, in substance, those upon which the question was reserved. Judgment was afterwards entered for defendants non obstante veredicto, and this appeal was taken.

Briefly stated, the question presented is whether the assignment of May 22, 1888, on the margin of the mortgage record, by Jarrett to plaintiff, was such legal notice to the mortgagor as precluded her from setting up payments made by her to Jarrett before she had any actual notice of said assignment. The key to the solution of this question is in the principle that the recording act was intended, not for the benefit of the mortgagor, but to provide a real security for his debt. Not being for the mortgagor's benefit, it is obviously immaterial to him whether or not the mortgage has been recorded. His creditor may or may not avail himself of his

security, but the fact of record does not alter the contract relations of the parties. The undertaking of the mortgagor is to pay, and payment, wherever or however made, will satisfy the debt. He is under no obligation to make inquiry as to the record, and the mortgagee cannot allege an unsatisfied record in answer to a plea of actual payment. If the debtor is under no obligation to take notice of the record of his mortgage, much less must he take notice of the assignment of it. The assignee has but an equity, and as he is bound to inquire for all the defenses which the debtor may have, whether they appear of record or not, so he must give notice of the assignment, if he would protect himself against subsequent payments made to his assignor. *Bury v. Hartman*, 4 Serg. & R. 175; *Henry v. Brothers*, 48 Pa. St. 70; *Horstman v. Gerker*, 49 Pa. St. 282. "Legal or constructive notice, as distinguished from actual," said Mr. Justice Strong in *Henry v. Brothers*, supra, "is that which the law regards as sufficient to give knowledge. If the existence of knowledge is presumed from any other fact, if the presumption be *juris et de jure*, the other fact must be certain. But there is no certainty that a debtor has knowledge of the entry of a judgment against him by virtue of a warrant of attorney which he may have signed. Much less, that he has knowledge of the assignment of a judgment. * * * A subsequent incumbrancer or purchaser must know, for it is his duty to examine the record." The recording act imposes no such duty on a mortgagor. It is to the interest of the assignee, not his, that the assignment should be made effectual; and it would be an intolerable hardship if, every time he may wish to make a payment and obtain a credit on his debt, he should be compelled to visit the recorder's office to ascertain whether or not his mortgage has been assigned. It is therefore apparent that actual notice of the assignment is essential to the completion of the contract relations between the assignee and the mortgagor, and consequently, until that has been given, the mortgagor does no wrong in making payments to the mortgagee. The court below was therefore right in entering judgment for defendants non obstante veredicto, and its judgment must be affirmed.

(159 Pa. St. 552)

GOODWIN v. SCHOTT. (No. 100.)

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

NEGOTIABLE INSTRUMENT—ACTION—AFFIDAVIT OF DEFENSE.

Where, in an action on a note given for the purchase price of a drug store, the affidavit of defense states that plaintiff represented the receipts to have been from \$6 to \$14 a day, showing the apparent truth of his statement by a copy of the ledger, when in fact they were very small; and that the stock of goods

was worth \$2,000, when in fact it was worth only \$100, being stale and unsalable; that plaintiff by fraud prevented an examination by defendant of the stock; and that defendant, immediately upon examination and discovery of the fraud, notified plaintiff, abandoned the store, and demanded the return of the notes; and that plaintiff had been enjoined from negotiating the notes,—*held*, that the affidavit was sufficient to entitle defendant to a trial.

Appeal from court of common pleas, Philadelphia county; M. Arnold, Judge.

Action by Eugene B. Goodwin against Arnold Schott, as indorser upon his wife's note. From a judgment discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The affidavit of defense was as follows: "The promissory notes sued upon in this case were made by Bertha Schott, his wife, and by him indorsed and delivered to the plaintiff in consideration of the promise and undertaking of the plaintiff to sell to deponent a medical practice and drug store in the city of Camden, N. J., the latter situate at Fifth and Clinton streets, which attempted sale was fraudulent, and the said notes were obtained from him by the deceit and the false and fraudulent conduct and representations of the plaintiff, the facts and circumstances whereof being as follows: The deponent is a physician, and has for many years practiced in the city of Philadelphia. In 1889 his health failed, and for two years he was compelled to leave Philadelphia, and reside at Atlantic City, N. J. Early in the spring of 1891, having recovered sufficiently to resume work, his attention was called to an advertisement in the Public Ledger, of this city, in the month of April, 1891, offering for sale a drug store, with or without practice, at Camden, N. J., signed Dr. Goodwin, Kenton, Delaware. The deponent communicated with the plaintiff, the advertiser, and negotiations took place between them. The plaintiff represented that his practice, though only two years old, averaged a return of \$1,200 a year, and was constantly increasing. That the stock of the drug store was worth \$2,000. That it was fully stocked, and compared in this respect with the best in Camden, and that its daily receipts ran from six to fourteen dollars; and on one occasion during the negotiations he exhibited to deponent what he represented to be a copy of his ledger, showing cash receipts of the drug store for the then preceeding twelve months, which ranged, as it appeared, from \$225 to \$400, per month. During these negotiations, which lasted over a month, the deponent repeatedly asked for opportunity to inspect the stock of the said store; but by ingenious pretexts these requests were evaded by the plaintiff, either by pretending want of time on the part of the plaintiff, or the excuse that he was rarely in Camden, or that he

was detained by business in Delaware, or he would fail to be present on appointment, and his representative would profess not to have the keys of the store. These devices were plausible, and the deponent did not suspect that the plaintiff was contemplating a fraud. On May 14, 1891, deponent and his wife met the plaintiff at the store. The latter urged deponent to close the sale at once, as he expected another buyer at one o'clock, which hour was then at hand. Deponent repeated that he had not been afforded an opportunity to examine the stock, and that he relied wholly on the plaintiff's representations. The latter said the stock of drugs was worth fully \$1,500, not including the fixtures and soda fountain. The deponent then closed the purchase, and gave notes in suit, and a bill of sale of the stock and certain fixtures of said store was taken; but no assignment of the said alleged medical practice was made, or any stipulations concerning the same. On taking possession of the store, an inspection and account of the stock exposed the premeditated fraud practiced upon the defendant by the plaintiff. The stock was almost destitute of the drugs and medicines absolutely required in a drug store. What tinctures and syrups and other preparations there were, which are usually made in the store, were worthless, not being made in accordance with the United States pharmacopoeia, and of only half the strength prescribed. The herbs, roots, barks, and leaves, which ought to be renewed every season, were so stale as to be utterly useless, and fit only to be thrown away, the most of them having been there from six to ten years, as deponent is informed and believes. Most of the drawers and other receptacles were empty, and the rest partly filled with spoiled and rotten material. There was almost no stock at all of drugs used for filling prescriptions. The cases and windows were filled mostly with bottles containing colored water; nearly all the perfume bottles contained merely water. Few even of the cheapest articles in general use needed to carry on a drug store were there. Even the nominal value of the whole was less than \$100, and the most of that was in patent medicines which were obsolete and unsalable. The plaintiff's said ledger and any other book showing the amount of his stock and business had been removed by him. On examining the file of prescriptions for the preceding five months up to date of deponent's purchase it was found that the plaintiff systematically and almost daily, in numbering the prescriptions, skipped many numbers, in order to deceive any proposed purchaser, so that it would appear at a glance that he had filled twice or more prescriptions than he really had done. Further, the deponent says that he is informed, believes, and expects to be able to prove at the trial of this case, that the plaintiff said to his

clerk, pending the aforesaid negotiations between him and deponent, that he had a proposed purchaser, meaning the deponent, who had urged him at different times to be allowed to examine the store; but that he, the plaintiff, had to refuse it, as he would not have any buyer if he did not succeed in preventing that. Also, that if the deponent should call unexpectedly in the plaintiff's absence he would not purchase if allowed to see the daily receipts in the drawer, and that the clerk should show the accumulated receipts of different days to induce the belief in the mind of deponent that they were the receipts of a single day; and on another occasion, when the deponent was expected, the said clerk was urged by plaintiff to show deponent the amount of a large bill that had been paid, in order to deceive him as to the amount of the daily receipts. Further, that the plaintiff had himself purchased the said drug store two years before the sale to deponent, and had systematically depleted the stock, and turned it into cash. Further, that just before possession of the store was given to deponent the plaintiff carried off from the store to Delaware all the drugs which were costly and used in putting up prescriptions. Further, that the receipts from the drug store during the plaintiff's ownership had been always very small, and hardly covered the expenses, and that the plaintiff's practice amounted to almost nothing. On discovering by the investigation and account of the stock the fraud and deceit that had been practiced upon him by the plaintiff, the deponent immediately abandoned the said store, notified the plaintiff, and demanded the return of the notes in suit; and a proceeding was instituted by bill in the court of chancery of New Jersey on behalf of deponent's wife against the plaintiff, wherein, on May 23, 1891, as deponent is advised by counsel, a restraining order or injunction was signed by said court enjoining the said plaintiff from negotiating, selling, assigning, or in any wise disposing of the said notes, since which time, and until the commencement of this suit,—over two years,—the deponent had not heard of or from the plaintiff or the said notes except the bank notice of maturity of the first note in July, 1891. All which facts above set forth deponent expects to prove at the trial of this cause."

Alfred D. Wiler, for appellant. Henry C. Titus, for appellee.

PER CURIAM. Assuming, as we must in cases of this class, that the defendant is prepared to substantiate by competent evidence the material facts averred in his affidavit of defense, there was no error in discharging plaintiff's rule for judgment. The affidavit of defense is quite sufficient to entitle the defendant to a trial by jury. Judgment affirmed.

GOODWIN v. SCHOTT. (No. 101.)

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

Appeal from court of common pleas, Philadelphia county; M. Arnold, Judge.

Action by Eugene B. Goodwin against Bertha Schott upon her note made for the benefit of her husband, and by him endorsed to plaintiff. From a judgment discharging a rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

The affidavit was substantially the same as in the case of *Goodwin v. Schott*, 28 Atl. 358.

Alfred D. Wiler, for appellant. Henry C. Titus, for appellee.

PER CURIAM. The affidavit of defense interposed in this case is sufficient to entitle the defendant to a trial by jury, and hence the plaintiff's rule for judgment for want of a sufficient affidavit of defense was rightly discharged. Judgment affirmed.

(159 Pa. St. 541)

FOREMAN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

RAILROAD COMPANIES—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries, it appeared that there were three tracks at a station, it being on the south one; that over the tracks was a bridge, and between the south and middle track a board fence. Plaintiff, who was accustomed to take his train on the south track, a few days before the accident, arrived at the station a minute before the starting time, and, his train being then on the middle track, he was told by the conductor to pass around the fence, and catch the train there. On the day of the accident, which was drizzly, plaintiff arrived only a minute before time, and seeing a train on the middle track, which he thought was his, started around the fence, without looking, and carrying his umbrella open before him, and, while on the middle track, he was struck by the train he was accustomed to take, as it was being switched to its usual position on the south track. *Held*, that a judgment of nonsuit was properly rendered, because of his contributory negligence.

Appeal from court of common pleas, Philadelphia county.

Action by Edwin Foreman against the Pennsylvania Railroad Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The opinion of the court below was as follows:

"This action was brought to recover for personal injuries. The plaintiff lived at Paoli, and it was his custom to take the 5:55 A. M. train from that place to his business in Philadelphia. At Paoli station there are three tracks,—the south track, on which trains for Philadelphia run; the middle track, used for various purposes; and the north track, for trains going west. The 5:55 A. M. train from Paoli east started from this point. The engine and cars remained over night in a yard west of the station and north of all the tracks. On coming out of the yard in

the morning, the train was carried by a switch across the north track to the middle track, and it passed east on this track some distance beyond the station, where it was switched onto the south track, and backed up to the station. The station is south of the tracks, and a shed or shelter is on the north. A bridge extends over all the tracks a few feet west of the station, and is reached by steps on either side leading to it. Between the south and the middle track is a wooden fence, extending about seventy yards east of the station. The plaintiff lived south of the railroad, and had taken this train for the city almost every morning for a year, and was familiar with the station and its surroundings. On the morning of October 24th, three days before the accident, he arrived at the station one minute before the starting time, and found his train standing on the middle track. At the request of the conductor, he passed around the east end of the fence, and got on the train where he found it standing. On the day of the injury, October 27th, he reached the station one minute or less before the train started. He saw a train standing on the middle track, and, supposing it was the train he was to take, stepped from the platform, crossed the south tracks, and walked eastward on the roadbed between the tracks and the fence, to reach the end of the latter, in order to pass around it. The train for the city had passed eastward on the middle track, and been turned on the south track, and was backing to the station before he started, but was not in sight, because of an embankment at a curve of the road. Before reaching the end of the fence, he met this train, and was struck by it, and severely injured. The morning was dull and rainy, and he walked with his head down, and he carried an umbrella, which obstructed his view of any object in front. He was intent on reaching what he thought to be his train, and was looking at it. He did not look down the track, as he supposed no train was in that direction. On reaching the station, and seeing cars standing on the middle track, he at once concluded that the same conditions were before him that existed on the 24th, and instantly, and without reflection or exercising any precaution, acted upon that conclusion. On this occasion he did not step upon the roadbed at the suggestion of any one, but at his own instance, and during the year he had but once taken the train on the middle track. To reach that track, had it been necessary, there was a bridge to the west, and a plank crossing to the east at the end of the fence, and a platform south of the tracks extending from the bridge to a point near the crossing, and beyond the place at which he was injured.

"Assuming that the railroad company would have been liable if the plaintiff, without fault on his part, had been injured when

he crossed the tracks on the 24th by the direction of the conductor, it is not liable for his injury on the 27th, when he crossed of his own motion, if his conduct at that time is considered without reference to what occurred on the 24th. With a single exception, every morning for a year he had found the train on the south track. That it was on the middle track on that morning was evidently due to some exceptional cause, and could not give rise to a reasonable belief that a new place of starting had been established. If such a belief could arise, the fence was a standing notice not to attempt to reach the train by crossing the south track, and perfectly safe means of reaching it by a bridge over the tracks had been provided, and a reasonably safe one by the plank crossing at the eastern end of the fence. The plaintiff's first mistake was in supposing that the train standing on the middle track was the one by which he could reach the city. His second and more serious error was in attempting to reach it by walking along the roadbed, in close proximity to the track, and without noticing what was before him. If the railroad company was in any way accountable for the first, he alone is to blame for the second; and it was the second, and not the first, that occasioned his injury. He was not, as was urged on the argument of the case, by any fault of the defendant, placed suddenly in a position of peril. On the platform of the station he was in a place of entire safety, with some time to observe and reflect. If it was brief, it was because he made it so. There was no peril to be avoided. If he had been misled as to the starting point of his train, there was a safe way to reach it, with which he was entirely familiar. Without reflection, he chose a way obviously dangerous, and then failed to exercise the most ordinary precaution to avoid injury. We are of opinion that the nonsuit was properly entered, and this rule is discharged."

John Dolman, for appellant. David W. Sellers, for appellee.

PER CURIAM. At Paoli station, where plaintiff was injured, the defendant company had three tracks. Passenger trains for Philadelphia left the station on track No. 1. While the train was passing through the switches in order to take its usual position for starting, the plaintiff unnecessarily, and without invitation from any one, went upon the roadbed, and was struck by the rear end of the train that was being backed up. The undisputed testimony shows a clear case of contributory negligence on his part, and hence there was no error in refusing to take off the judgment of nonsuit. The case comes within the principle of *Irey v. Railroad Co.*, 132 Pa. St. 563, 19 Atl. 341. Judgment affirmed.

(159 Pa. St. 517)

CITY OF PHILADELPHIA v. BRADFIELD.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

STREETS—COST OF SEWER—ENFORCEMENT AGAINST ABUTTING OWNER.

Assumpsit will not lie against an abutting owner for cost of sewer, there being no remedy provided by statute other than by proceeding in rem.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by the city of Philadelphia against Mary Bradfield. Judgment of nonsuit. Plaintiff appeals. Affirmed.

E. Spencer Miller and Charles E. Pancoast, for appellant. Morris A. Bradfield, for appellee.

PER CURIAM. This action of assumpsit was brought to collect the frontage charges against defendant's property on Hamilton street, for the construction of a sewer in said street, as set forth in plaintiff's statement. The only assigned cause of demurrer is: "No personal claim exists for the alleged debt, but the law gives therefor only an action in rem against the land." The court below evidently thought, with the defendant, that the collection of such municipal claims by a personal action against the owner of the abutting property was unauthorized, and judgment for the defendant was accordingly entered. We have not been referred to any act of assembly that authorizes the collection of such claims otherwise than by the familiar proceeding in rem. Neither of the specifications of error is sustained. Judgment affirmed.

(159 Pa. St. 515)

CITY OF PHILADELPHIA v. MERKLEE.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

STREETS—COST OF PAVING—ENFORCEMENT AGAINST ABUTTING OWNERS.

Assumpsit will not lie against an abutting owner for cost of street paving, there being no remedy provided by statute other than by proceeding in rem.

Appeal from court of common pleas, Philadelphia county; Reed, Judge.

Assumpsit by the city of Philadelphia against Charles R. Merkle. Judgment of nonsuit. Plaintiff appeals. Affirmed.

E. Spencer Miller and Charles E. Pancoast, for appellant. William H. Peace, for appellee.

PER CURIAM. This action of assumpsit was brought to recover the cost of paving Winchester street in front of defendant's property. It is not denied that the work was done, nor is there any controversy as to the cost thereof. The only question is whether the latter can be recovered in a personal

action against the abutting property owner. In refusing to take off the judgment of nonsuit, the court below doubtless acted upon the reasonable presumption that the only remedy provided for the collection of such claims is by the ordinary and well-recognized proceeding in rem. We have not been referred to any act of assembly that in plain terms provides any other remedy. There was no error in refusing to take off the judgment of nonsuit.

It is not without reason that defendant's attorney objects to the blending of this case in same paper books with another and different case, in which he is not concerned. Judgment affirmed.

(159 Pa. St. 539)

HOLLIS v. BROWN et al.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

LANDLORD AND TENANT—ABATEMENT OF RENT—CONDITION OF PREMISES.

Where a tenant vacates the premises without giving the required notice to terminate the lease, the condition of the premises is no defense to an action for rent during the unexpired term.

Appeal from court of common pleas, Philadelphia county.

Action by Peter C. Hollis against Susan S. Brown and Elizabeth H. Brown to recover rent. There was judgment for plaintiff for want of a sufficient affidavit of defense, and defendants appeal. Affirmed.

This is an action of rent for the months of March, April, and May, 1893, on a house and lot of ground under a lease made August 31, 1891, to run for the term of nine months, or to June 1, 1892, and thereafter from year to year, until either party shall have given three months' written notice to the other, before the end of any one year after June 1, 1892, of an intention and desire to determine the tenancy, at the rent of \$700 per annum, payable in equal quantity payments. Plaintiff alleges that on February 28, 1893, defendants left the premises without previous notice, and refused to pay the \$175 due for the rent from March 1 to June 1, 1893. The material part of defendants' affidavit of defense reads as follows: "In the winter of 1893, the defendants discovered that the premises were in a wholly unfit and uninhabitable condition, owing to the defective drainage; and they were informed by their physician, and verily believe, it was dangerous to their lives to remain; and that they removed from the said premises as soon as the critical condition of the health of one of the defendants permitted her to be removed; and that, had they not vacated the said premises, the board of health of the city of Philadelphia would have required them to do so; and that subsequently to that time, and until the 1st day of June, 1893, the date on which the plaintiff admits the lease of the said

premises to have terminated, the said premises were not in a suitable sanitary condition for habitation. Your deponent is informed that the uninhabitable condition of the premises, owing to the defective drainage, terminated the lease, if it ever had any force and effect, and that on and after the 28th day of February, 1893, the date on which the defendants left the premises, no more liability on the part of the defendants occurred under the terms of the lease; and that all obligations under the lease, if any there were, due by the defendants to the plaintiffs up to and including the 28th day of February, 1893, have been discharged by the defendants; and this deponent denies that it was through any fault of the defendants that any injury occurred to the plumbing on the said premises, but that the uninhabitable condition of the said premises was due to the defective construction of said plumbing; and this deponent further denies that there were any repairs necessary in the stable or house owing to any act or acts of the defendants while occupying the said premises."

William Draper Lewis, for appellants.
Bernard Gilpin, for appellee.

PER CURIAM. We are satisfied from an examination of the record that there was no error in making absolute the rule for judgment for want of a sufficient affidavit of defense. Assuming, as we must, for the purposes of this appeal, that all the averments contained in the affidavit of defense are true, there is nothing in them that amounts to a defense to the plaintiff's case. Judgment affirmed.

(189 Pa. St. 545)

IN RE ASHBURNER'S ESTATE.

Appeal of FIDELITY TITLE & TRUST CO.
(Supreme Court of Pennsylvania. Jan. 29, 1894.)

BEQUESTS—PER STIRPES OR PER CAPITA.

A bequest to testator's daughters H. and M. and the children and heirs of his sons B. and O., to be divided equally between them, is per stirpes, and not per capita.

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

Accounting by Dallas Tucker, administrator of Sarah B. Ashburner, deceased. From a decree holding that the legatees of deceased took per stirpes, and not per capita, the Fidelity Title & Trust Company, guardian of Elizabeth A. Ashburner and Lesley A. Ashburner, children of Charles A. Ashburner, deceased, appeals. Affirmed.

The bequest was in the following form: "I give and bequeath all my real estate, stocks, bonds, mortgages, all of which I may die possessed, to my daughters Harriet E. A. Tucker and Maria B. Osborne, and the children and heirs of my sons Benjamin and

Charles B. Ashburner, to be divided equally between them."

The opinion of the orphans' court on exceptions to the adjudication of the auditor was as follows: "A bequest to a designated person and the children of another is a gift to ascertained individuals, which, in the absence of evidence of a contrary intent, is said to confer an equal share upon all alike; and the mere fact that the parent of the children is dead, and that he bore the same relation to the testator that the designated donee does, or that, had there been no will, the parties would have taken per stirpes under the intestate laws, does not change the result. The testator knows, or is supposed to know, exactly or approximately, the number of beneficiaries whose names are not mentioned; and, as he classes them with one whom he designates, there is, perhaps, a presumption of equality, though, as said by Lord Eldon in *Lincoln v. Pelham*, 10 Ves. 175, in applying the rule the real intention is frequently to the contrary. The rule, however, is one which, even in England, will 'yield to a very faint glimpse of a different intention,' (2 Jarm. Wills, 112,) while in Pennsylvania its existence at all has been seriously questioned, (*Osburn's Appeal*, 104 Pa. St. 637,) though *Dible's Estate*, *81 Pa. St. 279, is an illustration of its modified application; and, after all, as has often been said, rules of construction have very little weight in the case of wills, and 'precedents ought never to be allowed an unbending control of any case not precisely analogous or even strictly identical.' The rule in question has been more frequently disregarded than followed in this state and in other sister states. *Minter's Appeal*, 40 Pa. St. 111; *Risk's Appeal*, 52 Pa. St. 269; *Green's Estate*, 140 Pa. St. 253, 21 Atl. 317; *Lyon v. Acker*, 33 Conn. 222; *Lachland v. Downing*, 11 B. Mon. 32, etc. But a bequest to a designated person or persons, and the 'heirs' of another, or, as in the present case, 'the children and heirs' of another, is governed by very different considerations, and the 'rule' does not, either in letter or principle, apply to it. The word 'heirs' ex vi termini implies representation, and in this respect its meaning is not changed by being coupled with the word 'children.' It is not to be assumed that the two words are used as meaning the same thing, especially where there is an obvious reason for using both. In a bequest to children, grandchildren will not take, even where by statute lapse is provided against in the case of children dying in the lifetime of the testator, (*Gross' Estate*, 10 Pa. St. 360; *Guenther's Appeal*, 4 Wkly. Notes Cas. 41;) hence in such cases the number of persons to take is to all intents and purposes fixed, and the per capita rule of distribution is not altogether unnatural or unreasonable. But in a gift to 'heirs' or to 'children and heirs,' grandchildren, great-grandchildren, and descendants to the remotest degree may

and are entitled to take; and the persons so entitled may change from day to day, after the execution of the will, and in the lifetime of the testator, both in number and degree of relationship. In the present case, for example,—where the testatrix had two living children, one grandchild, the child of a deceased son, and two grandchildren, of another deceased son,—under a per capita division each would have been entitled to one-fifth; and, had the limitation been simply to children of the deceased sons, the number of shares could not have increased, though it might have been diminished by death of some of them in her lifetime. Under the gift to heirs, however, if one grandchild had died before she did, leaving six children, the shares, if the same rule is to be applied, would be reduced to one-tenth each; or, if all the grandchildren had so died, each leaving six children, to one-twentieth; while the children of the testatrix would thus be lowered to the level of grandchildren. It is impossible to attribute such an intention to any testator, and the authorities are clear that the so-called rule has no application where the class is referred to as 'heirs' or 'children and heirs.' *Daggett v. Slack*, 8 Metc. (Mass.) 450; *Holbrook v. Harrington*, 16 Gray, 102; *Balcom v. Haynes*, 14 Allen, 204; *Bassett v. Granger*, 100 Mass. 348; *Roome v. Counter*, 6 N. J. Law, 111; *Fissel's Appeal*, 27 Pa. St. 55; *Baskin's Appeal*, 3 Pa. St. 304; *Osburn's Appeal*, supra; *Hoch's Estate*, 154 Pa. St. 417, 28 Atl. 610. The effect is not altered by the direction to divide 'equally between them,' since these words are no less appropriate to a division among classes than to division among individuals. *Risk's Appeal*, 52 Pa. St. 273; *Minter's Appeal*, supra; *Green's Estate*, supra. It is not enough to say that the testatrix might have intended to place the children of her deceased children on a footing of equality with her living children; nothing short of absolute certainty can accomplish such a result. To doubt is to deny. 'It is a sound rule that, when a devise or legacy is given to heirs or their representatives, courts will apply the general principles governing the descent of estates, unless a contrary intention appears. The statute of distributions governs in all cases where there is no will, and where there is one, and the testator's intention is in doubt, the statute is a safe guide.' *Lyon v. Acker*, 33 Conn. 224. See, also, *Fissel's Appeal*, supra; *Amella Smith's Appeal*, 23 Pa. St. 9; *Hoch's Estate*, supra. Exceptions dismissed, and adjudication confirmed absolutely."

Francis Fisher Kane, Joseph F. Lamorelle, Jones & Carson, and William Scott, for appellant. C. Berkeley Taylor and M. Hampton Todd, for appellees.

PER CURIAM. The questions presented by this record appear to have been care-

fully considered and correctly decided by the orphans' court. Further discussion of them is unnecessary. We think the decree should be affirmed on the clear and able opinion of the learned judge of that court. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 531)

CLAPP et al. v. HOFFMAN.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

EQUITABLE RELIEF—RELIANCE ON MISREPRESENTATION—MISTAKE OF LAW.

1. Defendant owned a ground rent, which she believed irredeemable, and her son, an attorney, confirmed such belief. Plaintiff purchased it as irredeemable, on the strength of defendant's representation to that effect, and took the papers to a title insurance company, which confirmed the belief, and insured the ground rent as irredeemable. Defendant invested the proceeds, and 2½ years after the sale the ground rent proved redeemable. *Held*, that defendant's honest misrepresentation did not harm plaintiff, as he did not rely thereon, and that it would be inequitable to cancel the sale, and compel defendant to suffer a loss in realizing on her investment so as to return the money.

2. Equity would not grant relief in such case, as plaintiff's mistake was one of law.

Appeal from court of common pleas, Philadelphia county.

Bill in equity by Sarah R. Clapp, Lydia R. Semple, and B. Frank Clapp, as executors under the last will and testament of Nathan T. Clapp, deceased, and Sarah R. Clapp, B. Frank Clapp, and also the Fidelity Insurance, Trust & Safe-Deposit Company, as trustee for Lydia R. Semple under said will, devisees thereunder, against Phoebe W. Hoffman, to correct an alleged mistake of fact by defendant to the detriment of Nathan T. Clapp, deceased. From a decree confirming the report of a master and dismissing the bill, complainants appeal. Affirmed.

"The facts in this case are undisputed, and the master finds them to be as follows: The defendant, Phoebe W. Hoffman, had been for many years the owner of a yearly ground rent of seventy-two dollars, which issued out of premises situate on the south side of Lombard street, at the distance of one hundred and eighty feet eastward from the east side of Twelfth street, in the city of Philadelphia. This ground rent was always considered by the defendant and her family to be irredeemable. Edward F. Hoffman, Esq., a member of this bar, a son of the defendant, noticing that irredeemable ground rents were selling at fifty per cent. premium, called what he termed a 'family council' to consider the propriety of selling this ground rent. At this council there were present Edward F. Hoffman, Esq., his two brothers, and his mother, the defendant. She then gave her three sons authority to sell the ground rent whenever they thought best so to do. Some time after this the sons decided to sell the

ground rent, and it was arranged that Edward F. Hoffman, Esq., should take the ground-rent deed around to Thomas & Sons, auctioneers, and make arrangements about the sale. He did so, and told the clerk whom he saw that he wanted the ground rent sold at the next sale. He admitted in his testimony that he told the clerk that the ground rent was irredeemable. The ground rent was advertised by Thomas & Sons as an irredeemable ground rent to be sold May 7, 1889, and was sold on that day, as an irredeemable ground rent, to Nathan T. Clapp, for the sum of \$1,800. A short time afterwards the papers were delivered to the Land Title & Trust Company for the purpose of having the title insured. It appears from the papers produced by that company that the original application was made for insurance to the amount of \$1,200 only. This amount was afterwards changed, and increased to \$2,000, and a policy was issued by the said company to Nathan T. Clapp in the sum of \$2,000, in which the ground rent was insured as being irredeemable. Nathan T. Clapp died December 30, 1891. In January, 1892, B. Frank Clapp, Esq., one of the plaintiffs, had occasion to examine the papers relating to the ground rent in question, and found that the ground rent was redeemable. Mr. Clapp at once communicated this fact to the Land Title & Trust Company. Mrs. Hoffman, the defendant, was then communicated with, and certain verbal and written communications were had and passed between the defendant, represented by her son Edward F. Hoffman, Esq., the Land Title & Trust Company, and B. Frank Clapp, Esq. The defendant was asked to rescind the sale, and return the \$1,800 to plaintiffs; the ground rent to be reconveyed to her. This she declined to do, saying that, as she had invested the money arising from the sale, she could not return it without a loss. Finally, on September 19, 1892, a deed was executed by the plaintiffs for the ground rent in question, and tendered to the defendant, and a demand was made for the return of the \$1,800, which was declined and refused by the defendant. Subsequently, on October 31, 1892, the present bill was filed, in which plaintiffs ask that the deed from the defendant to them may be canceled, and that the bargain and sale of which it is the evidence be rescinded, and that the defendant pay to the plaintiffs the sum of \$1,800, upon their lodging with the clerk of the court a deed from them to her, in fee simple, of the said ground rent. It was proven by testimony which was not contradicted that the ground rent in question, being redeemable, was not worth over \$1,200. These are all the facts in the case, and the question to be decided is, under the facts, are the plaintiffs entitled to the relief they ask for? The master is of opinion that they are not, for at least two reasons:

"First. In this case no bad faith or willful

misrepresentation is charged. No such charges could be sustained. The defendant had what she always considered was an irredeemable ground rent, but which was redeemable. In this belief she was confirmed by her son Edward F. Hoffman, Esq., a reputable and highly-respected member of this bar. Honestly thinking the ground rent to be irredeemable, she sold it at a public sale to plaintiffs' decedent, Nathan T. Clapp, who undoubtedly bought it as an irredeemable ground rent upon the strength of the defendant's representations. Mr. Clapp, after the purchase, took the title papers to the Land Title & Trust Company,—a company organized for the purpose of examining and insuring titles. This company, after, presumptively, the fullest examination, confirmed the defendant's belief that the ground rent was irredeemable, and issued to Mr. Clapp a policy of title insurance, in which the ground rent is insured as being irredeemable. Settlement was made, and the money was received and afterwards invested by the defendant. The present case is therefore a case in which, after the purchase, no reliance is placed in the representations made by the seller prior to the purchase. On the contrary, the purchaser seeks the advice of, and pays for the examination by, a company especially organized for the purpose of examining and insuring titles. No harm was done the plaintiffs' decedent by the misrepresentations honestly made by the defendant, for he placed no reliance on them. The master of the rolls says in *Clapham v. Shillito*, 7 Beav. 146: 'Cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party.' In this case the contract is closed, and the defendant has invested the proceeds of the sale, and she is now asked, after a lapse of four years, to cancel the contract and return the money. If she is compelled to do this, it will be at a considerable loss to her. The master is of opinion that it would be inequitable to compel her to do it.

"Second. The master is of opinion that the mistake in this case is a mistake of law. Whether a ground rent is redeemable or not is certainly a question of law. The mistake, then, being one of law, equity will not grant any relief. The master does not deem it necessary to cite many cases in support of this proposition, as he understood the learned counsel for the plaintiffs to admit that, if the mistake was one of law, they were not entitled to the relief prayed for. If any authorities are necessary to support the mas-

ter, they can be found in *Rankin v. Mortimer*, 7 Watts, 372; *McAninch v. Laughlin*, 18 Pa. St. 371; and the later cases. The master is therefore of opinion that the plaintiffs' bill should be dismissed, with costs, and he recommends a decree to that effect."

D. Russell Nuttall and E. Hunn Hanson, for appellants. John G. Johnson, for appellee.

PER CURIAM. The propriety and correctness of the learned master's recommendation that the bill in this case be dismissed are amply vindicated in his report. The sale of the ground rent in question was fully executed by delivery of deed therefor, and payment in full of the consideration money, more than two years and a half before the bill was filed. There was no intentional misrepresentation as to the quality of the ground rent, nor any fraud in the procurement or in the consummation of the sale thereof. The vendee had ample time and opportunity, before accepting the deed and paying the purchase money, to have ascertained whether the ground rent was irredeemable or not. He satisfied himself as to the goodness of the title, and in the same manner he might have been fully advised as to the quality of the rent. Moreover, the relief prayed for would not have restored the parties to their original position. But it is not our purpose to discuss the questions presented by the record. They have been satisfactorily disposed of by the learned master, and, for reasons given in his report, we think neither of the specifications of error should be sustained. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 535)

LUCAS v. O'BRIEN et al.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

MECHANICS' LIENS—CONTRACT AGAINST CLAIMS.

A covenant that the contractor will not suffer any lien to be filed on the building, and that any such lien shall preclude any claim for payment under the contract by the contractor till it is released, does not prevent the enforcement of a lien for labor and materials by a subcontractor. *Iron Works v. O'Brien*, 27 Atl. 131, 156 Pa. St. 172, followed.

Appeal from court of common pleas, Philadelphia county.

Action by John Lucas against Francis O'Brien, owner, and Thomas A. Ash, contractor, to enforce a mechanic's lien on realty. There was judgment for defendants non obstante veredicto, and plaintiff appeals. Reversed.

A covenant in the contract between the owner and contractor, and on which defendants relied to defeat a judgment of lien, reads as follows: "And it is further agreed that the party of the first part [contractor]

will not at any time suffer or permit any lien, attachment, or other incumbrance, under any law of this state or otherwise, by any person or persons whatsoever, to be put or remain upon the building or premises into or upon which any work is done or materials are furnished under this contract for such work and materials, or by reason of any other claim or demand against the party of the first part, and that any such lien, attachment, or other incumbrance, until it is removed, shall preclude any and all claim and demand for any payment whatsoever under or by virtue of this contract."

John Sparhawk, Jr., and N. Dubois Miller, for appellant.

STERRETT, C. J. This case is ruled in favor of the plaintiff by *Iron Works v. O'Brien*, 156 Pa. St. 172, 27 Atl. 131. The contract in this case is substantially, if not precisely, the same as in that, and is not susceptible of any other construction. For reasons given in that case, the court below erred in entering judgment for defendant non obstante veredicto. Judgment reversed, and judgment now entered on the verdict in favor of the plaintiff for \$469.70, the amount found by the jury, with interest from date of the verdict.

(159 Pa. St. 537)

KELLY et ux. v. NORTHROP.

Appeal of LEISENRING.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

EJECTMENT—WRIT OF HABERI FACIAS POSSESSIONEM—SERVICE—CLAIM OF THIRD PERSON.

A sheriff is properly directed to execute a writ of haberi facias possessionem issued on a judgment for plaintiff in ejectment, though a third person claims to be in possession in her own right, not claiming under defendant in ejectment.

Appeal from court of common pleas, Philadelphia county.

Ejectment by George A. Kelly and his wife against Frank Northrop on a lease by plaintiffs to defendant. There was judgment for plaintiffs, and a writ of haberi facias possessionem issued to put plaintiffs in possession. The sheriff declined to execute it, Lydia A. Leisenring having notified him that she was in possession in her own right, not claiming under defendant, Northrop. To a rule on the sheriff to show cause why he should not execute writ, Leisenring filed an answer, which was attached to the sheriff's return, alleging that Northrop had never been in possession; that she had been in possession since long prior to the action of ejectment; that the right of possession was in her, not in plaintiffs; that she was not a party to the action of ejectment; and that she did not claim under defendant. From an order making absolute plaintiffs' rule, Leisenring appeals. Affirmed.

Arthur U. Bannard and Dwight M. Lowrey, for appellant. O. Berkeley Taylor, for appellees.

PER CURIAM. We find no error in this record. Neither of the specifications is sustained. The order making absolute the plaintiffs' rule on the sheriff to show cause why he should not proceed to execute the writ of *haberi facias possessionem*, etc., is affirmed, with costs to be paid by appellant.

(159 Pa. St. 512)

In re BARKER'S ESTATE. (No. 172.)

Appeal of SCOTT.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

CONSTRUCTION OF WILL — RIGHTS OF DEVISEES — POWERS OF EXECUTOR.

1. Testatrix gave her property in trust for the support of her husband and children; to be "enjoyed by him and them without * * * being * * * liable for" their debts, on the death of the husband to be equally divided among the children, and, if either of them should die, his share to be equally divided among his children. *Held*, that during the trust the children could not alienate, for payment of debts, the shares coming to them at the husband's death.

2. Under the will the interests of the children are vested, subject to be divested on their dying before their father without children; and where one dies without issue, leaving his interest to his father by will, the latter takes it with the right of receiving distribution in advance.

3. Testatrix appointed her husband executor, "with full power to take charge of my estate, and dispose of the same * * * at his discretion," and declared that "she has the most entire confidence that he will endeavor to do equal justice to all concerned." *Held* to give him full discretionary powers as to investments, and that he was not chargeable with losses incurred by investing moneys in bonds of a railroad company in a distant state, whose railroad was unfinished.

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

On settlement of the first account of Abraham Barker, executor of the will of Sarah W. Barker, deceased, the accounts presented by the executor were allowed, and Anna B. Scott, a devisee and legatee, appeals. Affirmed.

The following are copies of the will of Sarah W. Barker, and the opinion of Penrose, J., of the orphans' court, on exceptions:

Will of Sarah W. Barker, deceased: "I, Sarah W. Barker, wife of Abraham Barker, of Philadelphia, do make this, my last will and testament, hereby appointing my husband, Abraham Barker, my executor, with full power to take charge of my estate, and dispose of the same, both real and personal, in his discretion, subject to the restrictions and conditions hereinafter set forth, applying so much of the proceeds as may be necessary to the payment of the incumbrances thereon, dividing the balance which may remain equally among my children, and, if any or either of them die before

such division, such portion as would have appertained to the deceased to be divided among his, her, or their children, share and share alike, such distribution not to take place until the death of my said husband; until that time, the whole income, or so much thereof as he may desire, to be devoted to the support of the said Abraham Barker and such members of our family as may, in his discretion, require it. If, however, at any time during the life of my said husband, after the coming to the age of twenty-one years of any of our children, the said Abraham Barker should think it expedient to bestow on such child or children of age such portion of my estate as such child or children would inherit at the death of my husband, Abraham Barker, he is hereby fully empowered to do so, in his discretion, without being held liable to account therefor. This will to appertain to all the property, both real and personal, which I now possess, derived from my father, William Wharton, or that which I shall inherit by my father's will after the death of my mother, Deborah F. Wharton, and also to all other property, of whatsoever nature, of which I may be possessed. Should my husband die during the minority of any of our children, it is my desire that my brothers Charles William Wharton, Joseph Wharton, and William Wharton, Jr., should act as trustees for such minor or minors, possessing them of their property when they become of age. I wish my dear mother to have whatever keepsake she may select for herself, and that she and my husband may present to each of my brothers and sisters, and to my sisters-in-law, some token of my remembrance; also to my dear friend Anna M. Ferris, and to my niece Sarah W. Haydock. I also desire that each of my children should have some article or articles personally connected with me. I wish my husband, as soon after my death as convenient, to pay the following little legacies: To Hannah Cowan, \$25, (twenty-five dollars;) to Rachel M. North, twenty-five dollars; to Catherine Doherty, twenty-five dollars; and to Ellen Dolan, twenty-five dollars. In giving to my husband and executor the power to sell and dispose of my real and personal estate, it is my will that such sale and disposition be made so that the purchaser shall be freed and discharged from all liability to see to the application of the purchase money. It is my will, in creating the foregoing trust for the maintenance and support of my husband and family, that the same shall be enjoyed by him and them without being in any way subject to, or liable for, the debts or engagements of my said husband or any of our children. In giving my executor authority to bestow upon any of our children, after they shall arrive at the age of twenty-one years, his or her portion of my estate, my will is that should he, in such bestowal, exceed the share or proportion which would have otherwise

fallen to the share of such child or children, he shall not be held liable to account to the other children for such excess, having the most entire confidence that he will endeavor to do equal justice to all concerned; and it is my will that, should my said husband think proper to advance to any of our children, after they shall arrive at the age of twenty-one years, any portion of my estate less than the whole of his, her, or their share, he shall be at liberty to do so in such amounts as he shall deem expedient. I hereby revoke all other wills by me heretofore made, and declare this, only, to be my last will and testament. In witness whereof I have hereunto set my hand and seal this 14th day of Oct., 1861. Sarah W. Barker. [Seal.]”

Opinion of court below:

“Penrose, J., (July 1, 1893.) Every interest owned by a debtor in Pennsylvania, whether vested or contingent, may be the subject of assignment for the benefit of his creditors, unless the instrument creating it contains a valid restraint upon his power of alienation. *Wickersham's Appeal*, 18 Wkly. Notes Cas. 36; *Churchman's Estate*, 20 Wkly. Notes Cas. 367; *Id.*, 22 Wkly. Notes Cas. 131. Two questions, therefore, arise as to the assignment in the present case: Did it, or was it intended to, embrace the interest of the assignor in the estate of his mother, the testatrix? Was it assignable under the terms of her will? We have not been furnished with a copy of the assignment, and cannot, therefore, determine the first question; but, assuming its affirmative answer, the second point remains to be considered. The will expressly provides that during the trust for the maintenance and support of the husband and family of the testatrix the estate shall ‘be enjoyed by him and them without being in any way subject to, or liable for, the debts or engagements of my said husband or any of our children.’ So far as relates to income, the provision is unnecessary in case of the children, their right to any part of it being wholly dependent upon the discretion of the trustee. *Keyser v. Mitchell*, 67 Pa. St. 473. With regard to principal, where there is a present gift, in possession, of the entire beneficial ownership, a trust to protect against creditors is invalid. *Keyser's Appeal*, 57 Pa. St. 236. But the power of alienation may unquestionably be withheld in the case of a contingent interest before it vests, even in England, (*Large's Case*, 2 Leon. 82; *Id.*, 3 Leon. 182; *Barnett v. Blake*, 2 Drew. & S. 117;) and so it would seem in Pennsylvania, in case of a vested interest, prior to its coming into possession, or where the restraint is confined to a limited period not transgressing the rule against perpetuities, (*McWilliams v. Nisly*, 2 Serg. & R. 507, 513.) See, also, *Jaureche v. Proctor*, 48 Pa. St. 472. In the recent case of *Beck's Appeal*, 133 Pa. St. 51, 19 Atl. 302, it was held that a provision that an absolute legacy should not be liable to attachment is good so long

as the legacy remains in the hands of the executor; and this was followed in *Goe's Estate*, 146 Pa. St. 431, 23 Atl. 383. If, in the present case, it be held that an assignment by one of the children for benefit of creditors passed the share which he would take at the death of the father, it would thus be made subject to both his debts and engagements, in spite of the positive direction that it should not ‘in any way’ be subject to either. The legality of the restriction being established by the authorities referred to, it follows that, during the continuance of the trust, the right of alienation for payment of debts is withheld from the children as to the shares coming to them at the death of the husband, and that consequently the assignee has acquired no interest such as to entitle him to interfere in the settlement of the account of the executor.

“The questions with regard to the share of the son who has died depend upon the character of the interests taking effect at the death of the husband; and without overruling *Manderson v. Lukens*, 23 Pa. St. 31; *Crawford v. Ford*, 7 Wkly. Notes Cas. 532; *Reed's Appeal*, 118 Pa. St. 215, 11 Atl. 787; and very many other cases,—we cannot sustain the exceptions. These interests are clearly vested, subject to being divested by death before the period of distribution, leaving children. The rules upon this subject are not peculiar to Pennsylvania. *Harrison v. Foreman*, 5 Ves. 207; *Smither v. Willock*, 9 Ves. 233; *Hodgson v. Smithson*, 21 Beav. 356, etc. The authorities, English and American, will be found in the text-books. See *Williams, Ex'rs*, (Perkins' Ed. 1877,) 1383; *Hawk. Wills*, 267, 268. *Cascaden's Estate*, 153 Pa. St. 170, 25 Atl. 1075, cited by the exceptants, was decided under its own peculiar circumstances. It differs from the present case in many particulars, one of which is the absence of the provision permitting distribution, at the discretion of the trustee, during the continuance of the prior estate. Here, the son having died without children, his interest, which was not divested, passed under his will to his father, who took it with the right of receiving distribution in advance. It is immaterial, therefore, whether the notes referred to in the exceptions were intended as advances or not. If they were not, they remained part of the original estate until transferred, by way of anticipation, to the father as legatee of the son.

“It is immaterial that the income was at one time brought into the account. It was improperly there, and it was proper to withdraw it. The whole income is given by the will to the husband, whose rights are not reduced by the discretionary power to apply it for the support of such members of the family as, in his judgment, may require it. There is no direction that the income shall be consumed as it accrues. It does not accumulate for the benefit of the estate, but remains during the husband's lifetime, sub-

ject to his right to devote 'the whole' to his support, etc.

"It does not appear that the auditing judge was asked to strike items of distribution and of investment from the administration account, for otherwise he certainly would have done so. Nothing can be said in commendation of an account which blends distribution with administration. The supreme court, in very many cases, has spoken of the mischief and confusion thus occasioned, (*Yundt's Estate*, 6 Pa. St. 35; *Com. v. Snyder*, 62 Pa. St. 153; *Jones' Appeal*, 99 Pa. St. 124.) and the rule of court forbids it in express terms. Equally objectionable is the practice of including investments in the administration account, the obvious effect being to show a balance for distribution less than what is actually held. The amounts credited for payments in distribution and for investments will be added to the balance shown by the adjudication, as will also the portions of the estate taken in distribution, and not debited at all; and the whole will be awarded to the accountant, subject to payments so made in distribution, to be held for the purposes of the trust. In this way the shares of the distributees will be made apparent.

"With regard to the investments in the bonds of the Oregon Pacific Railroad Company, the majority of the court concur with the auditing judge in the opinion that upon the whole will the intention of the testatrix as to the discretionary powers of the accountant is apparent. Speaking for myself, I do not concur in this view. It is conceded, as it must be, that the investment was not one which an executor or trustee, in the absence of authority conferred by the instrument creating the trust, is permitted to make; for while the measure of care required of a fiduciary is, in general, that which a man of ordinary prudence exercises in the management of his own affairs, a much more restricted rule governs in the case of his investments, especially, it would seem, in Pennsylvania, where even an act of the legislature is not permitted to authorize the investment of trust funds in the bonds or stock of any private corporation. Const. art. 3, § 22. It is true, this may be authorized by the creator of the trust; but, where such a provision is relied on, it is for the trustee to establish it with the utmost clearness, and, when shown, it will be strictly construed. That he has acted with perfect good faith, and that sagacious capitalists, dealing with their own moneys, have bought the same securities, is immaterial, (*Ihmsen's Appeal*, 43 Pa. St. 431;) and though we may sympathize with an honest trustee, whose investment outside of those permitted by law has been made with a sincere desire to promote the interests of his beneficiaries, we are powerless to relieve him. The rule has been established for the protection of trust estates, and the hardship of any individual case is as nothing compared with the dis-

astrous results that would flow from its relaxation. The rule is founded upon the highest considerations of public policy. See *Perry, Trusts*, §§ 452, 460; *Mant v. Leith*, 15 Beav. 524; *Worrell's Appeal*, 9 Pa. St. 508; *Ihmsen's Appeal*, supra. Unless, therefore, there is that in the present case which enables us to say with certainty that the testatrix intended her executor not to be restrained in this respect, the consequences of his deviation from the plainly marked path ought to be borne by him alone. The necessary authority, it is said, is found in the provision appointing the executor 'with full power to take charge of my estate, and dispose of the same, both real and personal, at his discretion,' and in the emphatic declaration of the testatrix, when speaking of his powers with reference to allotment of shares to her children, that she 'has the most entire confidence that he will endeavor to do equal justice to all concerned,' coupled with the very extensive discretionary power throughout the will with regard to distribution of principal and income, and the fact that the will is that of a wife appointing her husband, in whom she has implicit confidence, executor. Is this sufficient? The discretion given in express terms relates, in the one case, to the power to 'dispose of' the estate, real and personal, by way of conversion, and, in the other, to his power to make distribution among his children. There is no grant of discretion with regard to investment, unless it is to be found in the direction that he is to 'have full power to take charge of' the estate. But taking charge of the estate confided to his care is simply what every trustee must do, and in the absence of a provision that his discretion shall extend to its 'management,' or to the management of the funds produced by the 'disposal' of it, can it be said that it appears beyond all question that enlarged powers of investment were intended? The power ought not to be sustained upon conjecture, nor inferred from general expressions of confidence, nor express grant of discretion as to matters not relating to the management of the fund. The presumption is against the existence of such a power, and all doubts should be resolved against the party asserting it. As, however, the opinion of the majority of the court is not in accordance with these views, the exceptions must be dismissed. The exceptions are dismissed, and the adjudication, with the modification as to credits for distribution and investment, confirmed absolutely."

J. Howard Gendell, for appellant. S. S. Hollingsworth and Richard C. McMurtrie, for appellee.

PER CURIAM. All the facts necessary to a proper understanding of the questions involved in this case are clearly and concisely stated in the opinion of the learned

auditing judge, and need not be repeated. A consideration of the questions arising upon said facts has led us to the conclusion that they were rightly decided, and, for reasons given in said opinion, we think the decree of the court below should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 512)

In re BARKER'S ESTATE. (No. 173.)
Appeal of MELLOR.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

On settlement of the first account of Abraham Barker, executor of the will of Sarah Barker, deceased, the accounts presented were allowed, and Deborah W. Mellor, a legatee and devisee, appeals. **Affirmed.**

John G. Johnson, for appellant. Richard C. McMurtrie and S. S. Hollingsworth, for appellee.

PER CURIAM. This case was argued with Anna B. Scott's appeal from same decree, and involves precisely the same questions. For reasons briefly stated in the per curiam opinion just filed in that case, (28 Atl. 365; No. 172 of this term,) the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 549)

FRISHMUTH v. BARKER.

(Supreme Court of Pennsylvania. Jan. 29, 1894.)

FALSE REPRESENTATIONS—ACTION TO RECOVER MONEY PAID—AFFIDAVIT OF DEFENSE.

Rule for judgment for want of sufficient affidavit of defense is properly denied where, in an action to recover money paid for an interest in a proposed banking organization to operate concessions which defendant is alleged to have falsely represented had been granted to him by the Chinese government, the affidavit of defense denies any false representations, and alleges that the concessions were granted to him, but were revoked after the transaction with plaintiff, and that all money paid defendant was applied to the expenses of the scheme.

Appeal from court of common pleas, Philadelphia county.

Action by William D. Frishmuth, Jr., to the use of himself and Benoni Frishmuth, against Wharton Barker. Rule for judgment for want of a sufficient affidavit of defense was discharged, and plaintiff appeals. **Affirmed.**

Plaintiff's statement of claim was as follows: "Plaintiff claims to recover of defendant the sum of \$1,250, together with legal interest from the 25th day of November, 1887, as follows: The defendant, on or about the aforesaid date, claiming and representing himself to be the owner of certain valuable banking concessions from the Chinese government for the furnishing of capital for the construction and operation of telephones, railways, mines, and other com-

mercial enterprises in China, received from the plaintiff the aforesaid sum of \$1,250 for fifty full-paid shares, of a par value of \$100 each, in a contemplated corporation to be known as the American and Oriental Banking Company, which company defendant then and there represented was about to be organized for the operation of said concessions, and to which the said concessions were to be transferred. Plaintiff avers that the said representations were false, in that the said Chinese government had not granted to the defendant any such concessions as aforesaid, and that, by reason of the failure of the defendant to procure said concessions, the said contemplated corporation was never organized, no certificates of stock were ever issued, and the entire plan for the same was wholly abandoned. Plaintiff further avers that the defendant has wrongfully and unlawfully appropriated the aforesaid sum to his own use, and has failed and refused to return the same, although requested so to do, and that the whole amount thereof, together with interest, as aforesaid, is justly due and owing to him from the defendant."

Defendant interposed an affidavit of defense, as follows: "Wharton Barker, the above-named defendant, being duly affirmed, says: I have just and true defense to the whole of the plaintiff's claim in the above matter, which I expect to prove on the trial of this case, of the following nature and character, to wit: In the month of November, 1887, a syndicate composed of a number of persons, including myself, was interested in certain proposed business enterprises about to be undertaken in China, and for which concessions had been granted by the representatives of the Chinese government to me and Count Eugene Minklewitz. The plaintiff, knowing that I was interested in this enterprise, desired to purchase a portion of my interest for himself therein, and approached me in reference thereto. All the papers in reference to the matter were submitted to the plaintiff, and examined by him. He saw the original documents in the Chinese language granting the concessions, and also the translations thereof. He read the documents. He then desired to purchase an interest which would represent the proportionate interest which \$5,000 would have in a joint interest, whose capital should be represented by \$20,000,000, or, if the capital should be increased beyond \$20,000,000, or made less than \$20,000,000, he desired to purchase an equivalent proportion of such increased or reduced capital, so that his entire interest should be the 1-4000 of whatever the capitalization of the entire interest concerned in these concessions should be; and for this he agreed to pay \$1,250. Prior to purchasing, the plaintiff and all those interested were expressly informed that if, for any reason, the original subscribers to the enterprise should deem

that a charter of incorporation would not be the most beneficial means of conducting the enterprise, whether owing to the impossibility of obtaining a charter with sufficiently large powers desired, or owing to expenses of taxation, or for any other cause, a special trust, instead of corporation, should be created, and certificates issued under the special trust to the parties interested therein, representing their interests in such trust; and the plaintiff purchased with this knowledge, and assented thereto. It was found that a sufficiently broad charter of incorporation could not be obtained, and a special trust was thereupon organized, and the concessions were transferred to such special trust as aforesaid; and in assigning the said concessions the defendant also bound himself to transfer to the special trust any concessions which he might acquire from the Chinese government during the ten years ensuing the year 1887. Certificates of interest in the form of certificates of stock therein were issued, and the fifty shares, representing the plaintiff's interest, were filled up to the said defendant, and have been ready for delivery to the said plaintiff whenever demanded by him, and of this he has been notified. After the special trust was created, the defendant was notified that the concessions were revoked by the Chinese government, and hence the whole scheme proved a total business loss. The money of the plaintiff was applied to the expenses incurred, which were about \$140,000, all of which were lost and sunk in the scheme. The plaintiff purchased expressly upon the papers which he read. He took the chance of the venture being a success or otherwise. He took the chance of the concessions being subsequently revoked. It was for this reason he only paid \$1,250 for a \$5,000 interest. Of this the plaintiff has been well aware for the past six years, and every other owner of interests has accepted, without complaint, the loss incurred thereby as a business risk. I deny that I made any representations of any kind other than those contained in this affidavit of defense, and I deny that I ever refused to issue the certificate to which the plaintiff was entitled, or wrongfully misappropriated the proceeds thereof. On the contrary, I have notified the plaintiff that, although worthless, he could have the certificate, and this the plaintiff has declined to accept. This transaction was over five years and eleven months prior to the writ issued in this case, and this writ was issued by reason of an action having been brought on October 24, 1893, by the assignee of Barker Brothers against the use plaintiff herein."

J. Martin Rommel, for appellant. A. T. Freedley, for appellee.

PER CURIAM. The affidavit of defense in this case is quite sufficient to carry the v.28A.no.6—24

case to a jury, and hence there was no error in discharging plaintiff's rule for judgment. Judgment affirmed.

(159 Pa. St. 559.)

MORCH v. RAUBITSCHKE.

(Supreme Court of Pennsylvania. Feb. 5, 1894.)

ARREST IN CIVIL CASES—JURISDICTION OF JUDGE — DISCHARGE OF DEFENDANT — REVIEW BY SUPREME COURT—JURISDICTION.

1. Where a defendant in a civil action, when arrested, must be brought before the judge issuing the warrant for his arrest, (Act July 12, 1842,) a judge other than the one who issued such warrant, though of the same court, has no jurisdiction of the proceedings under it.

2. The fact that a debtor has been tried for and acquitted of a criminal offense growing out of the transactions set forth in the complaint on which the warrant of arrest was issued is no ground for discharge.

3. The supreme court has jurisdiction to review on certiorari the proceedings of judges of the court of common pleas under a warrant for the arrest of a defendant or judgment debtor at the instance of the plaintiff, on whose complaint the warrant was issued.

Appeal from court of common pleas, Philadelphia county.

Action by Jacob Morch against Adolph Raubitschek, in which there was a judgment for plaintiff. Plaintiff obtained from James Gay Gordon, one of the judges of the court of common pleas No. 3, Philadelphia, a warrant for the arrest of defendant. On being arrested, defendant was taken before Thomas K. Finletter, another of the judges of such court, and was by him discharged. Plaintiff brings the proceedings to the supreme court for review on certiorari directed to such judges of the court of common pleas. Reversed.

Charles Lex Smyth and John Marshall Gest, for appellant.

STERRETT, C. J. This certiorari, directed to two of the judges of common pleas No. 3, Philadelphia, brings before us for review proceedings which were had under the warrant of arrest issued in the above-entitled case by the Honorable James Gay Gordon, one of said judges, under the act of July 12, 1842, after judgment had been entered against the defendant for want of an affidavit of defense. The right of a plaintiff, at whose instance such warrant has been issued, to have the proceedings reviewed here, has been too often recognized to be doubted. *Gosline v. Place*, 32 Pa. St. 520; *Berger v. Smull*, 39 Pa. St. 302; *Hart v. Cooper*, 129 Pa. St. 297, 18 Atl. 122; *Grieb v. Kuttner*, 135 Pa. St. 281, 19 Atl. 1040. In the last-cited case the question of jurisdiction was so fully considered that it may be regarded as definitively settled.

There is no question as to the sufficiency of the warrant, both in form and substance. It is grounded on a sufficient complaint made

before Judge Gordon, on oath of the plaintiff, and was regularly issued by him. It contains a recital of said complaint, and commands the officer to whom it is directed to arrest the defendant, and forthwith bring him before said judge at room E of the court of common pleas No. 3, etc. He was accordingly arrested, and brought, not before the judge who issued the warrant, but before the Honorable Thomas K. Finletter, president judge of said court. "And thereupon," as the bill of exceptions recites, "the said defendant, having been sworn, testified as follows: 'I am the defendant in this case. The plaintiff, Mr. Morch, lives in Brooklyn. I was arrested on a requisition before, and taken before the criminal court in New York, and tried before a jury on the same charges. They tried to prove that I got the goods on memorandum, but when it was shown that I bought the goods the judge told the jury to discharge me, and the jury acquitted me without leaving the box.' And thereupon the said Honorable Thomas K. Finletter discharged the said * * * defendant from custody." It is contended that the learned judge erred, not only in discharging the defendant without hearing on the merits, and for a wholly insufficient reason, but that he also erred in taking jurisdiction of the proceedings under warrant of arrest issued by another judge. Both of these positions appear to be well taken. There is nothing in the act of 1842 that authorizes such an assumption of jurisdiction, nor could it have been justified by anything that appears in the record. On the contrary, the act expressly provides that the defendant, when arrested, shall be brought before the judge who issued the warrant, and that he shall proceed to hear and dispose of the case. But assuming, for argument's sake merely, that he had jurisdiction, we think there was error in discharging the defendant because he had been tried and acquitted of a criminal offense growing out of the same transactions that are set forth in the complaint on which the warrant of arrest in this case was issued. The proceedings are entirely different. The former was a criminal prosecution, while this is a civil proceeding, at the instance of defendant's creditor. Defendant's acquittal of the criminal charge cannot, in the nature of a plea of *autrefois acquit*, be interposed as a bar to the civil proceedings. As was well said by Mr. Chief Justice Lowrie in *Gosline v. Place*, supra, the proceeding by warrant of arrest is "collateral to the action for a breach of contract, and in aid of it and dependent on it. * * * The proceeding is not at all a criminal one. The fraud is treated as a private injury, giving rise to a corresponding modification of the ordinary private remedy applicable to debts. If the debt be fraudulently contracted, or if it be fraudulently attempted to be evaded, this special remedy may be applied, whether the fraud be committed in or out of the

state; just as we allow actions of tort without question of the place where the wrong was done." Other cases to the same effect might be cited, among which are *Hutchinson v. Bank*, 41 Pa. St. 42; *Rohm v. Borland*, (Pa. Sup.) 7 Atl. 171. It follows from what has been said that the Honorable Thomas K. Finletter had no jurisdiction of the proceedings under the warrant of arrest, and, in so far as said proceedings were had before him, including his order discharging the defendant from custody, the same are reversed, and set aside, at defendant's costs, and record remitted.

(159 Pa. St. 556)

GROSS v. PARTENHEIMER.

(Supreme Court of Pennsylvania. Feb. 5, 1894.)

VENDOR AND PURCHASER—CONTRACT—INTERPRETATION.

In April, 1893, defendant, by written contract, sold plaintiff a lot, plaintiff to assume a mortgage thereon, plaintiff "to pay also the accruing interest on said mortgage." The interest on the mortgage was payable semiannually on the 28th days of February and August. *Held*, that "accruing interest" did not refer to interest due February 28, 1893, and unpaid.

Appeal from court of common pleas, Philadelphia county.

Action of assumpsit by Charles H. Gross against R. Partenheimer. From a judgment for plaintiff, defendant appeals. Affirmed.

William C. Mayne, for appellant. Geo. H. Chambley, for appellee.

STERRETT, C. J. In April, 1893, the parties to this suit entered into a written contract whereby defendant agreed to sell plaintiff a lot for \$8,000, payable \$5,000 in cash on delivery of deed, and the residue by plaintiff's assumption and payment of the mortgage for \$3,000, then on the lot; "said Gross to pay also the accruing interest on said mortgage, not exceeding six months, and also taxes on said lot for 1893. Title to said lot to be good and marketable, and free from incumbrances except said \$3,000 mortgage. Deed to pass and cash purchase money of \$5,000 to be paid on or about May 1, 1893, except \$50 thereof, now paid." The mortgage for \$3,000 was dated August 28, 1892, with interest semiannually on the 28th days of February and August. At the settlement, etc., May 1, 1893, the only items deducted from the consideration money were "cash paid on account, \$50," and "mortgage principal, \$3,000, interest from February 28, 1893," leaving \$4,950, which was then paid, and deed delivered. There was no controversy as to the taxes for 1893, or the interest on the mortgage from February 28, 1893. The six months' interest from date of mortgage to February 28, 1893, was past due and unpaid, and, to avoid foreclosure proceedings, plaintiff was compelled to pay the same, and this

suit was brought to recover that amount, with interest. As set forth in his statement filed, plaintiff's claim is substantially the foregoing. As disclosed by defendant's affidavit, the substance of his defense is that plaintiff was bound to pay not less than six months' interest on the mortgage, accrued and accruing up to the date of settlement, coupled with an averment that defendant is now, and always has been, ready "to allow said plaintiff the excess of six months' interest to date of settlement, to wit, the sum of \$31.50," etc. By assuming, as he then did, the mortgage debt, with accruing interest from February 26th to that date, plaintiff had already accounted for \$31.50, the amount of said "accruing interest." This, added to the \$90 past-due interest, which he was compelled to pay to prevent foreclosure of the mortgage, makes \$121.50 interest paid and assumed by him prior to the institution of this suit. Of this the defendant avers his willingness "to allow" \$31.50, which he terms "the excess," etc., thus holding plaintiff to what is claimed to be his contract liability to pay six months' interest up to date of settlement. This contention hinges entirely on the proper construction of the clause in the contract of sale above referred to, wherein the plaintiff agrees to pay "the accruing interest on said mortgage, not exceeding six months." There is nothing in the affidavit of defense that can in any wise aid or control the construction of this clause. If "accruing interest" means interest which, according to the terms of the security, was due and payable on February 26, 1893, and remained overdue and unpaid at the date of the contract, the defendant's construction should prevail; but we cannot agree that these words mean any such thing. Such a construction would be strained, and wholly unwarranted by the language employed. As generally understood, "accruing" interest means running or accumulating interest, as distinguished from accrued or matured interest. When we speak of interest which is from day to day accumulating on the principal debt, but which is not yet due and payable, we call it accruing interest. When we refer to interest heretofore payable, but still remaining unpaid, we speak of it as overdue interest, arrears of interest, or interest in arrear, just as we speak of rent in arrear. We are therefore of opinion that the words "accruing interest" do not refer to, nor in any manner embrace any part of, the six months' interest which was then overdue and unpaid. That interest was an incumbrance on the lot which the defendant was bound to remove. He refused to do so, and the plaintiff, who was compelled to pay it in order to prevent foreclosure of the mortgage, etc., is entitled to recover the amount thus paid, with interest from date of payment. The learned court was clearly right in adjudging the affidavit of defense insufficient, and en-

tering judgment against defendant for the amount claimed by plaintiff. Judgment affirmed.

(18 R. I. 413)

HALL v. BAIN, Town Treasurer.

(Supreme Court of Rhode Island. Nov. 23, 1893.)

TAXATION—PERSONAL PROPERTY — DEDUCTION OF INDEBTEDNESS.

Pub. St. c. 42, § 10, provides that no one shall be taxed for shares in a domestic corporation, the property of which is already fully taxed, or for shares in a corporation in another state, which is liable to taxation in that state; and that no one shall be taxed on personal property, except on the surplus of his ratable personal estate above his debts. *Held*, that it was improper to include such exempt corporate shares in the ratable personal estate from which one's debts were to be deducted to determine the taxable "surplus."

Appeal from court of common pleas, Providence county.

Action by William H. Hall against Hugh B. Bain, treasurer of the town of Cranston. Judgment for defendant for costs, and plaintiff excepts. Exceptions sustained.

Edward D. Bassett and Edward L. Mitchell, for plaintiff. George B. Barrows and John Palmer, for defendant.

MATTESON, C. J. This is an action of assumpsit to recover from the town of Cranston money paid by the plaintiff, under protest, to the defendant in his capacity of town treasurer of that town, in payment of a tax on personal property, illegally assessed against the plaintiff. The action was brought in the court of common pleas for Providence county. The defendant pleaded the general issue. Jury trial having been waived, the case was heard by the court on an agreed statement of facts, and judgment rendered for the defendant for costs. The plaintiff excepted to the judgment, and filed this petition for a new trial.

Pub. St. R. I. c. 42, § 10, is as follows: "Personal property, for the purposes of taxation, shall be deemed to include all goods, chattels, debts due from solvent persons, money and effects, wherever they may be; all ships or vessels, at home or abroad; all public stocks and securities, except those issued by the government of the United States; all stocks or shares in any bank or banking association; in any turnpike, bridge or other corporation within or without this state, except such as are exempt from taxation by the laws of this state: provided, that no shareholder shall be liable to taxation for shares held in any corporation within this state which in its corporate capacity is taxed within this state for an amount equal to the value of its property, or in any corporation without this state which is, or the shares in which are liable to taxation in the state where such corporation is loca-

ted: and provided, that no person shall be liable to taxation on personal property, except upon the surplus of the ratable personal estate owned by him over and above his actual indebtedness." The agreed statement of facts shows that the plaintiff at the time of the levy and assessment of the tax was possessed of personal property to the amount of \$69,402; that his actual indebtedness was \$42,850. The assessors, in making the assessment, deducted the \$42,850 from the \$69,402, and assessed the plaintiff for the difference, \$29,720. The plaintiff contends—we think, correctly—that this action of the assessors was erroneous, for the reason, as also shown by the agreed statement of facts, that of the \$69,402, which made up the total of the plaintiff's personal estate, \$39,682 was property within the first proviso of said section 10, and therefore not assessable or ratable estate of the plaintiff. This being so, the assessors had no authority to include it as a part of his ratable personal estate from which his indebtedness was to be deducted in ascertaining the surplus of his ratable estate over and above his actual indebtedness, under the second proviso of said section 10. As the amount of the plaintiff's ratable personal estate was only \$29,720, and as his indebtedness was \$42,850, he had no surplus of ratable personal estate, and hence was not liable to assessment for a personal property tax. The case was argued on the part of the defendant as if it was one merely of overtaxation, and it was contended that the plaintiff was without a remedy, because the account carried in by him to the assessors was insufficient, in that it did not state exact sums as the values of the different parcels of his personal estate, but stated these values only approximately as about such and such sums. We have not deemed it necessary to consider the sufficiency of the account, since the case is not merely one of overtaxation, but is one of illegal taxation as well. The exception is sustained, and the case remitted to the common pleas division, with direction to enter judgment for the plaintiff for the amount of the tax on personal property so illegally assessed, and interest to the date of the judgment, with costs.

(87 N. H. 274)

STATE v. ALMY.

(Supreme Court of New Hampshire. Grafton. July 20, 1892.)

MURDER—PLEA OF GUILTY — DETERMINATION OF DEGREE—RIGHT TO JURY TRIAL—WAIVER.

1. A person indicted for murder may waive his constitutional right to a jury trial by pleading guilty.

2. Gen. Laws, c. 282, § 3, which provides that on a plea of guilty of murder the court having cognizance of the offense shall determine the degree, is valid.

Case reserved from Grafton county; before Justices Doe and Allen.

Frank C. Almy was convicted of murder in the first degree, and moves for a new trial. Denied.

The defendant pleaded guilty, and the question of degree was determined by the court, in pursuance of Gen. Laws, c. 282, § 3. Murder was admitted. The only question was whether it was of the first or second degree, and it was found to be of the first degree. After judgment the defendant objected, and moved for a new trial, on the ground that the determination of the degree by the court was legal error, because his right to have the question of degree tried by jury cannot be waived, and the statute is unconstitutional.

Edwin G. Eastman, Atty. Gen., and W. H. Mitchell, for the State. Alvin Burleigh and J. C. Story, for defendant.

BLODGETT, J. In criminal proceedings a confession of the offense by the party charged by a plea of guilty is the highest kind of conviction of which the case admits, (2 Hawk. P. C. c. 31, § 1; 2 Hale, P. C. 225; 4 Bl. Comm. 362;) and subjects him precisely to the same punishment as if he were tried and found guilty by verdict, (1 Archb. Crim. Pr. & Pl. p. *110;) and the effect of a confession being to supply the want of evidence, (Rex v. Hall, 1 Term R. 320,) it is an admission of every material fact well pleaded in the indictment, and authorizes the court having jurisdiction of the offense to proceed to judgment, (4 Bl. Comm. 329; 1 Chit. Crim. Law, 429; 1 Bish. Crim. Proc. 795.) "Of judgments * * * in criminal cases there are two kinds—First, such as are fixed and stated, and always the same for the same species of crime; secondly, such as are discretionary and variable, according to the different circumstances of each case. * * * The judgment against a man or woman for felony of death hath always been the same since the reign of Hen. I., viz. that he or she be hanged by the neck till dead. * * * As to judgments * * * which are discretionary and variable, according to different circumstances, I shall observe, in general, that for crimes of an infamous nature * * * it seems to be in great measure left to the prudence of the court to inflict such corporal punishment, and also such fine and lien to the good behavior for a certain time, etc., as shall seem most proper and adequate to the offense, from the consideration of the baseness, enormity, and dangerous tendency of it, the malice, deliberation, and willfulness, or the inconsideration, suddenness, and surprise with which it was committed, the age * * * of the offender, and all other circumstances which may any way aggravate or extenuate the guilt." 2 Hawk. P. C. c. 48, §§ 1, 7, 14. Prior to 1837 degrees of murder were unknown in this state, and, upon conviction, the invariable judgment was death. In that year, by the legislative act of January 13th, which has since been in

force, the crime of murder was divided into two degrees, and transferred from the first class of crimes, in which the judgment is invariable, to the second class, in which the judgment is variable. It was recognized as a crime of different grades of enormity, deserving different penalties, and so the punishment was made more or less severe, according to certain aggravating or extenuating circumstances. See note, *State v. Dowd*, 19 Conn. 391. But the act did not create any new offense, or change the definition of murder as it was understood at common law. It merely mitigated the punishment in certain cases not of the most aggravated nature; and hence an indictment alleging murder in the same form as at common law will support a verdict of guilty of murder in the first degree under the act. *Com. v. Desmarteau*, 16 Gray, 1; *State v. Pike*, 49 N. H. 399, 405, and authorities cited; *Craig v. State*, (Ohio, May 10, 1892,) 30 N. E. 1120. Such an indictment "sets forth * * * the highest grade of homicide, murder in the first degree, and thereby includes the inferior grade of murder in the second degree, in like manner as an indictment for murder at common law embraces a charge of manslaughter, which is comprehended in the allegations necessary to charge the higher offense. The only difference in the two cases is that in the latter the indictment charges two distinct offenses, but in the former, as applied to degrees of murder, only one offense is charged, but in such form that it includes the higher as well as the lower grade, to which different punishments are attached." *Green v. Com.*, 12 Allen, 155, 173. Neither did the act make any change in the effect of a plea of guilty. It still confesses everything that is duly set forth, as a plea of not guilty puts in issue every fact which is comprehended within the averments of the indictment. When, therefore, this defendant pleaded guilty to the indictment charging upon him, in common-law form, killing with deliberate and premeditated malice, his plea was a confession that he was guilty of the common-law crime of murder, which the statute has not altered, and but for which a judgment of death would have been imperatively required; for, while the statute in no way detracts from the force or effect of the plea, it makes it the duty of the court to ascertain before judgment whether the extreme sentence which would otherwise follow the plea is warranted by the facts. "If any person shall plead guilty to an indictment for murder hereafter committed, the justices of the court having cognizance of the indictment shall determine the degree." For this purpose an inquiry was necessary into the circumstances of the defendant's crime, tending to show the higher or lower degree of enormity which the law recognizes, as it is necessary, when a defendant pleads guilty to an indictment for burglary, under Pub. St. c. 276, § 1. He is

to be imprisoned "not exceeding twenty-five years," but the court has no means of knowing whether the penalty should be 25 or 10 years, or the lowest possible limit of a year and a day, unless some information is given on the subject at a hearing on the degree of enormity. But nobody, it is believed, ever supposed that such a defendant has a constitutional right to a jury trial of this question. It is not an issue in any legal sense, and nobody, it is believed, ever supposed that the accused has a constitutional right to a jury trial to determine whether he shall be fined or imprisoned, or ordered to recognize to keep the peace, (chapter 278, § 20,) in a case of assault, or be fined and imprisoned in the county jail, or sent to the state prison, (chapter 272, § 1,) for adultery. And certainly the generation which made and adopted the constitution did not understand that the kinds or amounts of punishment to be imposed by variable judgments are issues triable by jury, for the act of February 8, 1791, "for the punishment of certain crimes," provided that a person convicted of one crime should be fined or set on the gallows, and might be imprisoned; that for another offense the convict should be set on the gallows one hour, with a rope about his neck, and one end thereof cast over the gallows, and imprisoned, bound to good behavior, and fined, and the court should order the person convicted to suffer all or part of the foregoing punishments, according to the circumstances and aggravations of the offense; for another offense the convict was to be set in the pillory, whipped, imprisoned, bound to good behavior, or fined, or suffer any or all the foregoing punishments, according to the nature and aggravation of the offense; for another the penalty was fine, imprisonment, or whipping, as the court, considering the nature and aggravation of the offense, may order; for another, sitting in the pillory, imprisonment, and fine, or any or all of these punishments, according to the nature and aggravation of the offense. See, also, *Prov. Laws*, (Ed. 1761,) pp. 11-14. "We regard it as a well-settled and unquestioned rule of construction that the language used by the legislature in the statutes enacted by them, and that used by the people in the great paramount law, which controls the legislature, as well as the people, is to be always understood and explained in that sense in which it was used at the time the constitution and laws were adopted." *Opinion of the Justices*, 41 N. H. 551. If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal nature and effect of a plea of guilty have been very imperfectly understood, not only by the authors of the constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law.

The necessary statutory inquiry into the circumstances of the defendant's crime has been made. His plea has been found to be warranted by the facts, and judgment has followed accordingly. In ascertaining the degree of his crime, he has been fully heard by himself, his witnesses, and counsel. Every facility has been provided him at the public expense to present before an impartial tribunal all the facts or circumstances tending in any way to mitigate or extenuate his guilt. No want of competent intelligence to make the plea is averred, and no mistake or misapprehension as to its effect is alleged. No evidence against him is claimed to have been improperly admitted, and no evidence in his favor is claimed to have been improperly rejected. His sole complaint is that he has had no trial, in the constitutional sense of the word. But his plea precluded such a trial. "The proceeding * * * to determine the degree of the crime of murder after a plea of guilty is not a trial, nor has the defendant any right to have that question determined by a jury." *People v. Noll*, 20 Cal. 164. The only question remaining was whether there were extenuating circumstances affecting his punishment, and mitigation of punishment on a plea of guilty is not made a question for the jury by the common law or the statute or the constitution. *Opinion of the Justices*, 9 Allen, 586. "When a prisoner on his arraignment hath pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, a jury is impaneled." 3 Bl. Comm. 330, 352; 4 Bl. Comm. 350; 1 Archb. Crim. Pr. & Pl. 110. And while in some states the common law has been so altered as to confer on the jury who try the general issue of guilt the power of deciding what punishment shall be imposed by a variable judgment, as well as the power of deciding the issue, and while an innovation of this kind was introduced in this state by the provision of the act of 1837, that "every jury who shall find any person guilty of murder hereafter committed shall also find by their verdict whether it is of the first or second degree," it has not been enacted that there shall be a trial by jury to determine the punishment, when there is no issue, and no denial of any allegation of the indictment, but a general, unqualified confession of guilt by a plea of guilty. *People v. Noll*, supra. Nor does the constitution confer any such right. "Trial by jury," in article 16 of the bill of rights, is common-law language, used in its common-law sense. It means trial by 12 men, who return their unanimous verdict "upon the issue submitted to them." But while the right of every one to have his cause tried, or to be tried himself, if accused of crime, by a jury, is guaranteed and established beyond the power of the legislature to abridge it, the constitution does not compel any one to exercise the right thus secured, and there is no

reason whatever to suppose that its makers designed to repeal or alter the moss-grown rule of the common law "by which a party indicted for an offense, however grave its nature, may enter a plea of guilty thereto, if he sees fit so to do," or the other no less well-established rule that "in such a case there is no issue to be submitted to a jury on which a verdict can be founded." "The trial by jury, secured to the subject by the constitution, is a trial according to the course of the common law, and the same, in substance, as that which was in use when the constitution was formed." *East Kingston v. Towle*, 48 N. H. 64.

The constitutional rights of the defendant have not been hampered or in any way abridged. The right of trial by jury remained to him after the act of 1837, the same as before. The act is not only in perfect harmony with the constitution in this respect, but, by mitigating the punishment for murder in cases not of the most aggravated nature, and by giving an additional tribunal for the ascertainment of the degree, it manifestly conferred a benefit upon the defendant, instead of depriving him of a right. By pleading guilty, he voluntarily relinquished his constitutional right of trial by jury, as he would by pleading guilty to an indictment for larceny, arson, or any other crime. It was entirely for him to say whether there should be an issue and a trial or not. He knew there would be a trial if he pleaded the general issue, and he also knew that the prosecution would not accept a plea of guilty of murder in the second degree. He preferred to have no issue and no trial, but to have a hearing, under the statute, in regard to the circumstances of the admitted murder, which he claimed would affect the penalty for the single and undivided crime of which he chose to be convicted on his confession. This he might lawfully do. "The legislature have the general power to constitute new tribunals, and to provide new modes of trial for future cases, provided the right to a trial by jury, such as the constitution intends, is secured to every one in the last resort, in every case where it is guaranteed by the constitution." *Opinion of the Justices*, 41 N. H. 552. "The supreme legislative power within this state shall be vested in the senate and house of representatives, * * * and shall be styled the 'General Court.'" Const. arts. 2, 3. "The general court shall forever have full power and authority to erect and constitute judicatories and courts of record or other courts, to be holden in the name of the state, for the hearing, trying, and determining all manner of crimes, offenses, pleas, processes, complaints, actions, causes, matters and things whatsoever, arising or happening within this state, or between or concerning persons inhabiting or residing or brought within the same, whether the same be criminal or civil, or whether the crimes be capi-

tal or not capital, and the said pleas be real, personal, or mixed, and for the awarding and issuing execution thereon." Id. art. 4. And, by article 5, "full power and authority are hereby given and granted to said general court, from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, * * * so as the same be not repugnant to this constitution, as they may judge for the benefit and welfare of this state and for the governing and ordering thereof and of the subjects of the same." These broad provisions are, for the purposes of this inquiry, restricted only by the declarations of the bill of rights, intended for the better security of persons accused of crimes against arbitrary and hasty public prosecutions, that "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land; * * *" and that the legislature shall not "make any law that shall subject any person to a capital punishment * * * without trial by jury." Articles 15, 16.

It is only necessary, therefore, in order to determine whether the legislature transcended its power in the act of 1837, to inquire whether it is prohibited by the constitution. As we have already seen, the right of the accused to a jury trial was not affected, and we can therefore have no doubt that the proceeding, whether it possesses the essential attributes of a trial in the common sense of the word or not, required by the act to ascertain the degree of the crime where in an indictment for murder the defendant enters a plea of guilty, is constitutional and valid. Statutes of like or similar import have been enacted in many of the states, and have never been held to be unconstitutional; on the other hand, they have been repeatedly and uniformly held to be constitutional. *Craig v. State*, supra; *State v. White*, 33 La. Ann. 1218; *State v. Askins*, Id. 1253; *People v. Noll*, supra; *People v. Lennox*, 67 Cal. 113, 7 Pac. 260; *State v. Worden*, 46 Conn. 349; *In re Staff*, 63 Wis. 285, 23 N. W. 587; *Dailey v. State*, 4 Ohio St. 57; *Jones v. Com.*, 75 Pa. St. 403. And see *State v. Kaufman*, 51 Iowa, 578, 2 N. W. 275; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773; *Darst v. People*, 51 Ill. 286; *League v. State*, 36 Md. 257; *State v. Moody*, 24 Mo. 560; *Ward v. People*, 30 Mich. 116, *Sarah v. State*, 28 Ga. 576; *Harris v. People*, 128 Ill. 585, 21 N. E. 563.

Irrespective of the statute, however, the defendant's condition must be held to have been according to "the law of the land." The right of the accused to plead guilty upon his arraignment has been universally recognized from the earliest period in the history of criminal procedure, and from the same period the universally recognized ef-

fect of the plea has been to authorize the court having cognizance of the offense to proceed to judgment; and if, contrary alike to the express and unambiguous language of the statute and every known rule of construction, it was held that the defendant had a constitutional right of trial by jury on his plea of guilty, he waived the right by voluntarily submitting to the tribunal having jurisdiction of the offense the determination of the degree of his guilt, and must abide the consequences. "A party may waive a constitutional, as well as a statute, provision made for his benefit." *Lee v. Tillotson*, 24 Wend. 337, 35 Amer. Dec. 624, 626, and note. "In our bill of rights jury trial is a liberty reserved by the people, and excepted out of their grant of governmental powers. * * * It is a private right of the subject, and not a public right of the state," (*Wooster v. Plymouth*, 62 N. H. 193, 196;) and it has always been so understood here, (*Dartmouth College v. Woodward*, 1 N. H. 129; *State v. Albee*, 61 N. H. 423, 427, 429.) It is one of the rights not surrendered by the people when they formed themselves into a state, and by its reservation they exempted themselves from the authority of the government they created to abridge it. The purpose was to secure to suitors and persons accused of crime, as individuals, the right and privilege of having their causes heard and determined by a jury, "as a protection of the subject against the government, and of the weak subject against the powerful subject. * * * It is a security, not for the sovereignty, the independence, or the public property of the state, but for private life, private liberty, and private property, against all power, public and private." *Wooster v. Plymouth*, supra. The prohibition, in article 16 of the bill of rights, of "any law that shall subject any person to capital punishment * * * without a trial by jury," must therefore be interpreted as a protection of the accused, and a security for his exclusive benefit, and, as such, he may avail himself of it, or waive it, at his own election. *Jones v. Robbins*, 8 Gray, 329, 339, 341. And we fail to find in that article, or any other provision of the constitution, any language which precludes or denies to the accused the power or option to waive a jury without authority of statute. But this question is not presented by the case, and consequently will not be discussed. It is enough that the legislature, in the exercise of the power with which it is invested by the constitution, has provided, at the option of the accused, a mode of trial in capital cases without the intervention of the jury, and that the defendant has availed himself of the option.

While the defendant's objection was too late, and gives him no rightful standing here, (*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *Alexander v. U. S.*, 138 U. S. 353, 11 Sup. Ct. 350,) his case has nevertheless been considered as if the objection had been seasonably

made, and we are constrained to hold, without doubt or difference of opinion, that the judgment against the defendant was and is in all respects legal and valid. Motion for a new trial denied.

DOE, C. J., and ALLEN, J., did not sit.

(55 N. J. L. 326)

LEHIGH VAL. R. CO. v. SNYDER.

(Court of Errors and Appeals of New Jersey.
Jan. 29, 1894.)

CONTRACT OF EMPLOYMENT — CONSTRUCTION —
RULES OF MASTER — CHANGE IN RULES — NOTICE
— DISCHARGE.

1. When one enters into the employment of another under a written contract, his duty to his employer must be measured by its terms.

2. By the terms of the written contract, the employe was to obey certain rules and regulations, and such other reasonable regulations as a superintendent should afterwards make. *Held*, that the employe must receive notice of new regulations before he will be bound by them, but evidence to establish notice need not show an actual delivery to him of a copy; and evidence reasonably justifying an inference that he received notice thereof will be admissible.

3. By the same contract the employe became accountable for the safe delivery of the full weight of any cargo delivered to him for carriage, and was bound to be present at the weighing of the cargo by the consignee on delivery, and to see that proper weights were marked on the receipt; and the employer was authorized to retain in its hands any money due the employe to an amount sufficient to cover any shortage in the cargo. It was also stipulated that an employe might be discharged for disobedience of an order of the superintendent. *Held* that, if the employer held no money of the employe to retain upon a claim for shortage, the superintendent could not lawfully order him to pay an amount for shortage which he disputed, and, upon his refusal so to do, could not lawfully discharge him from his employment. (Syllabus by the Court.)

Error to supreme court.

Action by Milton Snyder against the Lehigh Valley Railroad Company to recover for breach of contract. There was judgment for plaintiff, and defendant brings error. Reversed.

The other facts fully appear in the following statement by MAGIE, J.:

Snyder, the defendant in error, brought this action in the Warren common pleas against the Lehigh Valley Railroad Company, (lessees of the Morris Canal,) the plaintiff in error, to recover (1) freight earned in carrying coal on the canal under the employment of plaintiff in error, and (2) damages for unlawful discharge from such employment. It appears by the bills of exceptions that Snyder's contract of employment with the railroad company was in writing, and as follows: "Office Morris Canal, (Lehigh Valley Railroad Company, Lessees.) Phillipsburg, N. J., April 2, 1891. Milton Snyder, of Phillipsburg, N. J., is hereby employed to run boat No. 468 (or such other boat as the proper officers of said company may assign

to him in lieu of said boat No. 468) for the Lehigh Valley Railroad Company, lessees of the Morris canal, during the boating season of 1891, ending December 15, 1891, under and subject to the Rules and Regulations of the Morris Canal, edition of March 1st, 1891, a copy of which is hereby delivered to him. James E. Moon, Agent. Milton Snyder. Witness: D. S. Sweeney." A copy of the rules and regulations mentioned therein were delivered to Snyder on the execution of the contract. Among the rules and regulations were the following: "(6) The captain will be held strictly accountable for the safe delivery of his cargo, full weight, to whatever destination he may be ordered by the superintendent or agents; it being understood that the destination may be changed while the cargo is on its way; and, should the cargo fall short in weight, the company reserves the right to retain from the captain's freight, or any other moneys due, or which may become due, to the captain, an amount sufficient to cover the value of said shortage." "(8) The boatmen will be required to furnish and attend the guy line while unloading at destination, or pay whatever may be the charge for so doing, and must be present personally, and attend to moving and fastening their boats while unloading, and also when their cargoes are weighed out, to ascertain where and how weighed, and to see that the proper weights are marked on their receipt, or a statement given them of their weights. As soon as discharged, captains must have their receipt properly filled out, and signed by the consignee, and personally present it for settlement." "(48) The superintendent of the company may at any time make such reasonable regulations as he may deem advisable, which must be obeyed the same as the general regulations." "Refusal to obey the orders of the superintendent or his agents, and drunkenness or abusive conduct, shall be cause (at the option of the superintendent) for the discharge of any captain." It further appeared that the following notice: "Morris Canal Office. L. V. R. R. Co. May 20, 1891. Phillipsburg, N. J. Notice to Captains: From this date, article 6 of the general regulations, relating to cargoes falling short in weight, will be enforced, unless captains can bring positive proof that it was incorrectly weighed out, and that they witnessed the weighing of the entire cargo, keeping a tally of the same, which must be produced when settling their freight. By order of William I. Powers, Supt. (A);"—was posted on the bulletin in the collector's office, where such orders were customarily posted for the inspection of captains and boatmen, and that Snyder, who had then been some time in his employment, was in the office after the notice was posted. Upon objection, the offer of the notice was overruled, and exception taken. Other exceptions were taken to the charge and refusals to charge. The judgment of

the common pleas was in favor of Snyder. Having been removed to the supreme court, the judgment was there affirmed, and this writ of error was taken.

Robert H. McCarter, for plaintiff in error.
B. C. Frost, for defendant in error.

MAGIE, J., (after stating the facts.) It appears from the bills of exception that the principal contest on the trial of this cause was upon the question whether Snyder was rightfully discharged from his employment by the railroad company. It further appears that, from the evidence admitted by the court below, it was open to the railroad company to contend, and it did contend, that it had loaded on Snyder's boat a cargo of coal consigned to the Lehigh Valley Coal Company, weighing 72 tons, 2 cwt.; that cargoes thus consigned were not weighed on delivery, which fact Snyder knew; that during the transit of this cargo the consignment was changed, pursuant to the rules and regulations of the railroad company, and the substituted consignee was one Lehman; that, upon delivery to Lehman, the cargo was weighed, and contained but 68 tons; that Snyder did not attend to or observe the weighing of the cargo by Lehman; that the railroad company required Snyder to account for the shortage of 4 tons, 2 cwt.; that its superintendent ordered Snyder to do so, and he refused, accompanying his refusal with vile, indecent, and abusive language addressed publicly to the superintendent; that on other occasions Snyder had been guilty of abusive conduct to agents of the railroad company while in the discharge of their duties; and that he was discharged thereupon for his refusal to obey the superintendent's orders and for his abusive conduct. The contention was that this discharge was justified by the terms of Snyder's special contract of employment.

The attitude of the common pleas upon this contention is shown by the following portion of the charge, which was excepted to, and on which error has been assigned. "The contract between the plaintiff and defendant, upon which suit was brought, is a contract of hire, and not of bailment, strictly speaking. The rules and regulations are not absolutely necessary as imposing a duty on Snyder to safely deliver his cargo. That duty the law infers. If the rules and regulations are to be construed literally, then nobody but a fool would sign them." While this statement is not free from obscurity, it is obvious that it must have been designed to instruct the jury that Snyder's duty in respect to his cargo was such as arose, not upon his special contract of employment, but only such as the law infers from the relation of master and servant. This was clearly erroneous. It was an admitted fact in the case that Snyder entered his employment under a written contract,

and his duty to his employer was to be discovered in, and measured by, its terms. Those terms could not be disregarded in determining his duty, in the absence of proof of incapacity to contract. By the terms of his contract, Snyder was to obey, not only the rules and regulations there furnished him, but also such reasonable regulations as the superintendent should afterwards make. Obviously, however, he could not be held bound by new regulations 'unless he had received notice of them. It was shown that the superintendent had made a new regulation respecting the duty required by article 6 of the general regulations, and it became a question whether Snyder had notice of it. The common pleas rejected evidence offered by the railroad company to show such notice, which evidence is set out in the statement preceding this opinion. In this rejection there was also error, and the exception thereto is well taken. Evidence to establish notice of a new regulation need not show an actual delivery of a copy thereof into the hands of the person to be notified. It will be admissible if it justifies a reasonable inference that he received notice. *Francis v. Railroad Co.*, (Mo. Sup.) 19 S. W. 935; *Wilson v. Inhabitants of Trenton*, 53 N. J. Law, 645, 23 Atl. 278. Evidence that the copy was posted on the bulletin, where other notices were by the rules and regulations to be posted for such information, coupled with proof that Snyder had subsequently been in the office where the bulletin board was, ought to have been admitted, and, in the absence of denial or counter proof, would have justified the inference that he had notice.

Another assignment of error is directed to the exception taken to the refusal of the common pleas to charge, as requested, that if the jury believed that Snyder had refused to obey the orders of the superintendent by refusing to settle his freight according to his contract, or had been guilty of the abusive conduct testified to, his discharge was justifiable. As before stated, the measure of Snyder's duty is to be learned from his contract of employment. By section 6 of the rules and regulations he was accountable for the safe delivery of the full weight of any cargo delivered to his boat for carriage. By section 8 he was bound to be present when the cargo was weighed out on delivery to the consignee, "to ascertain where and how weighed, and to see that the proper weights are marked on the receipt." This duty was of great consequence to his employer, to prevent it from being injured by careless or fraudulent weighing on the part of the consignee. This duty Snyder wholly failed to perform as to this cargo. But these terms must be construed with reference to the subject-matter of the contract, viz. the carriage and delivery of coal. Coal, when loaded, is weighed by the railroad company. The captain may

be present, and see that the weighing is properly done. If present, and he does not object, or if absent, and he accepts a manifest specifying the amount of load, he doubtless becomes chargeable, *prima facie*, with that amount; but it would be open to him to prove that by error or mistake too great a weight was entered in the manifest. So, coal is weighed by the consignee on delivery. The captain not only could be, but was bound to be, present, and to see that it was weighed correctly, and a receipt for its true weight was given. If, in breach of his duty, he absented himself from such weighing, and accepted a receipt for the amount so weighed out, he would no doubt be chargeable, *prima facie*, in a settlement with his employer, with the amount of shortage. This results from his agency for his employer and his dereliction of duty. But it would also be open to the captain to prove that by error or mistake the consignee receipted for a less weight than he actually received. Another clause contained in section 6 provides that the company may retain from the captain's freight or other moneys due him an amount sufficient to cover the value of the shortage. Construed together, these provisions give the right to the employer to retain the value of the shortage *prima facie* shown. If there is no money in its hands upon which to exercise the right of retention, it has its action against the captain for the value of the shortage. If there is money improperly detained on this claim of right, the employee has his action therefor. In either action, whether or not there was a shortage can be determined.

Applying this construction of the contract to the case in hand, it is clear that Snyder was *prima facie* liable to account for the value of the shortage of 4 tons and 2 cwt., and the railroad company might retain from him the value thereof out of moneys in its hands. If it had none, it could sue Snyder for the value of the shortage; if Snyder claimed that money was improperly retained, he could sue the company; and in either case the question would be whether there was an actual shortage. But the instruction under review assumes that, if the company has no money in its hands to retain for shortage, its superintendent may lawfully order the captain accountable therefor to pay such shortage; and the claim is that upon disobedience of such an order the captain might properly be discharged. The stipulation that an employee may be discharged for disobedience of the order of the superintendent must be limited to such orders as the superintendent could lawfully give. But an order to pay such shortage—at least in a case where the fact that there is a shortage is disputed—is plainly not one within the superintendent's power. The employee has the right to have the question of fact determined by a competent tribunal, and not by the mere arbitrary act of his

employer, interested in its determination. The result is that the instruction now under consideration was properly refused. It was asked now upon alternative grounds, and, as it would have been improper upon one of those grounds, it could not be rightfully given. Had the request been confined to the ground of abusive conduct, it would probably have been proper; but the court was not bound to sever the two propositions which were combined in the request, or on which the instruction was asked. The result, however, is that, for the errors first pointed out, the judgment must be reversed.

(56 N. J. L. 222)

STATE (WHITE, Prosecutor) v. MAYOR, ETC., OF BOROUGH OF NEPTUNE CITY.

(Supreme Court of New Jersey. Dec. 16, 1893.)

JURISDICTION OF JUSTICES OF THE PEACE—VIOLATION OF ORDINANCES — SUFFICIENCY OF COMPLAINT—REVIEW ON CERTIORARI.

1. The proceedings prescribed by the second section of "An act respecting licenses in incorporated boroughs" (P. L. 1892, p. 293,) are civil suits in the courts for the trial of small causes.

2. In order to give the justice's court complete jurisdiction in proceedings under the statute above mentioned, there must be filed in the court a complaint on oath or affirmation that a person designated has violated a certain section of an ordinance passed under authority of the act; and a summons, stating what section of the ordinance has been violated, must be served upon the person designated.

3. If the complaint refer to one section of the ordinance, and the summons refer to a different section, the court will not obtain complete jurisdiction to try the defendant for violation of either section; and a judgment against the defendant, based on such proceedings, may be reviewed by certiorari.

4. The jurisdiction of the justice's court in such cases is not impaired by the fact that the acts charged against the defendant were in contravention of a section different from that referred to in the complaint and summons.

5. If, in certiorari, a reason assigned for reversal be the unconstitutionality of a statute, and such reason be not mentioned in the argument or brief of counsel for the prosecutor, it may be regarded by the court as waived.

(Syllabus by the Court.)

Certiorari at the suit of William P. White against the mayor and common council of the borough of Neptune City to review a conviction before a justice of the peace for violating a borough ordinance. Dismissed.

Argued November term, 1893, before AB-BETT and DIXON, JJ.

David Harvey, Jr., for prosecutor.

DIXON, J. The prosecutor was sued in four actions instituted by the mayor and council of the borough of Neptune city before a justice of the peace in the county of Monmouth for penalties said to have been incurred by the violation of an ordinance of the borough passed under authority of "An act respecting licenses in incorporated boroughs," approved March 28, 1892, (P. L.

1892, p. 293.) Judgments having been rendered against him in these proceedings, he has removed them to this court by writs of certiorari, and now assails them chiefly upon the ground that they lack the essentials of "summary convictions." The justice before whom the suits were brought regarded them as actions in the court for the trial of small causes, and has so entitled the records returned with the writs of certiorari. It is necessary, therefore, to determine in what capacity the judicial officer on whom power is conferred by the statute in question is to act, for the determination of that matter must have an important bearing upon the judgments which we should now render. The proceeding intended by the statute is a civil suit. This is, I think, conclusively settled by the decision of the court of errors in *Brophy v. City of Perth Amboy*, 44 N. J. Law, 217, upon provisions identical in substance with those now before us. In describing the procedure, the statute first empowers "every justice of the peace in any county" to issue process; then it directs "the said court, justice of the peace or recorder" to hear the testimony, and give judgment; and, finally, it requires "the said court, justice of the peace, police justice or recorder" to give judgment, and issue execution. It is not easy to gather the sense of such incongruous clauses as these, but the best construction I can put upon them is that the judicial officer intended is a justice of the peace, or a police justice, or recorder invested with the powers of a justice of the peace, and that such officer is to hold a court. Under these views, then, we have a court, presided over by a justice of the peace or an officer possessing the authority of a justice of the peace, and competent to entertain a civil suit.

The next question is whether the court thus contemplated by this statute is one newly created by the statute itself, or is the pre-existing and well known "justice's court." According to the decision in *Greely v. Passaic*, 42 N. J. Law, 429, we should deem it the justice's court, unless the act under review clearly indicates the contrary. The procedure prescribed by this act differs from that prescribed by the small cause court act in several respects. A complaint under oath before summons takes the place of a state of demand without oath after summons. The summons may be made returnable within a different period. And perhaps a trial by jury is denied, as apparently it can be, in even civil actions brought for the recovery of penalties imposed by municipal ordinances. *McGear v. Woodruff*, 33 N. J. Law, 213. But these modifications of the procedure do not necessarily lead to the conclusion that a new tribunal is to be erected. The machinery of the old justice's court is adequate for this new practice. Other features of the act strongly suggest that the legislature had in mind this existing ma-

chinery, for without its supplemental aid it will be difficult to give effect to this statute. The act directs that process in the nature of a summons is to be issued, but does not say by whom, or how it shall be served, or how its service shall be attested. It requires the court to give judgment for the penalty and costs, but does not say what costs. Execution is to issue against the goods and chattels and the body of the defendant, but to what officer the writ shall go, and how it shall be executed against goods and chattels, are not stated. On all these points the act constituting courts for the trial of small causes affords the needed information. So the act under review dispenses with a special order as preliminary to the awarding of execution against the body. Such an order is not required in any proceedings before a justice of the peace, except when he is sitting in the small cause court; and I think no reason can be assigned for this dispensation, except that the legislature in this statute regarded him as holding that court, and intended to change the practice of the court to this extent. On the whole, it seems most in harmony with the provisions of this act to hold that they are to be applied to suits brought in the court for the trial of small causes. This result is fortified by the consideration that thereby greater safeguards are thrown around the property and liberty of the individual than he would enjoy in summary proceedings before a magistrate.

Regarding the cases now before us as suits instituted in a justice's court, the next question is whether they can be reviewed by certiorari. The small cause court act provides (Revision, p. 564) that "from any judgment which may be obtained before any justice of the peace, except such as shall have been given by confession, either party may appeal to the court of common pleas," and (Revision, p. 556) that "where the justice has jurisdiction, no judgment hereafter to be rendered in any court for the trial of small causes, from which an appeal is given to the court of common pleas by this act, shall be removed into the supreme court or circuit court by certiorari or otherwise, for the correction of any supposed error therein; but the party thinking himself aggrieved shall have relief upon the appeal only, and that both as to matter of law and matter of fact." The judgments rendered below were not given by confession, and therefore the prosecutor could have appealed to the common pleas; and, consequently, if the justice had jurisdiction, the writs of certiorari were improvidently allowed. Jurisdiction is of two sorts,—jurisdiction over the subject-matter, and jurisdiction over the party with reference to that subject-matter. *Van Doren v. Horton*, 25 N. J. Law, 206; *Munday v. Vail*, 34 N. J. Law, 418; *Funch v. Smith*, 43 N. J. Law, 484. Both elements of complete jurisdiction are necessary to deprive a party in a

justice's court of the remedy by certiorari. *Williamson v. Middlesex Common Pleas*, 42 N. J. Law, 386, 396. Under the statute with which we are now dealing, jurisdiction over the subject-matter depends upon the filing with the justice of a complaint, an oath, or affirmation that a designated person has violated a certain section of an ordinance passed under authority of the act; and jurisdiction of the person is obtained by issuing and serving on such person a summons which states what section of the ordinance has been violated. On examination of the proceedings returned into this court, it appears that in three of the suits complaints were filed charging the defendant with violating the sixth section of the borough ordinance, and that upon each of these complaints a summons was issued and served requiring the defendant to answer for a violation of the second section of the ordinance. These proceedings did not invest the court with complete jurisdiction to try the defendant for violation of either section. The only subject-matter brought within its jurisdiction was the question whether the sixth section had been violated by the defendant. The party was brought within its jurisdiction only to be tried for violation of the second section. We think, therefore, that in these cases certiorari was an appropriate remedy, and for the error thus apparent these three judgments must be reversed.

In the other case, the complaint and the summons both allege a violation of the sixth section of the ordinance, and we find here no ground for denying the jurisdiction of the justice. There is, indeed, placed in our hands by the prosecutor a printed document, purporting to be a copy of the ordinance violated, according to which the defendant's act, charged in the complaint, was in contravention of the second, not the sixth, section. But this document is not legally before us, and, if it were, it would not show that the justice lacked jurisdiction to try the defendant for the alleged offense. The complaint averred two facts,—that the defendant had done a certain thing, that that thing was in violation of the sixth section of a designated ordinance. These were the facts which the complaint and summons gave the court the right to try. If they were proved, the defendant was to be found guilty; if they were not proved, he was to be acquitted. This document can only show that the proof did not warrant conviction, that the court's judgment against the defendant was erroneous. Such an error does not affect jurisdiction. Among the reasons assigned, none touches jurisdiction in this case except those aimed at the constitutionality of the statute. These are not referred to by counsel for the prosecutor in his brief, and we therefore decline to consider them, regarding them as waived. Hence our conclusion is that the justice had jurisdiction, and that an appeal lay from his judgment to the common pleas. The writ

of certiorari was therefore improvidently issued, and should be dismissed. The prosecutor not having appeared in the court below, and the borough not having appeared in this court, no costs will be allowed in any of the cases to either party.

(56 N. J. L. 265)

STATE ex rel. TAYLOR v. MAYOR, ETC.,
OF CITY OF BAYONNE.

(Supreme Court of New Jersey. Dec. 22, 1893.)

MANDAMUS TO MUNICIPAL OFFICERS — REINSTATEMENT OF SUSPENDED POLICEMAN.

The mayor of Bayonne had the right, under the city charter, to suspend the relator as a policeman, and he was thereupon entitled to a trial by the council, upon charges. He never had such a trial, and never asked for one during nearly two years since his suspension. *Held*, that he is not entitled to be restored to the force by this court; that he is still a suspended policeman, entitled to a trial by the city council, unless he has lost that right by his laches.

(Syllabus by the Court.)

Original application, at the relation of Edmon Taylor, for mandamus, to the mayor and council of the city of Bayonne, to reinstate relator as a member of the police force of defendants' city. Heard on rule to show cause. Writ denied.

Argued November term, 1893, before DIXON and ABBETT, JJ.

W. W. Anderson, for relator. Jas. Benny, for defendant.

ABBETT, J. Edmon Taylor was a policeman of said city, when, on August 22, 1891, charges against him were preferred by the chief of police, and filed with the mayor. He was charged with being off post and intoxicated while on duty, on the night of August 18th and the morning of August 19th. The specifications stated that he was off post in Lennar's saloon, sitting down, under the influence of liquor, Tuesday night, August 18th, and, further, on Wednesday morning was found asleep and intoxicated, sitting on a beer keg in Twenty-Second street, and was so found by Roundsman McDonald. In pursuance of notice served on him, Taylor, on August 25th, appeared before the mayor for trial on said charges. His own examination under oath shows that he was off his post, in the saloon, Tuesday night, and was asleep on a beer keg next morning. The mayor found him "guilty of being off post, and asleep on beer keg, as charged." The mayor reported to the city council, and recommended his dismissal, and reported that he had suspended Taylor from the police force, and recommended that he be dismissed and removed from the force by the council. The communication was received and confirmed by the council September 1, 1891, and since that time the mayor and council have absolutely refused to recognize Taylor as a member of the police force. It is conceded that Taylor never had any trial or hearing

before the city council, and that no charges were ever filed with the clerk of said city against said Taylor, except as shown in the communication of the mayor to the council. Taylor, since his removal, has not performed or offered to perform any police duty, and he has never demanded a trial before the council. He has acquiesced, without protest, in the action of the mayor and the council for nearly two years, and now asks for a mandamus to compel the city authorities of Bayonne to reinstate him on the force. The city charter gave to Taylor the right to a trial before the council, but he has never asked for such a trial, and does not now. He is a suspended policeman. He was suspended by the mayor, under section 10 of the revised city charter of March 10, 1869. In defining the powers of the mayor, that section says: "He shall have power to suspend any policeman or watchman, and he shall report such suspension to the board of councilmen at its next meeting thereafter, with the reasons therefor, and such officer may then be restored or removed by said board." The mayor acted under this section, and complied with its provisions. The council did not give him a trial, and Taylor does not seem to have desired one. He ceased doing police duty thereafter, without any protest against the action against him, and now, after waiting nearly two years, he seeks to be restored without trial, because the city council did not regularly try him on the charges which his own testimony, in great part at least, show to be true. He was entitled, and still is entitled, to a trial before the council, if he has not waived his right thereto by his laches and acquiescence in the action of the city officials for nearly two years. It is not necessary for us to decide this question at present. It is clear he is not entitled to be restored without trial, and that he has never asked for a trial by the city council, and has never been refused one. His legal position is that of a properly suspended policeman, who has never asked for a trial, and who has acquiesced in the action of the city authorities for nearly two years. If he is now entitled to any relief whatever, which we do not decide, it is the right to be tried for his self-admitted neglect and violation of duty. He has no right to be reinstated, under the facts of this case. The application is denied, with costs.

(56 N. J. L. 268)

STATE (BOOTH et al., Prosecutors) v. MAYOR, ETC., OF CITY OF BAYONNE.

(Supreme Court of New Jersey. Dec. 22, 1893.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—AWARDING CONTRACTS—VALIDITY OF RESOLUTION.

1. A resolution to readvertise for bids for work to be done on a street in Bayonne, because the lowest bid is in excess of the estimate therefor made by the commissioners of assessment, is one affecting the interests of

the city, and has no validity unless approved by the mayor, or passed over his veto, as provided in the city charter.

2. In this case, such a resolution, not having been so approved, or passed over the veto of the mayor, never became operative, and it is not, therefore, necessary to decide as to its effect if it had ever become operative.

3. The power of the council over streets is a continuing one, and bids for work thereon, presented to the council, may be acted upon by that body in the present case, notwithstanding an election had intervened in which one-half of the members thereof were to be voted for.

4. The difference in this case between the estimated cost and the lowest bid is not so great as to warrant the inference by this court from that fact alone that it was fraudulent, or that its acceptance by the council does great injustice to the city, its city council and mayor having both finally exercised their discretion in accepting it, after the matter had been fully presented to them.

(Syllabus by the Court.)

Certiorari at the suit of Alfred W. Booth and others against the mayor and common council of the city of Bayonne to review a resolution awarding a contract to Martin Murray for the completion of West Sixth street in defendant's city. Dismissed.

Argued at November term, 1893, before DIXON and ABBETT, JJ.

Collins & Corbin, for plaintiffs. James Benny, for defendants.

ABBETT, J. An ordinance was passed "to improve West Sixth street from Avenue A extending to Avenue D." It was approved January 4, 1893. It provided for "macadam pavement nine inches in depth, properly and thoroughly rolled and compacted." Upon advertisement sealed proposals were received April 4, 1893, for said work. The bids for the work varied from \$16,509.40 to \$14,600. The commissioners of assessment's estimate was \$13,983.73. Martin Murray was the lowest bidder. On April 18th the committee of the whole reported to the council that, "Mr. Murray being the lowest bidder, the committee find the amount of his bid to exceed the estimated cost, as shown by the commissioners of assessment's preliminary map, about \$1,500; and, since complaint has been made by property owners against having the work proceed at present prices bid for the same, they recommend that the city clerk readvertise for bids for the work, to be received at the next regular meeting." The report of the committee was adopted by a vote of 5 to 3. This action of the council was presented to the mayor April 21, 1893, who, on April 29th, vetoed the same, which veto was presented to the council at its meeting, May 2d. William C. Farr was the mayor for the term preceding April 24, 1893, and was re-elected, and qualified April 24, 1893. The mayor's term is for two years, and commences on the last Monday of April, so that Mr. Farr was mayor during all the periods in question, either under his first or second term of office. A charter election is held annually on the second

Tuesday in April, (Charter, § 5,) when one councilman from each ward is elected (being one-half of the whole number) for a term of two years. The veto of the mayor was referred to the committee on water, streets, and drainage, who gave the parties interested a hearing, and thereafter recommended that the contract be awarded to Martin Murray, the lowest regular bidder. This report was received and adopted by the council, May 16, 1893. The certiorari was allowed May 20th, and brings up this action of the council of May 16th. The reasons in certiorari raise the question as to the right of the mayor to act upon this resolution at all, either before or after April 24th, and the right of the council which was in existence May 16th to award a contract upon the lowest bid after their predecessors in office had ordered the work to be readvertised for bids. They also claim that the plans and specifications upon which the bid was based, which it is proposed to incorporate into a contract, are not in accordance with the petition for the improvement, or with the ordinance; and that the resolution is an unreasonable exercise of the board's discretion, and an abuse of its authority.

The city, under its charter, was vested with power to pass the ordinance for the improvement of this street, and to award the contract for the work to Murray, the lowest bona fide bidder. The question whether the city council had exhausted its power on April 18th, when it directed a readvertisement for bids, depends upon the effect of that action, and whether the power to act in reference to this improvement was a continuous one, or expired every year with the old council. The power to grade and improve streets, like other legislative powers, is a continuing one, unless the contrary be indicated. 2 Dill. Mun. Corp. § 686, c. 18, and cases cited. If the action of the council, April 18th, was subject to the veto of the mayor, it had no validity whatever until presented to him and approved by him, or had been left in his hands 10 days, and passed over his veto by a two-thirds vote of the council. The charter provides that it does not "take effect as a law" unless he approves it, or it is thus passed over his veto. Whether it was a resolution that should go to him depends upon whether it was a resolution affecting the interest of the city. It was clearly such, because the readvertising involved the expenditure of money by the city; and, further, the wisdom of such action in this case depended upon the judgment of the council subject to the review thereof by the mayor. If an honest bidder for a price that is not so unreasonable as to warrant the presumption of fraud or great injustice to the city finds that the city adopts a policy which is one directly opposite to that adopted by the court of errors and appeals in reference to juridical sales, (*Morrisse v. Inglis*, 46 N. J. Eq. 308, 19 Atl. 16,) it will be apt to dis-

courage competitive bidding for public work, and thus most seriously affect the interests of the city. We conclude, therefore, that this resolution of April 18th was one affecting the interests of the city, and never had any validity whatever as a municipal act, because it was not approved by the mayor, or passed over his veto. It is not necessary in this case to decide whether Mayor Farr had a right to veto this resolution after he entered upon his second term. It certainly was in his hands April 24, 1893, when his first term expired, and it has no efficacy, and cannot be considered as an act of the city, because it has never been approved by him, or passed over his veto, either by the city council existing before or the one existing after April 24, 1893. On May 16th (the resolution of April 18th never having had any legal efficacy) the city council passed the resolution which on May 20th was removed into this court. If it be said that this latter resolution has no efficacy because not approved by the mayor, the answer is that he has by the charter 10 days for action thereon after it is presented to him, and that the writ of certiorari was prematurely applied for, before the expiration of that time, and has prevented his action thereon. There can be no serious contention that every time there is an annual charter election in the city of Bayonne, wherein one-half of the council go out of office and their successors are elected, that all prior proceedings end, and must be again commenced. The city council is a continuous body, and, as to street improvements, the new city council can take up the proceedings where they were left by the old council, and proceed to carry out the provisions of the charter in reference thereto. The legal condition of this street improvement on April 24th was that bids had been made for the work, and the resolution in reference to readvertising was in the hands of the mayor, unacted upon. This resolution never became effective, for the reasons already stated. The new council, on May 16th, took up this street improvement, and awarded the contract to the lowest bidder. There is no evidence of fraud in this case affecting this bid. The preliminary estimate of the commissioners of assessment is not so much less than the bid of Murray as to warrant the conclusion that it was fraudulent, or that it was grossly excessive. The court will not, therefore, set aside the award to Murray as an abuse of the discretion vested in the city council.

The objection that the plans and specifications on which the bid was made are not up to the standard of the petition and ordinance is not supported by the facts of this case. The only objection urged was in reference to the depth of the macadam. The petition calls for macadam nine inches in depth, properly and thoroughly rolled and compacted. The ordinance calls for exactly the same thing. In the official papers the

notice to contractors was published, stating that sealed proposals would be received for the improvement of this street, and it was therein stated that this improvement consisted of grading, flagging, sewerage, and laying macadam pavement in said street. Murray bid for "macadam pavement." Cornelius Vreeland, a civil engineer of Bayonne, testifies as expert (page 35, etc.) that the plans and specifications call for a portion of the street to be macadamized for a width of 18 feet and a depth of 9 inches, different sizes of stone. On being asked (page 36) how he made up the nine inches after stating that the first course of stone was to be five inches, he says, "on page 26, [of the specifications,] under head of second course, to be spread evenly over the surface of the roadway to a depth necessary to bring it to the true grade and course as shown in the plan;" and he further testifies as such expert that the plan will show what the depth of the macadam will be under that specification. The plan by scaling shows this nine inches. Murray, under these circumstances, would be compelled to lay nine inches of macadam, as his bid was to do the work called for by the improvement; and he would be charged with notice of what was in the ordinance, and that called for nine inches. I find nothing in the reasons and the record and testimony to warrant the setting aside of the award of the contract to the lowest bidder. The prosecutors' suit should be dismissed, with costs.

(56 N. J. L. 255)

STATE (JACOBUS et al., Prosecutors) v. MESKILL, Fish and Game Protector.

(Supreme Court of New Jersey. Dec. 22, 1893.)

FISHERIES—CRIMINAL PROSECUTION—COMPLAINT.

The conviction of the prosecutors for unlawfully taking or catching fish with a net, where the complaint was for a violation of section 1 of the "Act for the preservation of fish," approved April 13, 1876, set aside for defects in the complaint and in the record, and because section 1 of the act of 1876 was so far amended by the act of March 8, 1877, as to repeal the original section on which the complaint is founded.

(Syllabus by the Court.)

Certiorari at the suit of Abraham P. Jacobus and others against Thomas Meskill, fish and game protector, to review a conviction of a violation of the fishery laws before a justice of the peace. Reversed.

Argued November term, 1893, before DIXON and ABBETT, JJ.

Collins & Corbin, for prosecutors. W. W. Cutler, for defendant.

ABBETT, J. A. P. Jacobus and others were convicted August 20, 1892, before Thomas P. O'Brien, a justice of the peace of Morris county, of unlawfully taking or catching, with a net, fish in the Rockaway river, August 13, 1892, contrary to section 1 of "An act for the preservation of fish," approved

April 13, 1876, (Laws 1876, p. 127.) An appeal was taken to the Morris common pleas, and November 21, 1892, judgment was again rendered against the prosecutors. The first section of said act provides "that hereafter it shall not be lawful for any person or persons, at any time whatever, either by day or night, to put, place or haul any gill, drift, fike or other net or nets, or any eel pot or pots, basket or baskets, or other contrivances whatever, for the taking or catching of fish, in any of the waters of the state, above tide water, * * * and any person or persons who shall take or catch any fish in manner aforesaid, shall, upon conviction thereof, * * * be punished by imprisonment in the common jail of the county for the term of ten days, or by a fine of twenty dollars, for each and every offence: * * * provided that said penalty shall not apply to the legitimate taking or catching of fish with hook and line, or with hook, line and rod, nor to the catching of fish with drift or drag nets by any person or persons in waters running through * * * his, her or their own lands, if none of the fish so caught are sold or exposed for sale; * * * the privileges herein granted shall not be extended to any person or persons other than the owner or owners of the lands, through or along which any stream may run where such fishing with nets may or shall be carried on * * *." This section was amended by the supplement of March 8, 1877, (Laws 1877, p. 84,) which omitted the privilege previously given to landowners, and is in other respects different from the act of April 13, 1876. The complaint not only misrecites the title of the act of April 13, 1876, but utterly fails to refer to the act of 1877, under which act alone can this conviction be sustained. It is admitted by defendant's counsel that the first and eighth reasons are well founded, but it is objected that the prosecutors are in laches in not making these objections below. These reasons are: "First. Said complaint is defective in not showing that Thomas Meskill was fish and game protector, and also in not negating the provisos of said act to show that the exceptions are inapplicable here." "Eighth. The section of the act on which this complaint was made was so far amended by the act of March 8, 1877, as to repeal the original section."

The following objections were taken on the trial before the justice, and all overruled: "(1) The complaint is not indorsed as it should be; (2) the complaint does not set forth an offense under the act of April 13, 1876; (3) the complaint is defective in every particular." These substantially, and other objections, were made in the common pleas after the appeal was moved, and before any evidence was offered. I find no laches on the part of the prosecutors in presenting the objections which are admitted to be fatal. This is a summary proceeding, in which the party has not the right of trial by jury, al-

though, upon conviction, he may be punished by 10 days' imprisonment. The complaint should clearly bring the case within the statute, and should show that the party is not within the exceptions therein stated. The record should also show the grounds of the conviction. It makes no reference to the act of March 8, 1877, or the grounds of the conviction; and if reference is made to the docket of the justice, or the case brought here on appeal, these defects are apparent. Under the authority of *Doughty v. Conover*, 42 N. J. Law, 196, 197 et seq., the complaint and record are defective, and the judgment of the common pleas should be reversed. See, also, *Hoeberg v. Newton*, 49 N. J. Law, 617, 9 Atl. 751. The judgment should be reversed.

(56 N. J. L. 362)

RAUB v. BLAIRSTOWN CREAMERY ASS'N.

COOK v. SAME.

(Supreme Court of New Jersey. Dec. 22, 1893.)

CORPORATIONS—POWER OF PRESIDENT TO CONFESS JUDGMENT.

1. The president of a corporation has no authority, by virtue of his office as president, to execute a cognovit. The cognovit is in terms a confession of the action, and the doctrine of *Stokes v. Pottery Co.*, 46 N. J. Law, 237, controls this case.

2. No presumption of the president's authority arises from his attaching a common paper seal, and stating in the certificate, "witness the corporate seal of said defendant," there having been in fact no delegation of authority to him by the company to sign the cognovit or attach the seal.

3. The case of *Parker v. Manufacturing Co.*, 49 N. J. Law, 466, 9 Atl. 682, is not antagonistic to the views expressed in this opinion.

(Syllabus by the Court.)

Case certified from circuit court, Warren county; before Justice Abbott.

Two actions on contract for work done and goods sold and delivered,—one by Calvin E. Raub against the Blairstown Creamery Association, and the other by J. Watson Cook against the same defendant. There was judgment for plaintiff in each case, and defendant obtained a rule to vacate the same. Heard on rule certified for an opinion. Judgments vacated.

The other facts fully appear in the following statement by ABBETT, J.:

The question certified for the advisory opinion of the supreme court is as follows: "The above-stated causes coming on to be heard upon rule to show cause why the judgments entered therein should not be set aside, and the executions issued thereon be set aside, on the application of L. Milton Wilson, receiver of the said Blairstown Creamery Association, the defendants in said judgments named, and it appearing that the said cases present questions of doubt and difficulty, I do hereby certify the said causes into the supreme court for its advisory opinion upon the matters involved in said causes, and

whether the rules to show cause allowed should be made absolute, and the judgments and the executions issued thereon be opened and set aside. The question certified in both cases is whether or not the president had power to sign the cognovit upon which judgment was entered in both cases, and affix a common seal as the corporate seal of the company, and whether judgment could be entered thereon, there having been no delegation to him of authority by action of the corporation to sign such cognovit." The questions arise as follows: Actions were brought in the circuit court by the plaintiffs against the defendants upon contracts for work done and goods sold and delivered. The actions were commenced by the service of a summons dated August 1, 1893, accompanied by a declaration, which were both served on the defendant by the sheriff that day. Judgment was entered August 2d, in the Raub case, on the following cognovit: "Calvin E. Raub v. Blairstown Creamery Association. Warren Circuit Court. On Contract. Cognovit. The said the Blairstown Creamery Association, the above-named defendant, hereby confesses this action, and that the plaintiff hath sustained damage to the amount of two hundred and thirty-seven dollars and fifty-one cents, as laid in his declaration, besides his costs and charges to be taxed, as witness the corporate seal of said defendant, this first day of August, in the year of our Lord one thousand eight hundred and ninety-three. [Signed] The Blairstown Creamery Association, by [Common Paper Seal] Ferdinand Wildrick, President. Charles E. Harris, Atty. of Deft.,"—and on the same day in the Cook Case, on a similar cognovit. Execution was issued on both judgments. There was no delegation of authority by the company to the president of the company to sign this cognovit, or affix the seal he did, as the corporate seal of said company. August 8th, L. Milton Wilson was appointed receiver of said defendant corporation, which was declared insolvent, and he gave bonds, and entered upon the discharge of the duties of his office. Upon application of the receiver, September 12th, it was ordered that the plaintiffs show cause why the judgments should not be opened and made void, and the executions issued thereon set aside. The case is pending before the circuit judge, on papers and depositions taken by both sides.

Argued November term, 1893, before DIXON and ABBETT, JJ.

Henry S. Harris, for plaintiff. George M. Shipman, for receiver.

ABBETT, J., (after stating the facts.) This case cannot be distinguished on principle from the case of *Stokes v. Pottery Co.*, 46 N. J. Law, 237. It was held in that case that the president of a corporation has no power, in virtue of his office as president, to execute a bond and warrant of attorney for

the entry of a judgment by confession against the corporation. The *cognovit*, in terms, is a confession of the action, and the right to give it does not come within the power the president has, as the general agent of the company, to direct and control its business, or where his agency is presumed from the assent of the directors, by their consent and acquiescence, in permitting him to do this class of acts. No presumption arises from the seal attached, because it does not appear upon its face to be the corporate seal of said company, and the case does not show that the corporation authorized its use as such. There is no proof that it is actually what it purported to be, and such a seal does not prove its own authenticity. *Den v. Vreelandt*, 7 N. J. Law, 353. The case of *Parker v. Manufacturing Co.*, 49 N. J. Law, 466, 9 Atl. 682, is not antagonistic to the view here taken. That was a case where there was no question as to the seal being the corporate seal of the company, but the question was whether its probative force was overcome by the testimony in the case. The court held "that this testimony does not countervail the presumption in favor of the validity of the sealed instruments." Let the circuit court be advised that the president of the Blairstown Creamery Association had no power to sign the *cognovits* upon which judgment was entered in both cases, and affix thereto a common paper seal, as the corporate seal of the company, and that no judgments could be entered on said *cognovits*.

(73 Md. 539)

HOPPER v. CALLAHAN.

(Court of Appeals of Maryland. Jan. 23, 1894.)

SALE—BONA FIDE PURCHASER—WIFE'S CHATTELS.

1. When a husband is placed in charge of a farm by the owner, the wife's possession of the personalty thereon does not clothe her with such apparent title that a purchaser from her without notice takes a good title.

2. It is proper to refuse a charge that plaintiff in replevin can recover on a temporary right of possession, not explaining what facts in evidence would establish such a right.

3. Under Code, art. 45, § 2, permitting a husband and wife to convey the wife's chattels by their joint deed, a wife's separate deed of her chattels is a nullity.

Appeal from circuit court, Baltimore county.

Replevin by John H. Callahan against Harrison Hopper. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before ROBINSON, O. J., and BRYAN, McSHERRY, FOWLER, PAGE, and BOYD, JJ.

Geo. L. Van Bibber, G. Y. Maynadier, E. M. Allen, and John I. Yellott & Son, for appellant. W. H. Harlan, J. E. Webster, D. G. McIntosh, and J. F. Hisky, for appellee.

BRYAN, J. Callahan brought an action of replevin against Hopper for the recovery of v.28A.no.6—25

certain goods and chattels. There was a count in the detinue and one in the detinue. The case was tried on issues under the first-named count. The articles about which there was a contest were such as are necessary or useful for the successful management of a farm. There had been a distraint for rent. The plaintiff replevied, and there was an avowry by defendant, which was afterwards withdrawn. The pleas were non cepit and property in the defendant. There was another plea, which seems to have been withdrawn. The verdict and judgment being for the plaintiff, the defendant appealed.

There was no controversy about the title of the plaintiff to a number of sheep and lambs which were included in the property replevied. The evidence in his behalf tended to prove that the other goods and chattels replevied were on a farm in Harford county; that they belonged to his mother, and were sold by her to him, and that the possession was delivered to him by her and her husband. The evidence for the defendant tended to prove that in the year 1884—several years before the alleged sale to the plaintiff—he bought the farm and the personal property on it (being the goods and chattels now in controversy) from Timothy Callahan and Margaret, his wife, (the father and mother of plaintiff,) and that they delivered to him the possession of the real and personal property; and that after this purchase Timothy Callahan attended to the business of the farm for him; and that in the year 1889 the defendant rented the farm and everything on it to the plaintiff. The defendant admitted that the deed for the farm was intended to a great extent as a security for money due him by Timothy Callahan. There was also evidence on behalf of the plaintiff tending to prove that from 1884 to 1889 the defendant never exercised any control over the personal property on the farm, and that it was during that time in the possession and under the control of Timothy and Margaret Callahan. The plaintiff testified that the property, both real and personal, was held by his father and mother until 1889, and was managed by his father. The defendant took three bills of exception to the rejection of testimony, and one to the ruling of the court on prayers for the instruction of the jury. The court granted three prayers in behalf of the plaintiff, and refused one asked in behalf of defendant. We will consider the prayers before stating the exceptions to evidence.

The plaintiff's first prayer asked a verdict for the sheep and lambs before mentioned, and was not objected to. The second prayer (marked "four") maintained that if Margaret Callahan, from 1884 to 1889, was in possession and control of the personal property above mentioned by and through the concurrence of the defendant, and that the plaintiff, in the year 1889, for valuable consideration and without notice of any claim by de-

fendant, acquired possession of it, and held possession and control of it, until the distraint was laid, then the jury might find a verdict for the plaintiff for said goods. This prayer was granted, and the defendant excepted. It will be observed that this prayer does not require the jury to negative the defendant's title, although evidence had been given in support of it. On the contrary, it proceeds on the theory that, even if he had a good title to the personal property, the plaintiff could acquire a good possessory title by purchase for a valuable consideration from Margaret Callahan if she was in possession and control of it by defendant's concurrence. According to the general rule of law in regard to sales of chattels, "no one can transfer to another a better title than he has himself," and a bona fide purchaser succeeds only to the rights of his vendor. There are some exceptions to this rule, which are as well recognized and established as the rule itself. When the owner of goods has put in possession of another person such evidence of the right of selling them as would, according to the ordinary and common course of business, establish a right of disposal or sale to a bona fide purchaser without notice, it will divest his title. He is surely bound by his own act when he holds out to the public a third person as one having competent authority to make sales. But it is not held that mere possession of goods will justify the inference that the possessor has the right to sell them. The inference must be a natural and obvious deduction from the circumstances of the case according to the usages of business. Where goods were delivered to a person whose common business was to sell, it was held that an authority to sell might be implied. But it is also held that no such authority would be conferred by intrusting them to a person whose business was of a different nature; for instance, where a watch is given to a watchmaker to be repaired, an authority to sell cannot justly be supposed. In *Hoare v. Parker*, 2 Term R. 376, a widow had pawned plate in which she had only a life interest under her husband's will, but the pawnee had no notice that her interest was limited. It was held that the lien for the money advanced on the pledge was void against the remainder-man after the widow's death. The court said: "This point is clearly settled, and the law must remain as it is until the legislature thinks fit to provide that the possession of such chattels is proof of ownership." We think that these principles are clearly declared in *Saltus v. Everett*, 20 Wend. 267, and in *Levi v. Booth*, 58 Md. 305. If Hopper bought the farm and this personal property from Timothy Callahan and his wife, and employed Timothy to attend to the farm for him, the fact that the chattels were in the possession of Mrs. Callahan by the defendant's concurrence could not authorize a reasonable inference that she had a right to sell them. The circumstances of the posses-

sion are very far removed from those which in *Saltus v. Everett* and *Levi v. Booth* are mentioned as giving an apparent right of property or right of disposal. When a man is in charge of a farm for the owner it is not at all strange that his wife should have the possession and control of the personal property on it. Certainly it could not justly be said that the owner had given her the apparent authority to sell it. It is not the common business of persons who are placed in charge of farms to sell the personal property which the owners confide to their custody for the ordinary and necessary requirements of farms. Persons who purchase such property from them without the necessary evidence of their right to sell must take the consequences of their own improvidence. We think that the court committed an error in granting this prayer.

The defendant's prayer set forth his title as alleged in the evidence offered by him, and asked a verdict on the hypothesis of its truth, notwithstanding the finding of the facts in the plaintiff's prayer just mentioned. From what we have said, it will be seen that this prayer ought to have been granted without modification. But the court modified it by striking out the reference to the facts embodied in the plaintiff's prayer. The plaintiff's prayer marked "six" is entirely abstract. The principles stated in it were correct, but they ought to have been applied to the facts in evidence, and the jury ought to have been informed what facts were left to their finding. In the form in which it was offered it left the jury to apply the law to the evidence according to their own unaided judgment, and it was well calculated to perplex and mislead them. When they were told that the plaintiff could recover on a temporary right of possession, although the title to the property was in another person, they ought further to have been informed what facts in evidence would establish a temporary right of possession against the owner.

As the case must be remanded for a new trial, it is proper to decide all the exceptions. The first and second exceptions were taken to the refusal of the court to admit in evidence a paper writing called in the record a "bill of sale." It purported to have been executed by Mrs. Callahan without the joinder of her husband, and to have been acknowledged before a justice of the peace of the city of Baltimore; but it had not been recorded. Supposing the chattels embraced in this instrument belonged to Mrs. Callahan, she and her husband might have conveyed them by their joint deed, as provided in article 45, § 2, of the Code; but her own separate deed is not within the statute. It was not the purpose of this section to prevent husband and wife from disposing of her chattels by a sale in the ordinary way, without deed or writing. (*Whitridge v. Barry*, 42 Md. 151;) but in cases where a

deed is made, as it authorizes only a joint deed, the wife's separate deed stands as it did before the statute was made; that is to say, it is void. There was a subscribing witness to the instrument, who was dead at the time of the trial, and his handwriting was proved. This proof would have been sufficient to entitle the writing to be read in evidence if the contract had been such as the married woman was competent to make. She and her husband could jointly sell her chattels without writing; and if they had, both acting together, sold them at the time this paper writing was executed, the sale would, of course, have been valid; but the paper writing would neither have added to nor detracted from the efficacy of the sale. In the third exception the defendant offered to prove that after the sale to him by Callahan and wife, they fully recognized and assented to his purchase and possession of the property, and that she acquiesced in all that her husband had done in delivering the possession to him. The court ruled that the witness must "limit his answer to Mrs. Callahan's knowledge as to defendant's possession of the property, and her acts and declarations, concerning the transaction." The witness thereupon testified that "Mrs. Callahan knew that he had possession of the personal property, assented to his possession, and made no objection," and this evidence went to the jury. We are unable to see in what way the defendant was injured by this ruling. For the errors in respect to the prayers the judgment must be reversed, and a new trial awarded.

(78 Md. 389)

MOTTU v. FAHEY.

(Court of Appeals of Maryland. Jan. 12, 1894.)

JUSTICE OF THE PEACE — RETURN TO SUPERIOR COURT — AMENDMENT — *EX PARTE* TRIAL — FIXING DAY — RECORD.

1. Where property has been sold on a judgment of a justice court, and the sale ratified by the superior court, and return made to it by the justice court, as required by Code 1860, art. 83, § 9, the superior court may allow the return to be amended so as to show that defendant was summoned in the justice court.

2. The provision that the constable shall make return to the justice, who shall forthwith deliver all of said return to the superior court, has application only to the original filing of the return, and does not prevent the constable refiling the papers under an order for an amendment thereof.

3. Under Code 1860, art. 51, § 19, providing that, a summons having been returned as served, and defendant having failed to appear on the return day, the justice shall fix a day of trial not less than 6 nor more than 14 days from the return day, and proceed to try the case *ex parte*, it is not necessary that the record show an order in writing fixing a day, but it is enough that it appears by a trial being had within the specified time that a day was fixed.

Appeal from Baltimore court of common pleas.

Ejectment by James Fahey against Theo-

dore Mottu. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before ROBINSON, C. J., and ROBERTS, BRYAN, BRISCOE, FOWLER, and McSHERRY, JJ.

Geo. R. Willis and Thos. R. Clendinen, for appellant. Jas. McColgan, for appellee.

FOWLER, J. This is an action of ejectment. The plaintiff, who is the appellee here, claims under a deed which sets forth a merely nominal consideration from one Michael Kelly, dated subsequent to the deed, under which the defendant, Theodore Mottu, claims. This is the second trial of this action brought by the plaintiff to recover the property in question. In the first trial the plaintiff claimed, as he does now, under his deed from Kelly, and the defendant rested his case upon certain magistrate judgments against said Kelly, and the proceedings thereon, which had been recorded and returned to the clerk of the superior court, under the Code of 1860, (article 83, § 9.) The defendant's title rested on the validity of the proceedings so recorded, and on the appeal taken from the judgment in the first trial it was held that the record of the magistrate's judgments and the proceedings thereon were fatally defective, because there was nothing therein to show that Kelly had ever been summoned, and that, therefore, the judgments against him, the sale of the property in question to the defendant, Mottu, in this case, and the deed to him by the constable, were all void. *Fahey v. Mottu*, 67 Md. 250, 10 Atl. 68. The cause having been remanded by this court for a new trial, the defendant, Mottu, thereupon applied to the superior court for leave to withdraw the original papers in the magistrate's cases, and to refile them with additional returns, to remedy the defect pointed out by this court in 67 Md. and 10 Atl., supra, namely, a failure of the record, as returned, to show that the defendant Kelly had been summoned. On the 28th June, 1888, leave was granted as prayed, and subsequently, on the 10th September following, the original papers, with the necessary additional returns, were filed in the superior court, from which it appeared that Kelly had been duly summoned. On the 27th July last the case was again tried in the court of common pleas, and the question is presented whether the record of the proceedings in the magistrate's cases as amended and refiled are, as the appellee contends, utterly null and void, or whether such record is legally admissible evidence in support of Mottu's title.

The objection made in the former case to the admissibility of the record in evidence and to the validity of the judgments was that it did not appear from the proceedings that a summons had been issued; and while it is not denied, and, in the face of the explicit testimony of the constable, cannot be

denied, that the defendant was in fact summoned, as now shown by the amended or corrected record of proceedings before the magistrate, it is contended that the superior court has no power to authorize any amendment of the record of such proceedings. Neither reason nor authority was suggested for this position. It would seem but reasonable that the court which takes jurisdiction, to which the sale is reported, and by which it was required, under the provisions of the Code then in force, to be ratified, should have the same control over the record of proceedings returned by the magistrate as over its own records. When returned to the superior court by the justice, his proceedings became a part of the records of that court, and the amendment authorized did nothing but allow the addition of a necessary part of the record, which had been improvidently omitted. If, as contended by the appellee, the superior court has no power to order the amendment, because, when it passed the order of ratification of sale, it was functus officio as to that case, and if, as was also suggested, the justice was equally without power after making his return to the court, no correction or amendment whatever can be made after the periods above indicated. But such a rule seems to be an arbitrary one, would certainly result in great inconvenience, and practically prevent the correction of errors in a class of cases in which they are most frequently found.

Nor do we think there is any force in the objection that the papers were refiled by the hands of the constable, rather than by the justice in person. It is sufficient to say, in answer to this objection, that while the Code does provide that the constable shall make return to the justice, "who shall forthwith deliver all of the said return * * * to the clerk, * * * of the superior court," yet this provision clearly refers to the first filing of the proceedings, and has, we think, no reference whatever to the refiling, which was done by virtue of the order of the superior court, the validity of which is not to be determined by provisions of the Code relating alone to magistrates and constables. It seems to us, however, without prolonging this opinion, that the one sufficient answer to most of the difficulties suggested by the appellee, including the failure of the justice to rule the cases against Kelly for trial in accordance with article 51, § 19, Code 1860, is that when the defendant has been summoned, as the amended record shows he was, the justice then had jurisdiction, and his failure subsequently to rule the case for trial did not oust it. It does, however, appear from the record that there was a substantial compliance with the statute in this respect, for the record shows that Kelly was summoned to appear on the 8th of November, 1883, at 9 A. M., in the first case, and that on the 15th day of the same month a trial *ex parte* was had. The same is true as to

the other case. It therefore appears that the trials were postponed until the seventh day after the defendant was summoned, and this we think a sufficient and substantial compliance with Code 1860, art. 51, § 19, that, "If the summons shall be returned summoned, and the defendant shall fail to appear on the return day thereof, then the justice shall fix a day of trial not less than six nor more than fourteen days from the return day, and proceed to try the case *ex parte*;" for the statute does not require that the fixing of a day after defendant is summoned and fails to appear shall be in writing, and be made a part of the record of proceedings. It is enough that it does appear that in fact the cases were properly fixed or ruled for trial. It was also objected that the levies and advertisements of sale by the constable are fatally defective because of insufficient and conflicting descriptions of the property levied on and sold, but we think the proceedings are free from any such objection. The first prayer of the appellee should have been refused. It instructs the jury that on the pleadings and evidence in this case their verdict must be for the plaintiff for the property described. It has been held that instructions like this are defective. (*Kent v. Holliday*, 17 Md. 389; *Chipman v. Stansbury*, 16 Md. 154; *Institution v. Weedon*, 18 Md. 320; and *Dorsey's Ex'rs v. Harris*, 22 Md. 85.) because they are expressed in such general terms that it is impossible to ascertain from them or the record exactly what point was intended to be decided by the lower court, (*Poe, Pr. § 297*.) The second prayer of the appellee excluded from the jury the amended proceedings in the magistrate's cases returned to and recorded in the superior court, which, when amended, as we have said, should have been admitted. It follows that the judgment appealed from should be reversed. Judgment reversed, and judgment for appellant.

(78 Md. 338)

ALBERT v. ALBERT.

(Court of Appeals of Maryland. Jan. 12, 1894.)

GARNISHMENT — NONRESIDENT DEFENDANT — APPEARANCE AND PLEAS FOR GARNISHEE—APPEALABLE ORDER.

1. Though Code Pub. Gen. Laws, art. 9, § 14, provides that a garnishee in an attachment against a nonresident defendant may plead in behalf of defendant, he need not, and if he does he subjects himself to costs, so that without the consent of garnishee an attorney cannot appear and plead in his name for him and defendant, though plaintiff and garnishee be the same person, but defendant must appear and plead for himself.

2. Under Code, art. 5, § 2, providing that from any judgment or determination any party may appeal, a garnishee, who is also a plaintiff, may appeal from an order overruling his motion to strike out an unauthorized appearance for him by an attorney, and pleas filed by him in the garnishee's name for the garnishee and nonresident defendant.

Appeal from superior court of Baltimore city.

Attachment by Augustus Albert against himself as garnishee and Edward Lauterbach as nonresident defendant. From an order overruling a motion of Albert as plaintiff and garnishee, he appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, ROBERTS, and BRISCOE, JJ.

W. Geo. Weld, for appellant. Atty. Gen. Poe and John C. Rose, for appellee.

BRISCOE, J. The appeal in this case is from an order of the superior court of Baltimore city, overruling a motion to strike out an alleged unauthorized appearance by attorney for the garnishee in an attachment suit, and to strike out certain pleas filed in the name of the garnishee on his behalf and that of the nonresident defendant. By the fourteenth section of article 9 of the Code of Public General Laws it is provided that the garnishee in every attachment issued in pursuance of the preceding sections may plead, in behalf of the defendant, any plea or pleas which the defendant might or could plead if the summons had been served upon him, and he had appeared. There can be no doubt that a nonresident has the right to appear to the action, and defend the same by subjecting himself to the jurisdiction of the court. And under the statute the garnishee can plead in behalf of the defendant any plea which he might or could plead if he had appeared. In the case of *Steamboat Co. v. Clyde*, 51 Md. 178, where a nonresident defendant appeared by attorney for the purpose of moving that the judgment of condemnation be stricken out, and the execution thereon quashed, it was decided that there could be no doubt of the legal right of the defendant to appear for that purpose in the attachment case, without thereby being within the jurisdiction of the court in respect to the suit against him personally. There was no appearance in that case to the action of assumpsit, nor a plea to the merits of the cause, which could be construed as a submission to the jurisdiction of the court. In the case of *Wilson v. Wilson*, 8 Gill, 192, an attachment was issued by the plaintiff, and laid in his own hands as garnishee. There was an appearance to the *causas* by the garnishee, and a plea of nonassumpsit and nulla bona, upon which issues were joined; but in that case there seems to have been a voluntary appearance, and no objection to either the appearance or the pleas. The case of *Harding v. Hull*, 5 Har. & J. 479, relied on by the appellee, was where an attachment had been laid in the hands of Hull & Tyson, who appeared by counsel, and pleaded nulla bona, to which there was a general replication and issue joined. At the trial the plaintiff read in evidence certain written certificates, which were admitted by

the garnishee's counsel to be in their handwriting, stating that at the time of laying the attachment in their hands they had funds belonging to Boyle, and that they never authorized any attorney to appear for them to contest the same. The plaintiff thereupon prayed the court to strike out the appearance by counsel, which was refused by the court. There was no opinion in this case filed by the court, stating the grounds of its conclusion, but it bears no analogy to the case now under consideration. In *Harding v. Hull*, supra, the garnishee had not pleaded nonassumpsit for the defendant, but only nulla bona for themselves, and the motion to strike out was not made by the garnishees, but by the plaintiff.

The case now under consideration is somewhat anomalous in its character, and different from the adjudicated cases. The facts are these: On the 8th of April, 1892, Augustus Albert, a resident of Baltimore city, sued out a writ of attachment against Edward Lauterbach, a nonresident of the state, and caused it to be laid in his own hands as garnishee. On the 25th of April, 1892, Messrs. John P. Poe and John C. Rose, two members of the Baltimore bar, entered their appearance on behalf of the garnishee, and filed pleas of nonassumpsit and nulla bona. Shortly afterwards, Albert, as plaintiff and garnishee, filed a petition asking to have the appearance for him as garnishee, and the pleas filed in his name, stricken out as unauthorized, and as a wrongful invasion of his right to be represented by counsel of his own selection. This motion was overruled. Now, it is well settled that a garnishee stands, in all respects, in a situation exactly similar to that of a defendant debtor. He may contest the claim made against him, but if he does so he is liable to costs. He may not only defend his own interest as a mere neutral in the controversy between the plaintiff and the defendant, but he may assume the character of an ally of the defendant. He is allowed to plead and defend his rights, for him and in his behalf, (*Wilson v. Starr*, 1 Har. & J. 491;) but, if he contests the plaintiff's right to recover, the reason and justice of the case require that he shall be chargeable with cost, (*Chase v. Manhardt*, 1 Bland, 344, and cases there cited.) It is insisted, upon the part of the appellant, that while the garnishee, under the statute, "may plead in behalf of the defendant," etc., "yet such pleading is optional with him, and cannot be had without his authority and against his consent;" and in this view we all concur. It has been the established practice in the state that an attorney cannot enter an appearance, and claim to be entitled to the usual appearance fee, unless he has been employed, or his services have been accepted. *Neighbors v. Maulsby*, 41 Md. 490. In the case of *Kelso v. Stigar*, 75 Md. 405, 24 Atl. 18, this court, by Chief Justice Alvey, says that unless there had been fraud or im-

position practiced, or the party himself had made objection to the use of his name, the court will not assume that the attorney bringing the suit had acted without authority. Manifestly, therefore, where, as in the case at bar, the party himself makes objection to the use of his name, the motion to strike out should prevail.

But it is urged upon the part of the appellee that to sustain the contention of the appellant would enable a party, where he is both plaintiff and defendant, to control both sides of a litigation, and in a controversy, the object of which is to subject a third person's property to the claim of the plaintiff. Ordinarily, and as a general rule, an action at law cannot be maintained where the same person is one of the plaintiffs, and is also sole or one of the several defendants. But there is no hardship or injustice imposed on the nonresident from the view we take of the case at bar. The nonresident defendant has a right to appear, and, upon his appearance, has a right to plead for himself, and is not affected by the pleas put in for him by the garnishee. *Spear v. Griffin*, 23 Md. 418. He is deprived of no right, and, like other suitors, is simply required to submit to the jurisdiction of the court before he can avail himself of its protection. It would be at variance with every rule of sound pleading to permit him to interpose a plea to the merits of the action without submitting to the jurisdiction of the court. To hold otherwise would defeat the very object and policy of our attachment laws, which are intended for the benefit and protection of our citizens. Practically, it would enable a nonresident defendant to appear and defend his suit, through an unwilling and protecting garnishee, by a plea to the merits of the action, without subjecting himself to the court's jurisdiction. The great purposes of our attachment laws, said this court in *Risewick v. Davis*, 19 Md. 83, are by seizing the property of a debtor to compel his appearance to answer the demand of the plaintiff when, from nonresidence or flight, he is beyond the process of our judicial tribunal, and, on failure of appearance, to apply such property to the just end of satisfying his debts. We know of no rule of pleading or legal principle that would sustain the position contended for by the appellee. The fact that the attachment is laid in the plaintiff's own hands does not affect the case. A garnishee is not a party to the action in the sense that he is required to make defense as between plaintiff and defendant. There is no statute in our state requiring him to interpose a defense, and to do so subjects him to the expense of a trial, and the risk of a judgment against himself for costs. So far as the motion to dismiss is concerned, we have this to say: That the Code (article 5, § 2) provides that from any judgment or determination of any court of law in any civil suit or action any party may appeal to the

court of appeals. We think the order of the court below is such a determination of the rights of the parties as entitles the appellant to an appeal. For the reasons we have assigned, we reverse the judgment below. Judgment reversed.

(78 Md. 499)

POWELL v. CURTIS et al.

(Court of Appeals of Maryland. Jan. 18, 1894.)

APPEAL—DELAY IN FILING RECORD—DISMISSAL.

Under Ct. App. Rule 13, requiring the record, on appeal from the orphans' court, to be transmitted within 30 days after the praying of an appeal, the appellate court will, of its own motion dismiss an appeal, no excuse being made for a delay of two years in transmitting the record, though counsel stipulate to take no advantage of the delay.

Appeal from orphans' court of Baltimore city.

Jacob Powell, Sr., filed a caveat to the will of Rebecca M. M. Powell. Alfred A. Curtis and Christopher C. Shriver answered. From an order admitting the will to probate, caveator appeals. Appeal dismissed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and BOYD, JJ.

C. W. Johnson, C. C. Rhodes, and F. V. Rhodes, for appellant. O. J. Bonaparte, for appellees.

BRYAN, J. A certain paper writing was propounded in the orphans' court of Baltimore city for probate as the last will and testament of Rebecca M. M. Powell, deceased. A caveat to the said paper writing was filed by Jacob Powell, Sr., who alleged himself to be the brother of the decedent. The caveat was answered by the appellees, and on the 29th day of June, 1891, the orphan's court passed an order admitting the paper writing to probate as the last will and testament of the decedent. An appeal was prayed by this caveator on the 16th day of July in the same year. The transcript of the record was filed in this court on the 18th day of July, 1893,—more than two years after the appeal. The thirteenth rule of this court requires that appeals from orders or decrees of the orphans' courts shall be taken and entered within 30 days after such order or decree, and that the record shall be transmitted to this court within 30 days after the praying of the appeal. The record furnishes us with no explanation of the long delay in sending up this appeal. It is true, an agreement of counsel has been filed that neither party shall take any advantage of the delay. But our rules are made by the authority of the court, and are not liable to be changed or relaxed at the pleasure of counsel. This one, among others, was intended to diminish the delay in the administration of justice, which, even when necessary, is a serious evil, and which, when unnecessary,

is a scandal and a reproach to the law. But it would be in vain to pass rules for this purpose, if we should permit them to be frustrated at the will of counsel. We are not now considering the validity of an excuse for the breach of this rule, for none has been alleged to exist. So far as the record discloses the facts, there seems to have been a willful disregard of it. Although there has been no motion by the appellees, we think it our duty to take the matter in our own hands in this case, and enforce our rule *sua sponte*, as we have frequently done heretofore in cases of a much less marked character. We shall therefore dismiss the appeal. Appeal dismissed, with costs.

CONSOLIDATED GAS CO. OF BALTIMORE CITY v. GRAFF, Justice of the Peace.

(Court of Appeals of Maryland. Jan. Term, 1894.)

APPEAL FROM JUSTICE—APPROVAL OF BOND—MANDAMUS.

Under Code, art. 5, § 89, requiring, for stay of execution on appeal from a justice of the peace, that an appeal bond be filed with the justice "with approved and sufficient security," mandamus will not lie to compel a justice to approve a bond which he has refused because the sureties are unknown to him.

Appeal from Baltimore city court.

Petition by the Consolidated Gas Company of Baltimore City for mandamus to E. Beatty Graff, a justice of the peace. Petition dismissed. Petitioner appeals. Affirmed.

Argued before BRYAN, McSHERRY, ROBERTS, and PAGE, JJ.

Alex. Preston, for appellant. E. B. Graff, in pro. per.

PAGE, J. The order in this case must be affirmed. The petition of the appellant sets out a judgment against itself, in favor of a certain Carrie V. Dubrime, on which an attachment was issued, and laid in the hands of the Evening News Company, garnishee; that thereupon an execution was ordered, and was issued by the appellee, as a justice of the peace, against the appellant, which, in order to protect itself, directed the appellee to enter an appeal, and offered a bond (annexed to the petition) to stay proceedings, "with two good and responsible persons upon it; that Graff refused to accept the bond" on the ground "that the said bond was not signed by the appellant,"—and prays for a writ of mandamus to transmit the papers and stay all proceedings in said cause until the court decides as to the sufficiency," etc. In his answer, the appellee, among other things, alleges that he "refused to accept or approve the bond because it was not such an appeal bond as is required by law, and because the sureties therein are unknown to respondent." The case was submitted with-

out evidence, and, upon the petition being dismissed, the petitioner appealed.

1 Code, § 89, art. 5, provides that no execution shall be stayed "unless an appeal bond in double the sum recovered, with approved and sufficient security, be filed with the justice," etc. The approval of a bond is an act requiring the exercise of judgment and discretion. The appellee states that he failed to approve the bond because the sureties were unknown to him. Where the acts to be done require the exercise of judgment and discretion in the officer against whom the mandamus is prayed, it will be refused. *Green v. Purnell*, 12 Md. 336; *Miles v. Bradford*, 22 Md. 185. Order affirmed.

(78 Md. 491)

BOYD v. SACHS et al.

(Court of Appeals of Maryland. Jan. 18, 1894.)

WILLS—REMAINDERS—REMARRIAGE OF WIDOW.

1. Testator gave his property to his wife for life, provided that she continued a widow, and devised the realty, after her death, to his son, D., and his heirs, provided that, from the time of taking possession, he or they should pay annually, for 10 years, \$100 to each of testator's two daughters. Should D. die before his mother, the realty was devised to said daughters, and should testator's wife remarry, from that time all her right to the benefits of the will was to cease, and the provisions respecting the children were to take effect. *Held*, that on the widow's remarriage the estate vested in D., and was not divested by his subsequent death before his mother.

2. D. conveyed to his mother, and one daughter conveyed to her all her interest. The other daughter conveyed to her all her interest for life. The mother lived 24 years after the two former conveyances, and 30 years after the latter one. *Held*, that the charges in favor of the daughters were extinguished.

Appeal from superior court of Baltimore city.

Ejectment by Francis J. Boyd against Louis and Henrietta Sachs and Philip Freedenberg. Judgment for defendants. Plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

A. Constable and John J. Donaldson, for appellant. Isidor Rayner and J. J. H. Mittenick, for appellees.

BRYAN, J. The decisive question in this case depends upon the construction of a will. Daniel McDonald, having executed his last will and testament in such manner as to pass real estate, died in the year 1845. In the determination of this case it is necessary to take into view every portion of the will, and we shall therefore quote the bequests and devises at large: "I give, devise, and bequeath all of my estate, of whatever kind or nature, to my beloved wife, for and during the term of her natural life, provided that during the same time she continue a widow and unmarried; and after her death I will and bequeath all my personal estate re-

maining at the time of her death, to be equally divided among my children or their representatives (per stirpes) living at the time. And, as to my real estate, I give and devise the same, after her death, to my son, Daniel, and his heirs, provided, however, that from the time of his or their receiving the same, and coming to possession, he or they shall pay annually, for the space of ten years thereafter, the sum of one hundred dollars each annually to my daughters Mary Jane and Caroline, if living, and, if dead, to the heir or heirs or legal representatives of the said Mary Jane and Caroline, or the survivors of them. And I do further will that in case of the death of my son, Daniel, before his mother, that the said real estate so devised to him shall go to his sisters aforesaid and their heirs as tenants in common, and that, in the event of the marriage of both or either of them, their shares shall be so secured as to be free from any debts, contracts, or obligations of their respective husbands. And, further, I do will that in the event of any future marriage by my wife aforesaid, that from that time all claim and right of my wife to the benefits of this will shall cease, and the provisions herein respecting my children shall take effect immediately thereon." The widow, Jane McDonald, in the year 1848, married Michael McDonald, who died within a few weeks after the marriage. During the same year she married Seaver Hatch, who died in the year 1855. The son of the testator and the two daughters executed deeds to their mother after the death of Hatch, her third husband. The deed of the daughter Mary Jane, executed in 1860, conveyed to her mother for life all her estate and interest under the will of the testator. Daniel, the son, and Caroline, the other daughter, having previously made conveyances to their mother, executed a deed, in 1866, which conveyed to her in fee all their right, title, and estate in the real estate devised by the will of the testator. Mary Jane, in 1862, married Francis J. Boyd, and died in 1864, having previously devised all her property to her husband. Mrs. Hatch mortgaged the real estate above mentioned, in 1881, to Bruce Jenkins, and it was afterwards sold under the mortgage to Louis Sachs, one of the defendants. Daniel McDonald, the son, died in 1882. Mrs. Hatch died in 1890. Boyd brought an action of ejectment against Sachs and wife and Freedenberg to recover the real estate devised by McDonald's will. Judgment having been rendered against the plaintiff, he has appealed to this court.

Although the plaintiff's declaration proceeds for the whole of this property, in reality, as shown by his prayers for the instruction of the jury, he claims only an undivided half of it. It is clear upon the face of the will that the testator intended that every interest which he had given to his widow should cease and be divested in case

she should marry again. In the first place it was given expressly on the condition that she should continue a widow and unmarried; and, secondly, he declared by a special clause of his will that, in the event of her marriage, all her claim and right to the benefits of the will should cease, and the provisions respecting the children should take effect immediately. Subject to these conditions, all of his property was given to the wife for life, and, after her death, to the children. By the third of the clauses of the will which we have quoted, the real estate was given to his son, Daniel, and his heirs, incumbered with certain charges in favor of his daughters. When the widow married again, her life estate was defeated, and brought to an end, as effectually as if she had died; her rights were entirely extinguished, and the allotment of the property to the children was to be made without reference to her. This is explicitly stated in the last clause of the will; and, without this clause, it would have been the necessary result of its proper construction, deduced from the manifest purpose of the testator. In *Clark v. Tonnison*, 33 Md. 85, there was a devise to the testator's wife as long as she remained his widow, and, at her death, to his children. It was held that it was the intention of the testator to give the property to the children on the termination of the wife's estate, whether that occurred by death or marriage, and that therefore, upon her marriage, the children's interest vested in possession. If the children's right of possession had been postponed to the death of the mother, inasmuch as her life estate had been forfeited by marriage, there would have been a hiatus until the period of her death, and to this extent there would have been an intestacy, which would have been in opposition to the testator's purpose. And so, in the present case, the widow's marriage was to have the same effect upon all the interests devised and bequeathed by the will as would have been wrought by her death. By the third clause of the will the real estate was given to Daniel, the son, after the widow's death, and by the fourth clause it was stated that, in case of his death before the widow, it should go to his sisters and their heirs, as tenants in common. The plain meaning of these clauses is that Daniel was to take the real estate on the termination of the widow's life estate, (by death or marriage,) and that, if he should die before such termination, it should go to his sisters. It is impossible to read this will without seeing that the testator's intention was to divide his property among his children as soon as the provision was satisfied which he had made for his widow. It would defeat the whole scheme of the will to hold that the son was to take the real estate as soon as the widow should marry, and to lose his title to it if he died in her lifetime. Especially unreasonable would this construction be in the light of

the charges in favor of the sisters, which are imposed upon the real estate by the third clause of the will. As soon as the devise to him should vest in possession, he was required to pay each of them \$100 a year, and this payment was to continue for the space of 10 years. Now, if, after paying these charges for 10 years, his title is liable to be defeated by his death in the lifetime of the widow, the devise might be an injury to him, instead of a benefit. A construction making such a result possible certainly would not be adopted, unless imperatively required by the words of the will. It is in opposition to a well-established rule declared by this court in *Glenn v. Spry*, 5 Md. 118, and in *Snyder v. Nesbitt*, 77 Md. —, 28 Atl. 1006: "Every devise is intended for the benefit of the devisee, and when a devise is thus incumbered, unless the devisee were to take the fee, he might, by dying before he had reimbursed himself the amount charged out of the land, be a loser by the devise, and what was intended as a benefit become an injury; and the rule applies to every case where a loss is possible. * * * It makes no difference if the sum be less than the value of the land devised. No regard is paid to the disparity, however great." This rule of construction was applied to wills containing devises very different from the one now under consideration. But the rule is a salutary one, and it furnishes valuable aid in ascertaining the meaning of a will like the one before us. To say that Daniel, the son, was to take a fee, and, after paying these annuities to his sisters, was to lose his title in case he died in the lifetime of the widow, is to attribute a purpose to the testator which is not disclosed on the face of the will. The death of the widow after her marriage was an event which the testator did not take into consideration at all. He made none of his legacies or devises dependent upon it, because the remarriage cut her off from all interest in his estate, and all connection with it. Daniel, having a fee simple indefeasible, conveyed it to his mother, the daughter Caroline conveyed to her in fee all her interest in the real estate, and the daughter Mary Jane conveyed all her interest in it to her for life; this meant all the annual payments which should become due in her mother's lifetime. The mother lived for 24 years after the acquisition of the titles of Daniel and Caroline, and 30 years after the conveyance from Mary Jane. It is impossible to suppose that the charges on the land are now in existence. If they were unpaid at the time the widow acquired the fee, they were extinguished by the union of the title and the charges in one owner. *Mitchell v. Mitchell*, 2 Gill, 236. The widow, therefore, was competent to mortgage the property, and the sale under the mortgage conveyed her fee-simple title. Consequently, Boyd, the plaintiff below, took no title to

this real estate under the will of his wife. This being the result to which we have arrived, it is irrelevant to consider in detail the prayers granted and refused by the trial court. Judgment affirmed.

(78 Md. 454)

FIDELITY & DEPOSIT CO. OF MARYLAND v. HAINES et al.

(Court of Appeals of Maryland. Jan. 12, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — PERSONAL PROPERTY — WHEN TITLE PASSES — SET-OFF AND COUNTERCLAIM.

1. Under Code, art. 21, §§ 44, 45, requiring conveyance of personal property to be recorded in the county or city in which the grantor resides, where the trustee for the benefit of creditors files his bond under article 16, § 205, at the domicile of the grantor, where the trust deed is recorded, title of all the personal property of the grantor passes to him, though it may be situated in another county or city.

2. In an action by the assignee in insolvency on a bond given in replevin against the assignee for property sold to insolvent by plaintiff in replevin, the note given by insolvent for the goods replevied cannot be pleaded as a set-off.

Appeal from superior court of Baltimore city.

Action by Hanson H. Haines and Francis Stokes, assignees, against the Fidelity & Deposit Company of Maryland, on a replevin bond. There was judgment for plaintiffs on demurrer, and exceptions to the declaration, and defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and FOWLER, McSHERRY, BRYAN, BOYD, and BRISCOE, JJ.

F. C. Slingluff, for appellant. E. H. Gans and B. H. Haman, for appellees.

BRISCOE, J. The appellees sued the appellant, a corporation, in this state, in an action of debt, as surety on a replevin bond. The following facts arise on the pleadings: On the 1st of December, 1889, the Bolton Mines Company, of Baltimore city, sold a certain lot of fertilizers or phosphates to the Waring Manufacturing Company, of Cecil county, Md. The goods were delivered, and a note, dated the 15th of March, 1890, was executed and delivered for the contract price. Afterwards, on the 23d of May, 1890, the latter company, being financially embarrassed, made a deed of trust to the appellees for the benefit of creditors. This deed of trust was recorded in Cecil county, the place of domicile of the corporation, and the bond of assignees filed on May 30, 1890, in the same county. On the 9th of June following, the Bolton Mines Company replevied the identical goods of the appellees, and took possession of them. The replevin suit was not prosecuted with effect, or the property returned, but was dismissed by order of the plaintiff in the replevin suit; and this action was brought against the appellant, as surety on the replevin bond.

The questions to be passed upon by us arise upon demurrers and exceptions to the various prayers. It is contended upon the part of the appellant that, when the fertilizers were replevied, on the 9th of June, 1890, the appellees had no title to them, because, while the deed of trust was recorded in Baltimore city on the 5th of June, 1890, the assignee's bond was not filed there until the 11th of June, two days after the goods had been replevied. This contention can be disposed of by a single reference. In the case of *Stiefel v. Barton*, 73 Md. 411, 21 Atl. 63, we passed upon the identical question, and in construing the 205th section of article 18 of the Code, which provides "that every trustee to whom any estate, real, personal or mixed, shall be conveyed for the benefit of creditors, * * *" there said that a deed conveying real property for the benefit of creditors must be recorded in the county or counties, or in the city of Baltimore, in which the land lies;¹ and, if it conveys personal property, it must be recorded in the county or city in which the grantor resides.² We said also that, as the property in dispute in *Barton's Case* was personal property, the deed ought to have been recorded in the county where the grantor resided, and the bond of the trustee ought to have been filed with the clerk of that county for his approval; and until the deed was so recorded, and the bond of the trustee so filed, no title to the property could vest in the trustee. There can be no question, then, that as the deed of trust in the case now under consideration was recorded, and the bond of the trustees was approved and filed, in Cecil county, the place of the domicile of the grantor prior to the issuing of the writ of replevin, and in the absence of fraud in the sale, which charge is abandoned by the appellant, the legal title to the personal property of the Waring Manufacturing Company passed to the trustees, under the deed of assignment, and the taking of this property was a wrongful and unlawful interference with the possession of the assignees. The subsequent recording of the deed and filing of the bond in Baltimore city was manifestly for the purpose of passing title to the real estate, and could in no wise affect the title to the personal estate. The demurrer, therefore, to the defendant's third plea, which raised this question, was properly sustained. *Wilson v. Carson*, 12 Md. 77; *Stiefel v. Barton*, 73 Md. 411, 21 Atl. 63.

We come now to the second question in the case,—that is, the appellant claims to recoup or set off against the plaintiffs' demand the amount of the note made by their assignor, which demand arose out of matters altogether subsequent thereto. It is well settled that recoupment is a species of common-law set-off for damages due the defendant

growing out of the same transaction, and is allowed in this state, in actions both *ex contractu* and *ex delicto*, in order to avoid circuity and multiplicity of actions. *Insurance Co. v. Dalrymple*, 25 Md. 309; *Dowler v. Cushwa*, 27 Md. 367; *Warfield v. Booth*, 33 Md. 63. And while it is true that an assignee for the benefit of creditors stands in the place of the assignor, and is merely such for the payment of pre-existing creditors, and takes the property under the assignment subject to all existing equities, yet it is clear that a liability subsequent to the assignment cannot be set off against the assignee. *Burrill, Assignm.* § 403. The reason of this is that the assignee, in virtue of the assignment, becomes a trustee for the creditors. The status of the assignors, debtors, and creditors is fixed by the assignment in trust for the creditors. The case of *Seldner v. Smith*, 40 Md. 602, relied on by the appellant, is entirely distinguishable from this case. The principle recognized and applied in that case was that, a replevin bond being one of indemnity only, a surety on said bond is entitled to be subrogated to the right of his principal, and to avail himself of the same defenses which were open to him. In *Seldner's Case* the plaintiff was the party to whom the goods had been sold, and the title had not passed to a third party, as, in this case, to an assignee for the benefit of creditors. The claims were mutual, and arose out of the same transaction; whereas, in the case at bar, the liability on the bond arises out of transactions subsequent to the assignment, and for a claim also subsequent thereto. In *Thompson v. Whitmarsh*, 100 N. Y. 35, 2 N. E. 273, it was held that upon new contracts made by an executor or administrator, and never existing in favor of the decedent, but growing out of the dealing of the former alone, a debt against the decedent cannot be made the subject of a counterclaim. And the same rule has been established by this court in the cases of *Scott v. Scott*, 17 Md. 78, and *Schwollenberg v. Jennings*, 43 Md. 554. To sustain the contention of the appellant would destroy the principle of equality among creditors in the settlement of insolvent estates, and establish an inequitable preference in the administration of estates, entirely at war with the established doctrine of this court.

For the reasons we have stated, the demurrers to the pleas were properly sustained. The plaintiff's first prayer fairly submitted to the jury the finding of every fact essential to their right to recover, and was properly granted. The second prayer relates to the measure of damages, and was correct. The third prayer was conceded. The defendant's first prayer, relating to the recoupment and set-off, was properly rejected, for the reasons we have heretofore given. The third prayer, in reference to the measure of damages, was fully covered by the plaintiffs'

¹ Code, art. 21, § 13.

² Code, art. 21, §§ 44, 45.

third prayer, which was correct. The rulings of the court below will therefore be affirmed. Judgment affirmed.

(78 Md. 330)

CONDON v. SPRIGG et al.

(Court of Appeals of Maryland. Jan. 12, 1894.)

PLEADING—AMENDMENT OF DECLARATION—NUISANCE—WHAT CONSTITUTES.

1. Where the amendment of a declaration does not change the form of the action, the writ need not also be amended.

2. H. conveyed two lots to defendant without his knowledge, and defendant, on learning thereof, refused to hold title thereto. H. then presented him a deed to execute, which, defendant testified, H. told him conveyed both lots. The deed covered only one lot, and H. testified that he told defendant so. Defendant had large experience in the purchase and sale of land. *Held*, that defendant was chargeable with the liability which attached to the ownership of the lot, title to which remained in him.

3. An area in front of a dwelling house on a public street, without fence or gate to prevent one falling therein, is a nuisance.

Appeal from superior court of Baltimore city.

Action by Jane Sprigg and Horace Sprigg against Levi Z. Condon. There was judgment for plaintiffs, and defendant appeals. *Affirmed*.

The following are prayers for instructions granted by the court: Plaintiffs' fifth prayer, (granted in connection with and subject to defendant's second prayer:) "The court instruct the jury that if they find from the evidence that the plaintiff Jane Sprigg was lawfully passing along the footway or pavement on Whatcoat street, in the city of Baltimore, and using reasonable care and caution, and fell into an area or excavation in said footway or pavement in front of a certain house on said street, and that the defendant was the owner of said house, and that said area or excavation was put there for the purpose of giving light to the basement of said house, and an entrance from the street into said basement, and was open and unprotected, and the said plaintiff suffered injury therefrom, then their verdict should be for the plaintiff; and, in assessing the damage, they are to consider the condition of the plaintiff before the injury, as compared with her present condition in consequence of said injury, and whether the said injury is in its nature permanent, and how far it is calculated to disable the plaintiff from engaging in those employments and pursuits for which, in the absence of said injury, she would have been qualified, and also the physical and mental suffering to which she was subjected by reason of the said injury, and to allow such damages as, in their opinion, will be a fair and just compensation for the injury which the plaintiff has thus sustained." Defendant's prayer No. 2, (granted:) "(2) If the jury find that the witness Haines put the property mentioned in the deed from Holland to the

defendant in the name of him, the defendant, without his consent, and that he never assented to or accepted said deed, nor accepted said conveyance to him, and that he executed the two other deeds described in the evidence only for the purpose of disclaiming said property in said deeds described, and getting the same out of his name, then their verdict ought to be for defendant."

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and ROBERTS, JJ.

J. I. Alexander and Jos. C. France, for appellant. H. P. Jordan and R. E. Jordan, for appellees.

ROBERTS, J. This is an action on the case for the recovery of damages for a nuisance. The suit was originally brought in the name of Jane Sprigg, by Horace Sprigg, her next friend. Subsequently the plaintiff moved to amend the declaration by striking out the name of "Horace Sprigg, as next friend," and to make Horace Sprigg, the husband of Jane, a joint plaintiff with her. Leave was granted, the amendment made, and the defendant excepted. It is contended by the defendant that the amendment was improperly allowed, because the writ was not also amended, and that, under the present state of the pleadings, the action cannot be maintained. In this view we do not concur, and think the question has been conclusively determined by this court in *Treusch v. Kamke*, 63 Md. 282. The writ has accomplished its purpose when the parties are before this court. The plaintiffs are voluntarily in court, and the defendant, in obedience to the mandate of the court, is required to appear. If, for the purpose of the plaintiffs' case, it had been requisite to change the form of action, then an amendment of the writ might have been necessary. We find no error in the court's action in making the amendment. There was no oral argument in this court on the demurrer to the equitable plea, nor do we find any reference to it in the appellant's brief. We therefore infer that the question is not before us for our consideration. The facts of this case are that the plaintiff Jane Sprigg sustained serious injury while passing along the west side of Whatcoat street, a public thoroughfare of the city of Baltimore, by falling into an area or opening in front of a dwelling house on said street. This area is used as an entrance to the basement of the dwelling, which has a front of 12 or 14 feet. This area is about 12 or 14 inches in depth, and extends the full length of the front of the house, and has a uniform width of 2 feet and 7 inches to the coping. The pavement is 8 feet and 2 inches in width from the house front to the gutter. The night on which the accident happened was so dark that the plaintiff could not see the pavement at her feet. She was not aware of the existence of the opening, nor did she know

that there was any basement to the house. The area was without fence or gate to prevent any one falling therein.

The chief controversy in this case arises out of the conflict of testimony as to the ownership of the property. At the time of the accident the land records of Baltimore city disclosed the fact that the proper title to the premises was in the defendant. It appears from the testimony in the record that the premises had been conveyed to the defendant, before the happening of the accident, without his knowledge, and the deeds for the same placed upon the land records without his consent by an office companion of the defendant, a Mr. Haines. Subsequently, Haines, having sold one of the lots, applied to the defendant to execute a deed for the same to the purchaser, which he did, and in which he acknowledged the receipt of the sum of \$600, the whole purchase money, and therein warranted specially the property granted, with such further assurances as might be requisite. The defendant claims that the first intimation he had of the two lots being conveyed to him was when Haines requested him to execute a deed, and that he immediately requested him to convey the lots to somebody else, as he objected to them being in his name. When he executed the first deed he says he supposed that both lots had been included in it, and that he never knew to the contrary until this suit was brought by the plaintiff. The second deed was not executed by the defendant in the premises when the accident happened until after the plaintiff had fallen into the area way and was injured, and or until after this suit was instituted. The second deed, like the former, contains a receipt for purchase money, and guaranties and assurances of title. It is quite clear that if Haines caused the property to be conveyed to the defendant without his knowledge, and placed the deed on record without his consent, the defendant under the circumstances of the case, could not be held responsible for the injuries resulting to the plaintiff from the accident. There can be but small doubt as to the motive of Haines in thus concealing the title of the property, and placing the same in the defendant. The defendant, however, cannot be affected with a fraudulent delivery of the deed, any more than he can be held responsible for any other fraud, in the commission of which he has had no part. *Leppoc v. Bank*, 32 Md. 143. But, after the defendant was informed of Haines' conduct, it then became incumbent upon him to take prompt action for his own protection. Now, what did he do to accomplish this purpose? He says he told Haines he would not consent to have the title remain in him, and thereupon Haines presented a deed for his execution, which, he says, Haines told him included both lots. This Haines denies, and says that he told the defendant that it was a deed for one of the houses, and again he

says he told him what the deed was. It is in proof that the defendant was a man of large business experience, especially in the purchase and sale of real estate; and yet, with the knowledge that Haines had, without his assent, conveyed this property to him, he executes a deed, containing guaranties of title, etc., without even reading it, to find out whether, by executing the deed, he had divested himself of the ownership of the property, and released himself from all liability concerning it. It was, we think, the duty of the defendant, when he became cognizant of the conduct of Haines in seeking to place the title of the property in him, to have taken prompt steps to relieve himself from complications which, under the circumstances, might be fairly expected to follow. It must have been apparent to the defendant that Haines was actuated by an improper motive in what he had done. In the ordinary transactions of life, men do not convey their real estate to strangers for the purpose of convenience.

We come now to the consideration of the prayers. The plaintiffs' fifth prayer was granted in connection with and subject to the defendant's second prayer. Standing by itself, the plaintiffs' fifth prayer substantially embodies the law announced by this court in *Irwin v. Sprigg*, 6 Gill, 200, which has been approved in *Owings v. Jones*, 9 Md. 118, and in other cases. That which this court said in *Irwin v. Sprigg*, supra, is, we think, equally applicable here: "The existence of an area, open and unprotected, like that described by the witnesses in this case, is an unauthorized and illegal obstruction of a public street in a populous city, of a most aggravated and dangerous character, and is therefore a public nuisance; yet, as he subsequently became the owner of the house to which it belonged, the law imposed upon him the obligation to render it secure." The doctrine of this case was much criticised at the hearing in this court. It was contended that the case found its only support in the case of *Coupland v. Hardingham*, 3 Camp. 398, where Lord Ellenborough had delivered the opinion of the court, and that since then *Coupland v. Hardingham* had been overruled in *Fisher v. Prowse*, 2 Best & S. 770. However this may be, we think the doctrine announced in *Irwin v. Sprigg* is proper, under the circumstances shown by the record in this case, to be applied here.

As to the questions presented in the defendant's first and third prayers, they have received sufficient consideration in what we have already said, and we think they were properly rejected, especially when taken in connection with the defendant's second prayer, which was granted, and gave the defendant all the law to which he was fairly entitled respecting the ownership of the property in question. We think the rulings of the court below were correct upon all the

points raised by the prayers. The judgment must therefore be affirmed.

Judgment affirmed, with costs.

(78 Md. 408)

BALTIMORE TRACTION CO. OF BALTIMORE CITY v. STATE, to Use of RINGGOLD et al.

(Court of Appeals of Maryland. Jan. 12, 1894.)

STREET RAILWAYS—WHO ARE PASSENGERS—CONTRIBUTORY NEGLIGENCE.

1. A person 45 years of age, and weighing 200 pounds, who attempts to board a street car moving 6 miles an hour, with a basket in one hand and a bottle in the other, is guilty of such negligence as will bar an action for his death because of failure to stop the car, unless the trainmen, with reasonable diligence, could have avoided the accident after discovering his peril.

2. One who attempts to board a street car while it is moving 6 miles an hour is not a passenger of the car, and entitled, as such, to protection from injury by the trainmen, though he signaled the car to stop, but is only entitled to such care on the part of the trainmen as is due to any person in the street.

Appeal from Baltimore court of common pleas.

Action in the name of the state, for the use of Virginia T. Ringgold and others, against the Baltimore Traction Company of Baltimore City, to recover for the death of Edward Ringgold. There was judgment for plaintiff, and defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BOYD, McSHERRY, and PAGE, JJ.

R. D. Morrison, H. Munnikhuisen, and N. P. Bond, for appellant. J. S. Lemmon and C. Baker Clotworthy, for appellees.

PAGE, J. On the 26th May, 1891, Edward Ringgold, desiring to take one of the defendant's cars to go to his business, left his home, having in his right hand a beer bottle containing cold tea, and on his left arm a small basket, about eight inches long, containing his lunch. He stopped on the west side of Druid Hill avenue, at a point 25 or 30 feet south from Dolphin street, and there he raised his arm for the purpose of signaling a car which was then coming down the avenue. Gallagher, the gripman, states that he saw him standing there looking at the cars, but "saw no signal or indication on the part of the deceased that he wanted to get on the car." As the car came down the avenue, it slowed up as it approached Dolphin street, and as it crossed "it was going slow;" but, after it reached the south side of Dolphin street, its speed was suddenly increased. The gripman gives as the reason for this that when he approached Dolphin street "there was a gentleman who got on the trailer, * * * and that after passing the south corner, * * * and seeing no one there to get on, the witness started the train up gradually until five bells were rung, which was the signal to stop immediately." When the car had

passed about 30 feet from Dolphin street, and while it was still moving, the deceased, who had moved into the street, made an effort to get on. Before he could do so, the speed of the car was increased. He grabbed the car with his left hand, and, running by its side, tried to board it. The conductor, seeing him in this position, seized him under the arm to prevent him from falling. The deceased then told him, "Let go my arm. I can get on," and twice repeated the words, "Let me go;" and the conductor, though he says he thought he would hold on to him, and thus prevent an accident, then let him go, whereupon he fell, and was killed by being run over by the trailer. It also appears from the evidence that the conductor, after he seized Ringgold, was unable to make the signal to stop the car until after he let him go, because of the fact that both his hands were then occupied,—one in holding Ringgold, and the other in retaining his own position on the car. The train consisted of two cars, the power being in the forward one. There was a conductor on each car, and a bell on the trailer which did not connect with the bell on the grip car, and could not be heard by the gripman, in consequence of which all signals from the trailer had to be repeated by the conductor on the grip car, in order to reach the gripman. By rule 7 of the company, gripmen are required to keep a sharp lookout for passengers, and stop trains at proper places to receive them, looking in each direction at cross streets; to stop trains to take on and let off passengers at the further sides of cross streets, (except when special notice should be given from time to time of other places,) and stop so that the rear car platform of the rear car will be over the flagstone. Ringgold was 42 years of age, a little over 5 feet 2 inches in height, and weighed about 200 pounds. He was active, intelligent for a man of his color, temperate, and accustomed to use the cars daily.

The parties offered several prayers, all of which, (except the seventh of the plaintiff's, upon the measure of damages,) the court refused, and granted in lieu thereof instructions of his own, intended to cover the whole case; and the rejection of the defendant's prayers, the granting of the seventh prayer of the plaintiff, and the instructions given by the court, constitute the defendant's first exceptions. The objection to the seventh prayer of the plaintiff was not pressed at the argument; also, it was not contended that it was error to refuse the defendant's prayers, though correct in themselves, if the instructions actually given by the court cover the same points in other forms. It was insisted, however, that the court's instructions were erroneous, and did not present the case to the jury as particularly as the defendant was entitled.

By the defendant's first prayer, the court was asked to instruct the jury that the de-

ceased was guilty of such carelessness as to amount in law to contributory negligence, if they found that, being of the age and physical condition stated in the evidence, he received his injuries in consequence of his attempt to board the car while it was moving at the rate of six or more miles per hour, with a bottle in his right hand and a basket on his left arm, and by reason of being so incumbered was prevented from grasping with his hand the handle attached to the car. While it is well settled that when there is a contrariety of evidence, and the question of care or negligence depends upon the consideration of a variety of circumstances, "the most a court can do is to define the degree of care and caution exacted of the parties, and leave to the practical judgment and discretion of the jury the work of comparing the acts and conduct of the parties concerned with what would be the natural and ordinary course of prudent and discreet men under similar circumstances," (*Fitzpatrick's Case*, 35 Md. 44,) yet cases do occur in which there are clearly established such glaring acts of carelessness on the part of the plaintiff as to amount in law to contributory negligence, and in such it is the duty of the court, when requested, to so instruct the jury, (*McMahon v. Railway Co.*, 39 Md. 449.) This prayer, however, does not take from the jury the finding of the facts upon which it is based. The court is asked to instruct them that the deceased was guilty of contributory negligence, as matter of law, but only upon the hypothesis of their finding the several facts stated in the instruction. Such a conclusion, in a case like this, is ordinarily a matter to be submitted to the jury, to be determined by them. Even if the facts were conceded, or proved beyond the possibility of contradiction, it may still sometimes be a matter of doubt whether the danger was so apparent as to make it the duty of the person to desist from the attempt. But, when, on account of the rate of speed, or for other reasons, no reasonably careful person, of ordinary strength and agility, would make the effort, it is his negligence in law, and it is the duty of the court, on proper application, to so instruct the jury. *Corlin v. Railway Co.*, 154 Mass. 198, 27 N. E. 1000; *Picard v. Railway Co.*, (Pa. Sup.) 23 Atl. 566; *Railroad Co. v. Coulbourn*, 69 Md. 369, 16 Atl. 208; *Kane's Case*, 69 Md. 27, 13 Atl. 387; *Maugan's Case*, 61 Md. 61.

The proof shows that Ringgold was about 45 years of age, and accustomed to use the cars daily. He was extremely stout, in proportion to his height. His weight was about 200 pounds, though his height was slightly over 5 feet 2 inches. His wife testifies that he was very active; another witness, that he was "fairly" active. There was testimony tending to prove that the rate of speed when he attempted to board the car was six miles an hour or more. He was incumbered by having in his right hand a beer

bottle, and on his left arm a basket about eight inches in length; and, being so incumbered, there was evidence tending to show that he ran alongside the car, endeavoring to leap or climb upon it. We are of the opinion that if, under these circumstances, the deceased chose to make the experiment of attempting to enter the car, he must be required to bear the consequences of his own act, unless the defendant, when he discovered his peril, failed to use the proper diligence in endeavoring to avert the injury. *Phillips v. Railroad Co.*, 49 N. Y. 177; *Reddington v. Traction Co.*, 132 Pa. St. 154, 19 Atl. 28.

It is also contended that the prayer was bad because it permitted the jury to find a verdict for the plaintiff without requiring them also to find that the peril of the deceased could not have been discovered by the driver, by the exercise of diligence, in time to avoid the accident. But, under the theory of this prayer, we do not think this would have been proper. The hypothesis upon which they could find for the defendant was that Ringgold had negligently attempted to enter the car. If they so found, such conduct would be the proximate cause of the injury, unless there supervened some contributing negligence on the part of the railway. Proximate cause is the act which directly produces the injury. *Trainor's Case*, 33 Md. 542. And if that was due to the improper conduct of the deceased, or if such conduct so far contributed to it that without it the accident would not have occurred, the plaintiff would not be entitled to recover, unless the defendant could, by care and prudence, have avoided the consequence of such negligence. *Lewis' Case*, 38 Md. 588. If, therefore, the jury found that the cause of the accident is to be attributed in this case to the act of the deceased in having attempted to board the car where it was obviously imprudent for him so to do, the fact that the agents of the defendant failed to stop the car, although such failure may have been a breach of duty on their part, cannot affect the question. By the rule of the company, it was the duty of the gripman to keep a "sharp lookout for passengers, and stop the car at proper places;" but, if he failed to do so, it would not authorize the deceased to do an imprudent act, and thereby place himself in peril. If a party thinks proper to make an experiment under circumstances of peril open and known to him, and which he could reasonably have avoided, he must bear the consequences of his own act. *Dietrich's Case*, 58 Md. 359. If the car was moving too rapidly for any man, incumbered as the deceased was, prudently to attempt to board it, it was not the duty of the defendant's agents to notify him not to make the effort. They were authorized to infer that being a sane person, and *sui juris*, his own sense of danger would prevent him from doing an obviously imprudent and dangerous act. Many cases may be cited to support

this statement. In *Frech's Case*, 39 Md. 580, where a person was run over by the defendant's cars while on the latter's track, the court says: "The defendant's agents were justified in acting upon the reasonable supposition that the plaintiff would be guided by his own sense of danger." In *Holohan's Case*, 8 Mackey, 324, the court held, under circumstances similar to the case at bar, that the defendant was not bound to anticipate the negligence of the plaintiff, he being *sul juris*, and to warn him. "Its servants," said the court, "had the right to assume, under the circumstances, that the plaintiff, being *sul juris*, and in possession of all of his faculties, desired to stop the car, and intended not to get on the car until it stopped." *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. 1125. Even if the jury found that the signal to stop was or ought to have been seen by the gripman, and the deceased had a right to suppose, from the slowing of the car, that his tender of himself as a passenger had been accepted, it would not authorize him to make an attempt to enter under circumstances of peril open and known to him, and which, by the exercise of his senses, he could fully understand. He was on the street, and not on the property of the company, and need not have so acted unless he chose so to do. *Dietrich's Case*, 58 Md. 359. In such a case, he must bear the consequences of his own act, provided the agents of the defendant, as soon as the dangerous position was discovered by them, used all reasonable efforts to prevent an accident. *State v. Baltimore & O. R. Co.*, 69 Md. 341, 14 Atl. 685, 688. We will add here, to avoid misunderstanding, that we do not mean to decide that there are no cases in which the duty rests upon the defendant to exercise diligence in discovering a peril to which the plaintiff may be exposed by his own act. *Railway Co. v. Smith*, 74 Md. 216, 21 Atl. 706, was such a case. There the car had stopped, the plaintiff was about entering, and it was the duty of the driver not to start until she was in a position of safety, and it was proper for the court to instruct the jury to that effect. It is contended, however, that the subject of this prayer is fully covered by the instructions granted by the court. It is true that by the second paragraph of those instructions the jury were told that if they found "any failure of the deceased to exercise ordinary care on his part, as by attempting to board a car in too rapid motion, while the deceased was holding a bottle and a basket, running after the same, for the purpose," etc. "But," as was said by this court in *Railroad Co. v. Mall*, 66 Md. 60, 5 Atl. 87, "the defendant was entitled to a definition of what would constitute contributory negligence," or, as was said in *Stever's Case*, 72 Md. 159, 19 Atl. 449, "to have the mind of the jury directed to the specific facts in evidence, and instructed as to the effect of such facts, if found to exist." We are of the

opinion, therefore, there was error in the rejection of this prayer.

The second prayer of the defendant asked the court to say to the jury that there was no evidence in the case from which they could find that there was negligence on the part of the defendant after becoming aware of the perilous position of the deceased. It was insisted at the argument by the appellees' counsel that at the time the conductor released his grasp on the deceased the latter was a passenger, or in the position of a passenger, and in the keeping of the railroad, and that, though the defendant's agent was told by the deceased, three times, to let him go, and did so, in consequence of this demand, the act of the conductor in then letting him go was evidence from which the jury could find there was negligence on the part of the defendant. But the prayer requires the jury to find as a preliminary fact that the deceased was on the car, and in the perilous position described in the evidence, by his own imprudent act; and, if he was, we do not think he ought to be regarded as a passenger. There was no evidence that the gripman saw his signal, and if he did the deceased could not infer his tender to become a passenger had been accepted by the slowing of the car, provided it was still moving so rapidly as to make it obviously unsafe to attempt to board it. The relation of carrier and passenger may indeed be implied from slight circumstances, but one who intends to take passage on a street car cannot be regarded as a passenger, while he is in the act of entering it, unless he does so with a proper degree of care and prudence. The street was in no sense a passenger station, for the safety of which the company is responsible. *Booth, St. Ry. Law*, 445; *Creamer v. Railway Co.*, (Mass.) 31 N. E. 391; *Platt v. Railway Co.*, 2 Hun, 124. So, until he had entered the car, or was in the act of prudently entering, he had not placed himself in the charge of the defendant; and, if the attempt to enter was so obviously reckless and careless as to amount in itself to contributory negligence, it would be unreasonable to hold that such imprudent conduct entitled him to be regarded as a passenger while hanging onto the outside of the car. In *Smith v. Railway Co.*, 32 Minn. 1, 18 N. W. 827, the court pronounced an instruction correct which set out that when a person intends to take a street car, and has hailed it, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step on the platform. *Booth, St. Ry. Law*, 326. If, therefore, the jury found, as they were required by this prayer, that, when the deceased was discovered by the agents of the defendant, he was clinging to the car, and in a position of peril by his own imprudent act, the duty of the conductor towards him was not that of the utmost diligence, but only such rea-

sonable care and caution as is due to a person not a passenger. Breinig's Case, 25 Md. 378. If this be so, the duty of the conductor was to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation. Coughlan's Case, 24 Md. 84. Ringgold was a sane man, in full possession of his faculties, and accustomed to the use of cars. He believed he could recover himself, if released, and therefore thrice demanded to be let go. The conductor's duty to him was the same as that of the passenger to the railroad in Leapley's Case, 65 Md. 577, 4 Atl. 891, viz. that of ordinary care, when the conductor directed the passenger to alight from the moving car, and in which the court said: "It would come with a very ill grace from the road to say to the passenger, 'You have been careless and negligent, because you obeyed the order of my agent.'" If Ringgold was in the position of a passenger, the rule of the duty of the conductor might not be the same. The railroad would then have had the safety of the deceased in its keeping, and it would have been the duty of the conductor to have exercised the utmost diligence for his protection. But, if that relation did not exist, Ringgold had a right to judge for himself, and insist upon having done whatever seemed to him to be the proper thing to insure his safety. He had a right to have his thrice-expressed wish respected; and that it was so respected ought to furnish him, if he were alive, or his representatives, now that he is dead, no just ground for complaint. By the last clause of this prayer the court was asked to instruct the jury that there was no evidence from which the jury could find that the defendant failed to exercise ordinary care after becoming aware of the deceased's negligence. If the jury had found there was negligence on his part in attempting to board the car, for the reasons we have given, this would have been correct; but if they found there had not been such negligence on his part, and therefore that the relation of the deceased to the company was that of a passenger, then there would have existed the duty on the part of the conductor to exercise the utmost diligence and care, and it would have been their province to determine whether the conduct of the defendant's agents in letting him go met the requirements of that rule. It was only in the event of their finding the contributory negligence in attempting to board the car that the jury could properly be instructed that there was no evidence of want of proper care on the part of the defendant's agents in averting the consequence of his act, and it should have been so put to the jury. We think the prayer, for this reason, was properly rejected.

In discussing these two prayers, we have so thoroughly gone over the whole case that we do not deem it necessary to advert to

the other rejected prayers of the plaintiff. To do so would be either to repeat what has already been said, or to indulge in a criticism upon their form. We will add, however, that in our opinion the two first paragraphs of instructions by the court are erroneous, and by their form likely to mislead. By the first the jury are instructed that if they find "any want of ordinary care on the part of the defendant's conductors or gripmen, or either of them, such as by a failure to stop the train when signaled, or to notify the deceased not to attempt to board," etc., then the verdict should be for the plaintiff. By this no question as to the contributory negligence of the defendant is to be passed upon by the jury. Possibly, the learned judge intended the first paragraph to be read in connection with the second; but the instructions, as framed, do not make this apparent, and for that reason are capable of easily misleading the jury. But even if this were not correct, and the two sections be taken together, we think they ignore the question as to the proximate cause of the accident. For instance, they instruct the jury that if they find want of care on the part of the defendant in any one of the several matters joined in the instruction by the disjunctive "or," whether it bore any relation to the proximate cause of the accident or not, there must be a verdict for the plaintiff. We are of the opinion this was error. And, besides this, the parties were entitled to "have the mind of the jury directed to the specific facts in evidence, and instructed as to the effect of such facts it found to exist." Judgment reversed, and new trial awarded.

(78 Md. 439)

HISS et al. v. WEIK.

(Court of Appeals of Maryland. Jan. 12. 1894.)

WILLS—UNDUE INFLUENCE—EVIDENCE.

Testator, a man 73 years old, enfeebled in body, but with clear mental faculties, two weeks before his death made his will, giving a small amount to an invalid daughter, nothing to an insane son or the son's young daughter, and the bulk of his large property to a daughter who had importuned him for money, and who asserted her ability to induce him to do as she wished, and who had, just before the making of the will, denounced her insane brother to her father as unworthy of sympathy. Testator was greatly attached to the son's daughter, and deeply moved by the son's affliction, and though, in his will, testator stated, as a reason for cutting off his son, that he had given him all he desired to, just before testator's death, and after the will was made, the husband of the daughter to whom the property was left, in company with a servant whom he took as a witness, went to the asylum where the son was, and passed to him \$5,000 in bonds as a gift from his father. *Held*, that the court properly submitted to the jury the question of undue influence.

Appeal from Baltimore court of common pleas.

Trial of issues between Emma L. Weik, by her husband and next friend, Otto B. Weik,

and William J. Hiss and others, Emma L. Weik having filed a caveat attacking the validity of a will. Judgment for caveator, and caveatees appeal. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, BOYD, FOWLER, and McSHERRY, JJ.

Thos. M. Lanahan, Frank Gosnell, and Bernard Carter, for appellants. Wm. Pinkney Whyte and Jas. E. Carr, for appellee.

McSHERRY, J. There is but one bill of exception in the record now before us, and the chief question which it raises is whether there was legally sufficient evidence offered by the caveator (the appellee here) to justify the trial court in submitting the case to the jury. On May 6, 1879, the last will and testament of the late Bishop Ames, who died on April 25th of that year, was admitted to probate by the orphans' court of Baltimore city, and some 12 years thereafter his granddaughter, (the appellee,) upon her attaining her majority, filed a caveat assailing its validity. Issues were framed, and were finally tried before a jury in the court of common pleas of Baltimore city. The trial resulted in a verdict for the caveator upon the first and second issues, and for the caveatees upon the third issue. These issues were: First, as to whether the paper writing purporting to be the will of Bishop Ames was his last will and testament; second, as to whether the same paper writing had been procured by undue influence exercised and practiced upon the testator; and, third, as to whether it had been procured by fraud. At the close of the evidence in the court below the appellee presented two, and the appellants presented six, prayers for instructions to the jury. The appellee's first prayer was granted, and her second was rejected. The appellants' first and second prayers were rejected, and the remaining four were granted. The appellee's instruction accurately defined undue influence as understood in its legal sense, and left to the jury to find from the evidence the existence of the facts necessary to constitute such an influence. The appellants' first and second prayers asked the court to withdraw the case from the jury upon the ground that there was no sufficient evidence that the will had been procured by undue influence. If the appellee's instruction was properly granted, there was no error committed in rejecting the appellants' first and second prayers, but, if there was error in rejecting these latter, there was, of necessity, error in granting that of the appellee. So, as already suggested, the controlling inquiry is, was there legally sufficient evidence—that is, competent evidence—tending to prove the issues, which ought to have gone to the jury? Or, stating the question conversely, was the evidence offered by the caveator, assuming it all to be true, (as must be done when weighing its legal suffi-

v.28a.no.7—26

ciency, upon a prayer of this character,) so utterly inconclusive or devoid of probative force as not to enable an ordinary intelligent mind to draw a rational conclusion therefrom in support of the proposition sought to be maintained by it? The solution of this inquiry involves an examination of the evidence contained in the record. Before, however, proceeding to do this, it may not be amiss to observe that it is not our province, under the law, to determine whether the verdict of the jury was either right or wrong, or to decide whether the will ought or ought not to have been set aside. And, even though we might be of opinion, from the whole evidence before us, that the jury had reached an incorrect or mistaken conclusion of fact, we are without authority to disturb their verdict if the court below committed no error in its rulings upon the legal propositions submitted to it. The principles which must control this court, and the view from which we must approach a discussion of the case, are essentially and radically different from those which would be applicable and appropriate were we authorized to consider the propriety of the verdict upon a review of a motion for a new trial. Whether the jury ought to have found a verdict the way they did, or a different way, is a matter which the law gives us no jurisdiction to decide. As an appellate court we cannot review the findings of the jury upon matters of fact, nor can we pass upon the comparative weight of the conflicting evidence submitted to them. If no error of law has been committed by the inferior court in any of its rulings, the verdict of the jury, whether right or wrong, just or unjust, and even though it be directly against, and in the very teeth and face of, the preponderance of the evidence, cannot be interfered with here; and there is no power lodged elsewhere to set aside the verdict, except with the judge before whom the case was tried below. We have consequently to determine, not whether the jury ought, in view of the facts, to have stricken down the will, but whether there was any legally sufficient evidence in the case from which they could properly find, if they believed it to be true, that the will had been procured by undue influence. *Jones v. Jones*, 45 Md. 144; *Spencer v. Trafford*, 42 Md. 1. Undue influence is that degree of importunity which deprives a testator of his free agency, which is such as he is too weak or too feeble to resist, and will render the instrument executed under its influence not his free and unconstrained act. *Davis v. Calvert*, 5 Gill & J. 269. It is closely allied to, and in many of its aspects strongly resembles, actual fraud, and, like the latter, when most cunningly exerted is exceedingly difficult to unmask. The results accomplished in a given case, the divergence of those results from the course which would ordinarily and naturally be looked for, the situation of the party taking benefits under a will towards the person who

has executed it, and their antecedent relations to and dealings with each other, the legitimate, but unrecognized, claims of others upon the bounty of the testator and their dependence upon him, the instincts of justice of which every unbiased mind is sensible, the natural ties of parental affection, together with all the circumstances surrounding the transaction under investigation, and the inferences legitimately deducible from them, often furnish, in the absence of direct evidence, (which, from the very nature and secrecy of the wrong itself, is merely obtainable,) ample ground for the conclusion that undue influence has been used to accomplish an end which may be gross in its injustice, and whose very existence cannot be satisfactorily accounted for except upon the hypothesis that undue influence has produced it. *Grove v. Spiker*, 72 Md. 300, 20 Atl. 144.

Turning, now, to the facts of the case, it appears that Bishop Ames was upwards of 73 years of age when he died. He executed the will before us on April 7, 1879, and died on the 25th of the same month. He had become physically feeble, and, while his mental faculties remained relatively clear, his will had lost its former strength and power, as he himself appreciated when he stated to the Rev. Dr. Price, upon being urged by the latter to correct by his episcopal authority something that needed to be righted in the church: "It is too late; my time has passed; the grasshopper has become a burden." He had been of robust frame and of vigorous intellect, and his long and faithful service in the cause of religion marked him as an eminently just and upright man. He had three children, one, a son, who had been an officer in the army, but who, when the will was made, was, and for some time prior thereto had been, insane; another, an invalid daughter, who survived her father but a short while; and the third, a married daughter, and she and her husband are the caveatees in the case, and are the appellants in this court. Bishop Ames also left a widow—his second wife—surviving him, but she died some years ago. The value of his personal estate was upwards of \$55,000, and he owned, besides this, considerable real estate, both in and near Baltimore and in and near Chicago. By his will he gave to his widow an annuity of \$2,000, payable quarterly; to his invalid daughter an annuity of \$600; to his insane son and that son's dependent daughter nothing; but to his married daughter his entire estate. When the will was made, the son was a widower with one child, a daughter of nine or ten years of age, and she (her father having died some years ago) is the caveator assailing the will.

While the gross inequality of this will—the palpable injustice of its provisions, which absolutely cut off an insane son, upon whom a motherless and helpless child was dependent, and gave to an invalid daughter a mere annual pittance out of a large and valuable

estate—would not alone be sufficient to annul the will, yet such a disposition by an aged and feeble testator furnishes intrinsic evidence involving the will in suspicion, and was competent to be considered by the jury, in connection with other circumstances, in passing upon the issue of undue influence. *Davis v. Calvert*, 5 Gill & J. 301. It is a reasonable assumption that an unbiased mind will not voluntarily do an apparently unjust act without a sufficient or satisfactory motive, because, as observed by one of the most philosophical writers on the law of evidence, "there must pre-exist a motive for every voluntary action of a rational being. * * *

Man is not the passive subject of necessity or chance, nor are his moral judgments merely the abstractions of logic. On the contrary, he is endowed with instincts, passions, and affections, and, above all, with reason, and the capacity of estimating the qualities and tendencies of his volitions and actions, and with the power of choosing from among the various inducements, emotional and rational, which are presented to him, the governing principles of his conduct." *Wills*, Circ. Ev. 40. Now, the motive may be good or bad. But bad motives do not ordinarily influence just men, and when a false statement of fact is assigned as a reason for the doing of an act, which act requires a satisfactory motive to account for its having been done at all, it is a fair and legitimate inference that the act itself cannot be attributed to the motive assigned, because, if a reason apparently sufficient to justify a particular act be given as a motive for the doing of that act, when the act, standing alone, without the explanation suggested, would be either wrong or unjust on its face, and if the reason so assigned be palpably untrue in fact, as contradistinguished from mere misapprehension, then the act obviously proceeded, not from motive assigned, but from either a bad motive, or no motive at all; and consequently, in the latter instance, the act done would not be the voluntary act of an unbiased or uninfluenced mind, for the reason that an unbiased and uninfluenced mind is incapable of intelligently acting without a motive. Now, some motive must have influenced a wealthy father to disinherit his insane son and his insane son's helpless child, if he did this voluntarily. But the whole life of this eminent ecclesiastic is a solemn protest against the hypothesis that he was influenced by a bad motive, and his calling and his character alike forbid the assumption that he knowingly resorted, in his last will, to subterfuge or falsehood to conceal his actual motive, if he had one. Hence, if the reason given in his will for disinheriting his son is in fact not true, the only alternative left is that no motive originating in his own mind influenced him at all, and the act which was ostensibly his, and was ostensibly justified by him by the assignment of a false explanation, would not be his voluntary act. The reason given

in the will for cutting off his son is thus stated: "I make no provision for my son, Edward R. Ames, Jr., for the reason that I have already given to him all that I desire to bestow upon him." But was that reason true in fact? That the jury might legitimately infer that it was not is shown by a singular circumstance, which has neither been discredited nor contradicted. On the Sunday preceding the bishop's death, and therefore 13 days after the date of the will, wherein he had declared that he had already given to his son all he desired to bestow upon him, William J. Hiss, one of the caveatees, in company with a colored manservant whom he took with him as a witness, carried into the country, and there delivered to the bishop's insane son, across a picket fence on the margin of the public highway, \$5,000 in bonds as a gift from the dying bishop. Whether these bonds were valuable or worthless does not appear, nor does Mr. Hiss go upon the witness stand to offer the slightest explanation of this transaction. If the bishop sent the bonds, he obviously had not, when he made his will, given to his son all he intended to bestow upon him. This delivery of bonds after the date of the will flatly contradicted the declaration of the will, and afforded a reasonable ground for questioning the truth of the motive assigned for cutting off the son; and it was therefore competent to the jury to infer that the son was not disinherited for that reason, and, if not for that reason, no other being suggested, that he was disinherited by his father without reason at all, and, if so disinherited, that the will which did that was not the act of an unbiased or uninfluenced mind. Especially is this a legitimate inference when the jury had before them evidence which, as we have said, must, in considering the appellants' prayers, be assumed to be true, and which, moreover, was not contradicted, to the effect that the bishop was devotedly attached to his little granddaughter, and was deeply moved by the affliction of his only son; and that Mrs. Hiss, the caveatee, who secured all the estate, cruelly denounced her insane brother to their aged father, shortly before the will was made, as lazy and indolent, and unworthy of sympathy.

But there was other competent evidence adduced, the weight of which was a matter exclusively for the jury. Mrs. Hiss, it was proved, had declared that she had great influence with her father, that "he would do anything she would ask him to do." She had been heard importuning him for money, and upon one occasion he replied: "My God, Annie, if you don't let me alone you will set me crazy!" And, just three days before the will was executed, the feeble and decrepit old man conveyed to this same importunate daughter, in consideration of five dollars and natural love and affection, real estate in Baltimore city valued at \$40,000. Why he made that conveyance has not been explained; but

in and about that same period of time he had been heard by his domestics to declare that he was going to make his will, and leave his property to his children, and this was said to or in presence of Mrs. Hiss. But when the will was opened after his death this previously declared intention was not realized. On the contrary, one of the persons who should have been an object of his bounty was wholly cut off, another was but scantily provided for, and another, his son's child, whose tender years and helpless condition so pathetically appealed to his sense of justice that in his feverish restlessness upon his deathbed he exclaimed, "She could not be left alone in the world; that there would have to be something done for her," was never mentioned; and his entire estate under the deed, and under the will, was bestowed upon the daughter who had importuned him for money, and had asserted her ability to induce him to do as she wished, and who, just after he breathed his last, in the room where he died, "took some gold out of the drawer before her father was cool on the bed." It was perfectly natural and legitimate for the jury to draw the inference that a will so repugnant to the dictates of parental affection, so at variance with the instincts of a just man, and so divergent from the course which, according to his antecedent declarations, might have been expected, was procured by undue influence, and was not the voluntary emanation of an unbiased mind, because "there is a uniformity in human action, and a consequent possibility of foreseeing it, sufficient to be the basis of confidence and the determination of action between man and man. * * *

The homeliest and commonest transactions with men every day imply the confidence that they will act in the immediate future as they have been acting in the past." Harris, *Philosophical Basis of Theism*, 399. It is a generally accepted rule of law that the suppression or nonproduction of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence when he has it in his power to produce it. *Wills, Circ. Ev.* 187. Now, neither Mr. nor Mrs. Hiss, who were the caveatees, in reference to whose conduct, as hereinbefore observed, evidence had been given to the jury, went upon the witness stand to deny what had been imputed to them, or to give any testimony whatever refuting, or tending to refute, the serious charge of undue influence. Their very failure to contradict the accusations made against them might well have been regarded by the jury as an admission of their inability to dispute them truthfully; and their neglect to testify might equally have been presumed to have proceeded from a consciousness of guilt. In any event, it was a circumstance which the jury had a perfect right to weigh and to consider.

We have sketched but an imperfect outline

of some of the features of the evidence, with a view of showing that the court below would not have been warranted in withdrawing the case from the consideration of the jury. We are not unmindful of the fact that much evidence was offered upon the side of the caveatees having a tendency to show that Bishop Ames was uncontrolled or uninfluenced when he made his will. But, in disposing of the prayers we have been discussing, we have no right to look to, or to consider, any of this countervailing proof. It was for the jury to contrast and weight it; and, if they reached a result not supported by the evidence, it was for the trial court to remedy the error by granting a new trial. In cases involving the question of the legal sufficiency of the evidence, this court has, as a general rule, confined itself to a statement of the conclusion reached by it, without reciting the evidence, as in *Stirling v. Stirling*, 64 Md. 138, 21 Atl. 273, and *Moore v. McDonald*, 68 Md. 341, 12 Atl. 117; but we have ventured to depart to some extent in the case at bar from that practice, in order that the grounds of our decision might not be misunderstood. From what we have said it follows that the rulings of the court below must be affirmed, and it is so ordered. Rulings affirmed, and cause remanded.

(78 Md. 574)

YUNGER v. STATE.

(Court of Appeals of Maryland. Feb. 8, 1894.)

STATUTES—REPEAL—REPUGNANCY—"LOCAL OPTION" AND "HIGH LICENSE" LAWS.

The act of 1890, (chapter 208,) which submitted to the electors of a certain district in Carroll county the question of granting liquor licenses, was repealed by the "High License Act" of 1892, (chapter 423,) which is entitled "An act to regulate the sale and the granting of license for the sale of spirituous liquors in Carroll county," and which provides how licenses shall be granted, excepts no portion of the county, and expressly repeals all acts inconsistent with its provisions.

Appeal from circuit court, Carroll county.

George Yunger was tried for selling spirituous liquors in "Freedom District" of Carroll county, and appeals from a ruling of the trial court. Reversed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

Jas. A. C. Bond, for appellant. Atty. Gen. Poe and O. E. Fink, for the State.

ROBINSON, C. J. By the act of 1890, c. 208, the question whether or not license should be granted for the sale of spirituous liquors in the fifth election district of Carroll county, known as "Freedom District," was submitted to the qualified voters of said district, and at an election held in pursuance of this act a majority of the votes cast was against the granting of license. At the January session of the legislature, 1892, c. 423, an act known as the "High License

Law" was passed. This act is entitled "An act to regulate the sale and the granting of license for the sale of spirituous liquors in Carroll county," and it provides, in the first place, that any person desiring to obtain license to sell spirituous or fermented liquors in Carroll county shall file an application in writing with the clerk of the circuit court, to which shall be annexed a certificate signed by at least nine reputable freeholders, bona fide residents of the neighborhood in which the applicant proposes to conduct his business, each of whom shall certify that the applicant is, in their judgment, a proper person to have the privilege of selling spirituous liquors. Thereupon the clerk is required to publish, in some newspaper in the county, notice of such application, and, if any person shall file with the clerk any reason why license should not be granted to the applicant, the judge of the circuit court shall hear and determine whether license shall be issued to the applicant; and then the act provides the amount to be paid for licenses issued in pursuance of its provisions, the said amount varying from one hundred to three hundred and fifty dollars. The act further provides that "all acts or parts of acts inconsistent with the provisions of this act be and the same are hereby repealed." The traverser was indicted for selling spirituous liquors in the fifth election district of Carroll county, known as "Freedom District," and at the trial offered in evidence a license for the sale of spirituous liquors in said district, issued to him by the clerk of the circuit court in pursuance of the act of 1892. The court refused to allow the license to be offered in evidence, and to this ruling the traverser excepted. So, the question depends entirely upon whether the local option act of 1890 for that district is repealed by the subsequent act of 1892, known as the "High License Law;" and it seems to us there ought not to be any difficulty as to this question. The act of 1892 is, as we have seen, entitled "An act to regulate the sale and granting of license for the sale of spirituous liquors in Carroll county." It then provides how, and in what manner, license shall be granted, and no part of the county is excepted from its operation; and, to prevent any misconstruction as to its meaning and operation, it provides, in express terms, that acts inconsistent with its provisions "are hereby repealed." And if the legislature meant, by the act of 1892, to provide a new law regulating the issuing of license for the sale of spirituous liquors for the entire county,—and such seems to us to have been the intention,—then this act is inconsistent with, and repugnant to, the former act of 1890, which prohibited the issuing of license for the sale of spirituous liquors in Freedom district; and, this being so, the act of 1892 must necessarily operate as a repeal of the former act of 1890. No principle is better established than that a subsequent act

which is inconsistent with, and repugnant to, a former act, operates as a repeal of the former act, even though it does not so provide in express terms. Ruling reversed, and new trial awarded.

(78 Md. 536)

BITTLE v. STATE.

(Court of Appeals of Maryland. Jan. 23, 1894.)

MURDER—ATTEMPT—INDICTMENT.

An indictment charging that defendant attempted to commit an offense, to wit, to poison A., and in such attempt did an overt act towards the commission of the offense, to wit, delivered, knowingly and willfully, to A., a pill containing a large quantity of deadly poison, and solicited A. to swallow it, with intent to murder A., sufficiently alleges an attempt to murder by poison.

Error to circuit court, Carroll county.

Ruben F. Bittle was convicted of an attempt to murder, and appeals. Affirmed.

Argued before ROBINSON, C. J., and PAGE, BRYAN, BOYD, and FOWLER, JJ.

D. N. Henning, for appellant. Atty. Gen. Poe and C. E. Fink, for the State.

FOWLER, J. This is a writ of error to the circuit court for Carroll county. The plaintiff in error was indicted in the court below. He demurred to the indictment, which contains three counts. The demurrer was sustained as to the first and third counts, and overruled as to the second, on which he was tried before the court without the aid of a jury, convicted, and sentenced to the penitentiary for four years. The errors alleged are—First, because it was decided that the second count sufficiently alleged a criminal offense against the laws of this state; and, second, because it was held that said count sufficiently alleges an attempt to murder by poison. It seems to us too clear for controversy that the court below was entirely correct. The count in question is as follows, and charges that the plaintiff in error "did attempt to commit an offense prohibited by law, to wit, did attempt to poison one Ida S. Angel, then and there being, and in such attempt did then and there do a certain overt act towards the commission of said offense, to wit, did then and there furnish, supply, and deliver, knowingly and willfully, to the said Ida S. Angel, one pill containing a large quantity of a certain deadly poison called 'arsenite of copper,' commonly known as 'Paris green,' to wit, three and fifty-four one-hundredth grains of said arsenite of copper, and did then and there unlawfully and wickedly advise, solicit, and incite her, the said Ida S. Angel, to take and swallow the said pill containing the said quantity of said deadly poison, with intent thereby then, feloniously, willfully, and of his malice aforethought, her, the said Ida S. Angel, to kill and murder, contrary to the form of the act of assembly." Since the case of *Lamb v. State*, 67 Md. 524, 10 Atl. 208, 298, it is settled law

here that the bare act of solicitation to commit a misdemeanor is not in itself an indictable offense. But that question is not here involved. The crime with which the plaintiff in error is here charged with having attempted to commit is a felony, and the solicitation is only one of the acts constituting the attempt. The other act is the actual delivery of the deadly poison with the intent thereby willfully to murder. If this be not attempt to murder by poison, it would be difficult to make one without actually perpetrating the crime itself. We think the overt act, as well as the attempt to commit a felony, is sufficiently alleged in the second count. Ruling affirmed.

(78 Md. 518)

JUDEFIND v. STATE.

(Court of Appeals of Maryland. Jan. 23, 1894.)

APPEAL—FROM CIRCUIT COURT—JUSTICE COURT CASE—CERTIORARI—SUNDAY LAWS.

1. Where the circuit court has jurisdiction of an appeal from a justice of the peace, its decision is final, and an appeal or writ of error will not lie therefrom.

2. That the constitutionality of a law under which one was arrested and tried by a justice of the peace may be considered by the court of appeals, a writ of certiorari should be applied for.

3. The circuit court having authority to entertain an appeal from a justice of the peace on the question of jurisdiction as well as on other grounds, its decision as to the effect of defects in a warrant and bond on the jurisdiction of a justice are not subject to review.

4. A law prohibiting work on Sunday does not violate Bill of Rights, art. 36, guarantying religious liberty.

Error to circuit court, Kent county.

John W. Judefind was convicted of working on Sunday, and brings error. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, McSHERRY, PAGE, and BOYD, JJ.

Jas. T. Ringgold, for plaintiff in error. Atty. Gen. Poe and Wm. M. Slay, for the State.

BOYD, J. The plaintiff in error was arrested, under a warrant issued by a justice of the peace for Kent county, for husking corn on Sunday. He was tried, convicted, and fined five dollars and costs, in accordance with the provisions of article 27, § 247, of the Code of Public General Laws. He appealed to the circuit court, where he elected to be tried before the court, and was convicted and fined five dollars and costs by that court. He has brought the case to this court by petition in the nature of a writ of error, in which he designates the following as the points of law to be reviewed: (1) That section 247 of article 27 of the Code is void because it is in violation of the first paragraph of the fourteenth article of the constitution of the United States. (2) That said statute is void because it is in violation of article 36 of the bill of rights of the constitu-

tion of Maryland. (3) That the circuit court for Kent county had no jurisdiction to try and convict the traverser, since the justice of the peace had no jurisdiction: First. Because (a) the warrant charged no offense under the statute, as it failed to set forth that the husking of corn on Sunday was not a work of necessity or charity. (b) The warrant shows upon its face that it was issued on Sunday, and its mandate is to apprehend the traverser immediately. It is admitted that it was actually served on Sunday. For these reasons it is void, and no jurisdiction could be acquired under it. Second. That the bond for appearance of the traverser in the circuit court is void because it held him to answer a charge of Sabbath breaking, and no such offense is known to the laws of this state; and it is also in fatal variance with the warrant, which says nothing of Sabbath breaking by the traverser, but charges him with husking corn on Sunday.

The attorney general, on behalf of the state, moved to quash the writ of error on the ground that no writ of error lies to this court from the decision of the circuit court, on an appeal to it from the judgment of a justice of the peace. That motion must prevail. It is well settled in this state that, when the circuit court has jurisdiction to hear and decide an appeal from a justice of the peace, its decision is final, and an appeal or writ of error to this court will not lie, unless, of course, the statute authorizes such appeal or writ of error to this court. If the traverser desired to contest the constitutionality of the law under which he was arrested, and have that question properly presented for the consideration of this court, he could have applied for the writ of certiorari upon the specific ground of the unconstitutionality of the law, and the consequent want of power and jurisdiction of the justice of the peace to proceed under it. This court could then have reviewed the judgment of the circuit court on an appeal or writ of error. Nor can we review the decision of the circuit court on the question of the alleged defects on the face of the warrant and bond. That court had the power and authority to entertain the appeal from the judgment of the justice on the question of jurisdiction, as well as on other grounds, and, the plaintiff in error having invoked and submitted himself to its jurisdiction, its judgment is final and conclusive. The case of *Rayner v. State*, 52 Md. 363, is directly in point, and it is unnecessary to refer to the other decisions of this court.

The attorney for the plaintiff in error argued at considerable length the constitutionality of the Sunday law involved in this case, and urgently requested this court to pass upon that question, regardless of our views on the motion to quash the writ of error. Having determined that the case is not properly before us, we do not feel called upon to discuss at length the cases cited or reasons

assigned by the learned counsel, but, as a refusal to state our conclusions might be deemed by some an indication of doubt on our part, we will briefly state our views on this subject. We have not the slightest hesitation in announcing that the law complained of is not in conflict with the constitution of the United States or of Maryland. Although the argument of the attorney for the plaintiff in error gave evidence of thorough research and great labor, as well as ingenuity and ability, he was compelled to admit that, if we were to be governed by precedent, he had no standing in court, as the cases were opposed to his contention. There have been numerous decisions in this country, as well as elsewhere, sustaining such law, and we have no desire to be the exception to the general rule. Nature, experience, and observation suggest the propriety and necessity of one day of rest, and the day generally adopted is Sunday. There are, and always will be, honest differences of opinion as to how Sunday shall be spent, but the advantages of having a weekly day of rest, "from a mere physical and political standpoint," are too apparent to permit us to doubt the propriety of having reasonable laws to regulate work on that day. In interpreting them, courts must not place unreasonable constructions upon them. There may be some circumstances under which it would be deemed harsh and severe to punish a man for husking corn on Sunday; but if he defies the laws of the state, or makes himself obnoxious to those desiring the quiet and peace of this day of rest, he should expect the machinery of the law to be put in motion. If the position taken by the plaintiff in error in reference to the law in question is correct, then the law prohibiting the sale of liquor, etc., on Sunday, is unconstitutional, as would be most, if not all, of our laws concerning Sunday. If the legislature cannot prohibit work, etc., on Sunday, as forbidden by section 247 of article 27 of the Code, why should it be permitted to prohibit the sale of liquor, goods, wares, or merchandise, or prohibit dancing saloons, opera houses, barber shops, etc., from being kept open on that day? The laws and courts of this state have recognized Sunday as a day of rest from the time the state was formed, and statutes on the subject that were in force in colonial days are still in our Code. This court has, from time to time, given expression to its views on the question in very clear and unequivocal terms. In *Kilgour v. Miles*, 6 Gill. & J. 274, Judge Chambers, in delivering the opinion of the court, said: "The Sabbath is emphatically the day of rest, and the day of rest here is the 'Lord's day' or Christian's Sunday. Ours is a Christian community, and a day set apart as the day of rest is the day consecrated by the resurrection of our Savior, and embraces the 24 hours next ensuing the midnight of Saturday." In *State v. Fearson*, 2 Md. 313, Judge

Mason, in passing upon the charge of permitting persons to bet on cards on Sunday, contrary to the statute then in force, sustained the law, and added that, "independent of any statutory prohibition, this is a gross offense against decency and public morals, and therefore richly merits punishment." In *Railroad Co. v. Lehman*, 56 Md. 227, Judge Alvey, in speaking of Sunday laws in the different states, said: "They are substantially the same in their general scope and provision, all looking to keeping the day sacred, and as one of rest from secular employment;" and in other cases our Sunday laws have been enforced. Some of the statutes in force in this state were passed as early as 1723; the one complained of in this case bearing that date originally, and being continued in the Code of 1888. The tendency of legislation in this country is to provide for further rest, rather than to take away "the day of rest" that is welcomed by the industrious and hard-working people of our land. As late as 1892 the legislature of Maryland passed a law authorizing banks in the city of Baltimore to close their doors for business at 12 o'clock noon on every Saturday in the year, and provided for the payment of notes, etc., falling due on Saturday, "on the next succeeding secular or business day."

Article 36 of our declaration of rights guarantees religious liberty; but the members of the distinguished body that adopted that constitution never supposed they were giving a deathblow to Sunday laws by inserting that article. Those laws do not prohibit or interfere with the worship of God on any day other than Sunday, nor do they compel any one to worship him on Sunday. It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religions, of all sects and denominations, that observe that day, as rest from work and ordinary occupations enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, except works of necessity and charity, and thereby promotes the cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest, (as it undoubtedly is,) there is all the more reason for the enforcement of laws that help to preserve it. While courts have generally sustained Sunday laws as "civil regulation," their decisions will have no less weight if they are shown to be in accordance with divine law as well as human. There are many most excellent citizens of this state who worship God on a day other than Sunday, and our constitution guarantees to them the right to do so,—a right which no one can interfere with. The legislature of this state has not undertaken to prohibit

work on the day observed by them, and hence they do not have, in their religious work, the advantage of having their Sabbath made a day of rest by human law; but the legislature has not in any way interfered with their religious liberty, or with their worship of God in such manner as they think most acceptable to Him, as they have a right to do under the above provision in the declaration of rights. If, then, the question was properly before us, we would decide that section 247 of article 27 of the Code was not in violation of the constitution of the United States or of the constitution of this state, but, as stated above, we must quash the writ of error for the reasons given. Writ of error quashed, with costs.

(78 Md. 523)

BOND v. STATE.

(Court of Appeals of Maryland, Jan. 23, 1894.)

HOUSE OF CORRECTION—SENTENCES TO—TITLE OF ACT.

1. Code, art. 27, § 310, permitting convicts, liable under existing law to imprisonment of from two months to a year in jail or penitentiary, to be sentenced to the house of correction, does not conflict with section 313, permitting such sentences for misdemeanors punishable only by imprisonment in jail, or by that and fine; and one convicted of assault and battery a misdemeanor for which no special penalty is prescribed by statute, may be sentenced, under the latter section, to 18 months in the house of correction.

2. Const. art. 3, § 29, requiring acts to embrace one subject, described in the title, does not avoid provisions of "An act to establish the Maryland house of correction" for sentencing to said house persons convicted of certain classes of crimes, such provisions being, moreover, included and adopted in the Code.

Error to circuit court, Carroll county.

William A. Bond, sentenced to the house of correction on conviction for assault and battery, brings error.

Argued before ROBINSON, C. J., and BRYAN, PAGE, BOYD, and FOWLER, JJ.

D. N. Henning, for plaintiff in error. Atty. Gen. Poe and C. E. Fink, for the State.

FOWLER, J. The plaintiff in error was convicted in the circuit court for Carroll county of an assault and battery. Judgment was duly entered, and he was sentenced to the house of correction for 18 months. The case is here on writ of error, and it is contended on his behalf—First, that, having been sentenced under either section 310 or section 313 of article 27 of the Code, the sentence is illegal and void, because these sections are repugnant and totally inconsistent, and cannot therefore be enforced; and, second, that the act by which these sections were enacted by the legislature is in violation of section 29 of article 3 of the constitution of Maryland, which provides that every law enacted by the general assembly shall embrace but one subject, which shall be described in its title.

We discover no conflict whatever between these two sections. Section 310 provides that courts may sentence to imprisonment in the house of correction when, under existing law of the state, the convicted person is liable to be sentenced to imprisonment, either in jail or penitentiary, for a period not less than two months and not exceeding one year; while section 313 provides for imprisonment in the house of correction in a class of misdemeanors which, under the laws of this state, are punishable only by imprisonment in jail, or by both fine and imprisonment therein, the period of such imprisonment not being by existing law limited. Of course, therefore, when the time of imprisonment is limited under existing law to not less than two months nor more than one year, the court may, under section 310, sentence to the house of correction for the time provided by such existing law; but when the time is not limited by the law of this state, but such law does provide punishment by imprisonment in jail, or by fine and imprisonment in jail, the court may, under section 313, sentence to the house of correction for a period not less than two months. In this case the plaintiff in error was convicted of assault, and there being no existing law (except the common law) which prescribes any penalty for assault, except section 313 itself, and there being no law restricting the punishment for assault to imprisonment for a period not less than two months and not exceeding one year, he was properly sentenced to imprisonment in the house of correction for 18 months under section 313, unless there is some force in the other objection, namely, that the title of the act of 1874, c. 233, by which the house of correction was established, does not comply with the requirements of section 29, art. 3, of the constitution. The title is: "An act to establish the Maryland house of correction." Now, unless we are to hold that it must set forth all the details contained in the many sections of the act, the title would seem to be sufficiently comprehensive, under the liberal construction we have so often given this section of the constitution. But, in addition to this, these sections, as they now stand, were adopted and confirmed by the acts of the legislature adopting the Code. Rulings affirmed.

DAMMANN et al. v. DAMMANN et al.

(Court of Appeals of Maryland. Jan. 23, 1894.)

REVOCATION OF WILL—PARTIAL CANCELLATION.

A will must be deemed revoked when more than a third of the items thereof are canceled by testator, and others are thereby rendered unintelligible and repugnant.

Appeal from orphans' court of Baltimore city.

A writing purporting to be the will of Francis Dammann was admitted to probate,

and F. William Dammann and others, testator's children, filed a caveat asking that the probate be annulled. From an order affirming the decree admitting the will to probate, caveators appeal. Reversed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, PAGE, ROBERTS, BOYD, and BRISCOE, JJ.

F. O. Slingluff, for appellants. Wm. T. Donaldson, for appellees.

BRISCOE, J. The record in this case shows that a paper writing purporting to be the last will and testament of Francis Dammann, of Baltimore city, dated the 18th day of December, 1891, was submitted for probate in the orphans' court of that city. It was admitted to probate in part on the 30th day of August, 1893. Shortly afterwards a caveat was filed by four of the five children of the testator, asking that the probate be annulled, on the ground that the will had been canceled and obliterated by the testator in his lifetime, while of sound and disposing mind. The orphans' court, however, refused to annul the probate, but affirmed the order or decree admitting the will, and it is from this order that this appeal is taken. The following is the will:

Item I. I give my soul to God, and my body to be buried with simple funeral arrangements by the side of my beloved wife, Mary, in Bonnie Brae Cemetery.

Item II. I set aside for my funeral expenses and a simple marble monument in the form of a cross, and also for legacies to the St. Vincent de Paul Society, the sum of three hundred dollars, in such manner that, after my funeral expenses have been paid out of the sum of (\$300,) the balance shall be divided among the following three different institutions of the St. Vincent de Paul Society: that is, the (so called) Central Council the largest share; the (so called) Particular Council the next largest share; and the Conference of the Immaculate Conception the rest of, say abt. \$20 to \$25 dollars.

Item III. After paying the above items, I estimate my estate to be as follows:

My capital invested in my business under the firm of F. Wm. and E. Dammann	
I estimate at.....	\$47,500
My real estate property at 781 Lanvale street, sometimes called "Upton," at (lowest estimate).....	25,000
My lot under No. 61, in Hampden village..	4,700
Three, one thousand dollars each, of Union and Loganport Railroad bonds, (at par)...	3,000
Mortgage on property in St. Paul, Minnesota.....	800
	<hr/> \$81,000

Item IV. I leave to my sister Doris Dammann, residing in Bremen, Germany, an annuity of one hundred dollars (\$100) per year for the balance of her natural life, to be paid annually by my children, in equal proportions, out of their income.

Item V. I desire my partner in business,—that is my brother, Ernst Dammann,—and my son John Francis Dammann, to continue my interest in the firm to the end of the year of my decease.

Item VI. I desire that the interest in the aforementioned firm of my son John Francis Dammann be increased to forty per cent. of the yearly net profits, and that my son F. William Dammann be accorded an interest in the same

business of fifteen per cent. on the net annual profits for a beginning; this rate of 15 per cent. to be increased afterward as to be agreed upon.

Item VII. My capital invested in my business under the above-mentioned business title of F. Wm. and E. Dammann, and on the basis as given in above estimate, I wish to be divided, as soon as realized, as follows:

Fifteen thousand dollars.	To my son John Francis Dammann, less any indebtedness against him, or any of my sons, or their account in the books of the firm, the sum of.....	\$15,000
Six thousand one hundred and sixty-six and sixty-three dollars.	To my son Joseph Dammann the sum of.....	6,166 $\frac{2}{3}$
Sixteen thousand dollars.	To my son F. William Dammann the sum of..	16,000
Eleven thousand three hundred and thirty-three and one-third dollars.	To my trustees hereinafter named, for the benefit of my two daughters, Grace Mary and Emma Elizabeth, in equal interest, the sum of.....	11,833 $\frac{1}{3}$
That is the interest thereof after.	Being safely invested...	\$48,500

According to my above estimate.

According to the above estimate.

Item VIII. In my real estate, that is my property on 731 Lanvale street, my lot No. 61 in Hampden village, and my mortgage on St. Paul property, my son Joseph Dammann, my daughter Grace Dammann, and my daughter Elizabeth Dammann, shall each have an equal one-third interest, according to and on the basis of the above estimate. Whilst my son Joseph may receive his one-third interest in the two pieces of property when sold, and in the mortgage when paid, the interest of my two daughters I give to my trustees hereinafter named to divide in equal parts between my daughters. Not the capital realized out of these properties, but the annual income thereof, after the money realized shall have been carefully invested in safe securities; but I provide that the sale of my property on Lanvale street shall only be made at a considerable advance above my estimate of same, if any of my heirs, wishing to continue occupying the same, can agree with the rest as to a fair indemnity on the basis of my estimate for such occupancy.

I also provide that the sale of these two pieces of property on Lanvale street and in Hampden village is to be determined, as to time and sale, prices, by all my children, my executors, and my trustees, conjointly, and I advise that they be not sold by public auction, but privately, or be put for sale into the hands of a reliable good property agent,—say, for instance, Mr. O. Donovan,—some months, or even a year, previous to the time when it is desired that the sale should be consummated.

Item IX. My three one thousand dollar, each, Union and Loganport Railroad bonds, 7 per cent., I give to my trustees hereinafter named, for the benefit of my two daughters, Grace Mary and E. Elizabeth, to share equally in the interest of the bonds.

Item X. As the deaths of those interested in the bequests to my trustees shall occur, the

trusteeship shall cease, and my two daughters shall each have the right to dispose of their respective inheritance by will at their respective deaths.

Item XI. To provide to my two daughters, Grace M. and E. Elizabeth, for the lack of income from real estate not yielding any interest until sold and net proceeds invested and yielding income, I request that my three sons, Jo. Francis, Joseph, and William, share equally in supplying to my two daughters temporary lack of income.

Item XII. Any excess over the estimated capital invested in my business, and any excess over the estimated values of my real estate as well as any other property, personal or real, not herein named, and which I may die possessed of, is to be equally divided among my children under the above directions, the interest of my daughters in trust; in all cases children of a deceased parent to come in loco parentis.

Item XIII. My personal effects, furniture, books, silverware, and anything else constituting the appointments of my dwelling, so far as they belong to me, and not already to one or another of my children, I desire my children fairly and amicably to divide among themselves in kind or otherwise, in equal shares by the result of sale; that is, after my brother E. Dammann and my sister-in-law shall have made choice out of the above of some article for themselves as mementoes. I except, however, from this division, my gold watch and chain, which I give to my son John Francis.

Here insert item XIV, as below.

Item XV. I name as my trustees the Safe-Deposit Company of Baltimore, Mr. F. Newcomer, president, and as my executors my brother, E. Dammann, and my son John Francis Dammann, requesting the two latter to administer my estate without charge, except any the necessary expenses.

Item XVI. It is, I know, not necessary for me to request my children to pray for me, and have masses said for the repose of my soul.

This, my will, was made on the 18th day of December in the year 1891, whilst I was in good health, and in full possession of my faculties, reason, and judgment, and without any outside influences.

F. Wm. Dammann,
Francis William.

Witnesses:

Jos. S. Hastings,
J. T. Mason, R.

Item XIV. If any of my children married, and dying without issue, I request that their respective inheritance from me which they die possessed of be left by him or her by will in trust, with the proviso that, either relict wife or relict husband marrying again, or at death of either relict wife or relict husband, said inheritance shall revert to my estate, for the benefit of surviving children or grandchildren.

The orphans' court admitted to probate items 1, 2, 3, 4, and 16 in their entirety, and items 8, 10, 12, 13, and 15, in part, omitting the interlineations therein. Items 5, 6, 7, 9, 11, and 14 were rejected in toto. Item 14, being an unexecuted codicil, was necessarily rejected. There was testimony on the part of the two subscribing witnesses, in addition to the usual affidavit, that they did not notice the erasures, interlineations, and additions at the time of the execution of the will; and that item 14, the unexecuted codicil, was not there at the time of the execution. There was also testimony that the testator was of sound and disposing mind from the time of the execution of the will up

to his last sickness and death; that the alleged will was found among the other papers of the testator, after his death, by Francis W. Dammann, and carefully preserved by him; and it is admitted by the answer of the executors, the caveatees, that the will was found in the drawer of the testator's desk, among his private papers, in the condition in which it was offered for probate. Nor is it disputed that the erasures, interlineations, and obliterations on the face of the will were made by the testator himself; and, if there was an absence of proof (which there is not in this case) to show when they were made, the presumption would be that they were made after the execution of the will. Jarm. Wills, § 118, and authorities there cited. By the express terms of our statute, (section 811, art. 93, Code,) "no devise in writing of lands, * * * nor any clause thereof, shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or burning, cancelling, tearing or obliterating the same, by the testator himself, or in his presence, and by his direction and consent." And in the case of *Eschbach v. Collins*, 61 Md. 504, we said that under the statute an entire will could be revoked, or any clause thereof, by simply cancelling or obliterating the same, without the ceremony of republication. A personal examination of the will itself discloses the fact that items 5, 6, 7, 8, 9, and 11 were canceled by the testator, some in lead pencil erasure, and others in ink. In addition to this, there are interlineations in both lead pencil and ink, and marginal notes in ink, in items 7 and 8, and an obliteration of these notes in ink and pencil. It is clear, we think, that these erasures were intended by the testator as a cancellation of those items of his will; and it follows that items 10 and 12 and a portion of item 8, which do not appear to be erased, must fall, because, standing alone, they would be uncertain, unintelligible, and repugnant to the entire scheme of the will. We have carefully examined the original will, which is before us for personal inspection, and are satisfied from the erasures on its face in both lead pencil and ink, from the interlineations therein, some in lead pencil and others in ink, from the marginal notes, afterwards erased, it was the manifest intention of the testator to revoke the entire will by cancellation, and to make a new one. While there are items in this will which have not been specifically erased, yet, upon a careful inspection of the whole will, in connection with the additions, interlineations, and erasures thereon, we are of the opinion that the testator did by these erasures cancel and obliterate the entire will. Being, therefore, of the opinion that the effect of the obliterations of the items of the will in this case is to revoke the same under our statute, we shall reverse the order appealed from, and

remand the cause, so that an order may be passed in accordance with the views expressed herein; costs to be paid out of the estate. Order reversed, and cause remanded.

(78 Md. 517)

NORTH BALTIMORE PASS. RY. CO. v.

KASKELL.

(Court of Appeals of Maryland. Jan. 23, 1894.)

CARRIERS OF PASSENGERS—CONTRIBUTORY NEGLIGENCE.

1. Where a passenger on a street car has his hand crushed by a collision with a freight car standing on an adjoining track, the street-car company has the burden of showing that the injury did not result from its negligence, or that it could have been avoided by the passenger with ordinary care.

2. When an overcrowded street car ran off the track, and jolted on cobble stones for two blocks, without an effort at replacement by the driver, and in turning collided with a freight car standing on a switch four or five feet from its track, the question whether negligence can be imputed to a seated passenger whose hand, clasping the window post, was crushed by the freight car, is for the jury, in view of conflicting evidence, whether he had all the while had his hand outside the window, or caught the post to hold himself in place, after the car left the track. *Railroad Co. v. Andrews*, 39 Md. 353, distinguished.

Appeal from Baltimore court of common pleas.

Action by Charles Kaskell against the North Baltimore Passenger Railway Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, BRISCOE, BOYD, PAGE, and ROBERTS, JJ.

R. D. Morrison, H. Munnikhuyzen, and N. P. Bond, for appellant. Isidor Schoenberg and Charles W. Field, for appellee.

ROBERTS, J. The plaintiff, while a passenger on one of the defendant's cars, was injured in the hand, in consequence of the car colliding with one of the freight cars of the Western Maryland Railroad Company. It appears from the testimony that on the night of September 9, 1891, the plaintiff took passage on one of the defendant's Centre street line of cars in the city of Baltimore, and while a passenger thereon the car ran off the track at the east end of Centre street bridge, crossing Jones' falls, and continued off the track without effort on the part of the driver to replace it, until it had run down Centre street to Front street, then into High street, and down High to Hilton street, a distance of more than two squares. On the night of the injury, just at the street corner where the car makes a sharp turn to the right into Front street, there was a Western Maryland box freight car standing. The driver of the street car allowed the same to be drawn over the cobble stones with such rapidity that the rear of the car was thrown around so far to the left that it was brought

into collision with the freight car, thus lacerating and mashing the right hand of the plaintiff, with which, at the moment of accident, he was holding on to one of the up-rights or sash between the windows of the cars. When he first took hold of the up-right or sash is one of the questions of importance which this appeal presents, and about which the testimony is conflicting. It appears from the testimony offered on the part of the plaintiff that the car was densely crowded. Passengers were standing in the aisle, and filling the rear platform. The car was jolting heavily, and passengers with difficulty retained their seats in the car. The plaintiff, in his testimony, says "that he just took hold of the window when the car got off the track, because otherwise he could not hold himself. That was the first time he had his hand on the window. That he did not have his hand hold of the window before that." The defendant offered testimony tending to show that the plaintiff, before and at the time the car ran off the track, had been sitting with his elbow resting on the sill of the window of the car, and his hand clasped around the post of the window, the back of his hand being outside the car.

The questions which have been discussed before us arise on the exception to the granting of the plaintiff's first prayer, and to the rejection of the defendant's first and fourth prayers. The plaintiff's first prayer presents no new proposition of law, and has on more than one occasion had the approval of this court. The prayer is as follows: "If the jury believe that the plaintiff was a passenger on one of the defendant's cars, and whilst being carried therein was injured by a collision of said car with a railroad car on another track, close to defendant's track, then the presumption is that the injury resulted from the negligence of the defendant, and the plaintiff is entitled to recover, unless the defendant shows that said injury did not result from its negligence, or that the accident could have been avoided by the exercise of ordinary care on the part of the plaintiff." The criticism which has been indulged with respect to this prayer is rather hypercritical than sound or practical. It is contended that the prayer (except for unimportant verbal alterations) is the same as that passed upon and condemned by this court in *Railroad Co. v. Andrews*, 39 Md. 353. But this is an error. The prayer in the *Andrews Case* was disapproved because it failed to instruct the jury as to the effect of contributory negligence on the part of the plaintiff. The court then says: "No doubt the court intended the last clause of its first instruction as a modification of this prayer, but, as the two stand, and upon the assumption there was no error in that given by the court, there seems to be a plain inconsistency between them, well calculated to confuse and mislead the jury." The last clause of the court's instruction in the *Andrews Case* is similar in all material

respects to the last clause of the plaintiff's first prayer in this case, and, we think, announces the law correctly. The defendant's first prayer was properly rejected, because it is based upon a state of facts not found in the record. To say that the contributory negligence of the plaintiff appears from the uncontradicted evidence in the case is simply to ignore the manifest meaning of the plaintiff's testimony, which flatly contradicts the testimony of the defendant in every material respect. In the *Andrews Case*, 39 Md. 352, the court, commenting upon this question, says: "It must be observed, however, that while it is admitted the plaintiff's arm was out of the window at the time of the accident, there is a conflict of testimony as to how it came to be thus exposed, whether as stated by the plaintiff or by the witnesses for the defense. This question of fact it is the undoubted province of the jury to determine, and upon the weight of evidence in this respect it is not our province to express any opinion." We are of opinion that the defendant's fourth prayer was properly rejected. By this instruction the court was requested to say that if, under the circumstances detailed in the record, the plaintiff took hold of the part of the window sash, etc., and kept his hand in the same position until the happening of the injury complained of, and that the injury complained of would not have occurred if the plaintiff had not so had his hand outside of said car, etc., then the verdict of the jury must be for the defendant, unless they shall find that there was some controlling or justifying necessity for the plaintiff so to put and keep his hand on the outside of said car, and there is no evidence in the case of any such controlling or justifying necessity or cause. In this instruction we have substantially the same question which is presented by the preceding prayer, and, for the reasons already assigned, we might dispose of the exception without further comment. The question is, however, important in view of the fact that street-car travel has become very common, and of recognized convenience and comfort. It would very soon cease to be either convenient or comfortable if the drivers or managers of cars were to be permitted to adopt cobble stone for tracks, especially when cars are overcrowded. No reasonable excuse can be assigned for the conduct of the driver of the car on which the plaintiff was injured in allowing the same to remain off the tracks for two squares, without effort on his part to replace it. The question of contributory negligence *vel non* must depend upon the facts of each particular case. There is no arbitrary rule by which all cases are to be classified and determined. While it has been generally held to be the correct doctrine that when one, as in the *Andrews Case*, allows his arm or elbow to protrude from the window of a moving car, and is injured thereby, he is not entitled to recover, for the reason that his negligence has directly contributed

to produce the injury. But the facts of this case are materially variant from those to be found in Andrews Case and the other cases where the same doctrine is held. Here we have a street car off the track, driven rapidly over cobble stones for two squares, loaded beyond its reasonable capacity, its aisle and platform crowded, colliding with a freight car standing on a switch of the W. M. R. R. Co., distant from the street-car track between four and five feet, which could have been seen by the driver, if properly attentive to his duty, and no effort made on his part to replace the car on its proper track by which the accident could have been avoided. This describes a case of negligence pure and simple. As to where or how the plaintiff came to grasp the window post, and the justifying necessity for so doing, the testimony is conflicting, but it must have happened either according to the plaintiff's statement or that of the defendant's witnesses, and, under the circumstances, the question was solely for the determination of the jury, and beyond the province of the court to determine. Railroad Co. v. Andrews, 39 Md. 352. We think the court below has correctly announced the law and given to the defendant all the law to which it was entitled. We find no error in the rulings below, and therefore affirm the judgment. Judgment affirmed.

(78 Md. 537)

KUYKENDALL et al. v. DEVECMON et al.
(Court of Appeals of Maryland. Jan. 23, 1894.)

WILLS—NATURE OF ESTATE—RIGHTS OF LEGATEES
—DEVISE IN LIEU OF DOWER—ELECTION TO REJECT—EFFECT.

1. Testator bequeathed certain bonds and deposits to his daughter, subject to an executory devise to his sister. *Held*, that the daughter, claiming under the will, could not establish her right to take the deposits absolutely by showing title to them in herself.

2. Testator bequeathed certain property to his daughter, subject to an executory devise to his sister. By another clause he directed his executors to dispose of the residue of his estate, and to give part of the proceeds to the daughter. *Held*, that the daughter took her share of the residue free from the devise over.

3. A widow who elects to take dower instead of a devise in lieu thereof is entitled to take in kind.

4. Testator bequeathed certain property to his daughter in trust till she became of age, subject to an executory devise to his sister. *Held*, that the daughter, upon attaining her majority, was entitled to the control of the property free from trustees.

Appeals from circuit court, Allegany county, in equity.

Bill by Althea L. Kuykendall and husband against J. Semmes Devecmon and others for an adjudication as to the rights of the legatees and distributees under the will of John S. Coombs, deceased. From an order ratifying the report of an auditor as to the manner of distribution, plaintiffs appeal. Affirmed in part and reversed in part.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

D. James Blackiston and B. A. Richmond, for appellants. J. Semmes Devecmon, for appellees.

PAGE, J. 1. The questions arise on these appeals from out of the distribution of the estate of John S. Coombs, whose last will was construed, and the right of parties under it determined, by this court in Devecmon v. Shaw, 70 Md. 219, 16 Atl. 645. His daughter, Althea Louisa Coombs, who has since intermarried with Daniel F. Kuykendall, having arrived at the age of 21 years, has filed a petition praying the court to assume jurisdiction over the subject-matter of the will and the estate of her father in the hands of the executors and trustees appointed by the testator, and to further adjudicate the rights of the several legatees and distributees of his estate. Upon this petition all the parties interested answered, and the court passed an order by which it assumed jurisdiction of the estate; ordered the executors and trustees to make a full report, that a final distribution might be made; and on the 4th of August, after the trustees and executors had made their several reports, and other proceedings were had, ordered the papers to be referred to the auditor, with the instructions set out in the record. On the 28th of September, 1890, the auditor submitted his report, to the ratification of which Mr. Kuykendall and Messrs. Shaw and Devries and the Devecmons objected upon various grounds, which will be stated hereafter. By the third clause of John S. Coombs' will, he bequeathed to his daughter, Althea Louisa, the balance of United States bonds invested in his name, amounting to \$29,000, viz. 15 shares of stock in the Second National Bank of Cumberland, 25 shares of stock in the National Bank of Baltimore, and also all the money deposited in his daughter's name in the following Savings Banks in Baltimore, viz. the Eutaw Savings Bank, the Central Savings Bank, the Metropolitan Savings Bank, and the Savings Bank, "subject to be defeated by the death of said Althea Louisa without leaving a child or children at the time of her death, or, in case she shall die having a child or children surviving her, by the death of such child or of all such children under the age of twenty-one years," and, in the event of such contingencies happening, this property is to pass to Mrs. Althea M. Devecmon, and to her children and grandchildren, to stand in the place of their deceased parents. 70 Md. 229, 16 Atl. 645. The money in the savings banks, amounting to the sum of \$5,725.83, was deposited in the name of Althea Coombs while she was a minor, and she claims that it was her property at the time it was so deposited, and still is. It is treated by the auditor as part of the estate of the testator, and subject to the executory devise to Mrs. Devecmon, whereas she contends it should have been awarded to her absolutely. It is unnecessary to inquire whether the proof es-

establishes her title to this property, because, if she claims an interest under the will, she must give full effect to its provisions, as far as she is able. It is only carrying out the plain intent of the testator that the funds in the savings banks should stand on the same footing with the other items of property mentioned in the same clause, and be subject, like them, to the executory devise to Mrs. Devemon. "The foundation of this doctrine," said this court in *Barbour v. Mitchell*, 40 Md. 161, (citing from *Spencer on Equity*), "is the intention of the testator, and its characteristic is that by equitable arrangement effect is given to a donation of that which is not the property of the donor. * * * The intention being assumed, the conscience of the donee is affected by the condition, (though destitute of legal validity,) not expressed, but implied, annexed to the benefit proposed to him. To accept the benefit while he declines the burden is to defraud the design of the donor." *McElfresh v. Schley*, 2 Gill, 181.

2. Mrs. Kuykendall, who also excepts to the report, because "the sum of \$6,521.28, being two-thirds of the residuum after paying debts," etc., is audited to her, "subject to the devise to Mrs. Devemon," whereas she claims that it should have been awarded to her absolutely, free from any trust in the will, and also from the devise over to Mrs. Devemon. The testator, having made certain devises and bequests, directed his executors to sell all his real and personal property not otherwise disposed of in his will, and to divide the proceeds between his wife and daughter, one-third to his wife, and two-thirds to his daughter. Mrs. Coombs renounced the will, and in consequence the specific property intended to pass to the widow under the will became subject to the power of sale vested in the executors as "part of the estate not otherwise disposed of," and an intestacy resulted "as to the one-third of the real and personal estate embraced in and operated upon by the residuary clause of the will." 70 Md. 227, 16 Atl. 645. The court below was of the opinion that the decree in the case in 70 Md. and 16 Atl. embraced the portion of the residuary fund bequeathed to the daughter, but we cannot concur with him. The decree states that the adjudication was made "for the reasons set forth in the opinion of the court filed in the case." We are therefore at liberty to refer to the opinion to assist us in determining the scope of the decree, and to what portion of the will it was intended to apply. In his opinion Judge Alvey states that the case was submitted for the purpose of obtaining a judicial construction of the will "with respect to certain questions supposed to be of doubtful solution," and, after citing the clause containing the limitation, proceeds to discuss the nature and effect of "this devise over." There is not a word in reference to the property disposed of by the residuary clause, except in connection

with the effect of the renunciation of the widow. When the decree, therefore, speaks of the real and personal estate bequeathed to the daughter by the testator, it must be held to refer to that only which passed under the particular clause he was considering, and not to that covered by the residuary clause. Turning now to the will itself, we find in it no intention of the testator to subject the property passing to the daughter under the residuary clause to the limitations in favor of Mrs. Devemon that he had impressed upon that portion of his property which he had devised under the preceding paragraph. He had one child only, a daughter. He possessed a considerable property, and no doubt desired her and her children to enjoy the great bulk of his estate. If, however, his daughter died without children, or if she left children, but all such died before attaining the age of 21 years, it was his wish that a portion of his estate should go to his sister, Mrs. Devemon; and for that reason he sets apart and names specifically the several items of property which, upon the happening of the contingencies mentioned, she shall take; and then, by a clause which is perfectly clear and unambiguous, he directs his executors "to dispose of all real and personal property not otherwise herein disposed of, and the proceeds to divide between my wife, Wilhelmina J. Coombs, and daughter, Althea Louisa Coombs; one-third to my said wife and two-thirds to my said daughter." For these reasons we think this sum should have been awarded to Mrs. Kuykendall free from any limitation over.

3. The right of the widow to receive her share of the estate in kind seems to be recognized and well established in this state. Section 292 of article 93 of the Code provides that a widow who has renounced shall be entitled to "one-third of the personal estate of her husband, which shall remain after payment of his just claims against him, and no more." This provision was codified from the act of 1798, (chapter 101,) which established the testamentary law of the state. In *Evans v. Iglehart*, 6 Gill & J. 192, Judge Dorsey said that "executors, under the policy and provisions of our testamentary system, are required to divide specifically, or, in other words, in kind, between the legatees and distributees of the deceased, except so far as a sale may have been necessary for the security and benefit of the estate, * * * or where they are unable to make a satisfactory distribution" without a sale. *Williams v. Holmes*, 9 Md. 290; *Williams v. Kelly*, 5 Har. & J. 59; *Crawford v. Blackburn*, 19 Md. 42. Nor do we think this is a case to apply the doctrine of registration, so as practically to throw the payment of the dower upon the residuary fund by holding the bequest to the widow as a trust for the benefit of those whose legacies may be abated in consequence of having to surrender a portion of their legacies to the widow. The ground upon which

courts of equity interfere in such cases is for the purpose of carrying out the will of the testator, and to see to it that the donor's bounty is distributed on the terms and in the manner he desires; and for that reason a legatee takes his gift with all the burdens the testator sees fit to impose. Story, Eq. § 1077; 1 Pow. Dev. 430; Birmingham v. Kirwan, 2 Schoales & L. 449. A widow, to whom a general bequest is made by her husband in lieu of dower, is a purchaser under the will with a fair consideration. Durham v. Rhodes, 23 Md. 242. If, therefore, she chooses not to accept the legacy thus offered in lieu of her dower, she takes of the estate, not under the will, but in opposition; and, as was said in Devecmon v. Shaw, 70 Md. 227, 18 Atl. 645, "the property intended to pass thereby remains as if no such devises and bequest had been made. Nor does such renunciation affect other devises and legacies, except as they may be diminished by the award to the widow of her legal portion out of the estate." We think, therefore, there was no error in the audit in awarding to the widow her share of the estate in kind.

4. The remaining question is whether Mrs. Kuykendall, being now of age, is not entitled to the immediate possession of the property which is subject to the executory devise of Mrs. Devecmon, free from new trustees to be appointed by the court. In the case in 70 Md. and 16 Atl. it was determined that the daughter took an estate in fee in the realty, and the entire interest in the personalty, defeasible as to both realty and personalty, upon the happening of the contingencies specified. The trustees named took no estates, but only management and control, to continue until the daughter attained the age of 21 years, or until her death, if she should die under that age. Under those circumstances, we think the principles laid down in the case of Boyd v. Boyd, 6 Gill & J. 33, are decisive of this. In that case the testator bequeathed a sum of money of which the legatee was then in possession, to be at his disposition "for his use free of interest" during his natural lifetime, but after his death to be invested in bank stock in the name of and for the account of other persons, whom he designated. Upon an application for security for its protection the court held that those claiming in remainder had "no right to the interposition of this court, unless they can show that by suffering the fund to remain in his hands * * * their residuary interest will be put in jeopardy." It is true the property is now in the hands of trustees appointed by the testator, but by the terms of the will their functions were to cease on the arrival of the daughter at the age of 21 years; and we have no doubt, from a full consideration of the whole will, that Mr. Coombs intended to give to her the fullest enjoyment of his bounty after she came of age. Inasmuch as the two-thirds of the residuary fund belonging to Mrs. Kuykendall is award-

ed to her subject to the executory devise to Mrs. Devecmon, and not to her absolutely, we must reverse the order of the court ratifying the audit, and remand the case, that a new audit may be made awarding said fund to her absolutely. Order affirmed in part and reversed in part, and cause remanded for a new audit in conformity with this opinion; costs to be paid out of the estate.

(78 Md. 561)

SAVAGE v. BARTLETT.

(Court of Appeals of Maryland. Feb. 5, 1894.)

INSOLVENT CORPORATION—FRAUDULENT PROCUREMENT OF SUBSCRIPTION—REPUDIATION BY SUBSCRIBER—LIABILITY TO CREDITORS.

Where a subscription to the capital stock of a corporation was procured by fraud of the corporation, and the subscriber discovered the fraud without laches, and repudiated the contract in a reasonable time after the discovery of the fraud, and before the execution by the corporation of an assignment for benefit of creditors, such facts constitute a defense to an action by the assignee against the subscriber for his subscription, though the creditors gave credit to the corporation on the faith of such subscription.

Appeal from Baltimore city court.

Action by J. Kemp Bartlett, Jr., as trustee of the Valley Land & Improvement Company, against Charles E. Savage, for unpaid subscriptions to the capital stock of the company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, ROBERTS, and PAGE, JJ.

Wm. A. Fisher, for appellant. Ch. Marshall and Jos. C. France, for appellee.

ROBINSON, C. J. The Valley Land & Improvement Company was incorporated by an act of the legislature of the state of Virginia approved January 29, 1890, with a capital stock of \$2,000,000. In April, 1891, within 15 months after its incorporation, the company executed a deed of trust conveying all its property, including its unpaid capital stock, to trustees for the benefit of its creditors. In August of the same year, upon a bill filed by the creditors in the circuit court of Page county, Va., the plaintiff was appointed sole trustee to execute the deed of trust, in the place of the four trustees therein named, and was authorized and directed to collect all moneys due upon subscriptions to its capital stock. This is an action at law brought by the plaintiff, as trustee, against the defendant, to recover the unpaid installments due by him upon his subscription to the capital stock of the company. The defense is that the defendant was induced to become a shareholder upon the faith of certain representations set forth in a prospectus issued by the company, and that these representations were false and fraudulent, and that the defendant, within a reasonable time after the discovery of the fraud, and before

the execution of the deed of trust, notified the president of the company that he repudiated the contract, and refused to make any further payments on account of his subscription. And the question is whether these facts, if found by the jury, constitute a valid defense to the action. As against the company itself, it is well settled that a shareholder may rescind a contract of subscription procured through the fraud of the company, within a reasonable time after the discovery of the fraud. "Contracts of this description," says Lord Romilly, "between an individual and a company, so far as misrepresentation or suppression of the truth is concerned, are to be treated like contracts between any two individuals. If one man makes a false statement, which misleads another, the way in which that is to be treated affords the example for the way in which a contract is to be treated where a company makes a false statement which misleads an individual." *Railroad Co. v. Kisch*, 2 L. R. H. L. 99. And this well-settled rule applies with even greater strictness in regard to representations set forth in a prospectus issued by a company for the purpose of inviting persons to join in the undertaking; and although some allowances must be made for the manner in which the advantages which are likely to be enjoyed by the subscribers are described, yet, as was said by the lord chancellor in the case to which we have just referred, "no misstatement or concealment of any material facts or circumstances ought to be permitted." And then he quoted with approval what was said by Vice Chancellor Kindersley in the case of *Land Co. v. Muggeridge*, 1 Drew. & S. 381: "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares. At the same time, contracts of subscription procured by fraud are not void, but voidable, at the election of the shareholder; for, although deceived and misled, he has the right to abide by the contract. If, however, he means to rescind the contract, he must do so within a reasonable time after the discovery of the fraud." "A man must not," says Lord Romilly, "play fast and loose. He must not say, 'I will abide by the company, if successful, and I will leave the company if it fails,' and therefore, when a misrepresentation is made, of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from

the company, or whether he will remain a member." *Ashley's Case*, L. R. 9 Eq. 262.

In the prospectus issued by the company in this case, it is stated (1) That the company was the owner of the famous Luray Inn, with all its furniture and equipments; (2) that the company was the owner of the famous Luray caverns; (3) that it had acquired and owned 2,500 acres of the choicest lands for building and manufacturing purposes, and in fact all the available land for these purposes in and around the hotel, caverns, and town of Luray; (4) that it owned and controlled 8,000 acres of the best mineral properties in Virginia, consisting of iron, manganese, and other valuable minerals. Instead of being the owner, the defendant proved that the company had merely the option to buy these properties at certain stipulated prices; that this option had been assigned to the company by D. F. Kagey and his associates, some of whom were promoters of the undertaking, and that in consideration of the assignment of said option the company had issued certificates of stock to Kagey and his associates, of the par value of \$400,000; and that the amount which would have been required on the 7th July, 1890,—the date of the defendant's subscription,—to enable the company even to avail itself of the options, exceeded the sum of \$300,000 over and above the entire receipts of the company up to that time. The defendant further proved that a Mr. Leyburn had in fact procured the option for the purchase of 4,000 acres of the so-called "valuable mineral land" for \$2 per acre, and that he had assigned said option to Kagey and Marshall for 50 shares of the stock of the company. The defendant then proved that it was not until November, 1890,—three months after his subscription,—that he discovered the fraudulent character of the representations set forth in the prospectus, and that shortly afterwards, in January, 1891, and before the execution of the deed of trust, he notified the president of the company of his repudiation of the contract, and of his refusal to make any further payments on account of the same. Here was evidence to go to the jury, not only to prove that the defendant's subscription was obtained by fraud, but that he had also, within a reasonable time after the discovery of the fraud, rescinded the contract. And as there does not seem to be any question as to laches on his part, these facts, if found by the jury, would, according to all the authorities, have been a valid defense in an action brought by the company itself. But while it is conceded that a defrauded shareholder may, by a proper proceeding, rescind the contract, the argument is that the act of rescission must be of such a nature as to remove his name from the books of the company, and for the reason that persons dealing with the company are presumed to have given credit to the company upon the faith of his subscrip-

tion. This may be considered the settled law in England, and, further, that the proceeding to remove his name from the register must be instituted by the subscriber before the insolvency of the company. In the leading case of *Oakes v. Turguand*, (decided in the house of lords in 1867,) it was held that the application to remove the name of a member from the register on the ground that the subscription was procured through the fraud of the company must be made before the commencement of winding-up proceedings. L. R. 2 H. L. 325. "If a demand had been made upon Mr. Oakes for a call," says Lord Colonsay, "while the company was a going concern, and he had resisted it on the ground of fraud, I think he might have been entitled to succeed in that resistance, and to have his name removed from the register." And in the later case of *Mining Co. v. Smith*, 4 L. R. H. L. 64, it was decided that, "where an application has been made by a defrauded shareholder for the rescission of the contract and the removal of his name from the register, his right to a rescission will not be affected by the fact that winding-up proceedings intervene before his suit for rescission has been determined." These cases, however, are based upon the provisions of the English companies act of 1862, entitled "An act for the incorporation, regulation and winding up of trading companies and other associations." By this act a public officer was appointed for keeping a register of, among other things, the name of the projected company; a statement of the nature of its intended business; the amount of its capital; the names and addresses of every subscriber, with the number of shares taken by him, and the amount paid on each share. And, in the event of a company being wound up, the act provides that every member shall be liable to contribute to the assets of the company to an amount sufficient for the payment of its debts and liabilities. It further provides that the register shall be open to the inspection, not only of the members, but all other persons, and any person whose name has been wrongfully registered may apply to any superior court of law or equity for a rectification of the register. The act contains no less than 212 sections, collecting, as it were, into one Code, the provisions which were thenceforth to be applicable to such companies; "provisions intended," says Lord Colonsay, "on the one hand, to preserve the members from unnecessary molestation by creditors of the company, and, on the other hand, to preserve the rights of creditors to ultimate payment out of the estates of the members." *Oakes v. Turguand*. "The liability of the shareholders," says the lord chancellor, "is a statutable liability, under which the creditors have a right, which attaches upon the shareholders, to compel them to contribute, to the extent of their shares, towards the payment of the debts of the company." And, as was said in *Oakes v.*

Turguand: "The legislature took care to provide by registration the means of enabling persons dealing with the company to know whom and to what they had to trust. It intended to put the persons whose names are on it in the same position towards creditors as persons engaged in an ordinary partnership." And, in adopting the rules of law laid down in the English cases, the text writers—some, at least—have overlooked, it seems to us, the fact that these cases were governed and decided under the provisions of the companies act of 1862. There is, however, no such act in force in this state; and, although a defrauded shareholder may file a bill in equity to have his name removed from the books of the company, there is no fixed rule established, which denies to him the right of rescinding a fraudulent contract, except by a proceeding of that kind. Nor can it be said that there is an established rule which denies to him the right to rescind the contract, even after the insolvency of the company, without reference to the diligence exercised by him in ascertaining his right, and in repudiating the fraud practiced upon him.

In *Upton v. Trebilcock*, 91 U. S. 45, where a suit was brought by the assignee of an insolvent company, and the defense was that the subscription had been procured by the false representations of the agent of the company, the supreme court held that such a defense was not available under the facts in that case, because the shareholders had failed to use due diligence in ascertaining the truth or falsity of the representations, and in repudiating the contract. In that case the shareholder did not repudiate the contract until three years after his subscription, nor until a demand had been made by the assignee. But his right to repudiate the contract on the ground of fraud, apart from the question of laches on his part, and the right to repudiate it without a proceeding against the company to remove his name from the books of the company, is distinctly recognized. There is no intimation or suggestion on the part of the court that a proceeding of any kind was necessary to enable a defrauded shareholder to rescind the contract. It seems to have been conceded that a notification to the company, by the shareholder, of his rescission of the contract, was all that was required. And in the dissenting opinion of Mr. Justice Miller, in which the chief justice and Mr. Justice Bradley concurred, he says: "I am of opinion that, where an agent of an existing corporation procures a subscription of additional stock in it by fraudulent representations, the fraud can be relied on as a defense to a suit for the unpaid installments, when suit is brought by the corporation, and that if the stockholder has in reasonable time repudiated the contract, and offered to rescind it before the insolvency or bankruptcy of the corporation, the defense

is valid against the assignee of the corporation. I also think there was evidence of such fraud in this case, and that the question of reasonable diligence in the offer to rescind was fairly put to the jury." And in *Upton v. Englehart*, 3 Dill. 496, where a suit was brought by the assignee of the same company, and the defendant pleaded that he was induced to purchase the stock by the fraudulent representations of the agent of the company, and that he was in no way bound thereby, and that he not long ago repudiated said purchase by refusing to pay any more of the installments, Judge Dillon held the plea to be defective because it did not show that the defendant made use of reasonable diligence to make himself acquainted with the matters in respect of which the fraud is claimed, nor when or how he repudiated the contract. And after referring to *Oakes v. Turgand*, and other English cases, in which it had been held that the defrauded shareholder must make application to have his name removed from the register of shareholders before winding-up proceedings are instituted against the company, he says: "These decisions are doubtless, in some degree, influenced by the special provisions act, particularly that of 1862; but the general course of reasoning therein is applicable to cases of insolvent or bankrupt corporations in this country. There is no register of stockholders in Illinois, and it is possible that the decisions in England requiring active steps by bill in chancery to have one's name removed from the register might not be applicable in their full extent here. Indeed, I am inclined to the opinion that if a company has fraudulently represented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and afterwards guilty of no laches in discovering the fraud, and he thereupon repudiates the contract and offers to rescind the purchase,—these facts concurring,—I am inclined to the opinion that the bankruptcy of the company, subsequently happening, will not enable the assignee to insist that the purchase of stock is binding upon him." We may also refer to *Farar v. Walker*, before Mr. Justice Miller on appeal to the circuit court, and reported in 3 Dill. 506, in which that learned judge recognizes, in express terms, the right of the defrauded shareholder to repudiate the contract, and to repudiate it even after the insolvency of the company, if he has not had reasonable time in which to examine into the affairs of the company before the appointment of the assignee. We agree that the assets of an insolvent corporation constitute a trust fund for the payment of corporate debts, and that unpaid subscriptions to its capital stock constitute part of such assets, but the subscriptions must be such as the assignee can enforce according to

v.28a.no.7—27

the well-settled principles of law. And if it be conceded that a defrauded shareholder may rescind the contract by a proceeding against the company, instituted before its insolvency, it can make no difference to creditors who have dealt with and have given to the company upon the faith of the subscription whether the contract is rescinded by a proceeding against the company, or by any act or acts of the shareholder which in law amounts to a rescission. In either case the assets of the company will be diminished to the extent of the fraudulent subscription. If, therefore, the defendant's subscription was procured through the false representations of the company, and there was no laches or unreasonable delay on his part in discovering the fraud, and within a reasonable time after the discovery of the fraud, and before the execution of the deed conveying its property in trust for the benefit of its creditors, he notified the corporate authorities that he repudiated the contract, these facts, if found by the jury, constitute a valid defense to the action. And, this being so, there was error in granting the plaintiff's first and second prayers. We see no objection to the defendant's third and fourth prayers, except in this particular: They do not leave to the jury to find whether he had used reasonable diligence in discovering the fraud. As these prayers, thus amended, present the law as applicable to the case, it is quite unnecessary to consider the fifth prayer, which was rejected by the court. Judgment reversed, and new trial awarded.

(66 Vt. 38)

HOYT v. McNALLY.

(Supreme Court of Vermont, General Term.
Dec. 23, 1893.)

NEGOTIABLE INSTRUMENTS — ACTION ON NOTE — CONSIDERATION — PLEA OF PARTIAL FAILURE OF CONSIDERATION — WHEN ALLOWED.

1. In an action on a note for \$100 defendant alleged that it was given in consideration of the conveyance, with covenants of warranty and seisin by the payee of his equity of redemption in a farm; that he was induced to take the deed and give the note by false representations by the payee as to the condition of the farm and his ability to give immediate possession; that such farm, in its actual condition, was worth less than the amount of the mortgage thereon, and more than \$100 less than it would have been if in the condition represented; and that it was in possession of a tenant, whereby defendant was damaged more than \$100. *Held*, that such facts did not show a total failure of consideration.

2. Where, in actions on notes, etc., "between the original parties thereto," defendant may set up partial failure of consideration as a defense, (R. L. § 911,) the maker may plead such defense only when the action is by the payee, as shown by the note itself.

Exceptions from Bennington county court; Munson, Judge.

Action by Verona E. Hoyt against John McNally on a promissory note executed by defendant to Elisha F. Hoyt, and by him in-

dorsed to plaintiff. There was a verdict directed by the court in favor of plaintiff, and defendant excepts. Affirmed.

The note was for the sum of \$100, and was made payable to the order of Elisha F. Hoyt. It was indorsed upon the back to the order of the plaintiff. The defendant set forth in his notice that Elisha F. Hoyt held the title to a certain farm, which he conveyed to the defendant with covenants of warranty and seisin; that said farm was mortgaged; and that the note in suit was given in consideration of the conveyance of the said Hoyt's equity of redemption to the defendant as above; that the defendant was induced to take said conveyance and give said note by the representations of the said E. F. Hoyt as to the condition of said farm, and by the further representation that he could and would give the defendant immediate possession; that the aforesaid representations were false, as the said Hoyt well knew; that the farm, in its actual condition, was worth less than the amount of the mortgage, and more than \$100 less than it would have been if in the condition represented; that the farm was leased to and in the possession of a tenant; and that the defendant was damaged more than \$100 by reason of not obtaining immediate possession. The notice further alleged that the said E. F. Hoyt held the title to said farm for the benefit of himself and the plaintiff; that the aforesaid representations were made with the knowledge of the plaintiff, and on her account; that the note was taken in the name of E. F. Hoyt for the benefit of the plaintiff; and that the same was transferred to her after maturity, without consideration, and with knowledge of all the foregoing facts. Upon the trial the defendant offered to show the facts set up in his notice, but the court excluded the evidence, and directed a verdict upon the ground that the facts set forth in the notice did not, if proved, constitute a defense, to which the defendant excepted.

J. C. Baker, for plaintiff. O. M. Barber and J. K. Batchelder, for defendant.

THOMPSON, J. It is urged that the evidence offered and excluded shows a total failure of consideration for the note in suit, and that the plaintiff took it after its maturity, with full knowledge of the defense sought to be made by the evidence excluded. If the offer shows a total failure of consideration, such failure was a complete defense to the suit, and there was error below. The argument of the defendant in support of this contention is based upon the assumption that the farm would have been worth more than the amount of the mortgage on it, had it been, at the time of the sale, in the condition represented by E. F. Hoyt. The defendant, by his offer, did not propose to show that, had the farm been as represented, its value would have equaled or exceeded the amount of the

incumbrance upon it. All the facts included in defendant's offer may be admitted to be true, and yet, so far as appears from them, the value of the farm at the time of the conveyance may have been less than the amount of the mortgage. E. F. Hoyt conveyed the farm to the defendant and Dewey by his deed with the usual covenants of warranty and seisin. If the consideration of the note is assumed to be the conveyance of the title with the covenants, and the fraudulent representations of E. F. Hoyt, yet it cannot be said that there was a total want or failure of consideration, for the conveyance of the title and the covenants of warranty and seisin have not failed, but they are still held by the defendant. It does not appear that there has been any offer of rescission by him. If Ray held possession of the premises under a valid lease to him from E. F. Hoyt, executed and delivered prior to the conveyance to the defendant and Dewey, they have their remedy against E. F. Hoyt by an action on his covenants for all damages they have sustained by the retention of the premises by Ray under such a lease. It is apparent that, if there is any failure of consideration disclosed, at most it is only partial. Thrall v. Horton, 44 Vt. 386; Blaney v. Pelton, 60 Vt. 275, 13 Atl. 564. It is insisted that R. L. § 911,¹ gives the defendant the right to make the defense of a partial failure of consideration for the note in this action. Prior to St. 1867, now embodied in R. L. § 911, partial failure of consideration was not available as a defense to an action on a promissory note, even between the original parties thereto, unless there was fraud upon the defendant in procuring the note, an offer by him to rescind, and the amount to be deducted could be ascertained by computation. Walker v. Smith, 2 Vt. 539; Stone v. Peake, 16 Vt. 213; Burton v. Schermerhorn, 21 Vt. 289; Richardson v. Sanborn, 33 Vt. 75; Harrington v. Lee, Id. 249; Briggs v. Boyd, 37 Vt. 534; Farrar v. Freeman, 44 Vt. 63; Thrall v. Horton, Id. 386. We are aware that some of the remarks of Peck, J., in his opinion in Kelly v. Pember, 85 Vt. 183, are at variance with the doctrine as we have stated it and as laid down in the cases cited, but that case is not in conflict with these cases, for there it distinctly appeared that there had been an offer by the defendant to rescind. The later case of Briggs v. Boyd, supra, repudiates the idea that Kelly v. Pember was decided upon grounds in conflict with the rule above stated. R. L. § 911, varies this rule so far as to permit partial failure of consideration to be set up as a defense pro tanto in an action to recover upon

¹ R. L. § 911, provides as follows: "In actions upon promissory notes, bills of exchange, or other instruments in writing, between the original parties thereto, the defendant may, by plea, or notice, set up a partial failure of consideration, and the court may, upon issue joined thereon, render judgment for such sum as is found due."

a note, bill of exchange, or other writing, where the action is between the original parties to such instrument. The language of the statute is clear and explicit, and we hold that under it this defense can only be made in actions between the original parties to the instrument upon which recovery is sought, as appears by the instrument itself. Where the instrument is a promissory note, as in this case, the statute only applies to an action between the maker and payee of the note as shown by the note itself. The plaintiff is not an original party to the note in suit, and for that reason the defendant cannot avail himself of the statute to interpose the defense of partial failure of consideration. The court below therefore properly excluded the evidence offered, and directed a verdict for the plaintiff. Judgment affirmed.

(66 Vt. 44)

BURGESS v. NASH.

(Supreme Court of Vermont, General Term.
Dec. 23, 1893.)

Exceptions from Bennington county court; Start, Judge.

Action by Merritt E. Burgess against Patrick Nash on a promissory note. There was a verdict and judgment for plaintiff, and defendant excepts. Affirmed.

The note was for \$175, was signed by the defendant, made payable to the order of Patrick Nash, and indorsed by Patrick Nash and H. E. Burgess. The note in suit was given in renewal of another note for \$200 between the same parties, which had been originally given by the defendant in payment of an interest in a livery stock purchased by him. This trade was negotiated by H. E. Burgess. A part of the stock sold consisted of two wagons in the state of New York, which could not be inspected by the parties. Burgess represented that these wagons were worth \$175 and \$75, respectively, and agreed that, if they were not, a corresponding deduction should be made from the note. The defendant claimed on trial that the wagons were really worth very much less, and that the amount of the recovery on the note should be diminished accordingly. The plaintiff insisted that his only interest in the property sold was that of a mortgagee, and that this defense could not be made as to him. The defendant claimed that the plaintiff was the real owner, and that H. E. Burgess acted as his agent in the sale. The jury found specially that the plaintiff was the real owner, and that the wagons were worth \$50 less than represented. Notwithstanding this finding, the court gave judgment for the full amount of the note, to which the defendant excepted.

C. H. Darling, for plaintiff. C. H. Mason and Batchelder & Bates, for defendant.

THOMPSON, J. The only question presented in this case is whether the defendant

can make the defense of partial failure of consideration, under the provisions of R. L. § 911. As held in *Hoyt v. McNally*, 66 Vt. —, 28 Atl. 417, (heard and decided this term,) the plaintiff is not an original party to the note in suit, within the meaning of the statute, and therefore this defense cannot be interposed. Judgment affirmed.

(66 Vt. 46)

In re BLACKMER'S ESTATE.

(Supreme Court of Vermont. General Term.
Dec. 11, 1893.)

WILLS—PROVISION FOR WIDOW—HOMESTEAD.

1. A will gave the widow, for life or widowhood, certain dividends, and the use of testator's home place (worth \$3,400) and household goods, on condition that she should not rent the mansion or allow any family to live there, and should keep the buildings in repair, and pay taxes; said bequests to be in lieu of dower. *Held*, that the bequests were also in lieu of homestead, testator evidently intending to keep the place together for his heir.

2. A widow to whom are bequeathed, for her life or widowhood, the dividends on certain stock, is entitled to all that accrue after testator's death, though she does not at once elect to waive her antenuptial contract and take under the will; nor is she estopped to claim them by receipt meantime of support, which neither the contract nor the will gave her.

3. The agreed facts stated that the home place (whose use was given to the widow for life) had on it, besides the mansion and out-buildings, a small tenement house, situated at the extreme back end of the lot, facing a railroad, and separated from the rest of the lot by a fence across the corner; also a small pasture between the homestead buildings and the railroad. *Held*, that the statement conceded such house and pasture to be part of the home place, and the widow was entitled to the rent thereof.

Exceptions from Rutland county court; Taft, Judge.

In the matter of the estate of Hiram Blackmer, deceased. Appeal of Mary H. Blackmer, widow, from a decree of the probate court denying her homestead and certain dividends and rents. Judgment, pro forma, that appellant take the homestead and dividends, but not the rents. The executor excepts. Judgment reversed.

J. C. Baker, for appellant. Stewart & Wilds, for appellee.

ROWELL, J. The appellant, widow of the testator, was his second wife. They entered into an antenuptial contract, whereby she was to have, in lieu of dower, homestead, and all other rights in his estate, \$3,000 in money, (to be paid to her within one year after his death,) all the household goods and furniture that he should die possessed of, and the right to remain upon, use, occupy, and enjoy his home place, if he had one, and to be thereon supported out of his estate, for the term of one year after his death. Said contract also provided that, if the appellant should claim and obtain a homestead out of his estate notwithstanding said

contract, the said sum of \$3,000 should thereby be diminished to \$2,250. After their marriage, and not long before his death, the testator made his will, whereby he gave the appellant, during life or as long as she remained his widow, his home place in Brandon, consisting of four acres and a half, more or less, and all and singular his household goods, furniture, provisions, and other goods and chattels, except a piano, that might be therein at the time of his death, upon condition that she should not rent the mansion house to any family, nor allow any family to reside therein on any condition, and should keep the buildings in good repair, and pay all taxes and assessments imposed on said property during her occupancy thereof. A breach of said condition was to work a forfeiture of her right to the property, both real and personal. The will also gave the appellant, during life or as long as she remained his widow, the dividends on the testator's bank stock of \$3,000 in the First National Bank of Brandon; and it expressly provides that all the bequests to the appellant shall be in lieu of dower and of the provisions made for her by said antenuptial contract, but it does not expressly provide that said bequests shall be in lieu of homestead; and one question is whether the appellant, having elected to take under the will, is entitled to a homestead in addition to what the will gives her. The remainder of the testator's estate, except legacies of \$1,000 each to two of his nephews, is intestate, and his grandson is his only heir.

When a will does not express that its provisions for the widow are in lieu of homestead, electing to take under the will does not deprive her of homestead, unless it clearly appears from the will itself that such was the intention of the testator. *Meech v. Meech*, 37 Vt. 414; *In re Hatch's Estate*, 62 Vt. 300, 18 Atl. 814; *Wells' Estate v. Congregational Church*, 63 Vt. 116, 21 Atl. 270. In the *Meech Case* the will gave the widow, for life, four acres of land, that included the family mansion and the grounds. A larger tract, which included said four acres within its boundaries, was given to the testator's son in fee, excepting the life estate in the four acres given to the widow. The will did not express that the provisions for the widow were in lieu of homestead, but it did express that they were in lieu of dower. The widow, having elected to take under the will, claimed a homestead in addition, which was denied her. The court said that the plain construction of the will was that the son should have all but the widow's life estate, and that the testator could not have intended that she should have a piece severed to her in fee out of the four acres; that the setting out in fee of such a small piece from the house and grounds of such a mansion, and obliging his son to have a stranger introduced into a part of the old family mansion and grounds, was plainly inconsistent

with the testator's intention. In the case before us, we think it clear that the testator intended that his grandson, his only heir, should take all of the home place but his widow's life estate therein. He expressly prohibited her from renting the family mansion, and from allowing a family to live in it on any condition, and he imposed upon her the duty of keeping it and the other buildings in good repair, and of paying all taxes and assessments on the property, under penalty of forfeiture for a breach. This is entirely inconsistent with the idea of her having a homestead in the premises, which she would own in fee, and could do with as she pleased. It may be true that the presumption is that a testator intends to devise only that which belongs to him, and which he has authority to dispose of; but that presumption, if it exists, may be rebutted, and is rebutted when the will shows that his intention was otherwise. Again, the carving out of the heart of the property, appraised at \$3,400, of a small piece worth \$500, with necessary privileges in the other part, is inconsistent with the testator's intention as to the distribution of the residue of his property. It would, as said in the *Meech Case*, introduce a stranger into the old family mansion,—a thing that he had carefully and strongly guarded against as far as he could guard against it.

Another question is whether the appellant is entitled to the dividends on the bank stock from the death of the testator till she elected to waive the provisions of the antenuptial contract, and take under the will. It is well settled that a tenant for life is entitled to the income of a residue given in trust from the death of the testator, because any other rule would take the income from the tenant, and give it to the remainderman. *Lovering v. Minot*, 9 Cush. 157; *Williamson v. Williamson*, 6 Paige, 298. It is clear that the rights of the tenant for life can be no less in a special fund set apart by the testator than in a residuary bequest. This point is fully sustained by *Sargent v. Sargent*, 103 Mass. 297. There the will directed that certain United States bonds that the testator had should be sold, and the avails paid to one in trust, to pay the interest to another for life, with remainder over of the principal; and it was held that the tenant for life was entitled to the interest from the death of the testator. So, under a bequest for life of the interest on British consols, the beneficiary is entitled to the interest from the death of the testator. *Cogswell v. Cogswell*, 2 Edw. Ch. 281. Specific legacies are considered as separated by the testator from the general estate, and as appropriated at the time of his death, and consequently, from that time, whatever accrues from them belongs to the legatee; and therefore, when there is a specific legacy of shares of stock, the dividends belong to the legatee from the death of the testator. 2 *Williams, Ex'rs*, 1530. There seems to be no reason why the same rule is not ap-

pliable when only the income of stock is given, and not the stock itself, certainly as far as common and ordinary dividends are concerned. Indeed, it is not really contended that this is not so; but it is claimed that the appellant is estopped from taking the dividends in question, for that, under the antenuptial contract, she was not entitled to support out of the estate during its settlement; and that, had there been no will, she could not have waived the provisions of that contract, and received support, because support is not one of the things that the statute allowing a widow to waive such a contract authorizes her to take; and that she could not take such support under the will, for, by electing to take under that, she is confined to what it gives her; and that it does not give her support; and that, therefore, having in fact received such support when not entitled to it, she is now estopped to receive said dividends; and that the executor is entitled to retain them, to reimburse in part the expense the estate has been put to in such support. But we are unable to adopt this view. The statute gave the appellant eight months after the will was proved in which to make her election, and such further time as the probate court, in its discretion, allowed, and it allowed or permitted her to have till she applied for a decree of distribution under the will, which act constituted her election. During this time she had to have support from some source, and she had a right to stand for support on the right of a widow; and the probate court having allowed her support, the estate being solvent, she is now entitled to the full benefit of that allowance, and cannot be compelled to pay for it in any part by the retention of the \$750 dividends in the hands of the executor. Those dividends are hers, under the will, and must be paid to her.

It is conceded that if the tenement house and the pasture are a part of the home place, the use of which is given to the appellant, she is entitled to the \$73 received for the rent thereof; but it is claimed that whether they are a part of that place or not is a question of fact that has not been determined. But we regard the agreed facts as determining that question in favor of the appellant, for that statement says that "the home place of Pearl street, consisting of four and one-half acres, more or less, had upon it, besides the home mansion and necessary outbuildings, a small tenement house, that rented for one dollar per month a portion of the time, and also had a small pasture." The will describes the place in substantially the same way, except it does not undertake to state what was upon it, as the agreed facts do. The agreed facts further state that the tenement house is situated on the extreme back end of the lot, and faces the railroad, and is separated from the rest of the lot by a fence running diagonally across the south-

west corner of the lot, and that the pasture lies between the homestead buildings and the railroad. But this statement does not countervail the other statement, and overcome the force we give to it. The appellee expressly waives all claim in respect of insurance premiums on the property of which the use is given to the appellant, but contends that she should be charged with the accrued and the accruing taxes on the bank stock and the real estate of which she has the life use; but, as that question is not presented by the record, we do not consider it. Judgment reversed, and judgment that the appellant is not entitled to a homestead, but is entitled to the \$73 rent and the \$750 dividends on the bank stock; costs in this court to the appellee. Judgment to be certified to the probate court.

(56 N. J. L. 106)

STATE (RAPHAEL, Prosecutor) v. LANE et al.

(Supreme Court of New Jersey. Nov. 9, 1893.)

RIGHT TO TRIAL BY JURY.

An action was brought in the first district court of Newark to recover a claim of over \$200 under the supplement to the district court act of March 27, 1882, (Laws 1882, p. 195.) When the case was called for trial, the defendant objected to the judge trying the case without a jury, upon the ground that the defendant had not waived a trial by jury. The judge proceeded to try the case without a jury, and gave judgment for the plaintiffs. *Held*, that this proceeding was in violation of article 1, par. 7, of the constitution, which declares that the right of trial by jury shall remain inviolate; that the defendant is not bound by the judgment, which should be reversed, and the record remitted to the district court to be proceeded in according to law.

(Syllabus by the Court.)

Certiorari to Newark district court; Truesdell, Judge.

Certiorari at the suit of Moritz Raphael against Michael J. Lane and James Olifford to review a judgment of the district court of Newark. Reversed.

Argued June term, 1893, before DEPUE, LIPPINCOTT, and ABBETT, JJ.

C. W. Riker, for prosecutor. Samuel Kallisch, for defendants.

ABBETT, J. The certiorari in this case brings up for review the judgment and proceedings in the first district court of the city of Newark, wherein a judgment was rendered against the prosecutor on February 13, 1888, for \$312.45. The suit was brought in that court under the act of March 27, 1882, (Laws 1882, p. 195.) When the case came on for trial before the judge of the district court the defendant objected to the proceeding of said trial before the judge without a jury, upon the ground that the defendant had not waived a trial by jury, and that the plaintiff, under the pleadings in the case, could not proceed to prove his case without one. These objections were overruled by the court, and

the defendant's counsel took exceptions to the ruling, which exceptions were allowed. The judge then proceeded to try the case without a jury, and rendered judgment for the plaintiffs, Lane and Clifford, against the defendant, Moritz Raphael.

The case presents the question whether the proceeding against the defendant was void, he having objected to the proceeding of said trial before the judge without a jury, and he never having waived trial by jury. The constitution provides (article 1, par. 7) as follows: "The right of a trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed \$50, by a jury of six men." *Hinchly v. Machine*, 15 N. J. Law, 476, was a case under an act passed December 10, 1825. By that act the court of common pleas of certain counties, of which the county of Morris was one, were authorized to appoint and hold special terms for the trial of appeals from the courts for the trial of small causes in cases where the judgment below had been rendered by a justice of the peace without the intervention of a jury. By a supplement to this act, passed February 20, 1830, the same power was extended to all courts of common pleas in the state, with the additional right of trying at such special terms appeals from judgments rendered on the verdicts of juries, if the parties consented to waive the right of trial by jury at the time of setting down such appeals for hearing at the special terms. Previous to the passage of these laws, the common pleas of Morris had adopted a rule of practice by which the parties should be considered as waiving their right to such trial, unless they signified their intention of having a jury on or before a certain day in the term, to which such appeal should be returned. Under this rule the appeal was ordered on, and tried at a special term, and of course, without a jury, because the party complaining had not given notice, in the manner required by that rule, of his desire to have the cause tried by a jury. It was insisted by the defendant in certiorari—First, that the rule of practice above mentioned was still in force, and the cause therefore rightly tried in the manner it was; and, secondly, that if the old rule of practice had ceased to be operative, yet the judgment ought to stand, because the party had waived the objection by going to trial and making defense. The court held that neither of these positions was tenable. It held that the former rule of practice required the parties to make their election within a certain time after the list of appeals should be made out by the clerk; whereas, by the supplement of 1830, such election was to be made "at the time of setting down the appeal for hearing at the special term." It held that this act was a virtual repeal of the old rule, for by the plain terms of the act the appeal was not to be set down for trial at the spe-

cial term unless at the time of setting it down the parties consented to waive the right of a trial by jury. It was held that the court could not, by a rule of practice, alter the law, and fix any other period for making such election, nor should a party be deprived of the right of a trial by jury upon a mere implied or constructed waiver of such right. It was also held that if the party had gone to trial before the court at the special term, without any objection to the mode of trial, it would have been too late for him to complain about it afterwards. This he did not do. He objected to the proceeding, but the court ordered on the trial. The court held that therefore he did not waive his objection by making the best defense he could, for he did not know but it might be his only opportunity to do so. They held that if the court below was right the judgment must stand, but if they compelled him to go into a trial contrary to law he ought not to be bound by the judgment. They held that the court erred in ordering on the trial at the special term. The judgment was therefore reversed, and the record remitted to the court of common pleas to be proceeded in according to law.

In the case of *Ten Eyck v. Farlee*, 16 N. J. Law, 348, a peremptory mandamus was ordered to the Hunterdon common pleas to reinstate an appeal where a trial was had without a jury. Ford, J., in that case, says: "A party has a vested right to his trial by jury unless he waive it. Courts may prescribe the form of, but cannot dispense with, the waiver." In the case of *McGinty v. Carter*, 48 N. J. Law, 113, 3 Atl. 78, an action of trespass was brought by the plaintiff against the defendant in the court for the trial of small causes. It was tried before a justice of the peace and a jury, and resulted in a verdict of not guilty. On appeal by the plaintiff to the court of common pleas from the judgment entered on this verdict, both parties demanded a trial by jury. It was refused, tried by the court without a jury, and judgment of guilty was rendered against the defendant, with damages assessed at \$15. The defendant removed the case by certiorari, and the only reason assigned was that he was denied a trial by jury in the court of common pleas. The denial of this trial was based on the supplement to the small cause act, dated March 12, 1880. It secured to either party on appeal a trial by jury where there had been a jury trial before the justice, if it were demanded. This provision for a jury trial on appeal, re-enacted in the Revision of 1874, is found in the act of November 23, 1821, and continued to be the law regulating this class of appeals until the amendment of March 12, 1880, was passed. This introduced a denial of the right to demand a trial by jury where the judgment appealed from should not exceed, exclusive of costs, the sum of \$30, and retained it where the judgment exceeds \$30, exclusive

of costs. As in this case the verdict of the jury in the trial before the justice did not exceed the sum of \$80, the court of common pleas on appeal held that this amendment took away the trial by jury on the appeal. The supreme court held that the act of 1821, above referred to, was in effect when the constitution of 1844 was passed, which ordained that the right of trial by jury should remain inviolate, and that, as this right of trial by jury had attached in cases of appeal where there had been a jury trial before the justice of the peace in the court for the trial of small causes, no legislation, after the adoption of the constitution of 1844, could deprive a party of that right, unless he assented by express waiver of this personal privilege secured to him. In *Gartner v. Cohen*, 51 N. J. Law, 125, 18 Atl. 684, which was an application to show cause why a mandamus should not issue to compel the judge of the second district court of Jersey City to accept the bond and allow an appeal from a judgment in said court in a plea of tort to the court of common pleas of Hudson county, the court, after reviewing the act in relation to said court of March 27, 1882, extending the jurisdiction of the court to \$300, and the act of February 9, 1886, extending the territorial jurisdiction of district courts, and the supplement approved March 11, 1885, in reference to pleadings, where the debt, claim of damages, exceeds the sum of \$200, making the proceedings conform to those in the circuit court, says: "This arrangement of these different sections shows that in suits for the recovery of over the amount of two hundred dollars, the proceedings in these courts of inferior jurisdiction, from the issuing of the summons to the judgment on the review by certiorari in the supreme court, shall be in the usual form of actions in the higher courts, except that a certiorari is used, with a bill of exceptions, instead of a writ of error." The first section of the act of March 27, 1882, (page 195,) provides "that from and after the passage of this act the jurisdiction of each and every district court established by law in any city of this state, whether by general or special statute shall, be and the same is hereby extended to every suit of a civil nature at law, in which the debt, balance, damage or other matter in dispute, does not exceed, exclusive of costs, the sum or value of three hundred dollars; provided, that this act shall not be construed to extend to or embrace any suit or action where the title to lands and real estate shall come in question." The second section provides that in all suits where the claim exceeds the sum of \$200, exclusive of costs, all writs, summonses, or attachment warrants, executions, venires, or other processes in any such suit or action shall be issued to the sheriff of the county wherein the city is located in which any such district court is established, and shall be issued out of said courts, and returned thereto in like manner as writs out of the

courts of common pleas in this state. Section 8 of said act provides that in any case where a jury shall be called by either of the parties to any cause in any district court in this state, in which the debt, damage, or other matter in dispute exceeds, exclusive of costs, the sum or value of \$200, the fee of each juror that serves in said cause shall be 50 cents per day, to be paid as now provided by law in other cases tried by a jury in said courts. The fair construction of the act of 1882, as amended as to its third section by the act of 1885, appears to be that a jury trial was contemplated in all matters of dispute exceeding the sum of \$200, and that under the act either party was entitled to trial by jury upon demand therefor, where there had been no waiver of such right. It also appears clear that, prior to the passage of said act of 1882 extending the jurisdiction of the district courts, the right of trial by jury existed in the courts where such a suit could be commenced; this being an action to recover the amount due on a promissory note of over \$200. This, therefore, being a case where the right of trial by jury existed at the time of the passage of the act of 1882, any construction of this act which would permit the judge to deprive the party of his right of trial by jury would be in violation of the constitution. As the act can be construed so as to make it constitutional, the court will adopt that construction. The recent case on this subject is *Clayton v. Clark*, (N. J. Sup.; filed June 9, 1893,) 26 Atl. 795, which holds that in an action brought in the district court, where the matter in dispute is above the sum of \$200, a demand for a jury, made by the defendant at the proper time, deprives the court of jurisdiction to try the cause otherwise than by a jury. Such a demand gives the defendant the right of trial by jury, without prepayment of costs, or the right to have the action against him dismissed. The court in this case says: "With reference to the expenses of these statutory courts, it will be observed that the plaintiff and defendant stand in totally different attitudes. The plaintiff chooses the tribunal in which he will bring his suit. When the amount of his claim is above two hundred dollars, he has, from which to select, the supreme court, the circuit court, and the court of common pleas, in all of which a common-law trial by jury is provided at public expense. If, with these courts open to him, the plaintiff elect to take the defendant before a statutory tribunal, where either party may demand a trial by jury, it is doubtful if he can be heard to complain of any reasonable regulation rendered necessary by the legislative frame of the tribunal selected. With the defendant it is totally different. The legislature has made the right to a jury absolute, if demanded at the proper time. This defendant has had no voice in choosing the forum, hence has submitted himself to no implied conditions arising from its construction. He is there

in invitum, with the right to question the constitutionality of the procedure in all its steps, and to ignore utterly all innovations upon his common-law rights for which express legislative authority does not exist." In the case of *State v. Blum*, (N. J. Sup.; filed June 8, 1893,) 26 Atl. 861, which was a suit for \$200 against a corporation, the court says: "It must be assumed in this case that a jury was not demanded on the trial in the court below, as the record made before us falls to show that such demand was made. The right of trial by jury may be waived, and where a party goes to trial before the court without a jury, and without objection, he cannot afterwards complain, [cases cited.] The prosecutor having waived his right of trial by jury, it is unnecessary to consider the constitutional question. By the act of 1878 the district court has jurisdiction to the extent of two hundred dollars; and, as causes are triable without a jury, the question whether legal provision has been made for jury trial is not before us." The defendant in the case before the district court having objected before trial to a trial without a jury, there is nothing in the present case to show a waiver on his part of his right to a jury trial in this case. The right to trial by jury in district courts in cases other than those arising under the act of March 27, 1882, and its supplements, is not necessarily involved in this case, and the court does not intend to express any opinion whatever in reference to cases not arising under said acts. The judgment should be reversed, and the record remitted to the district court, to be proceeded in according to law.

(56 N. J. L. 273)

**STATE (McDERMOTT, Prosecutor) v.
BOARD OF STREET & WATER
COM'RS OF JERSEY CITY et al.**

(Supreme Court of New Jersey. Dec. 22, 1893.)
MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS
—DIVISION OF WORK BETWEEN BIDDERS.

1. Where a city charter directs that certain paving or other work shall be awarded to the lowest responsible bidder, or to that responsible bidder who offers the terms most advantageous to the city, it is illegal to divide the work between the highest and lowest bidder.

2. It is the duty of the proper city board or officer to determine which of the bidders possesses the statutory qualifications, and then award the work to that bidder, unless they determine to reject all bids and readvertise for the work under the city charter, or the terms of the original advertisement forbid.

(Syllabus by the Court.)

Certiorari, at the suit of Allan L. McDermott, against the board of street and water commissioners of Jersey City and others, to review certain resolutions and proceedings of defendant board. Reversed.

Argued November term, 1893, before DIXON and ABBETT, JJ.

Allan L. McDermott, in pro. per. William D. Edwards, for defendants.

ABBETT, J. The certiorari in this case removed into this court, for review, certain resolutions and proceedings awarding contracts for asphalt paving in Jersey City, under proposals received by the board of street and water commissioners. The board advertised for bids for laying asphalt pavement, to be paid for out of the license money collected by the city, as provided in sections 5 and 6 of chapter 134 of the Laws of 1891, (Laws 1891, p. 259,) and further provided for in chapter 82 of the Laws of 1893, (Laws 1893, p. 164.) Bids were received therefor from the Trinidad Asphalt Company and the Barber Asphalt Company. The work would cost \$50,920 under the bid of the Trinidad Asphalt Company, and \$41,982 under the bid of the Barber Asphalt Company. The board did not award the contract to either. They divided it, giving paving to the highest bidder amounting to \$32,805, and giving the lowest bidder paving amounting to \$13,878. The preamble to the resolution awarding portions of the work to each company declares "that the samples [of asphalt] submitted are above the standard requirements, and this board has examined into the financial standing of both bidders, and finds them responsible; and as the prices bid, covering a guaranty of ten years, are advantageous to the city, and as the cost of preparation in establishing a plant to prepare the asphalt for street laying is between twelve thousand and twenty thousand dollars, it is advisable to make the contract of sufficient size as to amount of work to justify the erection of a plant; and as the laying of asphalt pavement has not been heretofore attempted in this city, and as the money to pay for the work on which bids were received is payable out of the excise moneys, and not by assessment, and this board believing it to be for the best interest of the city to divide the work between the bidders with a view of comparison of their work, inasmuch as the Barber Asphalt Paving Company has had the greater experience in laying the pavement, and the Trinidad Asphalt Paving Company has had the greater experience in refining the product, as we are informed: Therefore, resolved," etc. The resolution was presented to the acting mayor on August 19, 1893, and became operative within 10 days thereafter, under section 2 of the supplement to the city charter, approved March 24, 1873, (Laws 1873, p. 400,) he not having vetoed the same. He did not formally approve the same, but in a communication to the board, dated August 29, 1893, after giving his views, states: "I have decided to let the resolution stand."

Our opinion is that under the city charter this improvement was one that was to be borne by the city at large and paid by general tax, and that the proposed work cannot be paid for by assessment for benefits. Under the fifth section of said act of 1891, the board has power, in its discretion, to pave, repair, or improve, at public expense,

any part of any street, lane, alley, avenue, or public place already paved, or that has been paved, to be paid for out of the funds raised by the issue of licenses for the sale of spirituous or malt liquors heretofore appropriated under existing laws for that purpose in such city, or which may hereafter be appropriated for that purpose in any such city under the authority conferred by this act. There is a contention in this case as to whether or not the sections of the charter of 1871, under the title "Board of Public Works," which require the contract for paving to be awarded "to the lowest responsible bidder," or section 159 of the charter, under the heading "Finance," is applicable to this case, or whether the provisions of the latter section modify or affect the former provision, or the proper construction thereof. Section 159 provides "that no contract for work or materials shall be entered into, or purchase of personal property be made by, or on account of any board or department of the city government, except after due advertisement, for six days at least, in the official newspapers; whereupon the contract shall be awarded to, or the purchase shall be made of, that responsible bidder who offers the terms most advantageous to the city," etc. In deciding this case it is not necessary to determine which of these provisions are applicable, or whether there is any legal difference between the "lowest responsible bidder" and "that responsible bidder who offers the terms most advantageous to the city," or whether the board, in determining who is a "responsible bidder," is limited to the question of financial responsibility, or may broaden its field of inquiry, and exclude a bidder whose conduct in other public work, or other actions, would render it unwise to trust him to carry out the contract he might make. The board did not act under either of the provisions quoted. It did not award the contract to either the lowest responsible bidder or to that bidder who offered the terms most advantageous to the city. It awarded part of the work to the highest bidder, and part to the lowest bidder. The duty imposed upon the board by the charter was to determine which of these bidders on this work came within the words of the charter. They were both financially responsible, they both submitted samples of asphalt which were above the standard requirements, and were both treated as bidders who in good faith would perform their contracts to the best of their ability; the only difference between the two being that the highest bidder had the greater experience in laying the pavement, and the lowest bidder had the greater experience in refining the product. It was to one of these that the charter required the board to award the contract. The board seeks to excuse their failure to award the whole of the work to either upon the ground that they believed it to be for the best interest of the city to divide the work between them with a view of com-

paring their work. The answer to this action is that no such power is conferred upon this board. Its power is limited to awarding the contract to one of the bidders; and it failed to perform that duty when it divided the work unequally, according to its discretion, between the highest and the lowest bidders. The charter having limited the power of the board as to the bidder to whom the contract should be awarded, and as to his qualifications, any departure therefrom is illegal. *Cory v. Freeholders of Somerset*, 44 N. J. Law, 455.

The board had no right to consider any requirements not set forth in the statute or in the specifications. *Shaw v. Trenton*, 40 N. J. Law, 343, 12 Atl. 902. If the board could not determine which of the two was the lowest responsible bidder, or which was that responsible bidder that offered the terms most advantageous to the city, they could have rejected both bids, and have readvertised for the work under the same, or clearer or more detailed, specifications, or, if there were two classes of streets requiring different kinds of work thereon, they could have divided the work, and have asked bids on the different streets.

The prosecutor is a taxpayer of Jersey City, and has a right to question the legality of this action of the board of street and water commissioners. This case is not distinguishable in this respect from *Publishing Co. v. City of Jersey City*, 54 N. J. Law, 439, 24 Atl. 571.

The action of the board in dividing the work among the two bidders is illegal and void.

(56 N. J. L. 115)

FRY v. MYERS.

(Supreme Court of New Jersey. Dec. 30, 1893.)
LANDLORD AND TENANT—RECOVERY OF POSSESSION—TRIAL BY JURY.

In summary proceedings by the landlord to recover the possession of land from a tenant, because his leasehold term had expired, the tenant is entitled to a trial by jury, notwithstanding the passage of the act of April 23, 1888, (Laws 1888, p. 462.)

(Syllabus by the Court.)

Certiorari at the suit of Reginald Fry against Frances H. Myers to review a judgment given by a justice of the peace in summary proceedings against a tenant. Judgment reversed.

Argued June term, 1893, before DEPUE, LIPPINCOTT, and ABBETT, JJ.

John E. Fennell, for plaintiff. John B. Vreeland, for defendant.

ABBETT, J. Frances H. Myers brought a suit, under the landlord and tenant act, for the purpose of dispossessing Reginald Fry of a cottage in Chatham township, Morris county. It was alleged that his tenancy had expired under his lease. A venire was issued by the justice, and a jury summoned, but.

when the twelve men appeared by virtue thereof, they were dismissed, after the payment to them of their fees, and the justice refused to proceed with the jury, and tried it himself, and rendered a decision adverse to Fry. The case was brought to this court by certiorari, and two questions are presented—First, will certiorari lie? and, second, had the justice the right to dismiss the jury he had summoned, and try the case without a jury, against the protest of the defendant?

The question has been discussed as to the constitutional right of the defendant to trial by jury in this case, he having demanded it and not waived it. The defendant invokes article 1, par. 7, of the constitution: "The right of a trial by jury shall remain inviolate; but the legislature may authorize the trial of civil suits, when the matter in dispute does not exceed fifty dollars, by a jury of six men." Prior to the constitution of 1844, and up to the act of March 4, 1847, (Nixon's Dig., 4th Ed.,) pp. 494, *422, § 18, if the tenant held over, the landlord would have had to bring his action of ejectment, and the tenant would have been entitled to a jury trial. The act of March 4, 1847, provided in section 5 that "the summons shall be served in the manner prescribed by the act constituting courts for the trial of small causes; the suit may be adjourned, and either party may demand and have a trial by jury of six men, according to the provisions of said act." The procedure under this act is of a provisional and summary nature, to determine, as between the landlord and the tenant, who should have immediate possession of the leased premises. Section 1 of the act of March 8, 1848, (Nixon's Dig. pp. 495, *423, § 26,) provides that at any trial, under section 1 of the act of March 4, 1847, it shall be necessary for the plaintiff therein, if required by the defendant, to prove to the satisfaction of the court, or the jury if the trial be by jury, the facts which, according to the first section of said act, authorize the removal of a tenant, and if the said trial be by jury it shall be by a jury of 12 men. The Revision of March 27, 1874, left the first section of the act of March 4, 1847, substantially unaffected, so far as relates to the jurisdiction of the justice of the peace. The act of April 5, 1876, (Revision, p. 576,) left the jurisdiction substantially the same, except in cities where district courts had been established. The second section of the act amended section 15 of the Revision of 1874, but not as to the right of either party to demand and have a jury trial by a jury of 12 men. On April 23, 1888, the legislature again amended this 15th section, (Laws 1888, p. 462;) this amendatory act does not recite the 15th section as it appears in the act of April 5, 1876, but does give the section as amended. There is no repealing clause in this act. The provision for a trial by jury is omitted in this amended section.

An examination of the entire act shows that the omission of this provision in reference to jury trial was a mere inadvertence, and not a deliberate legislative intent to abolish it in this class of cases. Under the ejectment proceedings, prior to 1847, a trial by jury was a matter of right, unless waived by the parties, and from that time until 1888 there had always been express provision for a jury trial, although for one year (1847-48) a jury of only six men was named in the act. In view of the question as to the right of the legislature to take away trial by jury from the defendant in this case, and the fact that up to 1888 there had been legislative provision regarding this right, which had existed for 40 years, is it to be presumed, in the absence of an express clause of repealer affecting this right, that the legislature intended to take it away? In considering this question, let us examine the landlord and tenant act, as it existed on this subject after the passage of the act of April 23, 1888. Section 16 of the Revision of 1874 (Revision, p. 573, par. 14) came from section 6 of the act of March 4, 1847, as amended by section 1 of the act of March 8, 1848; and from 1847 to the present time it has contained a provision providing for putting the landlord in possession when it shall, among other things, appear to the said justice or jury that the summons had been duly served. Since the act of March 8, 1848, up to the present time, it has been necessary for the plaintiff, if required by the defendant, to prove to the satisfaction of the court, or the jury if the trial be by jury, the facts which authorize the removal of the tenant. Section 19 of the Revision (Revision, p. 574, par. 17) has been in existence since the act of 1847, and it provides, among other things, that the same fees shall be allowed to jurors as are provided for like services by the act constituting courts for the trial of small causes. Section 21 of the Revision (Revision, p. 574, par. 19) provides that, where the case has been removed into the circuit court, the judge of the circuit court shall issue a venire facias for a jury; and section 22 of the Revision provides that if the parties agree so to do they may waive a trial by jury and submit the case to the judge on the law and the facts. The existence of these provisions seems incompatible with a construction of the act of 1888 which takes away trial by jury in these cases, and compels the justice to try the case without one. There is nothing in the act of 1888 which expressly says that he must try the case without a jury, and in this case he had summoned the jury, and it was present, ready to try the case, when he dismissed it without the consent of defendant. If the jury had tried the case, its findings would have exactly fitted into the other provisions of the act. There is no practical or legal difficulty in carrying out the provisions of this act, in case of a jury trial.

If the legislature thought it right, on the

removal of the cause into the circuit court, to compel the judge there to give the party a jury trial, it is difficult to conceive a legislative intent, on a trial before a justice of the peace, which would deprive the party of the right to a jury trial in that tribunal. When the legislature, by section 7 of the act of March 4, 1847, which still exists, (Revision, p. 573, par. 16,) took away the right of appeal or the removal of the proceedings by certiorari, it was because the party had a right to go before the jury on the facts. It may well be doubted if the legislature would have enacted such a stringent provision if the party had been left to the decision of the justice both on the law and the facts. After a policy has existed for 40 years which gives a party the right of trial by jury, the court should hesitate long before they take that right away under an act which does not expressly take away such right, and when such right can still be enforced without interference with the remaining provisions of the act. This construction not only does not interfere with the remaining sections of the act, but is in entire conformity thereto; the other sections contemplating jury trials where there is no waiver of such right. We do not think it necessary to decide in this case the question as to the constitutionality of the act of 1888, or the constitutional question in reference to the right of trial by jury in this case, because we have reached the conclusion that the proper construction of the landlord and tenant act, as amended by the act of 1888, preserves the right of trial by jury before the justice when not waived.

The writ of certiorari lies in this case because the justice was, under the circumstances of this case, without jurisdiction to try the case himself without a jury.

(56 N. J. L. 232)

STATE (WOOD, Prosecutor) v. ATLANTIC CITY.

(Supreme Court of New Jersey. Dec. 22, 1893.)

MUNICIPAL CORPORATIONS—DIVISION OF WARDS—CONSTITUTIONALITY OF ACT.

1. Under a title concerning the division of wards in cities, a statute may contain provisions for the representation of the new wards in the municipal government.

2. A statute authorized cities "already divided into wards" to subdivide the wards when they reached a certain size. *Held*, that it was not confined to cities which had been divided into wards before its passage.

3. Cities may be constitutionally classified on the basis of population for the purpose of prescribing a limit to the size of the wards.

(Syllabus by the Court.)

Certiorari at the suit of Richard Wood against Atlantic City to review two ordinances of defendant. Affirmed.

Argued November term, 1893, before AB-BETT and DIXON, JJ.

O. L. Cole, for prosecutor. A. B. Endicott, for defendant.

DIXON, J. This certiorari brings up two ordinances of Atlantic City, passed in January, 1891, dividing the first and second wards of the city each into two wards. The reason assigned for questioning the validity of these ordinances is that "An act amendatory of an act entitled 'An act concerning divisions of wards in cities of this state,' " approved May 10, 1889, (P. L. 1889, p. 443,) under which authority to enact the ordinances is said to be claimed, is unconstitutional, because its object is not sufficiently expressed in its title, and it is a special act regulating the internal affairs of cities. This statute provides that in the cities to which it applies the common council may divide any ward into two wards, and that each of the new wards shall be entitled to the same representation in the municipal government as the ward from which they were formed. Counsel for the prosecutor contends that these are two objects, and that the latter, relating to representation, is not sufficiently expressed in the title. We think there is no basis for this contention. The end sought by the creation of wards in cities is the securing of local representation in the municipal government for the various sections of the city, and therefore provisions for such representation are of the very essence in any scheme for the formation of wards. The direct object of this statute, the division of wards, is expressed in the title; the other features of the act are cognate to it, and so are properly included. *Payne v. Mahon*, 44 N. J. Law, 213. The objection that the act is special is more deserving of consideration. It rests upon the first section of the statute, which enacts "that in cases where, in any city of not more than fifty thousand inhabitants already divided into wards, there shall have been polled in any such ward, at the last presidential or any subsequent election, more than one thousand legal votes, the common council or other legislative body of such city shall have power * * * to divide any said ward into two wards * * * provided, the provisions of this section shall not now or hereafter apply to any city of this state wherein the boundary lines of the wards therein are required by law to conform to the assembly district lines in any such city."

The proviso of this section must, we think, be deemed inefficacious. The only statute hitherto passed, requiring ward lines to correspond with assembly district lines, is that of April 18, 1889, (P. L. 1889, p. 288,) which was adjudged inoperative by this court in *Dempsey v. City of Newark*, 53 N. J. Law, 4, 20 Atl. 886; and as, according to the decision of this court in *State v. Wrightson*, and *State v. O'Connor*, (November term, 1893,) 28 Atl. 56, there can exist no assembly districts other than the counties, no statute of such a nature can hereafter become a law. Consequently no city has been or can be excluded from the reach of the statute under

review by force of the proviso. In ascertaining the cities to which this statute applies, the words "already divided into wards" are of some importance. They may have a meaning which would confine the operation of the act to cities so divided previous to its passage, or they may be construed to embrace all cities which, when the authority conferred by the act is called into exercise, had already been divided into wards. If the former signification be ascribed to them, the act will thereby be rendered special, under the rule laid down in *Pavonia Horse R. Co. v. Mayor, etc., of Jersey City*, 45 N. J. Law, 297, and *Pierson v. O'Connor*, 54 N. J. Law, 36, 22 Atl. 1091. I therefore think the other construction should be adopted, for it is the duty of the court, if it reasonably can, to keep the act within constitutional restrictions. Although this construction makes the clause merely express what was necessarily implied in the power granted, viz. to divide wards, yet such tautology is not uncommon, and should not be got rid of by an interpretation which will nullify the enactment. The cities, therefore, to which the statute is applicable are such as have not more than 50,000 inhabitants and are divided into wards, and the question is whether these cities may constitute a class by themselves, for the purpose to be subserved by this law. The manifest design of the statute is to secure to the inhabitants of cities at least an approach to equality of representation in the municipal government. In cities which are not divided into wards, absolute equality is enjoyed by all the inhabitants, for they all unite in selecting all the representatives. But where wards exist, only an approximation to equality is possible, and even this can be attained only by reasonable limitations upon the size of the wards. Such a limitation is prescribed by this act. It is, therefore, plain that cities not divided into wards do not naturally come within this legislative purpose, and their exclusion cannot render the statute special. It is also plain that, in prescribing a limit to the size of wards, there is substantial ground for discrimination between the larger and smaller cities. If in our largest cities each ward were to be divided whenever the voters therein numbered a thousand, the governing body of the municipality, composed of even a single member from each ward, might become inconveniently numerous. The population of the wards ought to bear some reasonable proportion to the population of the cities. The legislature, therefore, has the right to classify the cities of the state on the basis of population, for the purpose of fixing the size of their wards. The propriety of such a classification is expressly recognized in the opinion of the chief justice in *Dempsey v. City of Newark*, 53 N. J. Law, 4, 13, 20 Atl. 886. We find no adequate reason for denying the constitutionality of this statute. The case laid before us does not show that, in the wards divided by these

ordinances, a thousand votes had been cast at a preceding election, but we understand this fact to be conceded. The proceedings under review should be affirmed.

(56 N. J. L. 233)

STATO (CONOVER et al., Prosecutors) v.
BIRD et al.

(Supreme Court of New Jersey. Dec. 29, 1893.)
CERTIORARI—ORAL EVIDENCE ON REVIEW—HIGHWAYS.

1. Whenever the proceedings of a court of record are to be reviewed on certiorari, the record itself is the primary source of information as to those proceedings. If it be alleged that the statements of the record are not warranted by the actual facts which occurred or transpired before the court, or if some proceedings not stated in the record are to be shown, then a rule must be taken on the court to certify what those facts or proceedings were; and only when the court is unable to respond to such a rule can the testimony of witnesses be invoked.

2. If the record avers that an application for the laying out of a road was made to the court of common pleas in termtime, three judges being present, it sufficiently indicates that the application was made in open court.

3. If, in response to a rule of this court, the judges of the court of common pleas certify that, on an application for the appointment of surveyors to lay out a road, the court, without any reason, omitted to appoint the surveyors of highways in the townships wherein the road was to be laid, the proceedings to lay out the road will be set aside.

(Syllabus by the Court.)

Certiorari to court of common pleas, Hunterdon county; Chamberlain, Cullen, and Kugler, Judges.

Certiorari, at the suit of Nathan S. Conover and others, against Adeline H. Bird and others, to review certain proceedings for opening a public road. Reversed.

Argued November term, 1893, before AB-BETT and DIXON, JJ.

Paul A. Queen and Wm. M. Lanning, for prosecutors. Wm. C. Gebhardt and R. S. Kuhl, for defendants.

DIXON, J. This certiorari brings up the proceedings taken on the application of the defendants, made to the court of common pleas of Hunterdon county, for the opening of a public road in the township of Union, under the general road act. The reasons assigned for reversal of these proceedings relate chiefly to the action of the court in the appointment of surveyors to lay out the road. That action is questioned on several grounds: First, that the application was not presented in open court; second, that the court, without any reason, omitted to appoint, as one of the surveyors, Henry Everitt, who was a surveyor of highways in Union township; and, third, that the court appointed, as surveyors, a brother-in-law of one of the applicants and an employe of another. In support or denial of these objections there are laid before us three kinds of evidence, —the records of the court of common pleas

returned with the certiorari, certificates of the judges of that court sent in answer to a rule of the supreme court, and the testimony of witnesses.

According to the settled practice of this court, and on principles affirmed by the court of errors, whenever the proceedings of a court of record are to be reviewed on certiorari, the record itself is the primary source of information as to those proceedings. If it be alleged that the statements of the record are not warranted by the actual facts which occurred or transpired before the court, or if some proceedings not stated in the record are to be shown, then a rule must be taken on the court to certify what those facts or proceedings were; and only when the court is unable to respond to such a rule can the testimony of witnesses be invoked. *Parsell v. State*, 30 N. J. Law, 530; *Inhabitants of Oxford v. Brands*, 45 N. J. Law, 332; *South Brunswick v. Cranbury*, 52 N. J. Law, 298, 19 Atl. 787. In the present case, therefore, whether the application was presented in open court, and whether the court had any reason for not appointing Henry Everitt, are questions on which the testimony of witnesses cannot be considered, unless the other species of evidence to contradict or supplement the record by a rule to certify has been exhausted in vain.

With respect to the objection that the court was not open when the application was presented, no rule to certify has been taken, and consequently the matter must be decided by the record itself. The statute (Supp. Revision, p. 871) directs that the application shall be made "to the inferior court of common pleas of the said county, in open court." This phrase "in open court" was introduced into the road act of February 9, 1818, (Revision 1821, p. 615,) the earlier acts (Pat. p. 387; Bloom, p. 238) not using these words. Since its introduction the phrase has remained in the statute. Why it was first employed I have not been able to discover or conjecture, but I can ascribe no meaning to it other than that it emphasizes the distinction between the court in public session and one or more of the judges of the court exercising judicial functions in chambers. *English v. Bonham*, 15 N. J. Law, 431; *Chadwick v. Reeder*, 19 N. J. Law, 156. The record avers that the application was made to the court at a court of common pleas held at Flemington, in and for the county of Hunterdon, of the term of September, 1891, three judges being present. We think these averments sufficiently indicate an open, public session of the court, such as the statute requires.

Concerning the objection that the court, without any reason, omitted to appoint one of the surveyors of highways of Union township, the order appointing surveyors to lay out the road, signed by the three judges, recites that regard was had to the appointment of the surveyors of the township where

the said road was applied for to be laid. This is in the language of the statute, (Supp. Revision, p. 871,) and, if uncontradicted, is sufficient, (*State v. Vanbuskirk*, 21 N. J. Law, 86; *State v. Bergen*, Id. 342; *Inhabitants of Oxford v. Brands*, 45 N. J. Law, 332.) But in reply to a rule from this court, directing the judges of the common pleas to certify what reasons, if any, were assigned before them against the appointment of both of the surveyors of highways in Union township, where the road was to be laid, and what reasons, if any, existed why they did not appoint both of said surveyors, two of the three judges who appointed the surveyors to lay out the road certify that at the time of said appointment they did not know of any reason why both of the surveyors of Union township should not be appointed, and that no reasons were offered to them why they should not both be appointed, while the third judge certifies that reasons were offered to him, but he does not remember what reasons were offered, or what reasons existed, why both surveyors of Union township were not appointed. These certificates are irregular. Although our rule was addressed to the judges of the court of common pleas, yet it was addressed to them collectively, as constituting the court, and the response should have come from the court as a unit. But the certificates have been treated by the parties as legitimate, and the case has been presented to us on that basis. Consequently, and because these certificates no doubt embody the truth as it would be certified to us by the court itself, we will regard them as legally setting forth the facts according to which the recital in the order is to be tested. The action of a majority of the judges is the action of the court. It therefore appears that the court, without any reason, omitted to appoint one of the surveyors of highways in Union township. This is contrary to the true intent of the statute. In *Parsell v. State*, 30 N. J. Law, 530, the court of errors declared that the court of common pleas is bound, as a legal necessity, to appoint the surveyors of the township through which the road is to run, unless it is to run through their lands, or unless the court, for some other reason, in the exercise of a sound discretion, shall think they ought not to be appointed, (page 544;) and that, if it legally appears to the supreme court that the judges of the court of common pleas refused to exercise the discretion required by the statute, they will review and set aside their action, (page 548.) According to these views, when the court of common pleas omitted to appoint the surveyors of Union township to lay out this road, without any reason which operated upon the minds of the judges, they acted in disregard of their legal duty; and, that fact being now lawfully shown to us by the certificates of the judges, we must set aside their

action. This conclusion renders it unnecessary to pass upon the other reasons assigned for reversal. Let the proceedings under review be set aside, with costs.

(56 N. J. L. 95)

CONNELLY v. LERCHE et al., (two cases.)

WENZEL v. SAME.

(Supreme Court of New Jersey. Dec. 30, 1893.)

ATTACHMENT — AGAINST EXECUTOR AND DEVISEE
PROPERTY SUBJECT—PRACTICE.

1. A writ of attachment issued against an executor will be quashed, in such a case as here presented, as improperly issued against such executor.

2. Where lands were attached under a writ and a return made thereto, and an inventory and appraisal filed, a general appearance for the defendants in attachment was entered in the clerk's book, under section 38 of the attachment act. *Held*, that after such appearance the suit proceeded in personam, remaining a proceeding in rem as to the property attached, and that a motion to quash the attachment and proceedings thereunder will be refused.

3. Where a writ of attachment is issued against devisees under section 8 of the attachment act it should be limited to the lands of the devisor held by the devisees, and the return of the sheriff and the inventory should have like limitation; but where there is sufficient in the affidavit and testimony on the rule to show that the attachment and levy could be properly made, and that the lands taken were the lands of the devisor, held by the devisees, such amendment will be permitted to the writ and the return, if the facts on such application warrant the same.

(Syllabus by the Court.)

Three actions in attachment, — Edmond Connelly against Albrecht J. Lerche and Teresa O'Rourke, devisees of Felix E. O'Rourke, deceased; the same plaintiff against Albrecht J. Lerche, executor of Felix E. O'Rourke, deceased, and another; and Paulus A. Wenzel against Albrecht J. Lerche and another, devisees of Mary M. and Felix E. O'Rourke, deceased. Heard on rule to show cause why the writs of attachment should not be set aside. Conditional order.

Argued June term, 1893, before DEPUE, LIPPINCOTT, and ABBETT, JJ.

Gilbert Collins, for plaintiffs. Chauncy H. Beasley, for defendants.

ABBETT, J. An application is made in these cases by the defendants to quash the attachments therein on the ground that they were illegally issued. In No. 1,—the case of Edmond Connelly v. Albrecht J. Lerche and Teresa O'Rourke, devisees of Felix E. O'Rourke, deceased,—the affidavit for the writ states that Felix E. O'Rourke, deceased, in his lifetime was indebted to the said Edmond Connelly in the sum of \$15,000, as near as deponent can ascertain, and was a nonresident of this state; and that Albrecht J. Lerche, executor of the last will and testament of said Felix E. O'Rourke, and Teresa O'Rourke, are devisees of said Felix E. O'Rourke, and are not, to depon-

ent's knowledge or belief, residents in this state at the time of making the affidavit. The attachment directed the sheriff of Monmouth county to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Albrecht J. Lerche and Teresa O'Rourke, devisees of Felix E. O'Rourke, deceased, defendants, wheresoever in the said county the same might be found, so that the said defendant be and appear before the supreme court, etc., to answer unto Edmond Connelly in an action upon contract, etc. In the view taken by the court in this case it is not necessary to consider the objections made by defendants to the affidavit or writ. If these objections have any validity, they cannot be considered in this case, because on September 21, 1892, a general appearance was entered for the defendants by James S. Aitkin, attorney. No bond was given. This appearance was entered in pursuance of section 38 of the attachment act, and the latter part of the section states that after such appearance and notice the suit or suits of such plaintiff or plaintiffs, creditor or creditors, shall proceed in all respects as if commenced by summons; and no other or further claim shall be put in under such attachment after the entry of such appearance. Section 39 provides that in case of an appearance by virtue of section 38 the lien of the attachment shall continue. The supreme court, in *Jackson v. Johnson*, 51 N. J. Law, 461, 17 Atl. 959, says that, after such appearance, "thenceforth the suit proceeds in personam, remaining a proceeding in rem as to such property as had been already affected by the lien of the attachment, and no other." The same court, in *Davis v. Me-groz*, (June term, 1893,) 26 Atl. 1009, says: "The attachment suit is transformed into a suit begun by summons by the defendants' appearance to the action. An appearance in manner and form such as would be regarded as an appearance to a suit instituted by summons served on one of the defendants is all that is necessary to transform the attachment proceedings into a suit commenced by summons." See, also, *Thompson v. Eastburn*, 16 N. J. Law, 100. The result of such appearance under section 38 was to prevent any further claims being put in under such attachment, and the action of the defendants in appearing, affecting as it did the rights of other creditors, and preventing their filing claims, must bind plaintiff to the effect given by such statute to the appearance, which effect, under section 39, is that the lien of the attachment shall continue. Under the statute, the lands and tenements taken under the attachment having been attached and taken before the entry of such appearance, the lien thereon will be continued by virtue of the statute, and the motion to quash must therefore be refused. The defendants invoked the statute which enabled them to appear without giving bond. In doing so they were bound by the terms of that stat-

ute, which in such case continued the lien of the attachment.

The second attachment was in the case of *Edmond Connelly v. Albrecht J. Lerche, executor, etc., of Felix E. O'Rourke, and Teresa O'Rourke*. In this case the affidavit for the writ states that Mary M. O'Rourke, now deceased, in her lifetime was indebted to the said Edmond Connelly in the sum of \$18,000, as nearly as deponent can ascertain, on a judgment obtained in the supreme court of the state of New York in favor of said Edmond Connelly and Felix E. O'Rourke; that said Mary M. O'Rourke was a nonresident of this state; that Albrecht J. Lerche, executor of the last will and testament of Felix E. O'Rourke, and Teresa O'Rourke, are in possession of certain real estate in this state of Mary M. O'Rourke, claiming by devise from Felix E. O'Rourke, whose title, if any, was derived by devise from Mary M. O'Rourke; that said Felix E. O'Rourke was not a resident of this state, and said Albrecht and Teresa O'Rourke are not residents in this state at this time. The writ of attachment was issued to the sheriff of Monmouth county, commanding him to attach the rights and credits, etc., of Albrecht J. Lerche, executor of Felix E. O'Rourke, deceased, and Teresa O'Rourke, defendant, wheresoever, etc., so that the said Albrecht J. Lerche, executor, etc., of Felix E. O'Rourke, deceased, and Teresa O'Rourke, be and appear before the supreme court, etc., to answer unto Edmond Connelly on an action upon contract, etc. This writ was executed and returned with an inventory and appraisement stating that the rights and credits, lands, etc., of the defendant Albrecht J. Lerche, executor, etc., of Felix E. O'Rourke, deceased, and Teresa O'Rourke, made by virtue of the above-stated writ, had been attached, and mentioning the same two tracts of land at Navesink. This writ should be quashed, as issuing against an executor. It has been held that an attachment under our statute is a proceeding in rem, and obviously inconsistent with the law of administration of estates as established in this state; and that, therefore, a court will quash a writ of attachment against an executor, in such a case as here presented. *Haight v. Bergh's Ex'rs*, 15 N. J. Law, 183. See, also, *Muller v. Leeds*, 52 N. J. Law, 366, 19 Atl. 261; *Peacock v. Wildes*, 8 N. J. Law, 179, 181; *Haight v. Bergh's Ex'rs*, 3 N. J. Eq. 388.

In the third case—*Paulus A. Wenzel v. Albrecht J. Lerche and Teresa O'Rourke, devisees of Mary M. O'Rourke and Felix E. O'Rourke, deceased*—the affidavit for the writ says "that Mary M. O'Rourke and Felix E. O'Rourke (now deceased) in their lifetime were indebted to deponent in the sum of \$4,300, as near as deponent can at this time ascertain; that neither said Felix E. O'Rourke nor Mary M. O'Rourke were residents of the state of New Jersey; that there is now due to deponent on said indebtedness about the

sum of \$5,300; that Albrecht J. Lerche and Teresa O'Rourke are now seised of certain lands and premises in this state, claiming the same by devise from said Mary M. O'Rourke and Felix E. O'Rourke; and that said Albrecht J. Lerche and Teresa O'Rourke do not reside in the state of New Jersey." Upon this affidavit an attachment was issued directed to the sheriff of Monmouth county, as follows: "We command you to attach the rights and credits, moneys and effects, goods and chattels, lands and tenements of Albrecht J. Lerche and Teresa O'Rourke, devisees of Mary M. O'Rourke and Felix E. O'Rourke, deceased, defendants, wheresoever in your county the same may be found, so that the said defendants be and appear before the supreme court of the state of New Jersey," etc., "to answer unto Paulus A. Wenzel in an action upon contract to his damage \$10,600, and have you then and there this writ." An affidavit for \$5,300 was filed September 28, 1892, before issuing this writ. There was a deputization by the sheriff of Joseph Johnson indorsed on the writ, and a return of due execution, referring to the inventory annexed, which is as follows: "Inventory and appraisement of the rights and credits, moneys and effects, goods and chattels, lands and tenements of the defendants, and all devisees," etc., "of Felix E. O'Rourke, deceased, made by virtue of the above-stated writ on the 1st of October, 1892, by Rulif P. Smock, sheriff of Monmouth county, through Joseph Johnson, special deputy, and George H. Sickles, a discreet and impartial freeholder of said county;" and then follows a description of two tracts of land at Navesink. The rule in this case was to show cause "why the attachment issued in the above-stated cause, and all proceedings thereunder taken, should not be set aside and quashed on the ground that the said attachment was illegally issued."

These questions arise upon these proceedings: First, whether or not the writ and all proceedings thereunder should not be set aside as they stand, if they are not amendable; second, what are the irregularities, if any, in the writ or proceedings? and, third, whether or not these irregularities, if any, are subject to amendment.

The evidence taken under the rule shows: First. That Mary M. O'Rourke, formerly Mary M. Hartshorn, of the city of New York, devised and bequeathed to her husband, Felix E. O'Rourke, all her property and estate, both real and personal, of all kinds and nature, wherever the same may be situated, for his own use and benefit forever; and that she appointed him as the sole executor of said will. This will is dated January 29, 1874, and was proved before the surrogate of the city and county of New York, May 27, 1892, and an exemplified copy filed and recorded in the office of the surrogate of Monmouth county, N. J., June 24, 1892. Second. That Felix E. O'Rourke, husband of the late Mary M.

O'Rourke, deceased, made his last will and testament, in which he says: "I give, grant, devise, and bequeath all my estate, both real and personal, to my executor hereinafter named, in trust, however, to control and manage the same, as in his judgment shall be best, until such time, in his lifetime, as he shall deem best and proper for a sale thereof, and in the mean time to pay over to my sister, Teressa O'Rourke, the income thereof annually; and at the time when, in his opinion, my estate may, in his judgment, be sold and disposed of to the best advantage, and during his lifetime, then to sell and dispose of the same in such manner and in such parts as he shall consider best, with full power to make and execute such deeds or conveyances as shall be required in law, and from the proceeds thereof to pay to my said sister, Teressa O'Rourke, three-quarters thereof, and the remaining one-quarter to retain and dispose of according to his own good will." This will was dated April 3, 1891, and was proved before the surrogate of the city and county of New York, May 27, 1892, and letters testamentary issued thereon, and an exemplified copy thereof filed and recorded in the office of the surrogate of Monmouth county, June 24, 1892. Third. A deed from Benjamin M. Hartshorn to Mary M. O'Rourke, wife of Felix E. O'Rourke, dated and acknowledged November 24, 1886, and recorded December 19, 1886, in Monmouth county, the consideration whereof was one dollar, and conveys the property attached. Fourth. A judgment record of the supreme court, city and county of New York, wherein Edmond P. Connelly, plaintiff, against Mary M. O'Rourke and Felix E. O'Rourke, obtained and entered judgment March 14, 1885, for \$10,890.87 damages and \$18.22 costs. There is no direct testimony in the case of the death of either Mary M. O'Rourke or Felix E. O'Rourke. There is only a recital in the will of Felix of the death of his wife, Mary. The affidavit, however, states that at the date thereof, September 24, 1892, they were deceased, and that at that time they were indebted to Wenzel in the sum of \$4,300, and that neither of them were residents of the state of New Jersey, and further states that there was due at the date of the affidavit about the sum of \$5,300. The affidavit also states that the defendants in attachment were seised of certain lands and premises, claiming the same by devise from Mary M. and Felix E. O'Rourke, and that the defendants in attachment do not reside in the state of New Jersey.

The proceeding is clearly brought under the eighth section of the attachment act, (Revision, p. 43, § 8,) which provides "that the writ of attachment may be issued against the heir or devisee of any deceased debtor, in all cases in which the writ might lawfully have been issued against such debtor in his lifetime; and all lands, tenements, hereditaments, and real estate descended from or de-

vised by such deceased debtor to the heir or devisee against whom the attachment is issued, may be attached and taken by virtue of the said writ." The affidavit and the depositions clearly show a case where it was proper for a writ of attachment to issue under this section, under which could be attached and taken all the lands, tenements, hereditaments, and real estate which the defendants in attachment held by devise from such deceased debtors. The affidavit states that the parties from whom the lands attached came by devise were indebted to Wenzel, and states the sum still due on said indebtedness. An attachment under said section could clearly issue against lands of Lerche and Teressa O'Rourke which came to them by devise from the deceased debtors Mary M. O'Rourke and Felix E. O'Rourke. There is, however, a defect in the writ and return thereto, because they do not clearly limit the sheriff to bringing in the defendants by attaching the property which the defendants in attachment received by way of devise from Mary M. O'Rourke and Felix E. O'Rourke. The use of the word "devisees" in the writ and in the inventory and appraisement appears to be merely a designation of individuals, and not a limitation of the attachment to the lands which they had received by devise from the deceased debtors, but there is enough in the affidavit and the testimony to amend this writ and the return without any injury to the parties, if in truth and in fact the lands taken were the lands of the deceased debtors, which the defendants in attachment hold by devise from them. Section 75 of the attachment act provides: "That this act shall be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice and the benefit of creditors." This provision was clearly not intended to give the courts, under decisions in this state, any right to uphold an attachment where there was not in fact proper ground therefor, but it was evidently meant to apply in a case where it was clear upon the affidavit and the evidence that it was a proper case for an attachment under the act. It should be construed, then, in the most liberal manner for the benefit of creditors; and, under the power of the court to amend, it would be proper to put the case in such shape by amendment, if the facts justified it, as would enable the creditor to obtain the benefit of the attachment when he brought himself within the terms of the act. It has been suggested that the proper practice under section 8 might be to let the attachment go against the lands, etc., of the defendant, and leave it to the defendant, if other lands were attached than those that came to him by devise, to move to vacate the service of the attachment as to them. In my view, this would not be the proper practice under this section; and I am clear that the writ should be so limited in form as to direct the sheriff to attach only

property which came to the defendants by devise from the deceased debtors. The fair construction of this section, limiting the writ in this way, it seems to me is plain from the rules of the common law and the history of legislation to remedy evils existing thereunder. Under the common law the devisees took the lands absolutely free from the debts of the devisor. He could not be called upon to yield up these lands for the payment of debts of the devisor, nor could the debts of the devisor in any way be made out of these lands. An attempt was made to remedy this condition of things in England by the statute of 3 W. & M. c. 14, but under the decision in *Wilson v. Knubley*, 7 East, 128, the act was so limited in its effect that it did not reach a certain character of indebtedness of the devisor arising by covenant, etc. In the colony of New Jersey, in 1743, (Allin. Laws, p. 129,) an act was passed which made real estate chattels to be seized, sold, and disposed of for the satisfaction of debts. Before that it seems they could not be sold, but only extended upon an elegit. *Stone v. Todd*, 49 N. J. Law, 278, 8 Atl. 300. On March 7, 1797, "An act for the relief of creditors against heirs and devisees" was passed, authorizing creditors to maintain an action on simple and special contracts against heirs and devisees, and, in case of alienation before action brought, charging heirs or devisees with the value of the land, and, the act of 1743 having been repealed, the act of 1797 remained the only act by which land held by devisees could be reached for the debt of the devisor, until the Revised Statutes of April 16, 1846, (see *Nixon's Dig.*, Ed. 1855, p. 39, or Ed. 1861, p. 42, § 44,) where the heirs and devisees were made liable, as they now are under section 8 of the present attachment act. In 1853 (Laws 1853, p. 243) a supplement to the act of April 15, 1846, was passed, providing for proceedings in case of nonresident heirs and devisees, and how judgment should be entered against nonresidents. Section 15 of an act respecting the orphans' court, and the power and authority of the surrogate, (Revision, approved April 16, 1846; Rev. St. 205, *Nixon's Dig.*, Ed. 1861, p. 578,) provided "that when any creditor shall have obtained judgment against an executor or administrator, and the execution issued on the same, shall remain unsatisfied in whole or in part, for defect of personal estate to be levied on and sold, and there is real estate, it shall be lawful for the creditor or his legal representative, if the executor or administrator, being thereto required, shall neglect or refuse to obtain a sale thereof according to law, for the space of six months after being so required, to apply to the orphans' court of the proper county to order such sale to be made; and the said court, upon due notice given to said executor or administrator of such application, shall examine the circumstances of the case; and if it appears that the said debt or any part thereof is unpaid, and the

personal estate deficient as aforesaid, and no sufficient cause being shown to the contrary, the said court may make such order to show cause as is mentioned in the 15th section of the act entitled 'An act making lands liable to be sold for the payment of debts;' and such further proceedings shall be had as is prescribed in the same act in relation to the sale of real estate, where the personal estate is insufficient to pay debts." The orphans' court act revision approved March 27, 1874, (Revision, p. 766,) still provides for the sale of land of any person who shall die seized thereof for the payment of his debts; and the application therefor may be made either by the executor or administrator, or by the creditor, under section 79, if he have judgment against the executor or administrator. In order to bring suit against a devisee under the act of 1797 it is not necessary that the creditor should apply to the executor to pay the debt, nor need he in his declaration in such suit set up that there are not sufficient personal assets to pay the debt. He has a right to proceed to collect his debt by a suit wherein he is limited, except in special cases, stated therein, arising from faults of his own pleadings, to the lands which come from the devisor, or to the value of the same if they have been aliened before suit brought. He also has, undoubtedly, the right to issue his attachment, under section 8 of the attachment act, against the devisee, but in using this proceeding its character and extent should be determined in view of all the other means at his command to obtain payment of his debt out of the lands of the devisee. Justice Depue, in delivering the opinion of the court of appeals, in *Schenck v. Griffin*, 88 N. J. Law, 465, says that "foreign attachment is a peculiar proceeding to compel the appearance of a debtor by seizing his property, and, in default of appearance, appropriating it to the payment of the debt. It is strictly a proceeding in rem. With respect to the property attached, whether it be real or personal, or a debt due the defendant from the garnishee, the judgment and proceeding are conclusive."

This suit is an application by a creditor for a writ of foreign attachment, under section 8 of the attachment act, against the devisee, for the debt of his devisor, and not for any debt of his own. The object of this section is undoubtedly to enable a creditor to appropriate lands of which the nonresident devisor died seized. But it certainly was not intended, either by its language or by any fair construction, according to the spirit of the attachment act, to allow the writ to tie up or affect any lands of the defendant which he had not obtained by a devise from the deceased debtor. It is certainly clear that if the sheriff levied the attachment upon any other lands than those of the devisor which had come to the devisee, the attachment, as to them, would be set aside. How, then, can any construction

be contended for which would warrant the taking of lands which the defendant owned independent of the devise, when the court would set aside any such taking upon application? It would certainly be a strained construction of the act to say that true it is that, if the sheriff takes any other lands than those received by the defendant from the devisor, such taking would be set aside on application, and yet we will hold such taking good until such application is made by the defendant in attachment. No such construction is necessary for the protection of the rights of the creditors, and it is certainly one which would be of great injury to the defendant in attachment. The rights of the creditor are fully protected when the writ commands the sheriff to attach the lands of the deceased debtor, which the defendant holds under devise from the devisor. A writ in this form would give the creditor all that he is entitled to, and would not injure the defendant in attachment. It seems to me, therefore, that the proper practice under this section is to compel the plaintiff to limit his writ so that the attachment shall be only upon the lands devised to the defendant. Then, if the devisee does not choose to defend, the judgment will be in rem, and will take the lands authorized to be taken under section 8, and will take nothing else. The defendant is not then called upon to make any motions, or do anything whatever, unless he desires to do so. He may permit the judgment to go by default, and let the lands be sold for the devisor's debts. His own lands would then be unaffected by the proceedings, and he would not be called upon to take any step to protect them from proceedings which might cast an apparent cloud upon them, or deprive him thereof. While this is the proper construction of the act, yet the statute lays down a rule of construction in reference to it which requires courts to construe it liberally for the benefit of creditors. This statutory rule of construction does not warrant an attachment in any case except that provided for in the statute, nor does it authorize the levying of an attachment against any lands of the defendant for the debt of the deceased devisor, unless they are lands which came from such devisor to such devisee. Where, however, there is sufficient before the court in the affidavit of the attaching creditor and in the testimony taken to enable the court to amend the proceedings so that they will conform to this view of the act, we think the court is called upon to make such amendment on application of the attaching creditor. In this case such an amendment of the writ of attachment as will limit it to lands received by the defendants from the devisors, and such amendment of the return of the sheriff as will limit the lands attached to the lands of the devisors held by the defendants, will be proper. The affidavit and testimony seem

not only to warrant, but call for, a writ in such form; and under such writ the sheriff would have limited his return to the lands thus devised to defendants. We would order the amendment without application if there were affirmative proof in the case that the lands attached and returned in the inventory and appraisement were lands of the devisor liable to attachment at the time of his decease; but, as it does not appear with certainty that this is unquestionably so, we think the application should be made by the plaintiff to amend as suggested, and then the rights of the defendants in attachment, if any, can be fully protected.

(56 N. J. L. 3)

STATE ex rel. EDELSTEIN v. FRASER.
(Supreme Court of New Jersey. Jan. 13, 1894.)

QUO WARRANTO—PLEADINGS—MEMBERSHIP OF MUNICIPAL BOARDS.

1. In a proceeding by information in the nature of a quo warranto it is the title of the defendant that is alone put in issue.

2. The statute of March 11, 1893, declares that in all cases, in any city, in which the mayor can appoint any municipal officer, no such appointment shall take effect until the board of finance shall have confirmed the same "by a vote of not less than two-thirds of all the members of such board." The information alleged that it, through the mayor of Jersey City, did appoint the defendant a member of said board of finance; and, although the defendant thereupon took the oath of office and his seat in said board, and was recognized by a majority of the members of said board, the relator alleges that the appointment of the said defendant was of no effect, because the same "has not been confirmed by said board of finance." On demurrer to this information, *held*, because of this demurrer, the defendant acknowledged that he was not in office *de jure*, and that judgment by ouster must be entered against him.

(Syllabus by the Court.)

Information in quo warranto, at the relation of Edelstein, against John D. Fraser, to try title to membership in the board of finance of Jersey City. Heard on demurrer to information. Judgment for relator.

Argued June term, 1893, before BEASLEY, C. J., and MAGIE, DIXON, and GARRISON, JJ.

Wm. D. Daly, for relator. Collins & Corbin, for defendant.

BEASLEY, C. J. This controversy touches the right of membership in the board of finance of Jersey City. The discussion has arisen on a general demurrer to the information, and upon looking at this record I have failed to find any basis for the argument with which we have been favored by the counsel of the defendant. The case, as presented, stands before us in this wise: The information contains two counts, the tenor of the first being to this effect, viz.: "That the defendant, Fraser, for the space of six days and upwards last past, hath unlawfully held, used, and executed, and still doth un-

lawfully hold, use, and execute, the office of member of the board of finance," etc. The count then proceeds to set out the relator's title, which is that on the 24th of April, 1891, he was duly and legally appointed by the mayor of Jersey City a member of said board for the term of two years, and that he took the oath of office, was duly qualified, and duly exercised said office; "which said office the said John D. Fraser, during," etc., "upon the state of New Jersey hath usurped and intruded into, and unlawfully held, used, enjoyed, and exercised, and yet doth usurp and intrude into," etc., "to the exclusion of the said John Edelstein," etc., "in contempt of the state of New Jersey," etc. The demurrer, as applied to this count, confesses that the defendant, without a pretense of right, usurped this office, and still holds it in that unlawful manner. It does not seem that any argument in favor of the defendant can be other than futile, in view of such a confession. It has not been observed that the title of the narrator disclosed in this count is at all objectionable; but that title, be it good or bad, is not open on these pleadings to objection. These proceedings do not have the effect to put the narrator into office. His rights, therefore, are of no consequence except so far as they may serve to qualify or explain the right of the defendant. They can have no such effect, nor any effect whatever, in the present instance, as the defendant acknowledges that he is holding the office in question without right.

Nor does it seem that the second count presents any matter more debatable. As in the first count, it shows title in the relator, and similarly an intrusion by the defendant, and its diversity consists in this circumstance: After setting out the usurpation of the defendant it thus proceeds, viz.: "For although true it is that the mayor of Jersey City, at or before," etc., "did appoint the said John D. Fraser a member of the said board of finance to succeed the said relator, and the said John D. Fraser thereupon took and subscribed before the city clerk of Jersey City, in due form of law, the oath of office required by law for members of the board of finance, and took his seat in said board, and was recognized by a majority of the members of said board as a member thereof, and entered upon the duties of a member of the board of finance of Jersey City, yet the said relator gives the court here to be informed and understand that said appointment is hitherto of no effect, because the same has not been confirmed by said board of finance." From the foregoing extract it will be observed that the effect of the demurrer, as applied in this latter instance, is to admit that the defendant is now exercising the office in question without his appointment having been confirmed by the board of finance. By this confession he admits that he is an intruder, for the statute of the state passed March 11, 1893, enacts as follows,

viz.: "That in every case in any city where the mayor thereof is now authorized by any law to appoint any municipal officer or member of any municipal board, the name of the person appointed shall be submitted to the board of such city government having the control and management of the financial affairs and the duty and power of confirming the annual tax levy or tax budget, by ordinance or otherwise, by whatever name the same may be known in such city, and no such appointment shall take effect until such board has confirmed the same by a vote in favor thereof of not less than two thirds of all the members of such board, duly recorded in the permanent minutes thereof." The juncture, then, is this: The act just recited declares, in clear and unambiguous terms, that the appointment of the defendant shall not take effect until confirmed by the board in the manner prescribed. The demurrer admits the allegation that there has been no confirmation, and, most assuredly, thereby the defendant confesses that he has no claim to be considered an officer *de jure*; and yet that is the only question to be decided in this case as it is presented to us. In a procedure of this character, when the defendant acknowledged that he has no legal title, the inevitable result is that judgment of ouster must pass against him.

With respect to the argument that the act requiring a confirmative vote of two-thirds of the board of finance does not properly mean that the two members who retire annually are to be counted as constituents of the board for that occasion, it is only necessary to remark that such question is utterly dehors this record. There is no averment or statement in the case relating to that subject. All that we are apprised of is that there was no confirmation, in any form, by this board, whether it be by a board constituted of three voting members, or of five.

With respect to the suggestion in the brief of counsel that, for the purposes of this case, the court will look into the two other quo warranto proceedings relating to this general subject now on the files of this court between other parties, it is only necessary to say that the proposition is opposed to everything that can be found in the annals of the common law, from the Norman Conquest to the present hour. Let judgment of ouster be entered.

(159 Pa. St. 579)

MATTHEWS v. PARK BROS. & CO., Limited.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

MASTER AND SERVANT — DISCHARGE FOR DISOBEDIENCE — "POSITIVE ORDERS" OF MASTER — QUESTION FOR COURT.

1. The neglect or refusal of an employee to obey the directions of his employer as to the manner of performing his work, and the materials which he should use, is a breach of contract which justifies his discharge.

2. An employe in a rolling mill testified that "W. [the employer] came to me and said I shouldn't throw sand on the rolls," and answered affirmatively the questions, "Then the first conversation you had with W. he did tell you not to throw sand on the rolls?" and "He told you to use fire clay?" *Held*, that the orders of the employer not to use sand were "positive," and that it was improper to leave to the jury the question whether they were "positive orders" or only "ordinary conversation."

Appeal from court of common pleas, Allegheny county; John M. Kennedy, Judge.

Action by Joseph Matthews against Park Bros. & Co., Limited, on a contract of employment. From a judgment for plaintiff, defendant appeals. Reversed.

G. P. Graver, for appellant. Thomas M. Marshall, George E. Shaw, and Marshall & Sproul, for appellee.

WILLIAMS, J. The plaintiff is a roller man. He had a contract with Park Bros. & Co. for work in their steel-plate mill for two years at the rate of \$1.50 per net sheared ton of plate, with a guaranty that his wages should not fall below \$3,500 per annum. After working seven or eight months he was discharged. He sues to recover wages for the remainder of the two years for which he was hired, at the rate of \$3,500 per year. The defense set up is that he was discharged for a violation of orders which, under the contract, he was bound to obey; that the discharge under such circumstances terminated the contract, and, consequently, that no action will lie upon it. It appears from the evidence that the roll at which the plaintiff worked consisted of three rollers placed one above the other. The middle roller was moved by friction. The grease from the necks of the rolls would work out at times upon the middle roll, and destroy the friction, and so prevent its revolution. To cut the grease and restore the friction at such times, Park Bros. & Co. used fire clay, with which the roller men were provided. The plaintiff preferred to use sand. The objection to this was that, in scattering the sand along the face of the rolls, more or less of it fell upon the necks of the rolls, and cut them so as to injure and ultimately destroy them. Some three or four weeks before his discharge the manager of the mill ordered him to stop using sand. The plaintiff testified: "Mr. Worth came to me, and said I shouldn't use sand on the rolls." He also testified that he was directed to use fire clay, and that he replied that he couldn't get along with fire clay, and that he kept on using sand. The rolls then in use had to be removed soon after, and new ones put in, at an expense of some \$3,000; and the defendants allege that this became necessary because of the condition of the necks, occasioned by the use of sand. About the time the new rolls were put in, the manager repeated his order not to use sand. A few days later he discharged Matthews for disobedience of orders, and, not long

after, suit was brought. That case was before us in 1891, and is reported in 146 Pa. St. 384, 23 Atl. 208. The court below had left to the jury, as a question of fact for their determination, whether an admitted disregard of orders by an employe was willful or not, and had instructed the jury that an employe who had been discharged because of acts injurious to his employers might recover his wages for the balance of the term of his employment, less the actual loss to his employers from his injurious acts. For these reasons the judgment obtained in the court below was reversed. Another action was then brought, and another recovery had, under the ruling of the court below submitting to the jury, as a question of fact, whether the orders not to use sand were "positive orders" or "only an ordinary conversation." The plaintiff testified: "Mr. Worth came to me, and said I shouldn't use sand on the rolls," but that fire clay must be used. This conversation was three or four weeks before his discharge, and is spoken of as the first conversation between Worth and the plaintiff on this subject. He was further questioned in regard to this conversation, and made answers as follows: "Question. Then, the first conversation you had with Mr. Worth, he did tell you not to throw sand on the rolls,—that you were spoiling them? Answer. He didn't tell me that I was spoiling them. Question. He did tell you, however, not to throw sand on the rolls? Answer. Yes, sir. Ques. And he told you to use fire clay? Ans. Yes, sir." There was no doubt, therefore, on the plaintiff's own testimony, about Worth's language. It was plain, direct, and without the slightest ambiguity. Under such circumstances its meaning was not a question for the jury, but for the court. The learned judge, however, submitted it to the jury, saying: "Matthews claims that it [the order not to use sand, but fire clay] was, as I have stated, merely an ordinary conversation in which Worth objected to the use of sand, yet didn't give him positive orders to discontinue its use. That is the first question for you to determine." This claim to which the learned judge called the attention of the jury was directly in the face of all the testimony, including that of Matthews himself, which we have given above. The jury, however, adopted the plaintiff's interpretation of Worth's positive directions, and found that he did not mean what he said, and that the plaintiff was not guilty of disobeying orders when, in total disregard of the directions he had received, he kept on using sand when and as he pleased. The submission of this question to the jury was a mistake. The learned judge should have told the jury that it was the duty of an employe to obey the directions of his employer as to the manner in which his work should be done and the materials he should use, and that a neglect or refusal to obey such directions is a breach of the contract

which justified the employer in discharging him from his service. He should have told them, further, that, upon the plaintiff's own version of the conversation between Worth and himself, it was his duty to discontinue the use of sand on the rolls, and to use fire clay only; and, if he neglected or refused to do so, he failed in his duty to his employers under the contract of hiring, and was for that reason subject to dismissal from their service. The second and third assignments are sustained, and the judgment is reversed.

(160 Pa. St. 29)

SUTHERLAND v. ROSS.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

WITNESS—TRANSACTIONS WITH DECEASED PERSON—DEED.

1. Under Act May 23, 1887, prohibiting the surviving party to a contract, or one whose interest is adverse to deceased's right therein, to testify against deceased's successor in interest as to anything that happened before his death, where plaintiff alleges his and his wife's deed to defendant's deceased grantor to be a forgery, neither he nor his wife can testify that on the day when the deed purports to have been executed they were in another county.

2. Testimony of an alleged subscribing witness that on the day when the deed purports to have been executed she was not in the county, and did not on that day witness a deed from such grantors to such grantee, is not a denial of the genuineness of her signature on such deed.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Ejectment by James Sutherland against William Ross. Judgment for defendant. Plaintiff appeals. Affirmed.

For decision in former suit, see 21 Atl. 354.

March 2, 1874, Nicholas Dager conveyed two small houses, contiguous to each other, situated in West Conshohocken, with the lots appurtenant thereto, to James Sutherland. Sutherland went into possession of one house, and Dager remained in the other. Defendant alleged that Sutherland and wife, on February 14, 1877, executed a deed to Dager for the house and lot in dispute, which deed was recorded April 2, 1877. On April 3, 1877, Dager and wife conveyed the same premises to William Ross. In 1889, long after Dager's death, Sutherland brought ejectment for the house and lot, alleging that the deed from him was forged. This case ended with a judgment for defendant Ross. In 1892 this suit was begun. Before the trial, counsel for plaintiff notified counsel for defendant that they alleged that the deed was a forgery, and would require defendant to prove its execution. At the trial, plaintiff proved title in himself on March 2, 1874, and the return of sheriff to writ showing defendant in possession. Defendant offered deed from Sutherland to Dager, and its record in evidence. Plaintiff then interposed with ex parte affidavits of plaintiff and wife that

they were not in Montgomery county on the day on which the acknowledgment purports to have been taken, and objected to admission of deed in evidence. The deed was admitted, and defendant then offered deed from Dager to himself, duly executed, acknowledged, and recorded, and its record. In rebuttal plaintiff offered to prove by himself and wife the facts set forth in the above-mentioned affidavits, and that the facts set forth in the certificate of acknowledgment were false. Objection sustained, and verdict for defendant.

John M. Arundel, for appellant. Louis M. Childs and Montgomery Evans, for appellee.

PER CURIAM. The decision of this case when it was here before (140 Pa. St. 379, 21 Atl. 354) covers all the questions on the present record. We then decided that the plaintiff and his wife were both incompetent to prove any facts occurring before the death of Dager. The acknowledgment of the deed being dated February 15, 1877, and Dager not having died until after that time, the plaintiffs were incompetent to prove any fact whatever by their own testimony, which occurred on that day or before, or at any time before the death of Dager. We decided this before, and it is not necessary to review the subject again. The offer now to prove that Dager and his wife were not in the county of Montgomery on February 15, 1877, by their own testimony, is as much within the ruling as any other fact offered to be proved by the same testimony on the former trial. The record of the deed was competent proof under our recording acts, but, as we understand, the deed itself was also given in evidence. The witness Mary Powell could have been asked whether the signature purporting to be hers as a subscribing witness was a genuine or a forged signature, but, instead of that, she was only asked whether she was in Montgomery county on that day, and signed as a witness a deed from plaintiff and wife to Dager. The ex parte affidavits of the plaintiff and his wife and of Mary Powell of course were not competent. Judgment affirmed.

(160 Pa. St. 6)

HOATS v. ASCHBACH.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

NEGOTIABLE INSTRUMENTS — ACTION ON NOTE — FRAUD OF PAYEE—BONA FIDE PURCHASER.

In an action against the maker of a promissory note, which the payee had obtained by fraud, a verdict was properly directed for plaintiff, who discounted the note for value, where defendant's testimony failed to show that plaintiff knew of the fraud or participated in the proceeds thereof.

Appeal from court of common pleas, Lehigh county; Edwin Albright, Judge.

Assumpsit by Morris Hoats against Gerard C. Aschbach on a promissory note which

William P. Snyder obtained from defendant by fraud, and which plaintiff discounted for Snyder. From a judgment entered on a verdict directed for plaintiff, defendant appeals. Affirmed.

John Rupp and James B. Deshler, for appellant. Edward Harvey, for appellee.

PER CURIAM. It was proved on the trial, and not at all contradicted, that Hoats advanced to Snyder the whole amount of the note in controversy, less the discount. There was not a particle of proof that Hoats got back from Snyder any of the money paid him, except a small account for fees, which Snyder owed him, and there was no evidence whatever that Hoats participated in the proceeds of the fraud. It is impossible to perceive, therefore, why he would join with Snyder in imposing upon Aschbach a fraudulent order for the slate. After a very careful reading of defendant's testimony, we agree with the learned judge of the court below in holding that there is no evidence in the case sufficient to connect Hoats with the fraud, and therefore we are of opinion that the direction to find a verdict for the plaintiff was correct. Judgment affirmed.

(160 Pa. St. 3)

WALTON v. BRYN MAWR HOTEL CO.
(Supreme Court of Pennsylvania. Feb. 12, 1894.)

**MASTER AND SERVANT—INJURY TO EMPLOYEE—
NEGLIGENCE.**

The owner of a building is not liable for an accident to a workman thereon, occurring during its erection, if the owner employs competent architects and superintendent to erect it, and the accident is not caused by inherent weakness of the material.

Appeal from court of common pleas, Montgomery county.

Action by one Walton against the Bryn Mawr Hotel Company for personal injuries caused by defendant's negligence. From a judgment for defendant, plaintiff appeals. Affirmed.

James B. Holland and John M. Dettra, for appellant. Henry Freedley, J. Howard Gendell, and Charles Hunsicker, for appellee.

PER CURIAM. The plaintiff, a carpenter, was injured while at work on the defendant's hotel building during its construction by a fall from the fifth story. Some men were at work drawing up heavy joists which were piled up on the fifth story, and a lintel crossing the corridor gave way at one end, and let down the floor, and the plaintiff and two others fell and were injured. There was some evidence that the tiles or hollow bricks of which the partition walls were built, on which the lintels rested, were not as strong as they should be; but whether the lintel gave way on this account, or be-

cause of the extra weight of the joists, was entirely uncertain under the testimony. The defendant company employed architects of high standing in their profession and a superintendent whose capacity and fitness were unquestioned, to erect the building. There was no proof which at all impugned the competency or ability of either the architects or the superintendent to conduct this class of work. It was during the progress of the erection that the accident occurred. There was no definite proof that the accident occurred through any inherent weakness of the bricks. The case comes clearly within the principle settled in many cases,—that one who is erecting a building or other structure is not liable for accidents happening in the course of the erection if he exercises ordinary care in selecting competent persons to do the work. The subject was fully discussed in the opinion of this court in the case of *Coke Co. v. McEnery*, 91 Pa. St. 185, in which we held that a bridge company was not liable for the falling of their bridge while one who was crossing fell and lost his life. Other illustrations of the doctrine are found in *Walden v. Finch*, 70 Pa. St. 460; *Oil Co. v. Gilson*, 63 Pa. St. 146; *Sykes v. Packer*, 99 Pa. St. 465; *Moules v. Canal Co.*, 141 Pa. St. 632, 21 Atl. 733. The discussions have been so full in the cases cited, and in many others, that we think it unnecessary to indulge in any repetition here. Judgment affirmed.

(159 Pa. St. 623)

BUSCH v. GROSWITH. (No. 65.)
(Supreme Court of Pennsylvania. Feb. 12, 1894.)

JUDGMENT—AFFIRMANCE ON APPEAL.

Where there is nothing in the record to show that the issuance of an alias fieri facias was unwarranted, a judgment refusing to set it aside must be affirmed.

Appeal from court of common pleas, Philadelphia county.

Application by the West Philadelphia Real-Estate Investment Company to set aside a fieri facias to condemn certain property for nonpayment of interest due on a mortgage thereof, executed by Harry Groswith to Clarence M. Busch, before his conveyance thereof to petitioner. A rule to show cause why the fieri facias should not be set aside was granted, but was thereafter discharged, and the petitioner appeals. Affirmed.

John J. Ridgway, for appellant. Howard J. Lukens, for appellee.

PER CURIAM. The only error complained of is in discharging the rule to set aside the alias fieri facias issued on a judgment which appears to have been regularly entered on bond and warrant of attorney, and remains of record, unopened and unsatisfied. Whatever doubt, if any, may have existed prior to February 10, 1893, as to the plain-

tiff's right to proceed upon the bond, was removed on that day, when the payment on account of costs, principal, and interest was made. In the receipt then given by plaintiff's attorney it is stipulated as follows: "No proceedings to be taken for sixty days on the said mortgages, and no proceedings against said real estate to be taken on the judgment entered on the accompanying bonds. Proceedings may be had, however, against the personal property of the mortgagor, and, in case the principal, interest, and costs are not paid in full, proceedings to be had at the end of sixty days, notwithstanding this payment." The alias fieri facias was not issued until April 22d following. There is nothing in the record to show that its issuance then was unwarranted, or that anything has since occurred to change the situation; and hence there was no error in refusing to set it aside. Judgment affirmed.

(159 Pa. St. 622)

BUSCH v. GROSWITH. (No. 67.)

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

Appeal from court of common pleas, Philadelphia county.

Application by the West Philadelphia Real-Estate Investment Company to set aside a fieri facias to condemn certain property for nonpayment of interest due on a mortgage thereof, executed by Harry Groswith to Clarence M. Busch before his conveyance thereof to petitioner. A rule to show cause why the fieri facias should not be set aside was granted, but was thereafter discharged, and the petitioner appeals. Affirmed.

John J. Ridgway, for appellant. Howard J. Lukens, for appellee.

PER CURIAM. This case involves the same question that was presented in No. 65 of this term, between the same parties, (28 Atl. 438;) and, for reasons given in opinion just filed in that case, the judgment of the court below should be affirmed. Judgment affirmed.

(159 Pa. St. 623)

BUSCH v. GROSWITH. (No. 66.)

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

Appeal from court of common pleas, Philadelphia county.

Application by the West Philadelphia Real-Estate Investment Company to set aside a fieri facias to condemn certain property for nonpayment of interest due on a mortgage thereof, executed by Harry Groswith to Clarence M. Busch before his conveyance thereof to petitioner. A rule to show cause why the fieri facias should not be set aside was granted, but was thereafter discharged, and the petitioner appeals. Affirmed.

John J. Ridgway, for appellant. Howard J. Lukens, for appellee.

PER CURIAM. This case was argued with No. 65 of this term, between same parties, (28 Atl. 438,) and involves same question. For reasons given in opinion just filed in that case, the judgment of the court below should be affirmed. Judgment affirmed.

(159 Pa. St. 623)

BUSCH v. GROSWITH. (No. 68.)

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

Appeal from court of common pleas, Philadelphia county.

Application by the West Philadelphia Real-Estate Investment Company to set aside a fieri facias to condemn certain property for nonpayment of interest due on a mortgage thereof, executed by Harry Groswith to Clarence M. Busch before his conveyance thereof to petitioner. A rule to show cause why the fieri facias should not be set aside was granted, but was thereafter discharged, and petitioners appeal. Affirmed.

John J. Ridgway, for appellant. Howard J. Lukens, for appellee.

PER CURIAM. For reasons given in opinion just filed in No. 65 of this term, between same parties, (28 Atl. 438,) and involving precisely the same question, the judgment in this case should be affirmed. Judgment affirmed.

(159 Pa. St. 634)

NONNEMACHER et al. v. NONNEMACHER et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

MARRIAGE—WANT OF MENTAL CAPACITY—INSTRUCTIONS—BURDEN OF PROOF.

1. On an issue as to whether deceased was of sound mind when a marriage ceremony was performed between him and one of defendants, the court properly directed the jury to inquire as to deceased's mental condition at the very time of the marriage, when it also charged that evidence of his condition both before and after the ceremony should be considered in determining his condition at the time of such marriage.

2. The burden of proof of want of mental capacity of a person at the time of his marriage is on those asserting it, in the absence of proof of a confirmed condition of lunacy or idiocy prior to such marriage.

Appeal from court of common pleas, Lehigh county; Edwin Albright, Judge.

Issues framed, in which Lewis M. Nonnemacher and others, brothers, sister, and father of Molton Nonnemacher, deceased, are plaintiffs, and Pauline Nonnemacher and others are defendants, to determine the legality of a marriage between deceased and defendant Pauline. From a judgment for defendants, plaintiffs appeal. Affirmed.

Molton Nonnemacher died intestate on November 6, 1891, in the Pennsylvania Hospital for the Insane at Philadelphia, to which he had been removed on October 28th,—nine days previous to his death. The plaintiffs in this issue are his brothers, sister, and father, who, if he died unmarried, and without lawful issue, are his heirs at law and next of kin. Pauline Nonnemacher, or Weibert, one of the defendants, claims to be the widow of the said Molton Nonnemacher, and alleges that she was lawfully married to him on October 25, 1891,—12 days before his death; and she further alleges that Franklin Molton Nonnemacher, whose guardian, Christian Volle, is one of the defendants, was a son of

the deceased, and legitimized by such marriage. James Albright, the other defendant, was made a party to the proceedings, because letters of administration were issued to him by the register of wills pending this contest. Immediately after the death of Molton Nonnemacher, the said Pauline Nonnemacher, or Welbert, applied to the register of wills of Lehigh county for letters of administration on his estate, alleging that she had been lawfully married to him, and was his widow. To the granting of such letters a caveat was filed. Testimony was taken before the register, who, after consideration of the same, on April 4, 1892, refused to grant letters of administration to the said Pauline Nonnemacher, or Welbert, because, in his opinion, she was not the lawful widow of the decedent. Letters were then granted to James Albright, pending this controversy. From this decision of the register, an appeal to the orphans' court was taken by said Pauline Nonnemacher, or Welbert. On November 21, 1892, said orphans' court, after hearing, ordered and directed that an issue should be sent and a precept directed to the court of common pleas, which was accordingly done, to try the following facts, to wit: First. Whether or not, on October 25, 1891, a ceremonial marriage took place between Molton Nonnemacher and Pauline Welbert, or Nonnemacher. Second. Whether or not, at the time of marriage, October 25, 1891, Molton Nonnemacher was of sound mind, and whether or not he had at said time of marriage sufficient mental capacity to enter into a contract of marriage, and to understand the nature and obligation of such contract. Third. Whether or not, before October 25, 1891, Molton Nonnemacher and Pauline Welbert cohabited as husband and wife, and whether or not, while they so cohabited, it was reputed they were husband and wife. Fourth. Whether or not, before October 25, 1891, there was a contract by and between Molton Nonnemacher and Pauline Welbert that they should be and were each other's husband and wife. In pursuance of this precept an issue was subsequently framed in the common pleas, in which issue the brothers, sister, and father of the decedent were made plaintiffs, and the alleged widow and guardian of the minor child and the administrator were made defendants. At the trial of this issue in the court below it was admitted by the plaintiffs, and this was also admitted in the pleadings, that on October 25, 1891, a marriage ceremony was performed between Molton Nonnemacher and Pauline Welbert, but it was contended by them that said marriage was void, because said Molton Nonnemacher at that time was not of sound mind, and had not sufficient mental capacity to enter into a contract of marriage, and to understand the nature and obligations of such a contract. The plaintiffs also denied the matters alleged in the third and fourth parts of the issue. The court charged the jury that if

they found the first and second parts of the issue in favor of the defendants, they need not consider the questions raised by the third and fourth parts. The jury, under this direction, found a verdict in favor of the defendants on the first and second questions raised in the pleadings, but did not pass upon the matters alleged in the third and fourth parts of the issue.

John Rupp, James B. Deshler, and A. G. Dewalt, for appellants. Harry G. Stiles, J. Marshall Wright, and R. E. Wright, for appellees.

PER CURIAM. The substance of the contention between the parties in this case was whether Molton Nonnemacher was of unsound mind when the marriage ceremony was performed between him and the defendant on October 25, 1891. The learned court below carefully explained to the jury the question in dispute, and instructed them that if at the time the marriage was contracted he was of unsound mind, so that he did not understand the nature and obligation of the contract, they should find for the plaintiffs; and if they should find that at the time of the marriage he was of sound mind, and did understand the nature and obligation of the contract, they should find for the defendants. The learned court was certainly right in directing the inquiry as to the very time of the marriage, as the validity of the contract depended upon the mental condition of the party at that very time. The court fairly and fully explained that evidence was competent as to his condition both before and after the marriage, and that such testimony should be considered by the jury in determining his condition at the time of the marriage. A very large amount of testimony was admitted on both sides of the question, and it was all referred to the jury. We do not think that the charge is obnoxious to the criticism that it was unfair to the plaintiffs, or presented the testimony for the defendants more fully than that of the plaintiffs. On the contrary, the charge seems to us particularly free from all partiality or bias. The question was one of pure fact, and the jury, after considering it, returned a verdict in favor of the defendants. There was ample testimony to justify the verdict, and, considering all the circumstances of the case, it is difficult to believe there ever could be any other. We think the answers to the defendants' points were entirely correct, and also the rulings upon offers of testimony. As to the burden of proof, it was clearly upon the plaintiffs. There was no proof of such a confirmed condition of lunacy or idioy as to change the burden of proof from the plaintiffs to the defendants. Upon the whole case we see no error in the record. The jury having found in favor of the defendants upon the main question, the answers by the jury to the third and fourth questions sub-

mitted to them by the court became entirely immaterial, and there was no occasion to take a verdict as to them. Judgment affirmed.

(159 Pa. St. 563)

In re MILLER'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

WILLS—CONTEST—ESTOPPEL—RECEIPT OF LEGACY
—RES JUDICATA.

1. On petition by an heir for leave to appeal from a decree of the register admitting his ancestor's will to probate, if the other heirs are not made parties, the court acquires no jurisdiction to settle the validity of the will, and a decree dismissing the petition does not bar the rights of the heirs to contest the will.

2. The fact that an heir was witness on a hearing of a petition by another heir asking leave to appeal from the decree of the register admitting the ancestor's will to probate, and that such petition was dismissed, does not estop him from contesting the will.

3. The receipt by a legatee and heir of a pecuniary legacy does not estop him from contesting the will, where it is returned before he proceeds beyond the entry of his appeal from the decree dismissing his petition for leave to appeal from the decree admitting the will to probate.

Appeal from orphans' court, Allegheny county; Over, Judge.

Petition by Alexander H. Miller for leave to appeal from a decree admitting to probate the will of Alexander H. Miller, deceased. From a decree dismissing the petition he appeals. Reversed.

Charles E. Hogg, W. H. Tomlinson, S. M. Raymond, and Edward Campbell, for appellant. Knox & Reed and Edwin W. Smith, for appellee.

WILLIAMS, J. The appellant is a son and heir at law of Alexander H. Miller, the testator. His father left an estate valued at about a half million of dollars. Six children survived him,—five sons and one daughter. By his will he gave the bulk of his estate to one son, F. C. Miller, and made him one of his executors. The appellant was practically disinherited. He came into the orphans' court within the time allowed him by law, by petition asking leave to appeal from the decree of the register admitting the will to probate, and that an issue devisavit vel non be made up and certified to the court of common pleas of Allegheny for trial. He alleged the mental incapacity of the testator to make a will at the time when the alleged will was executed, and he further alleged that undue influence had been exercised over the mind of the testator by F. C. Miller, the executor, and devisee of nearly all of the testator's fortune. A citation to the executors and heirs at law was duly issued and served, and appellant began the work of taking testimony preparatory to a hearing in the orphans' court. While this was in progress the executors moved to dismiss the petition for reasons set up in their answer. This motion

was heard and granted, and the petition was dismissed without any hearing upon the merits. This appeal was then taken to bring the decree so made before this court for examination. It is not denied that the petition was sufficient in form and substance, nor that it was presented within the time allowed by law, nor that proper parties were before the court to enable it to make a decree that should conclude all parties entitled to be heard. But the executors concluded, and the orphans' court held, that the appellant was estopped from contesting his father's will upon two grounds. These were: First, that his brother H. J. Miller had presented a similar petition a year or more before, which had been heard and dismissed by the orphans' court, and that, upon the hearing in that case, A. H. Miller had been examined as a witness. For this reason the orphans' court held him to be bound by the decree made in that case, although he had not been a party to it. And second, that, having received some small sums from the executors which the testator had directed should be paid to him, he had affirmed the will, and was estopped, for that reason also, from contesting it. We will consider these grounds for an estoppel very briefly, and in their order.

On turning to the record of the proceedings upon the petition of H. J. Miller, we find that the citation issued at his instance was served upon the executors only. No one of the heirs at law was brought in, either as co-petitioner or respondent. The court had but two of the six children of the testator before it. This fact is conceded in the opinion of the orphans' court delivered on the dismissal of the appellant's petition in this case. The court said, "The act of assembly and the rules of court requiring notice were not complied with upon the petition of H. J. Miller," but immediately added that such failure to comply with the law was "only an error in procedure," that did not affect the jurisdiction of the court, or diminish the conclusiveness of the decree. Having thus settled the question of jurisdiction, the court brought the appellant into the case, and held him concluded, not because he was a party or in privity with the parties, but because he was a witness and was examined as such. We cannot adopt either of these conclusions. The orphans' court is not a common-law court. It was created, and its jurisdictions defined, by the statutes of this state; and outside of the lines drawn for it it is without power, and its decrees are a nullity. *Weylard v. Weller*, 39 Pa. St. 443; *Fretz's Appeal*, 4 Watts & S. 433; *Ake's Appeal*, 74 Pa. St. 116. With but two of the testator's children before it when a decree was made, it could not bind the four who had neither come in voluntarily nor had been brought in by citation. If it could not bind them, then it had no jurisdiction to settle finally the validity of the will at the stage of the pro-

ceedings then reached. It should have brought in all persons interested as heirs at law, devisees, or legatees, as well as the executors, and, when all were on the record as appellants or appellees, the orphans' court could have proceeded intelligently to hear and determine the questions raised. The question asked by Nicodemus nearly 1,900 years ago, "Doth our law judge any man before it hear him?" admitted of but one answer then, or at any time since. The learned judge correctly described the failure to bring in the parties interested as an error in procedure; but, when a court of limited jurisdiction is pursuing a statutory proceeding, an error in procedure that is a violation of the statute, or that disregards the conditions on which its right to proceed rests, may leave the court without jurisdiction, and it acts *coram non jure*. The suggestion that, being a witness, the appellant is estopped from asserting that he was not a party to the appeal of his brother, is a clear mistake. There are some cases in which actual knowledge of the pendency of an action at law, or the existence of an incumbrance, or the like, may take the place of legal notice; but I know of no case where one who has been examined as a witness is, by reason of that fact alone, concluded by the judgment or decree rendered in the case. There must be other circumstances shown connecting him directly with the litigation, as in fact a party to it, before he can be held bound by the result. Several cases have been cited in support of the general proposition that the appellant and all the parties interested in the testator's estate are bound by the decree dismissing the petition of H. J. Miller, but none of them come up to the question. *Warfield v. Fox*, 53 Pa. St. 382, *Wilson v. Gaston*, 92 Pa. St. 207, and *Cochran v. Young*, 104 Pa. St. 333, were actions of ejectment brought after the five years for appealing from the decree of probate had expired. They were attempts to impeach the decree or probate and the validity of the will in a collateral proceeding, which we said could not be done. What is said in these cases about the conclusiveness of the decree of probate refers to the effect of such decree after five years have passed without an appeal from it. In *Hegarty's Appeal*, 75 Pa. St. 503, the important question was whether the effect of the decree extended beyond the execution of the will and its authentication as the last will and testament of the testator. It was there held that the decree settled two things, viz. that the paper probated was the last will of the testator, and that it was executed in accordance with the law. Other questions relating to its construction and legal effect were left to be settled when they should arise. It is well settled that, in disposing of questions like that raised in this case, the orphans' court exercises an equitable jurisdiction. It adopts the equity forms, and applies the rules and principles of equity. The

rule in equity requires all parties in interest to be made parties to the proceeding in which their interests may be affected, and, if not brought in, a chancellor should dismiss the bill for want of proper parties. *Glovinger v. Hazard*, 42 Pa. St. 339; *Lehigh Coal & Nav. Co.'s Appeal*, 88 Pa. St. 499; *Lance's Appeal*, 112 Pa. St. 456, 4 Atl. 375; *Philadelphia v. River Front R. Co.*, 133 Pa. St. 134, 19 Atl. 556; *Gas Co. v. Douglas*, 130 Pa. St. 283, 18 Atl. 630. We conclude, therefore, that the decree of dismissal in the proceeding begun by H. J. Miller was right, but that it should have been made for want of proper parties, and for no other reason. It does not therefore stand in the way of the appellant in this case, or any other heir at law of the testator. It was not an adjudication upon the merits, for the court did not have the parties in interest before it, and was in no position to make a final decree.

The remaining question is over the effect of the receipt by the appellant of some small sums of money paid to him by the executors in compliance with the directions of the will. Is he estopped by the receipt of this money? The general rule is that one who accepts a benefit under a will cannot deny the validity of that instrument. He cannot affirm the will so far as it is beneficial to himself, and deny its validity as to others who are named as beneficiaries. *Zimmerman v. Lebo*, 151 Pa. St. 345, 24 Atl. 1082. But an election in pais to take under a will should be intelligently made, and should be unambiguous and positive in its character, to amount to an estoppel. *Dickinson v. Dickinson*, 61 Pa. St. 401. Whether the receipt of money by a legatee claiming to be entitled to receive it, and much more, as an heir at law, can be treated as an election to affirm the will, is, to say the least, very doubtful; but if, for the purposes of this case, we leave the conclusion reached by the court below on this question undisturbed, we do not think that the conduct of the appellant is of such a character as to amount to an irrevocable election to take under the will. The rule seems to be that a legatee who has received his legacy, and afterwards concludes to contest the will, may return the legacy to the executors, and so relieve himself from the operation of the general rule that forbids him to take under the will that which testator gave him, and at the same time deny its validity as to others. The earliest case upon the subject appears to be *Bell v. Armstrong*, 1 Addams, Ecc. 365. In that case the next of kin had acquiesced in the probate of a will, and received a legacy under it. It was held that he was not estopped from contesting the will by the mere acceptance of the legacy, but that he might bring into court the money he had received, and proceed with the contest. This case was followed by *Braham v. Burchell*, 3 Addams, Ecc. 243, in which the contesting legatee was required to bring the legacy into court to abide the

event of his contest. *Hamblett v. Hamblett*, 6 N. H. 333, was an appeal from a decree of probate by a legatee who had accepted the legacy. The proponent did not deny his right to appeal, but applied to the court for a rule on him to bring in the legacy before proceeding further to contest the will. The rule was granted, and, after hearing, made absolute. The precise point does not seem to have arisen in this state. *Cox v. Rogers*, 77 Pa. St. 160, was a case in which the legatee had received the benefit provided for her by the will, and had died without any effort to contest its validity. Her heirs at law sought to contest it. It was held that her acceptance and retention of the legacy estopped her, and those claiming under her, from denying the validity of the will. *Wise v. Rhodes*, 84 Pa. St. 402, involved substantially the same question. A married woman devised certain real estate to her sister on condition that she would take care of the husband of the testatrix, then an old and feeble man, and provide for him a comfortable maintenance, during his natural life. After the death of testatrix, the devisee, at the request of the husband, took possession of the real estate, and assumed the care and maintenance of the husband of her deceased sister. Several months later he changed his mind, and desired to take against the will of his wife. He was held to be estopped, under the circumstances of the case, by his election and his enjoyment of the care and maintenance provided for him. In both cases the rule laid down in *Dickinson v. Dickinson*, *supra*, was followed, and in *Cox v. Rogers* it was restated thus: "Such election, to be binding, must be evidenced by unequivocal acts, clearly proved, and must be made with a full knowledge of the facts; and the burden of showing this is upon him who alleges that an election has been made." It would seem to be a fair deduction from our cases that where the acts set up are equivocal, or were done in ignorance of the rights of the doer, or where they consist merely of the receipt of a pecuniary legacy, and the money is returned before the appellant proceeds beyond the entry of his appeal, they will not amount to an estoppel. The decree of the court below is reversed, and the record is remitted, with directions to the orphans' court to proceed in accordance with this opinion.

(129 Pa. St. 575)

In re MILLER'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

APPEAL FROM ORPHANS' COURT—TIME OF TAKING.

The three years allowed for taking an appeal from a decree of the orphans' court are to be computed from the date of the decree, and not from a refusal by the court to open it.

Appeal from orphans' court, Allegheny county; Over, Judge.

Petition by H. J. Miller for leave to appeal from the decision of the register admitting to probate the will of A. H. Miller, deceased. The petition was dismissed, and he filed a petition for rehearing, which was also dismissed, and he appeals. Reversed.

Charles E. Hogg, W. H. Tomlinson, S. M. Raymond, and Edward Campbell, for appellant. Knox & Reed and Edwin W. Smith, for appellee.

WILLIAMS, J. There are three years allowed within which an appeal may be taken from the decree of the orphans' court. The computation should be made from the date of the decree, and not from a refusal by the court to open it. This appeal was taken within the time allowed, and the motion to quash must for that reason be dismissed. The other questions raised have been necessarily considered in *Re Miller's Estate*, 28 Atl. 441, in which an opinion is filed herewith. It is unnecessary to do more than refer to that case for the conclusions that control this. The court below did right in dismissing the petition in this case, but the true reason on which such decree should have rested was the want of proper parties. The court was in no condition to pass upon the merits when but two of the six children of the testator were before it. In order that there may be no chance for misapprehension as to the effect of the dismissal of the appellant's petition, the decree is amended so as to read: "The petition of H. J. Miller for leave to appeal from the decree of probate, made by the register, of a paper writing alleged to be the last will and testament of Alexander H. Miller, deceased, is dismissed for want of proper parties, without prejudice." The decree thus amended is now affirmed. As the decree dismissing the appeal of A. H. Miller is reversed, there remains in the court below one appeal only. If not already brought in, all the parties in interest, whether as heirs at law or legatees, should be served with a citation, so that they may become, or decline to become, parties to the pending appeal.

(160 Pa. St. 8)

AXFORD v. THOMAS et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

VENDOR AND VENDEE—CONTRACT—TIME OF ESSENCE—FORFEITURE.

1. A contract for the sale of land for quarry purposes provided that the vendee should pay monthly installments on the price; that his neglect or refusal to pay installments for three months should nullify the contract, and forfeit all installments paid; and that the vendee should have the right to quarry stone on the land while the contract remained in force. *Held*, that time was of the essence of the contract, and that the vendee's failure to pay installments for three months forfeited all his rights under the contract.

2. The forfeiture in such case was not in-

equitable for loss of valuable improvements, since the vendee was in possession, not to make improvements, but to diminish the value of the property by removing stone therefrom.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Assumpsit by George Axford against Edward Thomas, William E. Thomas, and George O. Morgan. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

The following is the opinion of the trial court on plaintiff's motion for a new trial: "Did the defendant have the right, under the contract, to enforce the forfeiture? The agreement provides: 'In case the party of the second part, by neglect or refusal to pay the aforesaid monthly installments, becomes more than three months in arrears, then the agreement to become null and void, and the party of the second part to forfeit to the party of the first part all the amounts paid by them, and relinquish all claims against the party of the first part; the party of the second part to have the privilege of quarrying stone on the land as long as this agreement remains in force.' The contract, in plain words, provides for a forfeiture of the money paid as well as a forfeiture of all rights under the agreement. It is true, forfeitures are odious in law when they are unconscionable, or work injustice; but where time is of the essence of the contract, equity will follow the law, and will enforce a covenant of forfeiture as essential to do justice. *Brown v. Vandegrift*, 80 Pa. St. 142. Parties may make time of the essence of the contract by an express agreement. If they do, the law will not make a new contract for them. *Becker v. Smith*, 59 Pa. St. 472; *D'Arras v. Keyser*, 26 Pa. St. 254; *Dauchy v. Pond*, 9 Watts, 49. If a covenant of forfeiture can be sustained between a landlord and tenant, (*Brown v. Vandegrift*, supra,) how much more essential is such covenant to the contract now before us. The plaintiff was operating the quarry; the profits went into his pocket; the defendant had no share in these profits. Unless the defendant has some speedy remedy to protect himself, he may, without any compensation, lose his entire property. The installments may remain unpaid, and all of value in the property may be carted away. According to the evidence, the plaintiff was paying for the land with the stone he was taking out of it. The plaintiff had the advantage of securing a property without any ready money. The defendant stepped in, advanced the means to buy, and no doubt the covenant of forfeiture was introduced as a corresponding advantage to the defendant. The plaintiff had all to gain and nothing to lose. If the quarry proved valueless, he could aban-

don the property, and leave it on the hands of the defendant. If it proved profitable, he could pay for the property with the income from the quarry. Time is material, and of the essence of the contract, where the remedies are not mutual. *Westerman v. Means*, 12 Pa. St. 97. The plaintiff had the possession, and without the remedy by forfeiture the defendant was helpless. He might bring suit for the monthly installments; but before a final recovery of the money, even if such recovery were possible, the property may be ruined or valueless. The defendant received seven of the monthly installments under the contract. If the quarry was as profitable as indicated by the plaintiff's evidence, then the forfeiture did not work any serious hardship. The defendant is an old man of eighty years, and, if the plaintiff lost the benefits of a good bargain by neglecting and ignoring the rights of the defendant, he has no one to blame but himself. The jury found that the defendant did not waive the forfeiture, and the plaintiff cannot truthfully say that he was injured by any act of the defendant. It is said the plaintiff was a vendee in possession, but he was in possession, not to make improvements, but to diminish the value of the property. He does not fall within the class of cases where forfeitures are inequitable because of the loss of valuable improvements. In *Bodine v. Glading*, 21 Pa. St. 50, the vendor was not required to convey after the expiration of the fifteen days fixed for the payment of the purchase money. The court said: 'Commercial transactions would be greatly embarrassed, and the grossest injustice would be done, if the people are prohibited from making their own contracts.'

A. E. Longacre and Henry Freedley, for appellant. J. P. Hale Jenkins, for appellees.

PER CURIAM. The learned court below left it to the jury to say whether there had been any waiver of the forfeiture contained in the agreement, and the jury found by their verdict that there was not. The clause of forfeiture was written in the plainest words. A failure to pay the installments for a definite time of three months avoided the agreement by its express terms. It was the contract, and therefore the law, of the parties. Time was made of the essence of the contract, and we cannot disregard that provision without making a new contract for the parties. The reasons given by the court below in the opinion on the motion for a new trial are sufficient to sustain the action of the court. Substantially for those reasons we think the judgment should be affirmed. Judgment affirmed.

(160 Pa. St. 1)

BITTERLING et al. v. DESHLER.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

PLEADING—AMENDMENT TO CHANGE FORM OF ACTION.

A motion to amend by changing the form of the action was too late where it was made nearly six months after a judgment of nonsuit was entered, and after the statute of limitations had barred the action.

Appeal from court of common pleas, Lehigh county; Edwin Albright, Judge.

Assumpsit by Celinda Bitterling, Catherine E. Keck, Annie E. Seip, Clara M. Deshler, and Ellen J. Keiper, as surviving executrices of Sarah Keiper, deceased, against William H. Deshler. From a judgment of nonsuit, and an order denying a motion to amend the form of action, plaintiffs appeal. Affirmed.

Isaac Chism, for appellants. Edward Harvey and John Rupp, for appellee.

PER CURIAM. An examination of the testimony in this case convinces us that there is no merit in the claim of the plaintiffs, and that they were not entitled to recover anything in any form of action. The proposed amendment, therefore, even if applied for in time,—which it was not,—would be of no service to the plaintiffs, as it would give them no cause of action for which a recovery could be had. The motion to amend by changing the form of action was not made until nearly six months after the judgment of nonsuit was entered, and after the statute of limitations had become a bar to the action. Of course it was too late, and was rightly refused. Judgment affirmed.

(160 Pa. St. 625)

SILK v. MUTUAL RESERVE FUND LIFE ASS'N.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

INSURANCE—RELEASE—APPLICATION—WARRANTY.

1. A beneficiary's release of liability on a life policy may be impeached by proof that the company's agent, who had also been insured's man of business, read the beneficiary a fictitious doctor's letter, falsely stating the cause of death, told her that insured had made false statements in her application, and that she could not recover, and that the beneficiary signed the release relying on said letter and representations.

2. Two months after her policy had been issued, insured wrote the company that in looking over their application blank she had noticed questions which the doctor had not asked her, and answered them to the effect that she had consulted a doctor for heart failure. The company's examiner had certified her heart sound. Held, that the company's acceptance of an assessment 20 days after receipt of the letter was evidence that it had waived objection to the application on that account.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Mary A. Silk against the

Mutual Reserve Fund Life Association on a policy on the life of Georgiana B. Gleason, plaintiff's sister, deceased. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

The defense was (1) a release from plaintiff, (2) breach of warranty by insured in certain statements denying that she had ever had any disease of the heart, or had consulted a physician regarding her health within the past five years. Mrs. Gleason herself wrote a letter to the association, dated January 22, 1891, two months after the policy was issued, which was received at their office in New York, January 25th, in which she says: "In looking over one of your blank applications recently, I notice a few questions that the doctor had not put to me that I remember of. They are as follows, and I will give the correct answers: 'Have you at any time consulted a physician? Answer. Yea. Where? Worcester, Massachusetts. When? Last May, 1889. His name I don't remember. For what ailment? Heart failure.' I was directed by one of the employees to make this out and send it in, and that it would be appended to my application. I entered for two thousand the early part of November, 1890. Number of policy I don't know. Please attend to this." February 12, 1891, Mrs. Gleason was found in bed in her room in the Clarendon Hotel, unconscious. Dr. Rae, who was called in, and endeavored for three hours to restore her to consciousness, finding that she did not respond to any treatment, had her removed to the Brooklyn Hospital, where she died two hours later. Her case was diagnosed at the hospital by Dr. Kimball, who treated her for heart and kidney disease and for general collapse. In his opinion, asthenia was the immediate cause of her death. A post mortem examination was made by Dr. Belcher at the hospital. He testified that the cause of death was chronic disease of the kidneys, associated with the heart,—a lesion. In the afternoon of the day of Mrs. Gleason's death, Mary Silk, the beneficiary, called at the office of Mr. Wray, the agent of the association, in Philadelphia, who had also been Mrs. Gleason's man of business and adviser, and paid him \$4.40 as an assessment on this policy, neither she nor he being at that time aware of the death of the insured. Soon after, Mr. Wray, having been informed that questions in the application for insurance had been untruly answered, communicated that fact to Mary Silk, and proceeded to enter into negotiations with her to get the policy back. March 23, 1891, she surrendered the policy, signing a receipt on the back of it for one dollar in full of all claims thereunder, and stating that she thereby canceled and returned the policy; and on the same day she executed and acknowledged a formal release of all her claims under the policy. The release recites the falsity of the answers in the application. Mr. Wray testified that he paid her that dollar, which Mary

Silk denied, though she had twice receipted for it; and, in addition to this, both Wray and his clerk, Fernandez, testified to the repayment to her of the \$4.40 which she had paid on February 12th, and which was forfeited to the association by the conditions of the policy. Mary Silk denied the receipt of this money in cash, but testified that Wray then entered a credit of it to her against certain larger indebtedness of hers to him, and afterwards, upon a full settlement between them, made that an item in footing up the account.

The court charged as follows: "Gentlemen of the Jury: The first thing in this case which presents itself prominently is the fact of this release. There is no doubt that if the lady executed this release, without any fraud or misrepresentation, it is the end of the case. This paper which she signed appears to have been prepared with great care, and you have heard the learned counsel explain about the binding character and nature of it. That is the highest and most solemn instrument known to the law. That, while a receipt can be explained, and a contract without consideration can be avoided, yet the signing of such a paper as this imports consideration, and therefore the usual defense to matters of that sort cannot be taken. There is no evidence whatever that the peculiar nature of this paper was described to this lady when she signed it. There is no pretense that she was told that it was a paper incapable of subsequent explanation, or that it was so serious a paper as the learned counsel now represent it to be. In regard to the question of fraud on this occasion, the testimony of this lady, as taken down by the stenographer, is that she went to Mr. Wray's office, and Mr. Wray said very suddenly, 'Miss Silk, they won't pay the policy.' I said, 'Why not?' 'Because,' he said, 'your sister died of heart disease.' I said, 'The doctor did not tell me so.' 'Well,' he says, 'here is the doctor's letter, in which he states that previous to her being insured she had been treated for heart disease.' Taking up the doctor's letter and reading it to me, at the conclusion he said, 'There, you see, the doctor's testimony is that your sister died of heart disease.' 'Now,' he said, 'under those two papers you have no possible claim to this money.' Now, if there was any such letter as that in existence, and it was read to this lady as if it were in existence, it is difficult to see what can be a more palpable fraud than that. On the faith of those two letters she alleges that she signed this release. It is true that Mr. Wray denied that this took place. Of course, if you believe him, and discredit her, what I have said would have no application; but if you believe her, and do not believe him, that the fraudulent letter was read to this lady, and which has not been produced, and as to which there is no evidence of its existence, by which she was induced to sign this paper,

it is a fraud pure and simple, and it avoids, in my opinion, that release. If you should find that this release was a valid release, obtained in proper manner, of course, as I have said, that is the end of the case; you need go no further. If, however, you believe that this release was improperly obtained, and disregard it altogether, then you would have to consider the case on the grounds on which it has been presented to you. There is no denial that the policy was given, and as to the regularity of that there is no question. The defense is that at the time she was asked certain questions she made answers that were not true, and that these were warranted by her signing this paper to be true; and if they were false she has no right to recover. The certificate of the physician of the company at the time gives her a clean bill of health. He examined her, and he testified to nothing which would have any tendency to invalidate that; and I believe the doctor's certificate at the time of death seems to attribute it more to kidney disease and other matters than to a disease of the heart; but the question would be, not what she died of, but the truth of the assertion that she made at the time she was insured. Now, a letter has been produced from this lady herself, and it appears that after she was insured, on reading over these numerous provisions of the policy, she came to the conclusion, and so writes, that 'some of the questions were not put to me, that I remember of,' at the time of making the answers which she signed. She then says that at a certain time, a year and a half ago, she had been treated for heart trouble by some physician. Now, the assessment had been made on the 2d of February, and they received this letter on the 23d of January from this lady, giving them that information, and on the 12th of February she paid this assessment. So that the company, being aware of this fact on the 23d of January, sent out their assessment on the 2d of February, and received the assessment from this lady on the 12th of February. One would naturally infer from that they waived the question which she had raised. This was a year and a half before, and these questions have been so numerous, and cover so much ground, that they may have chosen to consider that that was nervousness on the part of this woman, and not worthy of consideration; and it is therefore urged by the plaintiff in this case that, when they were informed of it, it was their duty at once to tell this woman that that was the end of this policy. They had no business to keep it for all that length of time, and subsequently, when this woman died, to bring this fact up against the person for whose benefit the policy was taken out. Now, the learned counsel, in commenting upon that say: 'Why, it was necessary to investigate this subject; that was a short time to investigate it, and they were bound to investigate it.' Well, but what investigation

is necessary when the person himself tells you of the fact? Of course, if somebody else had sent word to the company that this woman had been treated for heart disease two or three years ago, or a year and a half ago, then you would naturally say: 'Well, that was no evidence' on which this company could act. That was a mere statement, and they would have to examine into that, and have to give the woman a chance to be heard, and therefore that would naturally account for their backwardness in informing her of the fact.' But where they put it on the ground that the woman herself wrote this letter, telling them that, what was there for them to investigate? She was the person affected by it. It was against her interests, and she herself writes this letter them. Therefore, what reason for hesitation could they possibly have had for not informing this woman instantly that that was the end of her policy,—'We have received your letter, and that is the end of your policy.' But they did not do so, but continued it, and allowed her to die in the belief that this policy was valid. Therefore the plaintiff contends that, even if they did not, that, having subsequently made the assessment and received the money from her, that was the end of it, and they have no right to set it up now in this defense. At the time of the release it was alleged that they had paid this money back. They probably saw the force of this, and at the time of the release it is alleged they paid her this money back. That, however, she positively denies, and says they did not pay it to her at all; neither did they pay her the one dollar consideration of this release. Therefore, gentlemen, I leave it to you to say whether this release was fairly and honestly obtained; and, second, whether this letter informing them of this fact was not waived by them by their subsequent action. I decline the points presented by the defendants in this case. The points are as follows: (1) The falsity of Mrs. Gleason's answers in her application is a sufficient legal cause for the defendant to enter into negotiations with a view to get the policy back; and, as there appears no evidence of fraud used on the part of the defendant in procuring the release, the verdict should be for the defendant. (2) The evidence is uncontradicted that the \$4.40 repaid by the defendant to the plaintiff was not paid or tendered to the defendant before suit was brought, and hence your verdict should be for the defendant. (3) In the light of all the evidence in this case the verdict should be for the defendant."

W. S. Price, for appellant. Wendell P. Bowman, for appellee.

PER CURIAM. There was no error in refusing to affirm either of defendant's three points recited in the specifications respectively. In effect, the affirmance of either would

have been a withdrawal of the case from the jury, with binding instructions to render a verdict for the defendant. That would have been clear error. The evidence was quite sufficient to require submission of the case to the jury, and that was done in a clear, concise, and adequate charge, in which their attention was fairly and impartially called to the questions of fact presented by the testimony. The verdict in favor of plaintiff was warranted by the evidence, and we find no error in the record, of which the defendant company has any just reason to complain. Judgment affirmed.

(160 Pa. St. 21)

ARMSTRONG v. MICHENER.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

A devise to testator's son for life, and "at his death the use and occupancy to be continued to his issue," and, if none, then to the next of kin, and so on as long as the law will permit, vests the fee in the son.

Appeal from court of common pleas, Montgomery county.

Assumpsit by William G. Armstrong against E. Mayhew Michener for refusal to take title to land sold to him. From a judgment for plaintiff, defendant appeals. Affirmed.

The following is the opinion rendered in the court of common pleas by SWARTZ, P. J.: "Does the devise to William G. Armstrong, the plaintiff, give him a fee in the Montgomery Square farm? The will of the father provides as follows: 'I direct that my son William Gordon Armstrong shall have for his own use and occupancy during the period of his life my home farm, in which I now reside, situate on the Springhouse and Fulltown turnpike, near Montgomery square, together with all the stock and appurtenances, the farm to be maintained in its present state of fertility and repair by my said son William G. Armstrong, and at his death the use and occupancy to be continued to his issue, if he shall so have, and, if none, then to the next of kin, and so on as long as the laws of this commonwealth will permit.' It is evident that the testator did not wish to violate the rules against perpetuities. So far as the language of the will is transgressive, it is the wish of the testator that it shall be disregarded. It follows that we may read the will 'to my son William for life, and at his death to his issue, and, if none, then to the next of kin.' If the unborn issue of William is to take but a life estate, the limitation over is void, because the event upon which it was limited might by possibility not occur within the prescribed period. *Donohue v. McNichol*, 61 Pa. St. 73. To read the will, 'to the son William a life estate, with the remainder to the issue, if any,' harmonizes the devise with that made to the other son, John.

And there is nothing in the will that indicates an intention to give the son William and his issue a less estate than was given to the son John and his issue. Again, the words 'use and occupation,' where there is no devise of the remainder, may give a fee. 3 Jarm. Wills, p. 34. The testator means to give the use and occupation forever, and this is equivalent to a devise in fee. Saxton v. Mitchell, 78 Pa. St. 479. The 'use of certain lands' carries a fee. Hance v. West, 32 N. J. Law, 233. Any other construction gives us an intestacy as to part of the testator's estate. If we are correct in the foregoing interpretation, then the solution of the question is simple. We have a life estate in the son William, and after his death a devise to the issue of William, and, in default of such issue, to the next of kin. The word 'issue' in such connection, is a word of limitation, and not a word of purchase, and gives to William an estate tail, which, by force of the act of 27th April, 1855, (P. L. 368,) becomes an estate in fee simple. The words 'and if none' mean an indefinite failure of issue. Kay v. Scates, 37 Pa. St. 31; Kleppner v. Laverty, 70 Pa. St. 70; Haldeman v. Haldeman, 40 Pa. St. 29; Lawrence v. Lawrence, 105 Pa. St. 339. It is useless to multiply authorities upon this point; the rule of law is too well settled. And now, January 2, 1893, judgment is entered in favor of the plaintiff and against defendant for the sum of \$100 on the case stated, with costs of suit."

J. P. Hale Jenkins, for appellant, Isaac Chism, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned court below, to which may be added the following references: Paxson v. Lefferts, 3 Rawle, 59; Rancel v. Creswell, 30 Pa. St. 158; Potts' Appeal, Id. 168; Ogden's Appeal, 70 Pa. St. 501. Judgment affirmed.

(159 Pa. St. 640)

ARMSTRONG et ux. v. UNITED STATES EXP. CO.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

COMMON CARRIERS—LIVE-STOCK SHIPMENTS—NEGLECT—LIMITING LIABILITY—VALIDITY OF RELEASE.

1. Where there was considerable testimony as to whether a stall in an express car, in which plaintiff's horse was placed for shipment, was properly constructed, the express company's negligence was a question for the jury.

2. The release of an express company from liability for negligence in the transportation of property is void as against public policy.

Appeal from court of common pleas, Montgomery county.

Trespass by William G. Armstrong and Rhoda Armstrong, his wife, against the United States Express Company, for negligently causing the death of a horse belonging to said Rhoda Armstrong. From a judgment for plaintiffs, defendant appeals. Affirmed.

ment for plaintiffs, defendant appeals. Affirmed.

Several days before the horse was shipped, William G. Armstrong agreed to release the railroad company from all loss or damage which might happen to the horse in carrying it from North Wales, Pa., to New York city. The release, when offered in evidence, showed an alteration so that it purported to release "the United States Express Co. and all other railroad and transportation companies."

John F. Keator, J. S. Freeman, and Wm. Rennyson, for appellant. Isaac Chism, for appellees.

PER CURIAM. This was an action to recover damages for the loss of a horse which the defendant company undertook to carry from North Wales, in Pennsylvania, to New York city. The horse was injured, and had to be killed, in consequence of alleged negligence on the part of the defendant in the construction of the stalls in the car upon which the horse was to be carried. The learned court below correctly and fairly instructed the jury as to the conditions upon which the liability of the defendant would depend, and left to them the question whether the stall in which the horse was placed was negligently or carefully built with reference to the due care of the horse. As there was considerable testimony on this subject, it was not possible to take the question of negligence away from the jury. They have found by their verdict that the stall was negligently constructed, and that the injury happened in consequence thereof, and that finding disposes of that question. The release was properly excluded. The erasures were not made when the plaintiff signed it. They were made afterwards by the defendant's agent, and there is no evidence that the paper was shown or read to the plaintiff after the erasures were made. But, even if the release was free from objection in this respect, it could not accomplish the purpose for which it was offered. It could not release the defendant from liability for negligence, as we have frequently decided. For any other purpose it was immaterial. We think the case was properly tried. Judgment affirmed.

(159 Pa. St. 630)

Appeal of JOHNSON et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

WILL—UNDUE INFLUENCE—QUESTION FOR JURY

In a will contest, the fact of illicit relations between the testator and the devisee is not sufficient, alone, to raise a question of undue influence, and carry the question to the jury.

Appeal from orphans' court, Montgomery county; Aaron S. Swartz, Judge.

Petition by Mary Johnson and Florence E. Haley for an issue after appeal by them from a decree of the register of wills admitting to probate the alleged will of Jesse K. Johnson,

deceased. From an order and decree refusing such issue, petitioners appeal. Affirmed.

N. H. Larzelere and M. M. Gibson, for appellants. James B. Holland and John M. Dettra, for appellee.

PER CURIAM. We think the learned court below was clearly right in refusing the issue asked for in this case. The application was for an issue upon the question of undue influence exercised by Anna M. Russell upon the testator in procuring the legacy in her favor. In point of fact the case is absolutely destitute of proof of a single act of influence, undue or otherwise, on the part of Mrs. Russell. There is no testimony to show that she ever, at any time, or in any circumstances, even so much as asked him to make a provision in her favor. The will was written by the testator himself four years before his death, without the slightest proof that Mrs. Russell was present or had anything to do with it, or that she knew anything about it. The contention of the appellants necessarily rests upon the proposition that the existence of an unlawful relation between the testator and Mrs. Russell is sufficient alone to raise a question of undue influence, and to carry the question to a jury. That such is not the law was expressly decided by this court in *Rudy v. Ulrich*, 69 Pa. St. 177; *Main v. Ryder*, 84 Pa. St. 217; and *Wainwright's Appeal*, 89 Pa. St. 220. In the former of these cases, *Dean v. Negley*, 41 Pa. St. 312, was distinguished as resting upon the peculiarity of its own facts. Those facts did not exist in *Rudy v. Ulrich*, as they do not in this case, and therefore the ruling in *Dean v. Negley* is not applicable here. The same is true in *Reichenbach v. Ruddach*, 127 Pa. St. 593, 18 Atl. 432. Other authorities in other states are to the same effect as our own decisions. Decree affirmed, and appeal dismissed, at the cost of the appellants.

PAYNE v. PAYNE.

(Court of Chancery of New Jersey. Feb. 12, 1894.)

DIVORCE—DESERTION.

1. In an action by a husband for divorce on the ground of desertion, the burden is on him to show that the wife's separation was both willful and obstinate.

2. A husband, who does not expostulate with his wife when she informs him of her intention to separate from him, who removes a portion of the household furniture to quarters which he has rented, leaving with her another portion, to be taken by her where she sees fit, and who only once asks her to return, and never remonstrates with her for her absence, must be held to have acquiesced in the separation, and is not entitled to a divorce on the ground of obstinate desertion.

Petition by Ellis J. Payne against Barbara J. Payne for divorce on the ground of desertion. Petition dismissed.

V.28A.no.8—29

George Biller and J. Frank Fort, for petitioner. Leonard Kallisch, for defendant.

GREEN, V. C. The petitioner alleges that the defendant deserted him on the 4th of April, 1891, and that her desertion has continued from that time on, and that the said desertion has also been willful and obstinate. The burden of proof is on the petitioner. The parties have lived separate and apart since April 4, 1891, and it is incumbent on the petitioner to prove that this separation was a willful desertion on the part of his wife, and, next that it has been obstinate. The parties were living in rooms in the city of Newark, and had received notice, some time in the winter of 1890-91, that the landlord would require the use of those rooms, and that they must make other arrangements. Payne says he told his wife to secure other quarters, and that she neglected to do so. She says that she found suitable lodgings, but that he objected to take them on account of the rent. It became at last necessary for them to move, and the undisputed facts are that Payne hired a carman who, under his directions, moved a portion of the furniture to rooms in the same street, and on the same day the wife engaged the same carman to move the remaining household furniture and goods to rooms where her brother and sister-in-law were living. Payne says his wife had told him that she would not live with him any longer, as she was tired of married life, and that she divided the goods before they were moved, and that he told her where he had engaged quarters, and that she refused to go with him. She, on the other hand, says that he did not tell her where he was going to move to, and that she only knew from watching where the carman took the things. She says that her husband took such of the household goods as he wished, and that she took what he had left; that, not knowing where to go, and it being necessary for her to leave those quarters, she took up her abode with her own relatives. The only corroborative evidence of the story of either one of these parties is the testimony of the daughter of the petitioner, who says that on some one occasion, if not more, Mrs. Payne said to her that she was tired of married life.

I think the petitioner has failed to establish that the separation of himself and wife, on the 4th of April, was a willful desertion on her part. If her story is true, she certainly did not desert him, and nothing appeared on the trial to indicate that she was not as much entitled to belief as her husband. But if desertion, was it obstinate? There is no pretense on his part that he expostulated with his wife when she, as he says, told him that she would not go with him. He seems to have made no effort whatever to change her mind from such determination, if she had formed it, and the undeniable fact is that he engaged a man to move

a portion of the furniture to quarters which he had rented, and left with her another portion, to be taken by her where she saw fit, when he should be gone. It would be impossible to conceive of a more clearly-proved case of acquiescence than this. He says that, on the night of the separation,—but there is some little confusion as to whether it was that night or two days after,—he went to the house where she was living and asked her to return, and that she refused. She denies such request, and says that he came after some clothes. He does not pretend to have ever asked her to return to him, except on this one occasion, or to have ever remonstrated with her for her continued absence. He knew where she was, and often met her on the street, and passed by the place where she lived, yet he never spoke to or noticed her. It has been repeatedly held in this court that, if a party acquiesces in the absence of the other, and remains content that the separation shall continue, he cannot successfully ask the decree of this court for an obstinate desertion. *Herold v. Herold*, 47 N. J. Eq. 210, 20 Atl. 375; *Broom v. Broom*, 47 N. J. Eq. 215, 20 Atl. 377, affirmed in 49 N. J. Eq. 347, 25 Atl. 963; *Chipchase v. Chipchase*, 48 N. J. Eq. 549, 22 Atl. 588, affirmed in 49 N. J. Eq. 594, 26 Atl. 468; *Olcott v. Olcott*, (N. J. Ch.) 26 Atl. 469.

The petitioner seeks to excuse his inaction and indifference by casting an imputation upon his wife's conduct in living in the same house with a man named Thompson, and to sustain him in this position he relies upon the testimony of his daughter. The testimony of the daughter, however, fails to show any occasion when the conduct of Mrs. Payne, in her relations with Thompson, can be said to have been improper, or even indiscreet, except once, and that cannot be said to justify more than a suspicion. This evidence was only admissible, under the pleadings, for the purpose of explaining or excusing Payne's acquiescence in his wife's separation, on the theory that he should be excused if he really believed his wife's relations with Thompson were not what they should be. The fact that he allowed his young, unmarried daughter to also become an inmate of the Thompson house, and to be there under the charge and keeping of his wife, goes far to disprove any such belief on his part. Mrs. Payne explains her going to the Thompson house by saying that she moved to it at the same time her brother and sister-in-law took up their residence there, and that she hired a room in the house, for which she paid the rent. She has been forced, ever since her separation, to support herself. While the propriety of her living in this house, and doing the work she appears to have done in the way of house-keeping, might be questionable in some persons, according to the way in which they have been brought up and lived, it might not be so in others. I think the evidence fails to show that Payne had any just grounds for

believing his wife unfaithful, and I do not think that, under the circumstances, he is to be excused for his neglect to use proper efforts to bring the separation to an end by a reconciliation. The petition should be dismissed with costs.

SOUTHER v. PEARSON et al.

(Court of Chancery of New Jersey. Feb. 12, 1894.)

MORTGAGES—MERGER—PARTIAL RELEASE.

1. Where a mortgagor of land conveys a portion of it, a conveyance of such portion by the grantee to the mortgagee does not merge the mortgage in the fee as to the portion still remaining in the mortgagor's hands, though the mortgagor's grantee assumes payment of the mortgage, and though his deed to the mortgagee purports to convey the entire mortgaged premises.

2. A release of a mortgage, as to a portion of the mortgaged premises sold by the mortgagor, operates as an extinguishment of the mortgage to that extent, and on foreclosure against the portion of the land still remaining in the mortgagor's hands he is entitled to be credited with the value of the tract so released.

Bill by Charles E. Souther against Edward A. Pearson and others for the foreclosure of a mortgage. Decree for complainant.

E. M. Colle, for complainant. C. B. Harvey, for defendants.

GREEN, V. C. This is a bill to foreclose a purchase-money mortgage given by Edward A. Pearson and wife to Erastus E. Marcy upon certain premises on Orange mountain, lying west of and abutting on Prospect avenue, containing 17.328 acres, to secure the payment of \$2,500 in five years, with interest at 5 per cent., the property having been conveyed by Dr. Marcy to Pearson by deed of the same date. The interest was paid in full to March 10, 1889, and is indorsed upon the bond, as well as a credit of \$2,500 on account of the principal. Edward A. Pearson and wife, by deed dated December 1, 1888, conveyed to the Orange Mountain Land Company 14.788 acres, with a frontage of 900 and odd feet on Prospect avenue, leaving the title to the balance of 2.540 acres of said tract in Pearson. Subsequently several judgments were obtained against the Orange Mountain Land Company, and execution issued, by virtue of which the sheriff of Essex county sold the property so conveyed to the Orange Mountain Land Company to George Spottiswood, to whom it was conveyed by the sheriff by deed dated January 20, 1891. Subsequently Mrs. Pearson, by deed, released her dower in the same premises to the grantee. August 5, 1891, George Spottiswood and wife executed and delivered to Erastus E. Marcy a deed which purports to convey the whole 17.328 acres, but it does not appear that Spottiswood had any title other than that from the sheriff, which could be for only 14.788. The answering defendants charge that by these

conveyances the mortgage given by Pearson to Marcy merged as to the whole of the premises conveyed by and described in the complainant's mortgage. The complainant contends that there was no merger, but that it was the intention of Marcy that the mortgage should remain an existing lien upon the whole of the premises, and that it still remains and is a valid lien thereon. July 11, 1889, Isaac W. Maclay and William E. Davis recovered judgment in the supreme court against Edward A. Pearson, and a number of other judgments were obtained against said Pearson in the supreme and Essex county circuit courts, on some of which judgments executions were issued, by virtue of which the sheriff of Essex county sold the premises described in the mortgage, excepting thereout the premises described in the deed of Pearson to the Orange Mountain Land Company to the said Isaac W. Maclay and William E. Davis, and conveyed the same to them by deed dated August 25, 1891. This deed conveyed the 2,540 acre tract. December 22, 1891, Erastus E. Marcy assigned the mortgage from Pearson to himself to the complainant. It is admitted that this assignment to complainant was for the convenience of bringing this suit, as the latter lives in New Jersey, and Dr. Marcy only had a summer residence here. January 14, 1892, Erastus E. Marcy and wife, by deed dated on that day, conveyed to John Crosby Brown the premises described in the deed from Pearson to the Orange Mountain Land Company, being the 14,788 acres, and on January 16, 1892, the complainant, Charles E. Souther, released the 14,788 acres from the lien of the mortgage. It appeared in evidence that the consideration paid by John Crosby Brown for the property was \$2,500, and that the same payment was the consideration for this release. All the deeds and mortgages mentioned were recorded on or about the day of their respective dates in the Essex county register's office. The object of the bill is to foreclose this mortgage as a subsisting lien upon the 2,540 acres for the balance due on the bond. The 14,788 acres, having been released by the complainant, are not included in this suit. These having been sold by Dr. Marcy to Mr. Brown for \$2,500, the only questions which the defendants can raise are: First, whether there was such a merger as to annul the mortgage; and the next, what equities arise in favor of the defendants by virtue of the release of the 14,788 acres from the mortgage?

It is claimed, in the first place, that the deed from Spottiswood to Marcy operated to merge the mortgage in the ownership. The property described in this deed, it is true, embraces the whole tract, but Spottiswood's title did not cover the 2,540 acres. All that he could possibly obtain by virtue of a sheriff's sale under a judgment against the Orange Mountain Land Company was so much of the tract as had been conveyed to the

company by Pearson, namely, 14,788 acres. The modern doctrine with reference to merger is that the question is to be decided not alone from the fact of the mortgagee taking a conveyance of the mortgaged premises, but is to be ascertained from the intention of the parties to the transfer. And while it might be assumed, if unexplained, that a party who took a conveyance of premises, on which he at the time held a mortgage, intended by accepting such conveyance to no longer regard his mortgage as an incumbrance thereon, such presumption I do not think is to be indulged in when the property conveyed to the mortgagee is not coextensive with that covered by his mortgage; for the presumption referred to, which operates as an extinguishment of the security, is based on the fact that the pledgee has become the owner of the pledge, with the consequent inconsistency of holding that in pledge of which one is the absolute owner,—a condition which does not follow from the fact that the mortgagee obtains title to only a part of that which formed his security. Nor is merger to be predicated on the fact that the Orange Mountain Land Company, in their deed from Pearson for 14,788 acres, assumed the payment of this mortgage. No agreement which Pearson and his grantee could make could possibly affect the security held by Dr. Marcy, nor does he become a party to that agreement by becoming a grantee of the purchaser at a sheriff's sale under a judgment against the land company.

Next, how are the rights of the defendants, as the owners of 2,540 acres, affected by the release of the 14,788 acres in the mortgage? This release was given by the present complainant to John Crosby Brown, a purchaser from Dr. Marcy. *Hill v. Howell*, 36 N. J. Eq. 25, was a suit brought for the foreclosure and sale of mortgaged premises. The mortgage was given by one Howell, who subsequently sold to one Smith. He conveyed six portions of the land to different parties, and afterwards the mortgagee released the tract sold fourthly in order of time. The chancellor held that, as the mortgagee had actual notice and knowledge of the first, second, and third conveyances at the time she released the fourth from the incumbrance of her mortgage, she must, before resorting to the first, second, and third tracts on foreclosure, credit those tracts with the value of the tract released; and that value must be estimated as of the time when the release is given, although the tract released was then worth less than it was when the deed for it was given. Applying the principle of this case to the one in hand, it is incumbent upon the complainant to credit the remaining tract with the value of the 14,788 acres at the time the release was given, which was January 16, 1892. I think the value of \$200 per acre must be accepted from the evidence as the value at the time of the release, although the witnesses intimate that that is a high price.

I will advise a decree for the complainant on the lines suggested, and will pass upon the question as to the apportionment of the costs on settlement of the decree. A copy of the proposed decree, and notice of motion to settle the same, should be served on the defendants' solicitor.

(53 N. J. B. 486)

HARE v. HEADLEY.

(Court of Chancery of New Jersey. Feb. 6, 1894.)

SUBROGATION—PARTIES.

After a decree of foreclosure and sale, a fire occurred in the mortgaged premises. The complainant mortgagee having received a certain amount from fire insurance effected by the mortgagor, the second mortgagee obtained an order that said amount should be credited on complainant's decree, and the surplus, after paying the amount thus due complainant and the costs, be paid into court. The decree provided that the proceeds of sale should be appropriated to the second, after the payment of the first mortgage. On a bill filed by the assignee of the fire insurance companies against the second mortgagee, claiming, under an agreement with the first mortgagee for subrogation, to be entitled to the fund in court, *held*, on demurrer for want of parties, that all parties to the original suit who had an interest, not only in the money, but in the manner of its disposition, should be made parties to the suit.

(Syllabus by the Court.)

Bill by J. Montgomery Hare against Albert O. Headley. Heard on demurrer to bill for want of parties. Demurrer sustained.

E. A. Day, for complainant. J. Frank Fort and E. Q. Keasbey, for respondent.

GREEN, V. C. This bill, styled an "original bill in the nature of a supplemental bill," is the outcome of the proceedings in the case of Insurance Co. v. Schwab, (N. J. Ch.) 26 Atl. 533. It was decided, on the application under consideration in that proceeding, that the present complainant could not be made a party to the original suit and obtain relief by petition, and leave was granted, under his prayer for other relief, to file an original bill, or an original bill in the nature of a supplemental bill. The facts set out in this bill are substantially those alleged in the petition referred to, and will be found stated in the report of that case. This bill is filed against Albert O. Headley alone, praying that the complainant may be decreed to be entitled to be subrogated to all the rights of the Mutual Life Insurance Company in and to the decree and execution in the suit of foreclosure, and to the remainder of the moneys realized upon the said sale, over and above the amount paid to the said company, and to the fund in this court, and that the clerk of this court may be required to pay over the said fund to the complainant, and that the complainant may have the benefit of said suit and the proceedings therein, with such other and further relief as the case may require. The final decree in the original suit

was entered January 27, 1892, adjudging, among other things, that there was due to the complainant therein, the Mutual Life Insurance Company, the sum of \$44,672.74 of principal and interest on its mortgage, and taxes paid by it, with interest from the date last aforesaid, and that there was due to John H. Kase under the second mortgage the sum of \$8,520, and that there was due to Albert O. Headley on his judgment and mechanic's lien the sum of \$4,199.27, and fixed the amount and order of priority of sundry subsequent incumbrances on the mortgaged premises, and directed that the whole of the premises should be sold to satisfy the amount due the complainant and defendant, respectively. Between the entry of the final decree and the sale under the execution, a fire occurred in the buildings on the mortgaged premises. Policies of insurance against loss by fire had been issued to the Schwabs, the owners, who had appointed the loss, if any, to be paid to the mortgagee, the complainant in the original suit, and it received, July 15, 1892, from the fire insurance companies, the adjusted loss, amounting to \$6,114.64. The sheriff of Essex county, under the fi. fa. issued on the decree, sold the mortgaged premises, August 23, 1892, for the sum of \$45,100, which sale was duly confirmed by this court. The purchaser afterwards completed his bid, and the sheriff delivered to him a deed, receiving the amount of the bid, with interest, amounting to \$45,257.85. On the 8th of September, 1892, Albert O. Headley, who was one of the defendants in the original suit, filed a petition therein, showing that he was the holder, by assignment, of the Kase mortgage, which, by the decree, was payable next after the complainant's mortgage, and claiming that he was entitled to receive the amount realized on the sale over and above the amount due the complainant after crediting the amount received from the insurance. On presenting this petition, an order was made in this court, directing the sheriff to pay into court the surplus moneys over and above the amount decreed to be due the complainant, with interest, costs, and sheriff's fees, after deducting therefrom the sum of \$6,114.64, received on said insurance policies. In pursuance of this order the sheriff paid the complainant the amount due, after crediting it with the amount received from said fire insurance, to wit, \$41,458.93, and, after retaining sheriff's fees, etc., paid into court the sum of \$3,484.02. The original mortgage in this case was made March 31, 1888, by John M. Riley and Joseph K. Osbourne, who were the owners of the mortgaged premises, and who also subsequently executed the Kase mortgage. Riley and Osbourne, by their deed dated January 25, 1890, sold the premises to Gabriel Schwab, Nathan Schwab, and Leo L. Schwab, partners composing the firm of G. Schwab & Bros., who, as charged in the present bill, until the foreclosure suit continued

to be the owners of record of the lands and buildings thereon erected, notwithstanding the fact, also charged therein, that they, by deed dated March 23, 1891, conveyed all their right, title, and interest in the mortgaged premises to Frederick Butterfield & Co. It was assumed on the argument that this deed was to be treated as a mortgage. According to this bill the said fire insurance companies entered into an independent agreement with the mortgagee, the life insurance company, by which the interest of the latter was absolutely insured, notwithstanding default or forfeiture on the part of the insured owners, provided it paid any premium not paid by them; and in such case, on payment of any loss by the fire insurance companies to the mortgagee after any such default of, or forfeiture by, the insured owners, they were to be subrogated to all rights of the mortgagee under the mortgage. This agreement was not referred to in, or attached to, any of the policies, which contained nothing outside of the contract of insurance with the owners, other than the appointment of the payment to the mortgagee; nor was the fact that such an agreement had been made alleged or disclosed in the original bill filed by the mortgagee, the Mutual Life Insurance Company. The present bill charges that, so far as the Schwabs were concerned, the policies were forfeited on several grounds,—among others, the nonpayment by them of the premiums; but it appears by the bill that the mortgagee, after execution issued, applied to be allowed certain amounts paid for premiums for insurance, and an order was made directing the sheriff to raise said amounts in addition to the amount named in the decree. The fire insurance companies having assigned their claims to the complainant, he files this bill for the relief before referred to. Several causes of demurrer were assigned, but it is unnecessary, at this time, to consider any other than those setting up a want of parties.

This is a bill to obtain a sum of money in court, in pursuance of the decree and order of the court made in a former suit. It is filed, not by a party to that suit, or an assignee of, or claimant to, the share of a party entitled under the decree or order, but by an entire stranger to the fund, claiming the same by right of subrogation to the original security on which the former suit was based. It is not simply a controversy between the parties to the suit, with the usual assertion, denial, and contention of adverse rights and interests, but a contest over a sum of money in the possession of the court, of which it is the custodian for the rightful owner. In the former class of cases the province of the court is simply to adjust the rights and equities of the parties, and its decree cannot affect the rights of any one not a party to the suit, in the subject-matter of the litigation. In the latter the court has a duty imposed on it to pay to no one not entitled to the fund, and it should, for its own satisfaction, in order

to rightly determine the ownership, see to it that every one who may have an interest therein is properly before the court, with right to prove his rights, and, if not otherwise concluded, contest those of other claimants. Nor should the inquiry in such cases be limited to those who have a direct interest in the money in court, but should also embrace those whose rights thereto are contingent. This bill is called an "original bill in the nature of a supplemental bill;" but it also partakes somewhat of the nature of a bill of review, for it seeks to give a direction to the surplus money different from that indicated in the original decree and the order made at the foot of the decree. When that is the purpose of the suit, not only every one who has an interest in the fund sought, but those who have an interest in the effect of the decree, should be made parties. Every one who was a party to the decree, and who still may have an interest therein, must be a party to a bill of review. *Ludlow v. Macartney*, 2 Brown, Parl. Cas. 67. It is argued, on the other hand, that as the fund in this case is not large enough to satisfy the second mortgage and judgment controlled by Mr. Headley, to whom the whole fund will, by the decree and order, go if the complainant is not entitled to it, it is necessary to make only Mr. Headley a party, he being the only one, other than the complainant, who can have an interest in the fund in controversy. This is not, however, the rule. Chancellor Zabriskie, in *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163, (which case was overruled, but on another point, in *Pillsbury v. Kington*, 33 N. J. Eq. 287,) says, at page 165: "The rule laid down by Story, Eq. Pl. § 72, that it is not all persons who have an interest in the subject-matter, but, in general, those only who have an interest in the object of the suit, who are ordinarily required to be made parties; and by Calvert in his treatise on Parties to Suits in Equity, (page 10.) 'The propriety of a person being made a party depends upon his interest, not in the subject-matter, but in the object of the suit,'—has been the rule adopted and acted upon in this state." And Lord Lyndhurst says, in his judgment upon the case of *Small v. Attwood*, Younge, 407: "The general rule is that all persons who are interested in the question must be parties to a suit instituted in a court of equity." Calv. Parties, p. 9, and at page 10 the word "interest," when used as a criterion of the proper parties to a suit, means interest in its object, and not interest in its subject-matter. Applying that rule, it would seem clear that not only those who, under the decree and order, would possibly get some part of the money, are necessary parties to a suit of this character, but also those whose interests, as established by the decree or order, would be affected by its modification. If the Schwabs, defendants in the original suit, are liable on the second mortgage or judgment held by

Headley, (as they may be, they have an undoubted interest in having this money appropriated to the payment of those incumbrances. It is no answer to say that it does not appear they are liable, if, as before stated, the court, for its own protection, will see to it that every one whose interests may be affected is brought in. It should appear that in no event resulting from the suit can such interest be jeopardized. Besides, the right of the complainant to the relief sought rests on the allegation that the policies of insurance were forfeited by the acts or neglect of the Schwabs. If the policies were enforceable by the Schwabs, the complainant has no right to the fund in court. No such issues were presented in the foreclosure suit, and its decree does not touch such questions. How can those questions, with the possible interest of the Schwabs referred to, be litigated and determined unless they are made parties, and have an opportunity to be heard? What has been said as to the Schwabs as owners of the fee may also be said as to F. Butterfield & Co. Counsel, on the argument, treated their conveyance as a mortgage; but it is said in the bill to be an absolute deed on its face, and, if so, that firm may be liable on the second mortgage, and interested in having the fund applied to its payment. I am unable to find, and have not been referred to, any case in point; but I am of opinion that in cases of this character, involving the payment by the court of surplus moneys, all parties to the former suit, except those who it clearly appears cannot be interested in the disposition of the fund, should be made parties to the proceeding. I think it appears that the original complainant has been paid in full, and no disposition of the fund in court can possibly affect its interests. The demurrer is sustained so far as relates to want of parties, with leave to complainant to bring in the parties indicated.

(52 N. J. E. 440)

LOEWENTHAL et al. v. RUBBER RECLAIMING CO. et al.

(Court of Chancery of New Jersey. Feb. 6, 1894.)

CORPORATIONS — AMENDING CERTIFICATES OF INCORPORATION.

The certificate of incorporation of a trading company organized under the general corporation act, together with the by-laws adopted at the time, and as a part of its organization, *held*, under the circumstances of this case, to constitute a contract between the stockholders, which cannot be altered by legislative authority, unless with the consent of all the stockholders, or in the manner provided in the certificate and by-laws.

(Syllabus by the Court.)

Bill by Rudolph A. Loewenthal and C. Edward Murray against the Rubber Reclaiming Company, Dana Bartholomew, N. Chapman Mitchell, Edward R. Sollday, and George O. Schneller for an injunction.

Heard on pleadings and proofs in open court. Decree for complainants.

Charles L. Corbin, for complainants. William S. Gummere, for defendants.

PITNEY, V. C. The complainants are stockholders in the defendant company. The individual defendants are officers and directors of it. The company was organized under the general corporation act of this state. The object of the bill is to restrain a change in the certificate of its organization and in its by-laws, which the individual defendants propose to make by the vote of a mere majority of the stockholders, under the authority of the sixth section of a supplement to the corporation act, approved March 21, 1893, (P. L. 445,) which provides: "That it shall be lawful for any corporation organized or that may be organized under any general law of this state, with the assent of a majority in interest of its stockholders, at a special meeting to be called for that purpose, to amend its original certificate of incorporation by a certificate which shall be duly signed by its president and attested by its secretary, under its corporate seal, and in all respects executed in the same manner as its original certificate of incorporation, which amended certificate shall be recorded in the office of the clerk of the county wherein the original certificate was recorded and filed in the department of state; and thereupon such amended certificate shall take the place of the original certificate of incorporation and shall be deemed to have been recorded and filed on the date of the recording and filing of the original certificate." Complainants allege and contend that the certificate of organization and the by-laws contemporaneously adopted constitute a contract between the stockholders, and that it is not competent for the legislature to authorize either to be changed without the consent of all the stockholders, except it be done in the mode provided by the by-laws themselves.

The law, as contended for by complainants, is well settled. *Mills v. Railroad Co.*, 41 N. J. Eq. 1, 2 Atl. 453, and cases cited. If the certificate of incorporation and the by-laws of a corporation form a contract between the stockholders, then the legislature has no power to authorize a mere majority to alter it, except in the manner provided by the contract itself. That the ordinary certificate of organization does form such contract seems too plain for argument. It takes the place of the special charter under which our corporations were usually organized before the constitutional amendments of 1875. Whether any particular by-law also forms a part of such contract depends upon the time when, and circumstances under which, it was adopted. If it was adopted as a part of the original organization of the company, so that the subscrip-

tions of stock were made, and money paid thereon, upon the strength of it, then it becomes a part of the fundamental contract between the stockholders. This position was held by the court of appeals of New York, after elaborate argument and full consideration, in *Kent v. Mining Co.*, 78 N. Y. 159, and is supported by vigorous and weighty reasons, and a careful consideration of the adjudged cases found in the opinion of Chief Justice Folger, at pages 179-182. It was there held that vested rights acquired under such a by-law could not be disturbed by a later by-law, although such later by-law was adopted in pursuance of a power reserved in the original by-laws to alter the same. In the same direction is *Railroad Co. v. Belfast*, 77 Me. 445, 1 Atl. 362, and *Hazeltine v. Railroad Co.*, 79 Me. 411, 10 Atl. 328.

The facts here are that, prior to the organization of this company, four distinct corporations and one mercantile firm,—five in all,—viz. the Philadelphia Rubber Works, the L. & M. Rubber Company, the New Jersey Rubber Company, the Derby Rubber Company, and the mercantile firm of Murray, Whitehead & Murray, were each engaged in the manufacture of reclaimed rubber; that in February, 1890, they associated themselves together for business purposes under a written agreement containing, among others, this provision: "Each corporation or partnership subscribing hereto shall be entitled to one membership, and to one vote at all meetings, and may be represented by any person selected by itself, and this person may appoint, in writing, a proxy (who shall be a member or officer of the company or partnership) to represent his corporation or partnership in his absence, at any meeting of this association." Subsequently, on May 9, 1891, a certificate of incorporation was duly executed by five persons, each representing one of the original parties to the unincorporated association, which certificate was filed in the office of the secretary of state on May 12, 1891, and thus the defendant corporation was created. The certificate provided for a capital stock of \$200,000, divided into 2,000 shares, of \$100 each, which were distributed as follows: To Mr. Mitchell, of the Philadelphia Rubber Works, 328 shares; to Mr. Loewenthal, of the L. & M. Rubber Company, 219 shares; to Mr. Bassett, of the Derby Rubber Company, 168 shares; to Mr. Murray, of Murray, Whitehead & Murray, 155 shares; and to Mr. Solliday, of the New Jersey Rubber Company, 130 shares,—in all 1,000 shares, amounting to one-half of the authorized capital,—upon the payment of which one-half the company, by its certificate, was authorized to commence business. This distribution of stock appears to have been made in proportion to the amount of the interests of the several original parties to the unincorporated association. This certificate was filed on the 12th of May in the

office of the secretary of state. On the 16th of May all the incorporators met for organization, and by-laws were on that occasion duly adopted by the unanimous consent of all. One of these provided for six directors, who, by common consent, were to be, and in fact were, distributed among the representatives of the five original parties to the unincorporated association, one to each, except the Philadelphia company, to which, on account of its greater holdings of stock, two directors were assigned. Other by-laws were as follows: "Sec. 3. Each stockholder shall be entitled to one vote for each share of stock held by him, at any election of directors, for each director to be elected, which votes he may cumulate upon one or more directors, giving to such director as many votes for each share of stock held by him as there are directors to be elected, or, at his option, give one vote to each of the persons he may desire to elect as directors, not exceeding the number to be elected. Such vote shall only be given by the stockholder in person, or, in case of his absence, by written proxy, given to and presented by a stockholder. No stock held by the company shall be voted upon." (The validity of this by-law was not questioned.) "Art. 6. These by-laws may be amended, added to, altered, or repealed, by the affirmative vote of the stockholders representing at least two-thirds of the whole capital stock, at any annual meeting, or at a special meeting called for that purpose." After the adoption of these by-laws the company was duly organized, and the capital stock paid in, and all of the parties to the original association leased to it their respective manufacturing plants. The allegation of the complaint is—and I think it is sustained by the clear weight of the evidence—that the provision for cumulative voting was adopted in the by-laws for the purpose of perpetuating the provision in the original articles of association that each of the parties to it should be represented in the board of directors, and that for that reason it formed a fundamental contract between the parties. The defendants do not deny that there was an understanding among all the parties, at the creation of the corporation, to the effect that each of the parties to the unincorporated association should be represented by a director in the corporation, excepting the Philadelphia company, which should have two, but they say that such understanding extended no further than for the first year. The witness who is relied upon to sustain this allegation swears, however, that nothing was said, one way or the other, as to subsequent years; and he swears that it was understood among some of the parties that the arrangement about directors should continue as long as the original concerns continued to hold the stock subsequently subscribed for, and issued to their several representatives. But I think that the solution of this question of fact is immaterial, since

the payments for stock were made, and the certificates of stock were issued, and the several manufacturing plants leased to the corporation, after, and not before, the adoption of these by-laws. They therefore became and were, under the circumstances, essentially a part of the contract between the stockholders, and therefore, for the reasons above stated, cannot be altered, except in the manner therein provided, or by the consent of all the stockholders. On the 12th of June, 1893, at a meeting of the directors, of which the complainants were two, a resolution was passed by the other four directors, against the protests of complainants, initiating proceedings under the section of the act of 1893, above quoted, for the avowed purpose of altering the certificate of organization in such a manner as to do away with cumulative voting. This action was restrained by an interlocutory order of this court, and I think such restraint should be made perpetual, and will so advise.

It was urged that the complainants, representing, severally, two of the original parties to the unincorporated association, have lost their right to representation in the board of directors by parting with the bulk of their holdings of stock. The answer to this position is that the right to a voice in the management of the corporate enterprise inheres in the actual ownership of the shares of stock, as shown in *White v. Tire Co.*, (N. J. Ch.) 28 Atl. 75. Each new holder of stock by transfer becomes a party to the original contract between the stockholders, and entitled to all its benefits.

It was urged by the counsel of defendants, in his able and ingenious argument, that the rule of the majority is the law of the corporation, and must govern, and that to hold this by-law un repealable, except by a two-thirds vote of all the stockholders, is in derogation of this law. The authority relied upon for this position is *Durfee v. Railroad Co.*, 5 Allen, 230. That case, as I read it, is in direct conflict with the line of cases in this state culminating in *Mills v. Railroad Co.*, above cited. Its reasoning is expressly repudiated by Chancellor Zabriskie in *Zabriskie v. Railroad Co.*, 18 N. J. Eq. 178, at page 190. The other instances cited by counsel in which the courts have held that a mere majority may repeal a by-law which contains a provision that it shall not be repealed except by a two-thirds vote were either cases of municipal corporations, with which we have here no concern, or cases where the by-law in question was passed long after the organization of the company, and where no vested rights had arisen or been acquired under it, so that no harm could be done by a change. The practical operation of this by-law is not, as contended by defendants, to prevent a mere majority from governing, for it leaves it in the power of the majority of stockholders to elect a majority of the directors. All that it can accomplish is to prevent a major-

ity of stockholders from electing all the directors, and to insure the minority of the stockholders a representation on the board of directors, and a voice in its deliberations. In this connection, it is worthy of remark that the stockholders, as such, have no power to make any contract or execute any work. Their power is confined to electing directors, and advising them in their conduct of the business of the company. *Fruit Co. v. Buck*, (N. J. Ch.) 27 Atl. 1094. Complainants are entitled to costs against the individual defendants.

(32 N. J. E. 380)

ILLINGWORTH v. ROWE et al.

(Court of Chancery of New Jersey. Feb. 6, 1894.)

BILL OF INTERPLEADER—WHEN PROPER—PLEADINGS.

1. To state a case of strict interpleader, the complainant must show that conflicting claims are made against him by two or more persons for the same thing, that he has no interest in the subject-matter of their controversy, and that the title to the thing in dispute is in some of the hostile claimants, but he cannot tell which; and all the relief he can ask is that, on the surrender of the thing in dispute, his liability shall cease, and that thereupon the hostile claimants be required to settle their dispute among themselves.

2. But under a bill in the nature of a bill of interpleader the complainant has a right to ask for active, affirmative relief; as, for example, where there is a dispute between two or more persons as to which is entitled to a mortgage debt, the mortgagor may file a bill to procure a decree adjudging which of the hostile claimants is entitled to the debt, and that on its payment the mortgage shall be surrendered to him for cancellation.

3. And so, where a house has been erected for a landowner under a written contract, which has been filed, and before the payment of the whole of the contract price a dispute arises between the contractor and a person who has furnished material which has been used in the construction of the house, as to who is entitled to the balance of the contract price, in consequence of which the owner is placed in a position where he may be compelled to pay the same debt twice, the owner may file a bill, in the nature of a bill of interpleader, to have it determined to whom he shall pay the balance remaining in his hands, and that on such payment being made all right of lien against his house and land shall become extinct.

(Syllabus by the Court.)

Bill of interpleader by John Illingworth against Alfred Rowe and the Newark Lumber Company. Heard on demurrer to bill. Demurrer overruled.

David A. Ryerson, for complainant. Frederick F. Guild and Edward M. Colle, for respondents.

VAN FLEET, V. O. This is an interpleader suit. Two of the defendants have demurred to the bill for want of equity. As a bill of strict interpleader, I do not think the bill can be sustained; but, if it be considered as a bill in the nature of a bill of interpleader, then I think it must be held to exhibit a

case which clearly entitles the complainant to relief,—but not relief of the kind now asked, but such relief as the court may, under a bill in the nature of a bill of interpleader, grant, upon the facts admitted by the demurrants. To state a case of strict interpleader, it is necessary for the complainant to show that conflicting claims are made against him for the same thing by two or more different persons; to aver that he has no interest in the subject-matter of their controversy, and also admit that the title to the thing in dispute is in some one of the conflicting claimants, but in which he is unable to decide. He cannot ask for affirmative relief against either of the hostile claimants, but must content himself with simply praying that they be required to cease from troubling him, and to settle their dispute, by some appropriate judicial proceeding, among themselves. But, as is said by Judge Story both in his commentaries on Equity Jurisprudence and Equity Pleadings, "There are many cases where a bill in the nature of a bill of interpleader will lie by a party in interest to ascertain and establish his own rights, where there are other conflicting rights among third persons." Among the instances which he gives, in which it is proper to have recourse to this remedy, is this: "If a mortgagor wishes to redeem the mortgaged estate, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court to ascertain their rights, and to have a decree for a redemption, so that he may make a secure payment to the party entitled to the money." 2 Story, Eq. Jur. § 824; Story, Eq. Pl. § 297b. In such a case, if the complainant prevails, he gets affirmative relief,—a decree that on the payment of the mortgage debt the mortgage shall be surrendered to him for cancellation.

Briefly stated, the case made by the bill is this: The defendant Rowe made a contract to erect three houses for the complainant, for \$2,550 for each; the contract price of each to be paid in three installments, as the work on each reached a specified stage in course of completion. Rowe agreed to furnish all the material and do all the work, and have the houses completed on or before February 1, 1893. The contract was filed. Rowe made a subcontract with one George Bopp for the erection of the houses. After one of the houses had been completed, and the contract price for that had been fully paid, and two installments of the contract price of the other two had also been paid, both Rowe and Bopp quit work on the remaining two, leaving them in an unfinished state. The complainant, then, after giving Rowe the notice required by the contract, procured material and workmen, and completed them himself. On July 13, 1893, the complainant and Rowe had an accounting to ascertain the balance remaining due under the contract, and agreed that such balance

was \$1,566.31. Of this sum the complainant paid Rowe \$897.36, and retained \$668.95. Prior to the accounting the Newark Lumber Company had given the complainant written notice that it had furnished to Bopp material of the value of \$668.95, which had been used in the construction of his houses, and for which it had not been paid. A written memorandum of the accounting and settlement was made, and signed by the complainant and Rowe, in which it is stated that the \$668.95 is retained by the complainant on account of an alleged claim of the Newark Lumber Company for materials furnished for the complainant's houses, of which the Newark Lumber Company had given the complainant notice, but which Rowe disputed. The memorandum then says: "The said John Illingworth is to file immediately in the court of chancery of New Jersey a bill of interpleader, and pay the said sum of \$668.95 into court; but the said Alfred Rowe does not consent or admit that the case is a proper one for a bill of interpleader, and reserves all rights of action, and all rights to plead, demur, or answer said bill of interpleader, which he would have had, had this settlement not been made." The bill further alleges that the Newark Lumber Company has not been paid for the material which it furnished to Bopp, and which was used in the construction of the complainant's houses, and also that it has not released any right which it acquired by furnishing the material, and also that it claims that the debt which was created by the use of its material in the construction of the complainant's houses may, by force of the statute, be made a lien on the complainant's buildings and land, and also that it threatens to file a lien claim for such debt against the complainant's buildings and land, and institute a suit to enforce its payment. This summary of the bill shows that the material facts admitted by the demurrants are—First, that the Newark Lumber Company furnished material which was used in the construction of the complainant's houses, and which has not been paid for; second, that whatever right the Newark Lumber Company acquired by furnishing the material so used has not been released, but still remains in full vigor, and also that, prior to the accounting between the complainant and Rowe, notice in writing had been given by the Newark Lumber Company to the complainant that it had furnished material which had been used in the construction of his houses, for which it had not been paid; third, that the complainant still has in his hands sufficient money, earned under the contract, to pay for the material which was furnished by the Newark Lumber Company, and used in the construction of the complainant's houses; and, fourth, that the Newark Lumber Company intends to enforce its debt for the material so furnished by filing a lien against the complainant's buildings and land, and bringing suit thereon.

The rights and duties of the parties to this litigation are prescribed by the mechanics' lien law, as amended by the act of 1892, (P. L. 1892, p. 358.) The great object intended to be accomplished by the mechanics' lien law is to secure to any person who does work in the construction of a building, or who furnishes material for its construction, pay for the work so done and material so furnished. To effect this object, workmen and material men are given, either a right of lien against the building and the land whereon it stands, or a right to pursue, and have appropriated to the payment of their debts, the money which is earned in the construction of the building, when it is erected by a contractor under a written contract which is made a matter of public record. Assuming the primary purpose of the mechanics' lien law to be what it has just been described to be, it will not be necessary to consider, in this discussion, any part of that law, except the act of 1892. That act, in substance, declares that, when a building is erected under a contract in writing which shall have been filed in conformity to the direction of the statute, no person shall have the right of lien given by the statute, except the contractor, provided that when the owner pays any part of the contract price the contractor delivers to the owner a release, executed by all persons having a right of lien, releasing their lien, together with an affidavit, made by the contractor, declaring that no other persons than those named in the release have furnished any material for, or done any work on, the building for which a lien can be claimed. And the statute then, in substance, says that any payment made upon the presentation of such release and affidavit shall be a full and complete bar to any and all right of lien for work done or materials furnished prior to the date of such release, except as to any person, not mentioned in such release, who may, prior to the making of such payment, have given notice to the owner that he has done work or furnished material for such building. It is manifest that the things which this statute requires to be done in order to deprive the Newark Lumber Company of its right to a lien, or to such part of the money earned under this contract as will be sufficient to pay its debt, have not been done. It has released naught. It is undisputed that prior to the settlement, and while the complainant still held over \$1,500 earned under the contract, it gave him the notice required by the statute to preserve its right of lien, and that he, in obedience to such notice, still retains sufficient money earned under the contract to pay its claim. The money was retained with the express assent of Rowe. He also expressly assented to its payment into this court. I shall not stop to consider whether or not, while this money remains in court or in the hands of the complainant, the Newark Lumber Company can

successfully assert a right of lien against the complainant's buildings and land. He, and not the Newark Lumber Company, is the person who is seeking protection. He admits that he owes somebody a debt for which a lien may be claimed. He is willing to pay that debt once, but not twice, and he asks to be protected against the injustice of being compelled to pay it to two different persons. It is certain that if he pays Rowe the \$668.95, whether he does so voluntarily or under compulsion, the Newark Lumber Company may, under the act of 1892, file a lien against his buildings and land.

The counsel of Rowe contended, earnestly and with apparent sincerity, that, if the complainant has incurred a double liability for this debt, such liability is the result of his own negligence. And the negligence he imputed to the complainant consisted in the fact that the complainant, after the accounting, and without first requiring Rowe to deliver the release and make the affidavit required by the act of 1892, paid to Rowe all the money that was found by the accounting to be due under the contract, except a sum sufficient to pay the debt of the Newark Lumber Company. But it is impossible for me to see how the complainant's conduct in this respect can, in any sense, be regarded as negligent, or otherwise faulty. I think, on the contrary, that his conduct was sufficiently cautious to give him the protection he was entitled to against the conflicting claims asserted by Rowe and the Newark Lumber Company, and also eminently liberal towards Rowe. Rowe certainly has no right to complain because the complainant paid him money which was not in dispute, but which he could not have been compelled to pay until all persons having a right of lien had released such right. In my judgment, it would be a dull and distorted sense of justice which would impose a double liability on a citizen because he had waived a legal advantage which was not necessary to his protection, and dealt liberally with another citizen. The complainant, without fault on his part, is in a position where he may be compelled to pay the same debt twice. Equity will not leave him in that position. If no remedy for such a wrong existed, it would be the duty of a court of conscience to invent one. The complainant's position is substantially like that of a mortgagor whose land is subject to a mortgage which he wants to pay, but which he cannot safely pay because different persons make conflicting claims to the mortgage debt. In that case it is settled, as has already been stated, that the mortgagor may file a bill, in the nature of a bill of interpleader, in order to have a determination as to whom the mortgage debt shall be paid, and also for affirmative relief, adjudging that on payment being made the mortgage shall be surrendered for cancellation. *Railroad Co. v. Clute*, 4 Paige, 384, 392; *Wakeman v. Kings-*

land, 46 N. J. Eq. 113, 116, 18 Atl. 680; Aleck v. Jackson, 49 N. J. Eq. 507, 509, 23 Atl. 760; 2 Story, Eq. Jur. § 824; Story, Eq. Pl. § 297b. And so, too, the purchaser of land, who takes possession and makes permanent improvements before acquiring title by deed, and before the payment of the purchase money, and then a dispute arises as to whether the title of his vendor is not void as against the creditors of the person who conveyed to his vendor, may file a bill in the nature of a bill of interpleader, to have it determined to whom he shall pay the purchase money, and what, on the payment of the purchase money, shall be done to invest him with a good title to the land. Parks v. Jackson, 11 Wend. 442, 450; Story, Eq. Pl. § 297b; 2 Story, Eq. Jur. § 824. As is obvious, the case made by the complainant's bill comes directly within the principle established by these authorities. On the case as it now stands, the complainant is entitled to relief, and the demurrers must therefore be overruled.

(53 N. J. E. 502)

In re DEVAUSNEY.

(Court of Chancery of New Jersey. Feb. 6, 1894.)

INQUISITION OF LUNACY—JURISDICTION OF NON-RESIDENT.

The court of chancery has jurisdiction to issue a commission de lunatico inquirendo if the alleged lunatic, though nonresident, has real estate in this state.

(Syllabus by the Court.)

Petition by Andrew Devausney for an inquisition of the sanity of Sarah H. Devausney. Heard on objections to the jurisdiction of court. Objections overruled.

The other facts fully appear in the following statement by GREEN, V. C.:

An inquisition has been returned into this court, finding that Sarah H. Devausney was, at the time of taking the inquisition, a lunatic and of unsound mind, so that she is incapable of the government of herself, her lands, tenements, goods, and chattels, and that she has been in the same state of lunacy for the space of 25 years last past; and that, at the time of the said inquisition, she was entitled to a one equal seventh part of the personal estate of her father, Jacob S. Vanness, deceased, and also seised of, and entitled to, a one equal seventh part of two tracts of land in Hudson county, in this state. The petition on which the inquisition was issued was filed by Andrew Devausney, of the city of New York, state of New York, husband of the alleged lunatic. It states that by the will of Mrs. Devausney's father she is entitled to an equal seventh part of real and personal estate in New Jersey, and that she was, at the time of filing the petition, an inmate of the Bloomingdale Asylum for the Insane in the state of New York. The jurisdiction of the court is brought in question.

Thomas S. Henry, for petitioner.

GREEN, V. C., (after stating the facts.) The jurisdiction of the court to institute the proceedings de lunatico inquirendo is challenged on the ground that, although the alleged lunatic is seised of, and entitled to, real and personal estate in New Jersey, she is not a citizen of or resident in this state, but is a citizen of and resident in New York. In Re Perkins, 2 Johns. Ch. 124, Chancellor Kent directed a commission to issue to inquire into the alleged lunacy of Daniel Perkins, of Bridgewater, in the state of Massachusetts, who was stated in the petition to be the owner of lands in New York, the chancellor saying: "There is no doubt, from the case Ex parte Southcote, 1 Amb. 109, that a commission of lunacy may issue against a person resident abroad." In Re Pettit, 2 Paige, 174, Chancellor Walworth directed a commission to issue in the case of an alleged lunatic, who was a resident of Wilton, in the state of Connecticut, and who was stated in the petition to be entitled to real and personal property in New York. In Re Ganse, 9 Paige, 416, the alleged lunatic had resided in Fishkill, New York state, whence, in a state of mental aberration, he had gone to some place unknown, leaving personal property in care of his brothers in Dutchess county. Chancellor Walworth said that "since the decision of Lord Hardwicke in Southcote's Case there can be no doubt of the right of the chancellor to issue a commission where the lunatic has lands within his jurisdiction, although the lunatic is himself domiciled abroad." It did not appear that Ganse had real estate in New York, but it did appear he had personal property therein; that, as he had left his residence in Fishkill in a state of mental aberration, it was wholly improbable he could have established any legal residence out of the state since that time, and he must therefore be considered still a citizen of the state of New York, and a resident of Fishkill; and the chancellor directed a commission to issue to be executed in that town. In Re Fowler, 2 Barb. Ch. 305, the alleged lunatic resided in Ohio. Chancellor Walworth held that it must appear by the petition, in case the alleged lunatic was non-resident, that he owned property in the state, saying: "The court had no jurisdiction to issue a commission unless the alleged lunatic resided here, or was the owner of property in this state." In Re Child, 16 N. J. Eq. 498, Chancellor Green, at page 499, says: "A commission may issue when the alleged lunatic is a nonresident, or temporarily absent from the state, when it is impossible for the jury to see him;" referring to the cases before mentioned. It is true that the question before the chancellor was only in what place the commission should be executed, the alleged lunatic being actually in the state lunatic asylum in Trenton, and his former domicile being in Morris county; but his

statement shows what he considered decided by *Ex parte Southcote* and the other cases. The jurisdiction is recognized in *Shelf. Lun. 86*; *2 Barb. Ch. Pr. 280*; *2 Hoff. Ch. Pr. 251*; *Blake, Ch. Pr. 444*; and *Dick. Eq. Pr. 810*, note. It is urged that all the American authorities cited rest on the case of *Ex parte Southcote*, 1 Amb. 109, 2 Ves. Sr. 401, and that the lord chancellor granted the commission in that case because the alleged lunatic was a subject of Great Britain, resident abroad, but having an estate in England. I do not think an examination of the case shows that this was the ratio decidendi. It is presumptively true that *Southcote* was a British subject, and Lord Hardwicke did say: "There can be no good reason why if any subject having an estate in England happens to be an idiot or lunatic, but is out of the kingdom, there can be no inquiry here;" but I do not understand that the fact the alleged lunatic was a subject was the *sine qua non* for instituting the inquiry. The jurisdiction in granting the inquiry in cases of lunacy was not at that time in the court of chancery, or the lord chancellor as chancellor, but in him as the person having, under the special warrant of the crown, the right to exercise the duty of the crown in the care of the persons and estates of idiots and lunatics. *Sherwood v. Sanderson*, 19 Ves. 280. This case the crown had by virtue of its prerogative, but it was a right which was never exercised except upon a previous office (for inquisition) found; and, for the purpose of its exercise, the crown, by sign manual, delegated its authority to its own great officer, not necessarily, but usually, the lord chancellor. *Elmer, Lun. p. 1*. The duty was not only as to the person, but also as to the estate of the idiot or lunatic. As to the person, it was the same as to each class, viz. to care and provide for safety and maintenance out of the estate of the idiot or lunatic. As to the estate, it was different in this respect: In the case of a lunatic the crown, as a trustee, had the duty only of taking charge of the person and property for the exclusive benefit of the lunatic and his estate, while in cases of idiocy it had both a trust and an interest, having the right to take, if it pleased, the profits of the estate, after making adequate provision for the necessary comforts of the idiot and his family. *Elmer, Lun. p. 3*; *In re Fitzgerald*, 2 Schoales & L. 432, 435; *Shelf. Lun. 10, 11*. An alien could take a fee by purchase, but he could not hold it against the king, (*Co. Litt. 2a, 2b*;) but the estate purchased by an alien did not vest in the king until office found, until which the alien was seised, and could sustain actions for injuries to his property, (*Page's Case*, 5 Coke, 52b.) *2 Bl. Comm. p. 293, c. 19*; *Id.*, § 5, p. 14. If an estate in England belonged to a lunatic, who was a nonresident subject or alien, the care of it for the lunatic, and its preservation, was still the duty, so to speak, of the crown, which,

however, was not to be exercised until such lunacy was ascertained by the finding of a jury under a commission de lunatico. The finding of a commission in another jurisdiction could not be made effective as to property not in that jurisdiction without statutory authority. In *re Duchess of Chandols*, 1 Schoales & L. 301; *In re Houstoun*, 1 Russ. 312; *In re Perkins*, 2 Johns. Ch. 124. So that, if no commission could issue in the jurisdiction of the estate, the owner being nonresident, no lawfully appointed caretaker of the property could be secured. The doubts as to the case which Lord Hardwicke expressed in *Re Southcote*, as stated in the report in *Ambler*, arose from matters of practice, and were whether he should issue the commission, first, because the commissioners and jury were entitled to inspect the alleged lunatic and examine him, either before them or by a committee, which was impossible, as *Southcote* was in a foreign country, and, next, because the general rule was that the commission should be executed by a jury of the county of the residence of the alleged lunatic, which was impracticable, as he was resident in a foreign country; but he resolved these doubts by directing the commission to be executed at the mansion house, the former residence, saying: "No mischief can follow from the granting a commission, for, if the jury are satisfied without inspection, they will find so; if not, they will not make a return, or will return that it does not appear to them that he is an idiot or lunatic."

This examination of the law and case, in my judgment, demonstrates that *In re Southcote* is an authority for issuing a commission when the alleged lunatic is nonresident, if he or she owns an estate within the jurisdiction. The Chancellor in *Re Farrell*, (N. J. Ch.) 27 Atl. 813, gives the origin and history of the jurisdiction formerly exercised by the lord chancellor of England in respect of commissions de lunatico inquirendo, and traces the legislation of this state from 1794 to the present time. The result of that legislation is that the jurisdiction formerly exercised by the lord chancellor under the authority of the sign manual has been vested in the court of chancery. The duty of the care and safe-keeping of the persons and property of idiots and lunatics, imposed on the chancellor by the act of 1794, (*Pat. Laws*, p. 125,) was transferred by the act of 1804 (*Bloom. Laws*, p. 117) to a guardian to be appointed by the orphans' court of the county in which the lunatic resided. That act, as well as the law as it now stands, required that on the return of the inquisition, if the party was found non compos mentis, a copy of all proceedings had thereon was to be transmitted to the orphans' court of the county in which the lunatic resided, which court was authorized and directed to appoint such guardian. It is apparent that no orphans' court other than that of the domicile has jurisdiction to appoint a

guardian for a person so found a lunatic, and that the statute in that regard is inoperative with respect to a nonresident lunatic. But, the inquisition having been returned that the person is non compos mentis, this court may still, if necessary, provide for the care and preservation of his or her estate by the appointment of a receiver, on a proper application for that purpose. The court has long exercised the power of appointing a receiver or temporary committee to care for the estate of a lunatic. In *re Dey*, 9 N. J. Eq. 181. This has been done, generally, pending judicial proceedings, on the ground that there is no person entitled to the property who is at the same time competent to hold and manage the estate. 8 Pom. Eq. Jur. § 1332. Kerr, Rec. at page 145, says: "The case of lunatics is the only exception to the rule that a receiver will not be appointed unless a suit is pending." In *Ex parte Whitfield*, 2 Atk. 315, Lord Hardwicke, as to the appointment of a receiver of an infant's estate, no suit being pending, says: "The case of idiots and lunatics has been insisted on as a similar case; but the jurisdiction which the court exercises with respect to them is a particular one, and therefore not like the present." See, also, *Ex parte Wagren*, 10 Ves. 622; *Ex parte Radcliffe*, 1 Jac. & W. 639; Kerr, Rec. 113; Sheff. Lun. 186. It is, however, a jurisdiction which the court seldom exercises, and only when it seems necessary for the protection and care of the estate of the lunatic. The statutes of this state have made ample provision for the care of the estates of nonresident lunatics by the appointment of a guardian by the orphans' court of the county in which the property of the lunatic may be, or by the ordinary in certain cases, on presenting and filing an exemplified copy of the proceedings upon an inquest or finding of idiocy or lunacy in the domicile of the lunatic, according to the laws of such residence. Revision, p. 602, § 2, (P. L. 1890, p. 507.) In my judgment, these provisions are so full, and the procedure so simple, that recourse should be had thereto unless there are unsurmountable reasons for not doing so. But these provisions of the statute do not oust this court of its jurisdiction to issue the inquisition, and this return should be filed with the clerk, to be proceeded on as occasion may require.

(51 N. J. E. 363)

**FIRST BAPTIST CHURCH OF HOBOKEN
v. SYMS et al.**

(Court of Chancery of New Jersey. Feb. 6,
1894.)

**CONSTRUCTION OF WILL — LEGACY AS A CHARGE
ON REALTY — JUDGMENT — EQUITABLE RELIEF —
ASSUMPSIT.**

1. If legacies be given generally, and the residue of the real and personal estate be afterwards given in one mass, the legacies are a charge on the residuary real as well as personal estate.

2. A judgment against an executor is con-

clusive upon legatees so far as the personality which comes to the executor is concerned, but is not conclusive upon them so far as their legacies are charged upon and payable out of realty.

3. A court of equity may restrain an executor from prosecuting proceedings to sell lands for the payment of claims he knows to be fictitious or without merit.

4. While a court of equity cannot sit in judgment upon the lawful acts of other tribunals, and review the conduct of those tribunals to see whether, in the exercise of their rightful powers, they have committed error either in law or in fact, its power to give relief against a judgment which has been procured by fraud or imposition upon another court is beyond all question.

5. Proof that evidence which would go to prevent the recovery of judgment was collusively withheld from the court by the parties to a suit is not alone sufficient to establish fraud or imposition. It must also clearly appear that the judgment thus recovered was in fact unjust.

6. An action for money had and received will not lie unless privity of contract, express or implied, exists between the parties to the suit.

(Syllabus by the Court.)

Bill by the First Baptist Church of Hoboken against Parker Syms individually, and as executor of the will of Samuel R. Syms, deceased, Robert H. Syms, and others. Heard on pleadings and proofs. Bill dismissed.

Gilbert Collins, for complainant. John Garrick, for Robert H. Syms. William Brinkerhoff, for Parker Syms.

MCGILL, Ch. Samuel R. Syms died at his residence in West Hoboken, in this state, in November, 1891, leaving a will which bears date one month before his death, in and by which he first directed that his debts be paid, and then gave to his wife his household furniture and personal effects, and to certain nieces, nephews, and cousins pecuniary legacies aggregating in amount \$10,000. Then he bequeathed 80 shares of the capital stock of the First National Bank of Hoboken to the cashier of that bank in trust for specified objects, and then gave to the complainant a pecuniary legacy of \$5,000; after which he made disposition of "all the rest, residue, and remainder" of his "property, real, personal, or mixed," to his executors, in trust to take the income therefrom, and distribute it, during his widow's life, as his will directs. At the expiration of the trust the principal thereof is to be distributed as the will provides. The testator's sons, Parker and Robert H., were appointed the executors and his wife the executrix of the will. Subsequently the will was admitted to probate, and Robert H. Syms and the testator's widow renounced the executorship, and Parker Syms alone assumed the duties thereof. In March, 1892, the executor filed an inventory and appraisal of the personal estate of his father, by which it was made to appear that that estate was worth \$25,394.80. In May, 1892, the testator's widow filed her dissent to take the property which the will gave to her in lieu of dower. On the 27th

of January, 1893, the executor, by his petition, represented to the orphans' court of Hudson county that the personal estate of Samuel R. Syms was insufficient to pay his debts, and that he died seised of lands, particularly described in the petition, valued in the aggregate at \$106,000, all of which lands, except a tract in Morris county, worth about \$25,000, are situate in the county of Hudson, and prayed that the lands in Hudson county should be sold to pay debts. With his petition he exhibited, under oath, an account of the debts and personal estate of the testator, in which account the personal estate was shown to be valued at \$37,954.63, the same having been increased by receipts subsequent to the inventory and appraisal hereinbefore mentioned; and the debts of the testator aggregated \$105,486.54, in addition to mortgaged liens upon the real estate, which amounted to \$36,000. Thus it was made to appear that more than \$60,000 in value of the real estate would be required to satisfy the debts, exclusive of the mortgage liens. Among the debts included in the account thus presented is one in shape of a judgment in the supreme court of this state against the executor, and in favor of the executor's brother, Robert H. Syms, for \$58,561.25, which judgment the complainant now attacks as collusive and fraudulent. The executor has been restrained by order of this court from continuing the proceedings for the sale of lands until further order herein, and under such restraint the proceedings in the orphans' court have been suspended.

The valuation of the real and personal estate, as shown by the executor's account in his application to the orphans' court, is not disputed, and it is observed if that valuation be correct, and the claims presented to the receiver are valid subsisting debts, that the complainant will not be paid anything for its legacy, even though that legacy be held to be charged upon the testator's entire estate, real as well as personal. If it should be held not to be charged upon the realty, it is apparent that it can take nothing, even though its attack upon the judgment of Robert H. Syms be entirely successful, because, without that judgment, the remaining indebtedness is sufficient to absorb the entire personal estate; consequently, in such case, an attack upon the judgment would not advantage the complainant, and its standing in this court to maintain a litigation which could not by any possibility benefit it may well be questioned. The first relevant inquiry, then, is whether the legacy to the complainant is a charge upon the entire estate. The rule laid down in *Hawk. Wills*, 294, that, if legacies be given generally, and the residue of the real and personal estate be afterwards given in one mass, the legacies are a charge on the residuary real as well as personal estate, is adopted by the courts of this state. *Stevens v. Flower*, 46 N. J. Eq. 340, 19 Atl. 777, (where the cases in this state are col-

lected and commented upon.) The reasoning upon which the rule rests is that the real and personal estate, by such gift, is treated by the testator as one mass, part of which is represented by the legacies, and what is given after the legacies are paid is given minus that which has been before given, and is therefore given subject to the prior gift, and is chargeable therewith. I think that this rule is applicable in the present case, and that the complainant's legacy is chargeable upon the real as well as personal estate of the testator. This being so, the serious injury which the complainant will suffer from the continuance of a fraudulent and collusive judgment against the executor is manifested, not perhaps (in absence of irresponsibility of the executor) in the mere fact of the payment of such a claim by him out of the proceeds of the sale of such real estate, for the propriety of such a payment may be questioned upon his accounting, but in the necessity it occasions for the submission of the real estate to a forced, and perhaps a sacrificial, sale, to unnecessarily raise a large sum of money. It is held by the prerogative court in *Smith v. Smith's Adm'r*, 27 N. J. Eq. 445, that in an application for an order to sell lands for the payment of debts the orphans' court is not invested with power to determine the validity of the claims of creditors, but that its inquiry is limited to the ascertainment of the truth of the executor's statement in his application, including the enumeration of claims which have actually been presented to him, and their respective amounts. The attack upon the judgment questions the greater part of the claim upon which it is based as fictitious and groundless, and asserts that the judgment itself was procured in a collusive suit between the executor and his brother by the fraudulent withholding of facts and evidence from the court in which it was recovered, which, appearing, would clearly have demonstrated that more than nine-tenths of the claim upon which the judgment was founded was a mere pretense. Part of the claim underlying the judgment is not disputed, and for that part the executor's statement should stand.

Another consideration is this: If the judgment is ultimately allowed to stand and be used it will be conclusive upon the executor, and also upon the legatees under the will, who are the executor's privies so far as the personalty coming to him, the primary fund for the payment of debts and legacies, is concerned, (*Castellaw v. Guilmartin*, 54 Ga. 299; *Redmond v. Coffin*, 2 Dev. Eq. 437; *Hooper v. Hooper*, [W. Va.] 9 S. E. 937,) and the entire personal estate may at once be applied to its payment, to the complete exhaustion of the personalty, leaving yet unpaid a portion of the judgment and the entire amount of the indisputable debts, the payment of which will be thrown upon the real estate. The judgment against the executor is not conclu-

sive upon the heirs and devisees who are not in privity with him, (*Garnett v. Macon*, 6 Call. [U. S. Cir. Ct.] 308, 337; *Birely v. Staley*, 5 Gill. & J. 432, 453; *Collinson v. Owens*, 6 Gill. & J. 4; *McCoy v. Nichols*, 4 How. [Miss.] 31, 39; *Beckett v. Selover*, 7 Cal. 215; *Stone v. Wood*, 16 Ill. 177, 179; *Robertson v. Wright*, 17 Grat. 534,) because they do not claim under him, and are not parties to the suit, and are not in position to adduce evidence in opposition to recovery, or controvert the testimony offered in support of the plaintiff's case, or appeal from the judgment when rendered; and for the same reason it is not conclusive upon the legatees, so far as their legacies are charged upon and payable out of the realty; and when, therefore, the executor seeks the realty for the payment of that judgment, those who are entitled to interest in the real estate are not bound by the judgment, but may question the claim which underlies it and is its foundation. It thus appearing that the judgment is conclusive upon the legatees as to the personality and is not conclusive as to realty, it would seem to follow that, if it stands and may be used as a shield to the executor, it will protect him in applying at least the personality, in its payment, and estop the legatees from questioning such application, and their right of ultimate contest will be limited to the remnant of it which comes over upon the realty unpaid.

Yet another consideration: The proceeding to sell land for the payment of debts is a statutory substitute for an action against the heir, devisee, or legatee whose legacy is charged upon the realty. But the prerogative court holds that in it a debt actually claimed cannot be contested. Surely the persons interested in the land should not be obliged to submit to the sale and thereby perhaps sacrifice of their property, to make an amount sufficient to pay such invalid claims as the executor may be pleased to report, merely because the orphans' court, in which the proceeding is conducted, has not power to investigate the merits of the claims. Such a condition of affairs exhibits a strong necessity for the interposition of equity, when it shall clearly appear that the proceeding is unjustly conducted to injure and defraud the applicant for its assistance.

The substantial reasons, then, for an attack upon the judgment at this time are: First, to preserve the personality for the payment of just debts, and, to the extent of the unjust portion of the claim underlying the judgment, exonerate the real estate from the charge of those debts; and, second, to reduce the amount of money to be made out of the real estate. This court cannot sit in judgment upon the lawful acts of other tribunals, and review the conduct of those tribunals, to see whether, in the exercise of their rightful powers, they have committed error, either in law or in fact; but its power to give relief against a judgment which

has been procured by fraud or imposition upon another court is beyond all question. *Glover v. Hedges*, 1 N. J. Eq. 119; *Boulton v. Scott*, 3 N. J. Eq. 236; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Reeves v. Cooper*, 12 N. J. Eq. 223, 498; *Stratton v. Allen*, 16 N. J. Eq. 220; *Doughty v. Doughty*, 27 N. J. Eq. 315, 28 N. J. Eq. 531; *Railroad Co. v. Titus*, 28 N. J. Eq. 269; *Mechanics' Nat. Bank v. H. C. Burnett Manuf'g Co.*, 33 N. J. Eq. 486; *Cutter v. Kline*, 35 N. J. Eq. 534; *Herbert v. Herbert*, 49 N. J. Eq. 70, 22 Atl. 789; *Id.*, 49 N. J. Eq. 566, 25 Atl. 366. It deals with the consciences of the parties to a judgment, and will inquire whether those parties, or either of them, have intentionally withheld or concealed from the court in which the judgment was rendered any fact which, if disclosed, would have shown that there was either no cause of action or no warrant for the amount of the recovery. *Doughty v. Doughty*, *Railroad Co. v. Titus*, *supra*. In the present case the charge is that both parties to the judgment colluded to so control the proceedings in the law court, and conceal from that court pertinent facts, as to procure an unjust judgment which could be used to, in effect, defeat the will of Samuel R. Syms, and, incidentally, the payment of the complainant's legacy. It appears that William J. Syms, of the city of New York, died testate on the 2d of April, 1889, leaving a large estate. He had no children. By his will he bequeathed to each of his brothers, Samuel R. Syms and John G. Syms, and to his sister, Mary E. Serrell, a legacy of \$50,000, and, after making sundry other legacies, among which was one of \$10,000 to his nephew Parker Syms, the son of his brother Samuel R., he disposed of the residue of his estate to his widow, Catharine E. Syms. His widow, his brother Samuel R., Dr. McBurney, and Mr. Henry C. Tucker were respectively appointed executrix and executors of the will. The will was admitted to probate by the surrogate of the city and county of New York on the 22d of April, 1889, and the nominated executors and executrix qualified, and assumed the burden of the administration of the estate. It appears that Parker and Robert Syms, the sons of the executor Samuel R. Syms, shortly after the probate, determined to contest the will, and, because they were not heirs at law or next of kin to their uncle, sought the co-operation of their father, and their uncle, John G. Syms, and aunt, Mary E. Serrell. Their father, after some consideration and conference with counsel, refused to take part in the contest, because of his executorship, and their uncle, John G. Syms, did not enter it because he had been paid a portion of his \$50,000 legacy, which he was unable to return. Mrs. Serrell hesitated for a time, but finally, upon the urgent solicitation of her nephews, Parker and Robert Syms, consented to become the contestant. She insists that it was understood that the contest was

to be made for the benefit of her brothers and herself, and that she and they were to share equally in whatever profit should result from it, and, in case of an unsuccessful and fruitless litigation, were to equally bear the losses; that her brothers were not to appear personally in any agreements or negotiations, but were each to be represented by a son; that at first it was understood that Parker Syms should represent his father, but afterwards Robert was substituted professionally with the executor Dr. McBurney, and his active participation in a suit against the will might be resented by Dr. McBurney in such a way as to disturb their amicable relations. Besides, as has been noted, he was a legatee of the will to be attacked. In behalf of John G. Syms, his son George N. was to act. As will presently appear, the defendants deny the truth of this insistent, taking the ground that Robert Syms acted for himself, and not for his father. The contest was commenced late in April, 1890, and on the 7th of May Mrs. Serrell and her nephews, Robert and George, entered into an agreement in writing with one Bomelsier, a lawyer of the city of New York, by which Mr. Bomelsier was intrusted with the management of the litigation for a fee contingent upon its success and the amount of recovery. In this agreement Mrs. Serrell and her nephews were parties, apparently in their own right, and, by recital, Mr. Bomelsier was styled "their" attorney. About the same time a paper was presented to Mrs. Serrell by either Parker or Robert Syms for her signature, whereby she was to bind herself, among other things, to share the profits of the contest with her nephews, Robert H. and George N. Syms. This paper Mrs. Serrell refused to sign, because, she says, she had verbally promised to divide the profits with her brothers, and was unwilling to renew that promise in writing, or to sign any paper which would apparently recognize the brothers' sons as entitled in their fathers' stead. Very soon after the agreement with Mr. Bomelsier was signed, negotiations were had for a settlement of the contest, which, early in June, resulted in a compromise, whereby, upon the payment of \$175,000 to Mrs. Serrell, the litigation was discontinued, and, to effectuate the compromise, general releases were given by Mrs. Serrell, and also her brothers, Samuel R. and John G., not only to the residuary legatee and devisee of William J. Syms, but also to the estate of William J. Syms and the executors of his will. Prior to the 7th of June the \$175,000 was paid to Mrs. Serrell, and, after she had disbursed therefrom \$27,262 for the expenses of the litigation, she divided the remaining \$147,738 between her brothers and herself, to each \$49,246. At the time of payment, because she feared that by her contest she had incurred the displeasure and resentment of Catharine E. Syms, she exacted an agreement with her brothers, which Samuel drew

with his own hand, whereby, to use the language of that document, "in consideration of the division of money obtained by said Mary E. Serrell in compromise of the contest of the will of their brother W. J. Syms, and of other valuable consideration," they agreed "that, in case Mrs. Catharine Syms, widow of their late brother W. J. Syms, should give, by will or otherwise, to either of the parties hereto any sums of money or property, at any time, they will share the same equally with each other, the intent being that the parties hereto shall be equally benefited by any gifts from her or proceeds from her estate." Samuel R. Syms was then peculiarly embarrassed by pressing obligations, among which was an indebtedness of \$30,000 to his sister, Mrs. Serrell, and in urgent need of money. When Mrs. Serrell paid him a share of the profits of the compromise she made the payment by giving him the difference between the \$49,246 and his indebtedness to her, and canceled that indebtedness. She testifies that when she promised to pay her brother Samuel one-third of the amount to be realized from the contest he had declared that he would not assist in the litigation, but, as executor, would, on the contrary, resist it; also that he did not claim a right in any portion of the moneys that might be realized through the contest, but at the same time he said that his sister could do as she pleased in paying part of those moneys, and, if she should pay him anything, such payment would be her free gift. She says that it was with the understanding that she was to pay him one-third of the net proceeds that she went into the contest. Both Parker and Robert Syms deny that it was understood as Mrs. Serrell claims, and in Robert's behalf they assert that, after their father and uncle John had refused to become parties to the contest, their aunt expressed a willingness to go into the contest for the benefit of herself and all her nephews and nieces, and afterwards agreed to go into it with Robert and George individually, and not as representatives of others. They also testify that, before Mrs. Serrell paid their father, Robert requested the father to go to his aunt and get the money, and, to properly equip him for his errand, gave him a written demand upon Mrs. Serrell for it. It does not appear that such a demand was delivered to Mrs. Serrell, and, although she was not called upon to deny its receipt, I think that a declaration of Robert, made some time after the payment, that she had "nothing to show" to protect her against a suit by him for the money, (to which I shall refer in another connection,) sufficiently establishes that it was not delivered to her. Upon hearing of some similar declaration to that which has just been stated, Mrs. Serrell demanded that her nephews, Robert and George, execute a release to her, a draft of which she had prepared and sent to each of them. That release was as follows:

"Bayonne, July 1st, 1890.

"We, the undersigned, having entered with our aunt, Mrs. Mary E. Serrell, into an agreement with Louis Edwin Bomeisler, whereby said Bomeisler was to act as our attorney of record in the contest of the will of William J. Syms, and in which agreement we bind ourselves to pay the said Bomeisler certain sums of money, contingent on a successful result of the contest or of a compromise, and, as the aforesaid contest resulted in a compromise, and as our aunt, Mary E. Serrell, has paid said Bomeisler in full, and also paid all other disbursements, as was agreed upon, and made such other division of the proceeds of the said compromise as agreed upon:

"Now, therefore, we, the undersigned, do, for ourselves, our heirs, executors, and assigns, forever release our aunt, Mary E. Serrell, from all obligation in this matter."

George signed the release as it was prepared, but, before Robert signed it, he had a conversation with his father, as is hereafter stated, and then, changing the words "as agreed upon," following the word "compromise," at the end of the first paragraph, to the words "as was satisfactory," executed the paper.

Mrs. Serrell is corroborated in important particulars, which tend to show the truth of her insistent, by her two sons and the wife of one of them, and also by her brother John and his son George, both of whom, in substance, testify that their understanding was that Robert and George appeared merely as the representatives of their fathers. The testimony very clearly exhibits that during the entire suit Parker and Robert Syms worked together, and were cognizant of the understanding with their aunt, as they were of every fact in the proceedings of which the above narrative is given. The claim upon which the disputed judgment is founded is made up of the \$49,246 paid by Mrs. Serrell to Samuel R. Syms, with interest thereon, and items, not now disputed, amounting to less than \$4,000.

The executor Parker Syms pleaded the general issue to his brother's declaration, and the case, instead of being tried in open court by a jury, was sent to a referee, before whom six witnesses were produced,—the plaintiff, his mother, his two sisters, his brother-in-law, and Mr. Bomeisler. No witnesses were produced in behalf of the defendant. The defendant appeared by counsel before the referee, and that counsel cross-examined the plaintiff's witnesses in such a manner that it is impossible to read the cross-examination without an abiding conviction that it was intended to aid the plaintiff's case, rather than to defend against it and defeat it.

Of all the documents referred to in the statement of facts above given, only the agreement with Mr. Bomeisler respecting his contingent fee was put in evidence. In that

agreement, it is remembered, Mrs. Serrell and her nephews styled Bomeisler as "their" attorney. The proposed agreement by Mrs. Serrell to share the profits of the litigation with her nephews instead of their fathers, which Mrs. Serrell refused to sign, was not referred to. Neither the release by Samuel R. Syms and his brother John to the estate of William J. Syms and his residuary legatee, Catharine E. Syms, nor the agreement between Mrs. Serrell and her brothers to share any proceeds or gifts from Catharine E. Syms or her estate, nor the release of Robert and George Syms to Mrs. Serrell, were produced. The plaintiff testified, as an excuse for the nonproduction of Mrs. Serrell as a witness, that she was then ill, and absent from home; and that excuse was suffered to account for her absence, no application being made to continue the case until her attendance could be had. Neither she nor her sons nor her daughter-in-law nor John G. Syms nor George N. Syms were produced by the executor, although the case abundantly discloses that they were known by him to be most material witnesses in his behalf. Although the executor was sued in a representative capacity, he made no objection to the plaintiff being sworn in his own behalf, and testifying both to conversations and transactions with his decedent. Indeed, it is difficult to see how the case could have been more carefully managed to support the plaintiff's claim, and exclude from the court's consideration the insistent of Mrs. Serrell that she agreed to give the \$49,246 to her brother Samuel, and did fulfill her promise, and that she always persistently refused to recognize any right in Robert to share in any portion of the compromise. Coupled with this indicia of collusion should also be mentioned the significant facts that Robert Syms, as though anticipating the recovery of a judgment, failed to qualify as executor of his father's estate, and his mother, as though anticipating the exhaustion of the estate by the debts, dissented to the acceptance of the provisions of her husband's will in lieu of dower,—which are urged as indicative of a preconcerted design. If it were within the power of this court to afford the complainant relief against the judgment upon the establishment merely of collusion between the parties to it, in pursuance of which important evidences were intentionally withheld from the court, particularly where that collusion is coupled with the fact that the defendant in the judgment occupies a position of trust and confidence, as executor of his father's will, to each of the legatees thereunder, which demands from him the exercise of a more scrupulous fidelity than such collusion will admit of, I could have little hesitation in granting it relief. But this court's jurisdiction obtains in such a case as this only upon the establishment of fraud, and to establish that the proofs must show, not only collusion and the intentional concealment of evidences,

but also that the evidences withheld, if they had been presented to the law court, would clearly have been sufficient to defeat the plaintiff's suit. In other words, it must clearly appear that the collusive acts have done injury to the complainant. It is not enough that they create doubt as to the validity of the claim, and present a contestable case. *Herbert v. Herbert*, (on appeal,) *supra*.

This brings me to the consideration of the defendants' proofs touching the merits of Robert's claim. At the point in her testimony where Mrs. Serrell asserts that she refused to agree to divide the proceeds of the compromise with her nephews, she is corroborated by her children, and directly contradicted by her nephews, Robert and Parker, and by Mr. Bomeisler. Besides that contradiction, the defendants testify that Samuel R. Syms went to his sister, as the agent of his son Robert, armed with that son's written demand for the money, and, after being paid, acknowledged to that son that he had received the son's money, and thereafter followed that acknowledgment by repeated avowals that the money he had received from his sister belonged to Robert. Parker Syms, corroborated by Robert, testifies that he and Robert were at their father's house when the father returned from Mrs. Serrell's, and that Robert, addressing the father, said, "Did you get my money?" to which the father replied: "Of course I did. I got every cent of it, as I told you I would;" and then proceeded to explain that the payment was not all made in cash. The testimony as to the declarations which followed this admission by Mr. Syms is this: Mrs. Sledler, a sister of Robert, states that the night before her father was stricken with apoplexy, from which he died, he discussed an attack that his co-executors of his brother's will were making upon him for complicity in the contest of that will, and said, "I am prepared to go into any court of law, and prove that I have never derived any benefits and received any moneys under that suit whatever." Of the same discussion the husband of this witness testified, respecting Mr. Syms' declarations, as follows: "He said that he was sure to beat them in this contest,—he was sure to vindicate himself; that they could not, by any possibility, show that he had any parcel or participation in the suit brought by Mrs. Serrell, or the revocation of the probate of the will of W. J. Syms; that he had received no part of the money; that, if they pointed to any money that had been paid to him by Mrs. Serrell, he could satisfactorily prove that that was not his money; that was Rob's money; that he got that money from Mrs. Serrell on Rob's order; that it was not his money at all," etc. Another witness testified that upon an occasion, some time after the compromise, at the seashore, Robert said to his father that Mrs. Serrell had paid the father by his (Robert's) authority, but

that she had nothing to show for her payment, and consequently he could sue her and make her pay the money over again; and then asserted that if he should send his aunt the release which she had demanded from him he could hold his father accountable for the money which the aunt had paid, and his father, after deliberating, said, "Yes, that is so." A real-estate agent testified that in conversation with Samuel R. Syms about some mortgages Mr. Syms remarked that he had received \$100,000 from his brother's estate, part of which belonged to one of his sons. Two witnesses speak of a time when Robert thought of using some of the money paid to his father by Mrs. Serrell in a mining venture, and say that, while Mr. Syms strongly advised against such use of the money, he at the same time admitted that his son had the right to it. Mrs. Syms, Robert's mother, testifies that her husband frequently spoke of Mrs. Serrell's payment to him as Robert's money. To still further sustain their position by discrediting Mrs. Serrell's testimony, the defendants produce an affidavit made by their aunt early in 1892, after her brother's death. It appears that the affidavit was solicited by Parker Syms to enable him, as executor of the father's estate, to secure the father's commissions as executor of W. J. Syms' will, and that it was represented to Mrs. Serrell that such an affidavit was needed, not only to secure the commissions, but also to protect her brother's memory by refuting the charge that he had been unfaithful to his trust by complicity in an attack upon the will he had sworn to execute. The affidavit was prepared and sent to her to subscribe and swear to. Among other things, it stated that she and George N. and Robert H. Syms had agreed to share equally in the expenses and profits of the will contest, and that, pursuant to the agreement, she had paid \$49,246, the share of Robert, to Robert's father, by Robert's consent and direction. To these facts she swore. The affidavit also contained the further statement that the payment to Samuel was in trust for Robert, and that Samuel did not in any manner aid or abet the will contest, and did not receive any part of the money in pursuance of an agreement by which it was to be paid to him, and was not at all financially interested in the contest. These statements she struck out of the affidavit. That which she swore to certainly conveyed the impression that Robert had agreed with her independently of his father, and in his own right, and that the money paid to the father was paid in obedience to Robert's order and consent, and it is inconsistent with the testimony she has given in this suit. Although its consideration in connection with that part of the proposed affidavit which she rejected and the evidence in this suit suggests that it was meant to be evasive and misleading, it must, in a great degree, destroy the confidence with which Mrs. Serrell's testimony might other

wise be accepted. I think that it is but just that I should here refer to the following circumstances, which appear to me to strongly point to the present attitude of Mrs. Serrell as sincere: Immediately after the compromise of the will contest Mrs. Serrell made Parker and Robert a present of \$20, which Parker acknowledged by a letter dated June 21, 1890, in this language: "I quite agree with you that we should be mutually thankful and congratulate ourselves on the success of the legal affair. I am very glad it is over, and that it reached so satisfactory an end, for it was certainly like getting that amount out of the fire. Father sent me a check from you for \$20 for Robert and myself. Many thanks; it will cover our expenses in the matter." And the following Christmas she made each of them another present, which evoked from their mother a letter containing these expressions: "It was especially generous of you to give Parker and Robert such an expression of your appreciation. We all gratefully recognize the fact of all we owe you in the great comfort we enjoy, and that you surely are not the one to need express an obligation, since, while the boys worked earnestly and very hard, yet all their efforts would not have availed at all without you. None of our family forget all the comfort, and especially the relief from care and anxiety, you have so brought to your brother and his family, in which I am glad the boys could aid to a degree." I think it is pertinent in this connection to ask whether Mrs. Serrell would have been thus grateful to her nephew Robert if she had known that by his work he had gained nearly \$50,000. Amidst the conflicting evidences, it is difficult to determine precisely what merit the claim upon which the judgment is founded has. It is a question of the credibility of witnesses, and disputable, whether or not Mrs. Serrell agreed to divide the profits of the will compromise with her nephews, Robert and George. And beyond this question, if it be resolved in the affirmative, is the important inquiry as to the capacity in which Samuel R. Syms took the money. Did he take it for himself or as the agent of Robert? If he took it in his own right, then there was no privity of contract between him and his son, and, even though the money was rightly the property of the son, the son was without cause of action at law. But, whatever may have been the intention of Mrs. Serrell when the payment was made, if the money rightfully belonged to Robert, and Samuel recognized the right of his son to it, and, as his agent, received the payment thereof, the son would be entitled to subsequently recover it from him or his estate. *Sergeant v. Stryker*, 16 N. J. Law, 464; *Nolan v. Manton*, 46 N. J. Law, 231; *Westcott v. Sharp*, 50 N. J. Law, 392, 13 Atl. 243. It is upon this inquiry that the testimony as to the written demand of Robert and the declarations of Samuel R. Syms

pertinently bear. After a careful scrutiny of this testimony, I reach this conclusion, which is sufficient for purposes of this case, that, if the testimony does not sustain Robert's claim, it at least fails to demonstrate that it is without validity. Because of the collusive appearance of the judgment, the suspicious environments of its recovery, and the dependent character of the complainant, I would be glad to so control it that its merits might be considered by a jury, but, as I understand the decision of the court of errors and appeals in *Herbert v. Herbert*, such a disposition in this case is not within my power. I am therefore constrained to dismiss the complainant's bill.

(52 N. J. E. 349)

WATSON v. WATSON.

(Court of Chancery of New Jersey. Feb. 10, 1894.)

DIVORCE—DESERTION BY WIFE—WHAT CONSTITUTES.

Desertion, as a statutory ground, is not shown by the mere withdrawal of a wife from her husband's bed, he submitting thereto, where they continued to appear together at the table of the boarding house at which they were, and consulted indirectly as to the needs and comforts of their children at school, the wife caring for their rooms and linen, while the husband supplied her with money, and paid her board.

Suit by George E. Watson against Mary L. Watson for divorce. On exceptions to master's report, advising that the petition be dismissed. Exceptions overruled, and petition dismissed.

Gilbert Collins, for complainant.

McGILL, Ch. The petitioner and defendant were married in 1871, and from that time until 1890 lived together as husband and wife. In April, 1890, upon the occasion of a disagreement, at which the husband, as he says, merely scolded her, the wife withdrew from his bed, and declared that she would never occupy it with him again. She thereupon removed to the front or sitting room of the two apartments they occupied in a boarding house, locked the door between the apartments, and made her bedroom there until July, 1892, when she took board at another place. I find that during the time in question, although the communications between the husband and wife were rude and severely constrained, they nevertheless admitted of indirect consultations concerning the needs, comfort, and welfare of their two daughters, who were away at school. The wife also cared for their rooms and linen, and the husband gave her money for her wants, and paid her board. They appeared at meals at the same time, and at the same table, so that their disagreement did not manifest itself to other boarders in the house. The petition was filed early in the year 1893, and alleges, as ground for divorce, a willful, continued, and obstinate de-

sertion by the husband for two years. To cover that statutory period, the petitioner seeks to include a portion of the time prior to July, 1892, and hence the question is presented whether the withdrawal of a wife from sexual intercourse with her husband, assuming that there was no just cause for the withdrawal, alone constitutes "desertion," within the meaning of the statute.

A single word as to a suggestion of acquiescence on the part of the petitioner. It does not appear that he, with determined earnestness, ever sought the restoration of his marital rights. He appears rather to have submitted to the position in which his wife's determination placed him, acting as one who, for cause, acquiesces in the justness of a decision against him, basing whatever feeble effort he may have made in that direction upon consideration for their children. Upon her part, on the contrary, the attitude appears to be one of distress, and yet, filled with consciousness of power which the right gives, she fearlessly demands her support from him. I think, however, that this appearance of acquiescence of the husband rests too largely upon inference and conjecture to be made the basis of a decision. I prefer to assume that there was no acquiescence, and to meet the question first stated. I have read with interest the elaborate argument of Mr. Bishop, in his work on Marriage, Divorce, and Separation, (volume 2, § 1676 et seq.) in favor of an affirmative answer to this question as the "better opinion," but I am unwilling to accept it as the true construction of our statute. The word "desertion," I think, is used in the sense of "abandon," to the extent that the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her. It would, I think, degrade the marriage relation to hold that it is abandoned when sexual intercourse only ceases. The lawfulness of that intercourse is perhaps a prominent and distinguishing feature of married life, but it is not the sum and all of it. The higher sentiment and duty of unity of life, interest, sympathy, and companionship have an important place in it, and the thousand ministrations to the physical comforts of the twain, by each in his or her sphere, in consideration of the marriage obligation, and without ceaseless thought of pecuniary recompense, fills it up. These latter factors may possibly, to some extent, exist in other relations of life, but not in completeness. They are all necessary to the perfect marriage relation. My opinion is that our statute means that divorce may be had when substantially all of these duties and amenities shall have been abandoned by the guilty party, willfully, continued, and obstinately, for two years, and not until then. In other words, the desertion must be complete, not partial; and, when the party accused remains in discharge of any duties which rise in value above mere pretense

and form, the desertion which the statute contemplates does not exist. This I understand to be the meaning accorded to the word "desertion" in the statute of Massachusetts. *Southwick v. Southwick*, 97 Mass. 327; *Magrath v. Magrath*, 103 Mass. 577; *Cowles v. Cowles*, 112 Mass. 298. In the present case, I find that, within two years prior to the filing of the bill, the defendant did remain with her husband, in the discharge of, at least, a substantial portion of his duty to him. I will sustain the master in his conclusion, and dismiss the petition.

WORKINGMEN'S MUT. BLDG. LOAN ASS'N v. MCGILLICK et al.

(Court of Chancery of New Jersey. Feb. 6, 1894.)

MORTGAGES—FORECLOSURE—SHERIFF'S SALE—LEGALITY.

The attorney for defendants, who had a three-fourths interest in lands sold on foreclosure, attended at the time and place of sale 12 times, but the sale was adjourned each time in the interest of complainant. He intended to attend on the day the land was sold, and bid on the property, and so informed complainant's attorney the evening before; but, being busy at the time, the hour of sale passed without his noting it until about 10 minutes after the sale, when such attorney informed him it had been made. He endeavored to have the land re-offered, but failed. Twenty minutes after the hour fixed for the sale, the sheriff sold the land, to a party interested in the property, on a single bid for about half its value. *Held*, that the sale should be set aside.

Action by the Workingmen's Mutual Building Loan Association against Ann McGillick and others to foreclose a mortgage, in which there was judgment for plaintiff, and a sale of the mortgaged premises on execution. Part of defendants moved to set such sale aside. Motion granted.

Allen H. Strong, for the motion. Van Cleef, Daly & Woodbridge, opposed.

BIRD, V. C. Courts, in disposing of questions arising upon judicial sales, have two objects in view, namely, to give character and integrity to judicial sales in the public mind, and also to secure the highest and best price for the property sold. On the one hand, this justifies bidders in feeling assured that their claims will not be trifled with, and also protects the property offered for sale from being sacrificed. Sound public policy involves these two conditions. With this in mind, I have come to the conclusion that the objections to the sheriff's sale in the case in hand were well taken. It appears that Mr. Weigle represented the complainant, and Mr. Allen H. Strong represented four of the defendants, and Messrs. Van Cleef, Daly & Woodbridge represented another interest. The property was first advertised for sale by the sheriff on the 23d day of August last, and was adjourned from week to week, at the request of the last-named counselors, in

the interests of the persons to whom the property was struck off, till the 22d day of November following. Mr. Strong was present at the place at which the property was to be offered for sale on the first day named, and was in attendance upon every day to which the sale was adjourned, until the last-named day, when the property was offered for sale, and struck off to Meyer. Mr. Strong was interested in behalf of his clients, who owned about three-fourths in interest of the fee. He intended to be present when the property was offered for sale. On the evening before the sale he met Mr. Weigle, the solicitor of the complainants, and informed him that he intended to be present the next day, and to bid on the property. The usual time for making sales by the sheriff had been 2 o'clock. Mr. Strong was unexpectedly detained with business in his office, and 2 o'clock arrived and passed without his noting the time until nearly or about half past 2, when Mr. Weigle informed him that the sale had taken place. The sale was for \$930, being less than \$4 above the amount of the decree and all costs. It is claimed, upon the part of the objectors to the confirmation of this sale, that the property is worth about \$2,000, and this claim has not been disputed. That Mr. Strong intended to be present, and to bid, in the interests of his clients, beyond the amount for which the property was struck off, is perfectly clear. It is also perfectly clear that the property was struck off to Meyer for very much less than its real value, even at a sheriff's sale. It is not disputed that the purchaser attended the sale and made his bid in the behalf of one who claims, directly or indirectly, an interest in the land. I have said that Mr. Strong intended to be present at the sale, and to bid for the property in behalf of his clients. They had employed him for this purpose, and undoubtedly relied upon him as they had a right to. His insistence is that the sale was a surprise to him, and certainly it was to his clients. He therefore insists that his clients ought to be relieved therefrom by refusing to confirm the sale.

The question, therefore, is whether or not, under the circumstances, considering the surprise, the inadequacy of the price, and the fact that the purchaser did not buy in his own interests nor for a stranger, the objections to confirmation ought to prevail. The surprise, I think, was complete. It cannot be said that there was any negligence or inadvertence, when regard is had to the trust most clearly arising from the accommodations afforded to each other by the respective counsel in this case. Counsel had a right to expect that no sale would take place so hastily without his first being informed that it was about to take place. The complainant's counsel knew that Mr. Strong had been in attendance at least 12 times, once each week during that number of weeks, with the view of purchasing the property, and had inform-

ed him particularly, the night before the sale, that he expected to be present and to bid. This view is enforced by the fact that neither the counsel of the complainant nor the counsel of the purchaser were present at the hour named for the sale, nor did either of them appear until they were sent for. It appears that the purchaser wanted to return to New York, his place of business, by the 2:17 train from New Brunswick, and urged that the sale might take place that he might do so; but when he procured the attendance of his counsel it was too late for that purpose, and, when the presence of the counsel of the complainant was had, it was at least 2 o'clock and 20 minutes. In the mean time his counsel told him that he could not leave New Brunswick for New York until 3:10, but that he could buy the property, and would have time enough to examine it, after buying it, before the train left. Counsel for complainant says that just as soon as he entered the sheriff's office the sheriff commenced reading the conditions of sale, and, after reading them, offered the property for sale immediately, and that, upon the single bid being made by Meyer, the property was struck off to him. He then went to Mr. Strong's office, (he says it was not yet half past 2,) and informed him of the sale, and Mr. Strong immediately sought out Mr. Meyer with the view of having the property again offered for sale, but the latter refused, and insisted upon the benefit of his bid.

The inadequacy of the price is also quite influential. The purchaser not being a stranger, in the sense in which that phrase is used in such proceedings, I think it would be a great infringement of the rule above stated to deprive the objectors to the confirmation of this sale of so large a portion of this land, or of its value, under the circumstances, and to give it to the real purchaser. It seems to me that the law which provides that it shall appear that every sale made by a judicial officer is made for the highest and best price that can be procured at the time for the same, when properly understood, meets this case, and protects these objectors. While, technically speaking, the sheriff may have performed his duty, yet, when the court comes to take all of the facts into account, it established, beyond any dispute, that the property did not sell for the highest and best price that could then be obtained for it. I do not mean to insist that the sheriff had any other duty to perform, but it is very plain to my mind that those who knew the interests of Mr. Strong in the case had a duty to perform if the sheriff had not. They knew perfectly well that, if Mr. Strong were present, the property would sell for a higher and a better price, or, if they did not have such knowledge as led to a conviction, it seems to me they had every reason for believing that he intended to bid more for the property. The cases which I have consulted I think sustain the views above expressed. Seaman v.

Riggins, 2 N. J. Eq. 214; Wetzler v. Schumann, 24 N. J. Eq. 60; Bank v. Sprague, 21 N. J. Eq. 458; Hayes v. Stiger, 29 N. J. Eq. 196; Brown v. Elliott, 17 N. J. Eq. 353. Upon the payment of the costs of sale and of this motion by the objectors, a resale will be ordered. I will so advise.

(53 N. J. E. 251)

GLORIEUX et al. v. SCHWARTZ.

(Court of Chancery of New Jersey. Feb. 7, 1894.)

CHATTEL-MORTGAGE SALE—INJUNCTION BY JUDGMENT CREDITORS—WHEN WILL LIE—EXECUTION—LEVY—EVIDENCE—BILLS OF SALE—VALIDITY.

1. Judgment creditors cannot enjoin the sale of their debtor's property under void chattel mortgages in the absence of proof of levy of their executions on such property.

2. A receipt of the sheriff for the amount of the sales of the goods in dispute by him is insufficient evidence of a levy on such property.

3. Judgment creditors took bills of sale from the debtors of goods to secure the debtors against execution, and to secure to them the possession and use of such goods to enable them thereby to pay the judgments. The bills provided that, in case of default, the creditors might enforce the judgments by way of execution. *Held*, that the creditors had no such right to the possession of the property as would enable them to enjoin the sale of the goods on void chattel mortgages given other creditors.

4. Bills of sale which provide that the grantors shall continue in actual possession and use of the goods are void as to other creditors.

Bill by William L. Glorieux and others against Alonzo Schwartz to enjoin the sale of goods on certain chattel mortgages executed by debtors of plaintiffs. Dismissed, and injunction denied.

F. T. Johnson and Samuel Kalisch, for complainants. Mr. Kighearn and J. Fleming, for defendant.

BIRD, V. O. This is a conflict between the complainants and the defendant as to the priority of right to certain goods and chattels named in the pleadings. The complainants claim by virtue of certain judgments and executions and sale thereunder, and the defendant by virtue of two chattel mortgages. One of these mortgages is dated and recorded long before the judgments were obtained, and the other afterwards. The complainants also claim by virtue of two bills of sale which were executed intermediate the execution of the chattel mortgages. It is said that an imperfection in the jurat which was taken before a notary public, out of the state, renders both chattel mortgages illegal as against the complainants. The jurat and signature on one, and all other additions, are in these words and figures: "Sworn and subscribed before me, at New York city, this 6th day of June, A. D. 1887. F. M. Haviland, Notary Public, (201,) City and County of New York, 22 Park Place,"—to which was affixed an impression usually called a "seal," in these words: "Frederick M. Haviland, Notary Public, New York;" and

on the other, in these words and figures: "Sworn and subscribed before me, at Carmel, N. Y., this 6th day of August, A. D. 1891. George E. Anderson, Notary Public,"—to which is affixed an impression usually called a "seal," in these words: "George E. Anderson, Notary Public, Putnam Co., N. Y." To this affidavit is affixed a certificate of the clerk of the county that the said Anderson was a notary public in and for said county and state of New York, and duly authorized, etc.

The first inquiry necessarily is, have the complainants established such a lien upon the goods and chattels in question as will justify them in resisting the claim of the defendant upon his chattel mortgages, or either of them, on the ground of any defect in the proof or other statutory requirements? It is not sufficient to say that he obtained a judgment to acquire a lien upon personal property. It is essential that there should be an execution. See Revision, p. 392, § 18. While it is alleged that there were execution and levies upon several judgments, there has been no proof whatever thereof. A paper was introduced in evidence purporting to be the receipt of the sheriff or undersheriff for the amount of the sales of the goods and chattels in question by him, at the price of \$1,600; but this is the only evidence, if it may be considered any evidence whatever, of any execution or any sales by any sheriff. Evidently, no title could be passed in this manner, if nothing else appeared to support the claim thereto.

It seems to me that the claim under the bills of sale give no better support to the complainants. The best interpretation that I can give to them is that they were prepared and executed with the sole design of securing the defendant in the judgments against an immediate execution of those judgments; or, in other words, to secure the defendant in such judgments in the possession and use of the goods and chattels in question, in the hope or expectation of their being able, by such use or possession, to pay off by installments the amount of said judgments. They cannot be read as absolute bills of sale in any event, or for any other purpose than as a transfer to the complainants of the said goods and chattels as collateral security for the payment of said judgments, if anything like so much can be said in that behalf; for it was expressly provided therein that in case of default, or in case of other execution creditors attempting to enforce their claims, or other similar contingencies, then the complainants might enforce their judgments by way of execution. It is true that the language of the agreement is that they assign, transfer, and set over unto the complainants the said goods and chattels; but, as above intimated, the only consideration or the real object was to give Heage and Butz the power, by use and possession of the goods, to pay and discharge the judgments,

and of preserving, as far as possible, the rights of the complainants, as judgment creditors, to proceed under their judgments in case of default. That this is the true interpretation of this paper I think would be determined if the complainants were to bring an action of trover or replevin against Heage and Butz. The application of this test would result in favor of the defendants; for, without taking other steps, there is nothing to show that they are entitled to the immediate possession. They can only proceed under their judgments. Such test, however, would not show that the agreements were void, as between the parties thereto, when the real object of them should be considered in the light of the interpretation above given to them, which is that they were entered into for the relief and benefit of the judgment debtors, and also in aid or support of the judgment creditors, and not that the judgment creditors should be permitted to take possession of the goods without reference to his judgment and execution, but then only in case of the default mentioned in the agreements. As first above stated, it does not appear by any legal or competent evidence that any such executions were ever issued. Therefore, it will be seen that the complainants have no lien, and consequently no standing in this court. It might also be well said that their claim under these bills of sale must give way to the claims of creditors when considered in the light of the rules laid down in *Twyne's Case*. The complainants, who now claim to be the vendees under such bills of sale, not only did not take possession, but they expressly provided that the "vendors," if they may be so styled, should continue in actual possession and use of the goods and chattels. If I am right in these conclusions, it is not necessary for me to inquire as to the validity or sufficiency of the jurat and certification thereto by the notaries in New York. This question can only arise when the complainants have established a lien, by execution or otherwise, upon the goods in question. I will advise that the injunction prayed for be denied, and that the bill be dismissed, with costs.

(160 Pa. St. 18)

HAWLEY v. HAMPTON et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

EXEMPTIONS—PROPERTY OWNED JOINTLY—COLLATERAL SECURITY.

1. Joint owners of stock are not entitled to have it set aside under the exemption law as against a joint debt.

2. Stock put in the hands of a creditor as collateral is not, as against the debt for which it is pledged, "property owned by or in possession of the debtor," within the exemption law.

Appeal from court of common pleas, Montgomery county; H. K. Weand, Judge.

Petition by Samuel D. Hawley against Joseph H. Hampton and George J. Humbert to set aside an appraisement made to each of them under a claim of exemption. From a judgment setting it aside, defendants appeal. Affirmed.

The opinion of the court below is as follows:

"The plaintiff is the holder of a note which reads as follows: 'Norristown, Pa., Dec. 1st, 1892. Four months after date we, or either of us, promise to pay to the order of S. D. Hawley, at First National Bank of Norristown, Norristown, Pa., seven thousand dollars without defalcation, for value received, having deposited herewith (140) one hundred and forty shares capital stock of the Norristown Steel Co. as collateral security, which we authorize the holder of this note, upon the nonperformance of this promise at maturity, to sell, either at the brokers' board or at public or private sale, without demanding payment of this note or the debt due thereon, and without further notice, and apply proceeds, or as much thereof as may be necessary, to the payment of this note and all necessary expenses and charges, holding us responsible for any deficiency. Joseph H. Hampton, Geo. J. Humbert.' The certificate for the shares stood in the name of 'Hampton & Humbert,' and it was transferred in blank by 'Hampton & Humbert,' and was and is in custody of plaintiff. Judgment having been obtained upon the note, a *fi. fa.* was issued, and under it the sheriff levied upon the 140 shares of stock, whereupon each defendant made a claim for the benefit of the exemption laws; and the sheriff had appraised and set apart to each defendant 'one-half interest of 140 shares of the Norristown Steel Co., evidenced by certificate No. 418, at \$2.50 per share.' The execution creditor now asks us to set aside said appraisement because (1) 'the 140 shares, etc., being joint property of the defendants, are not subject to appraisement under the exemption;' (2) 'the shares being pledged as collateral for a debt for which said execution is issued, as appears by the record of said court, the same are not subject to an appraisement under the exemption.' The facts show that this was a joint note, given for a joint debt. The certificate shows joint ownership in the stock, and it was assigned as such. Plaintiff, when he accepted the assignment, had a right to assume that the certificate spoke truly as to the ownership. Had he been informed otherwise, he might not have been satisfied with the collateral. There being, then, joint ownership in the stock, the defendants cannot claim the benefits of the exemption law. In fact, it is not capable of division, within the meaning of the exemption law. The appraisement gives each a one-half interest in the stock, which makes them again owners in common. It is not setting apart any specific property to either defendant. We are of

opinion that the cases of *Bonsall v. Comly*, 44 Pa. St. 442, and *Spade v. Bruner*, 72 Pa. St. 57, are conclusive upon the subjects, and that defendants were not entitled to the exemption. We think the second exception must also be sustained. This was not 'property owned by or in possession of the debtor,' for they had assigned their interest therein for the payment of the debt. The plaintiff had such property in the stock as that no other creditor of defendants could levy upon or sell it free from plaintiff's lien. Until his debt was paid, he had the right to dispose of the stock, and appropriate the proceeds towards the payment of the debt, for which it was security. The defendants could waive the benefits of the exemption law, and this they in effect did by their assignment. The act contemplates a case where a creditor attempts to deprive the debtor of his property against his will; but, when the debtor voluntarily passes it over for the very purpose of paying or securing his debt, he has no standing to reclaim it. Otherwise, to secure a debt of \$50 a debtor would have to assign at least \$350 worth of property. The hardship to the debtor of such a rule shows its unreasonableness. The exceptions are sustained, and the appraisements are set aside."

J. P. Hale Jenkins, for appellants. Louis M. Childs and Montgomery Evans, for appellee.

PER CURIAM. The judgment in this case is affirmed on the opinion of the learned judge of the court below. Judgment affirmed.

(159 Pa. St. 622)

**WINTHER v. SECOND & THIRD STS.
PASS. RY. CO.**

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

ACTION FOR PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, a charge rectifying the testimony of defendant's witnesses and characterizing it as the material testimony in the case, "furnishes no ground of complaint, where the testimony of plaintiff's witnesses is so contradictory and unsatisfactory that little reliance can be placed on it.

Appeal from court of common pleas, Philadelphia county; D. Newlin Fell, Judge.

Action by Ernest Winther against the Second & Third Streets Passenger Railway Company for personal injuries alleged to have been caused by a violent ejection from defendant's car. From a judgment for defendant, plaintiff appeals. Affirmed.

The following is the charge of the court and the assignment of error thereto:

"Gentlemen of the Jury: The question involved in this case is almost entirely one of fact. On the 13th day of February, 1889, the plaintiff got on one of the cars of the defendant's line on Oxford street, near Second, for the purpose of riding to his home, in Frankford. At the station on Frankford road he

changed cars, and got on a one-horse car, which went only as far as Allegheny avenue. It appears from the testimony that from this station at Frankford road two lines of cars went out upon the same track; the one-horse car going only as far as Allegheny avenue, and the two-horse car going all the way to Frankford. The pass which had previously been given to the passenger entitled him to take either line of cars, but he could not take the car that went to Allegheny avenue, and after that use the same pass to go on to Frankford. The pass, after he got into the car, was taken up by the conductor, and at Allegheny avenue he was asked to get out of the car. He refused to do so, and was put out by the conductor. There is no dispute as to that part of the case. Nor is it disputed that the plaintiff got on this car at Kensington Avenue station without any inquiry. He got out of the car on which he had been riding, and followed the line of passengers along the platform, and went into a car, without asking questions of anybody. The conductor has testified he stood upon the platform, giving notice to all parties as they came along that his car went only to Allegheny avenue; that before it left the station he went through the car, and collected the fares, and gave the same notice. Be that as it may, in any event it was the duty of the plaintiff to acquaint himself with the rules of the company. If he got on the car without inquiry, and neglected to inform himself, as to where the car was going, and was not misled by the act of the company, he had no greater right, when he was in the car with a wrong ticket, than he would have had if he had got upon the car with all the knowledge which proper inquiry would give him.

"The allegation here is that, irrespective of his right to be in that car, he was injured by the negligent and reckless conduct of the conductor of the defendant company. That, gentlemen, brings you to the consideration of the testimony in this case, which should receive your most careful attention. The plaintiff's statement as to the cause of the injury is this: That at Allegheny avenue he was told the car would go on no further. He asked the conductor to give him back his pass; that was refused. He does not say he was asked for a ticket to get back to the station, (to Kensington avenue,) but that he stood in the car, in the passageway, about three feet from the rear door, hesitating what to do,—whether to get out and take the next car to his home, or go back to the station and make complaint. While standing in that position, facing the rear of the car, the conductor came in from the rear door, and he turned to allow the conductor to pass him, and afterwards turned back to his original position. After the conductor had gone behind,—without any further controversy, without any wrangling,—he violently pushed him against the jamb of the door. He threw out both his hands in order to protect himself.

While in that position, somewhat stooping, the conductor struck him two or three violent blows upon his back with his knee. He was then pushed out upon the platform, and from the platform to the street. That immediately upon receiving these blows he felt a severe pain. That he stood on the curb until the next car came by, and rode to Orthodox street. That he there alighted from the car with difficulty, and called upon some boys to assist him to his home. After receiving assistance for some distance, he was unable to go further, and was taken to the house of a friend, and from there conveyed to his home in a wagon. That, briefly, is the plaintiff's story of this occurrence, as far as it is material for your consideration of the case. That is all the light we have upon it, from the plaintiff's side of the case. Upon the part of the defense, Mr. White, the conductor of the car, has testified that at Allegheny avenue the plaintiff refused to get off, refused to pay a fare back to the station, and when he told him that it was his duty to put him off, and that he would do it or get a policeman, the plaintiff told him to do it; that he then took him from where he was standing, in the front part of the car, by the arm, and conducted him to the rear door; the plaintiff put his one hand against the door jamb; that he removed it, and conducted him out on the platform, down on the street, and across on the other side; that in so doing he used no unnecessary force; that he did not at any time touch or strike him with his knee; that in the car there was no struggle when he went out; there was no resistance; he used some force in pushing him, but only such force as was necessary for that purpose. His statement in that respect is confirmed by three witnesses, Charles Colsher, Frank Stackhouse, and Robert Kerrigan, none of whom have any connection with the company. One of these witnesses, Colsher, was a passenger in the car. He got on the car to come back to the city. He says that he saw all of the occurrence, and that at no time did the conductor kick or strike him with his knee, or use more force than was necessary to push him out of the car, and remove his hands from the door jamb. They all agreed in saying that there was no struggle; that there was no violence, and that there was no kicking; and that the plaintiff got off, and stood upon the pavement until the next car came by. As to what occurred after he got upon the second car at Allegheny avenue, there are three witnesses. Thomas Styles [Sites], the conductor, testified that he got upon the car while it was in motion, and that the horses were trotting; that he went into the car, and sat down with the other passengers, and paid his fare; that his attention was only called to him when near Frankford; the lower part of Frankford, Mr. Slafer got on the car, and stood on the rear platform, talking to him, and then the plaintiff came out, and talked

to Mr. Slafer, complaining that he had to pay two fares; that at the instance of Mr. Slafer, when near Orthodox street, and because of the appearance of the plaintiff, he stopped his car and assisted him off; that he walked from the car down the street as far as he saw him; he saw no evidence of his being injured, and he made no complaint at that time of any injury. Mr. Slafer is a gentleman who is in business in Frankford; who is acquainted with the plaintiff and the conductor. He testified that he got in this car at the lower part of Frankford; while he was talking to the conductor the plaintiff came out of the car, and talked with him; that he said he had had a fuss with the conductor of the one-horse car; that after some further conversation, and as they neared Orthodox street, seeing that the plaintiff was about to get off, he told the conductor to stop; the plaintiff was about to get off the car before it crossed the street; the conductor put his hand upon his arm to restrain him from so doing, at the same time ringing the bell, and held him in that position, to prevent him from getting off while the car was in motion, until the car had stopped on the other side. These witnesses both agreed in the statement that at that time there was no apparent injury of the plaintiff, and that he made no complaints. The conductor is corroborated by the driver in saying that the plaintiff got upon his car while it was in motion, and while the horses were trotting.

"This is the material testimony in the case. From this you must determine, as a matter of fact, whether the plaintiff's injuries were the result of negligent and reckless conduct of the conductor of this car while in the performance of his duty. If they were, he has made out a case which entitles him to recover. If they were not, if his injuries were received afterwards, if they were the result of any other cause, I need not say to you that you are at an end of the case, because the defendant would not be liable. Whether they were or not is a question which you must decide from the testimony. You should consider them under the obligation of duty which rests upon you as men and as jurors, without prejudice, without feeling, unmoved by the sympathy which we all feel for a person who has been injured, but with a simple desire to ascertain the truth. All questions of the weight of evidence, the inferences to be drawn from it, and the credibility of the witnesses, are for you. In view of what has been said in the argument of this case by counsel, I think it is my duty to say this to you, that I see nothing in the conduct of this case, on the part of the defense, or the witnesses who have been called by the defense, to justify the insinuation that these witnesses have been improperly influenced. You have seen them. They appeared to me to be frank,—anxious to tell the truth as they saw it. That is all I have to say to you upon that point.

"If, in considering the whole testimony, you find that the plaintiff's injuries were the result of the negligent and reckless conduct of the conductor, there is one remaining question in the case, and that is the measure of damages. That is compensation the plaintiff is entitled to recover for the loss he has actually sustained; compensation for the pain and suffering that he has endured; compensation for the permanent injuries that he has sustained. I have been asked by the counsel for the plaintiff to say to you that 'a railway company is liable for injuries resulting from the negligent, careless, or reckless conduct of its conductors in removing from the car a passenger, even though that passenger had no right upon the car and refused to pay his fare.' I affirm that point.

"The only question for you to consider here is the question that I have suggested repeatedly to you, which is this: Was the plaintiff injured by the reckless and negligent conduct of the conductor while in discharge of his duty?"

Assignment of error: "The court erred in charging the jury as follows: 'As to what occurred after he got upon the second car at Allegheny avenue, there are three witnesses. Thomas Styles, [Stites,] the conductor, testified that he got upon the car while it was in motion, and that the horses were trotting; that he went into the car, and sat down with the other passengers, and paid his fare; that his attention was only called to him when near Frankford. The lower part of Frankford, Mr. Slafer got on the car, and stood on the rear platform, talking to him, and then the plaintiff came out and talked to Mr. Slafer, complaining that he had had to pay two fares; that at the instance of Mr. Slafer, when near Orthodox street, and because of the appearance of the plaintiff, he stopped his car, and assisted him off; that he walked from the car down the street as far as he saw him; he saw no evidence of his being injured, and he made no complaint at that time of any injury. Mr. Slafer is a gentleman who is in business in Frankford, who is acquainted with the plaintiff and the conductor. He testified that he got in this car at the lower part of Frankford; while he was talking to the conductor, the plaintiff came out of the car, and talked with him; that he said he had had a fuss with the conductor of the one-horse car; that after some further conversation, and as they neared Orthodox street, seeing that the plaintiff was about to get off, he told the conductor to stop; the plaintiff was about to get off the car before it crossed the street; the conductor put his hand upon his arm to restrain him from so doing, at the same time ringing the bell, and held him in that position, to prevent him getting off while the car was in motion, until the car had stopped on the other side. These witnesses both agreed in the statement that at that time there was no apparent injury of the plaintiff, and that he

made no complaints. The conductor is corroborated by the driver in saying that the plaintiff got upon his car while it was in motion, and while the horses were trotting. This is the material testimony in the case.'"

For the purpose of rebutting the evidence of Stites and Slafer by showing that they made statements on a criminal prosecution of the conductor alleged to have injured plaintiff, different from what they testified to at the trial, Dr. J. Ellis Cannon was examined in behalf of plaintiff, and testified as follows: "Q. Did you hear Stites, the conductor of the second car, testify before the magistrate? A. I believe I did; yes, sir. Q. Did not the conductor testify at that hearing that he stopped to let the plaintiff on the car? (Objected to.) Q. What did the conductor testify to, as to stopping or not stopping to let the plaintiff on at Allegheny avenue? A. To the best of my recollection, before the magistrate, Hacket, he testified that he stopped his car to allow Winther to get on." Cross-examined, he said: "Q. Tell us all that Stites testified to that you remember. A. I am not willing to say anything further than I have said, as I don't remember. Q. Why did you say, when you answered Mr. Rothermel's question, that you thought he was examined, and then went on to state what his testimony was? You were asked by Mr. Rothermel whether he testified, and you said you thought so, and then went on to state what he said? A. No, sir. Q. Why did you merely say you thought he was, if you were sure of it? A. I beg your pardon. I said I thought he said. I didn't say I thought he testified. Q. The man has sworn here that he did not testify at all, and was not called. You say you have a distinct recollection of his being called? A. I have a recollection of his being on the stand; yes sir. Q. Tell us what he swore to. A. I don't remember what he swore to, in total. I don't remember all he said. Q. Tell us all you do remember. A. I simply remember his relating the case,—the circumstance of Mr. Winther getting on his car, and taking him to Frankford, and stopping at Orthodox street, and letting him off. That is about the substance of the evidence, but the details I have forgotten. Q. Is that all you remember of it? A. There may be other little things, but they have slipped me. Q. Tell us all you remember that this man swore to, who swears he never was called at all. Give us all you remember of it. A. The details have slipped my memory, so I am not willing to say anything more. Q. Give us the substance of all you remember that this man swore to. A. I have just given you all I remember. Q. I wish you would repeat it. A. I say I remember his relating the circumstance of stopping his car at Allegheny avenue, receiving Mr. Winther as a passenger, conveying him to Frankford, Orthodox, and Paul, stopping his car, and letting him off." Concerning Slafer, he thus

testified in his examination in chief: "Q. Did you hear Slafer testify before the magistrate? A. I did; yes, sir. Q. You were there as a witness yourself, were you not? A. Yes, sir. Q. What did Mr. Slafer testify as to what was told him by Mr. Winther as to his injuries? A. Mr. Slafer said that Mr. Winther said the conductor pushed him off his car and hurt him. That was about the substance. Q. Mr. Slafer testified that Mr. Winther said the conductor pushed him off his car and hurt him? A. Yes, sir; that is what he said. Q. That is what he said before the magistrate? A. Yes, sir." In his cross-examination the witness swore: "Q. Tell us all that Slafer testified to, that you remember. A. Slafer's testimony before the magistrate was to the effect that he was on the car which conveyed Winther, and that he was on the back platform, and held conversation with Winther. As to whether Mr. Winther was in the car or out, I don't know. By Mr. Rothermel: Q. That is, you do not know whether he testified to that, you mean? A. Yes, sir. By Mr. Johnson: Q. You have told us all that you remember he said? A. That is all I remember." William R. Corbar was also examined, and testified as follows: "Q. What did Slafer say at the magistrate's hearing as to what was said to him by Mr. Winther as to the manner in which he got hurt, and so on? A. Slafer stated, as near as I can remember, these words: 'I saw the old gentleman on the car, and I thought he acted strange; and he said that he had trouble on the car at Allegheny avenue, and was shoved off.' Those are the words, as near as I can give them. Q. Did Slafer say that Mr. Winther had said anything to him as to his being hurt, or not being hurt? (Objected to.) Q. Did or did not Slafer testify before the magistrate that Mr. Winther told him the conductor pushed him off and hurt him? (Objected to. Objection overruled, and the court thereupon sealed an exception for defendant.) A. That is the substance of it." In cross-examination, he testified: "Q. When you were asked by Mr. Rothermel, a little while ago, to state what was said by Slafer, and before he put any question to you, saying the exact words, did you not mean to testify to all that Slafer said? A. I have there stated all, about, that Slafer said. Q. Therefore, when that question was put to you by Mr. Rothermel, and after he had asked what Slafer testified to, you answered that you remembered, did you not? A. Yes, sir."

P. F. Rothermel, for appellant. John G. Johnson, for appellee.

PER CURIAM. An examination of this record, with special reference to the single assignment of error to the charge of the learned trial judge, has failed to disclose anything of which the plaintiff has any just

reason to complain. There is nothing in the case that requires further comment. Judgment affirmed.

(159 Pa. St. 644)

EDELMAN et al. v. LATSHAW et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

EQUITY — JURISDICTION — ADEQUATE REMEDY AT LAW — CONSTRUCTIVE TRUSTS — TRUSTEE EX MALEFICIO.

1. An equitable action to cancel an executed sale of stock, and to recover it, on the ground that the buyer, by false representations, obtained it for a nominal price, will not lie where the stock has no special value to the seller apart from its money value, and where the damages can readily be ascertained.

2. Plaintiffs purchased stock at an executor's sale, and afterwards defendant, one of the executors, represented that the stock was worthless, but that he would like to have it as a relic of the estate, and plaintiffs sold it to him for a nominal sum. *Held* that, as plaintiffs had means of information concerning the value of the stock, and made investigation before selling to defendant, the latter could not be regarded as a trustee ex maleficio for plaintiffs, though his representations were fraudulent.

3. Even if plaintiffs had an equitable cause of action, a bill would not lie for the recovery of the stock, where it appeared that it had been sold, and was in the hands of innocent purchasers at the time the bill was filed.

Appeal from court of common pleas, Montgomery county; H. K. Weand, Judge.

Action by Amelia Edelman and others against S. B. Latshaw and another. There was judgment for defendants, and plaintiffs appeal. Affirmed.

The following is the opinion of the court below:

"This bill is brought for the cancellation of an executed contract of sale of certain shares of stock bought by the plaintiffs at a public sale, and afterwards sold to the defendant Latshaw. The allegation is that Latshaw induced plaintiffs to sell him the stocks by false representations as to their value and as to his object in buying. The stocks consisted of 750 shares of the New York and Middle Coal Field Railroad and Coal Company, 1,500 shares of the Arion Silver Mining Company, and 500 shares of the Montana Gold and Silver Mining Company, and had belonged to one Daniel Latshaw, deceased, the father of defendant, and were bought by plaintiffs at an executors' sale of decedent's effects, held March, 1887, for \$11.40. After the sale, defendant Latshaw, who was one of the executors, remarked to the purchaser that the stocks were of no value, and that he did not know where the offices of the companies were located. In September, 1891, one C. R. Lindsay, who previously had been connected as secretary with the New York and Middle Coal Field Railroad and Coal Company, wrote to Daniel Latshaw, not knowing he was dead, inquiring whether he still held any stock in said company, and asking the lowest price he would take for it, stating also that the stock

had no market value, but that he could use it at two dollars per share. This letter was received and answered by defendant S. B. Latshaw, who then wrote to Saylor, one of the plaintiffs, asking whether he still held the stocks bought at the sale, and what he would take for them. A correspondence was then carried on between defendant and Saylor, in which Latshaw stated that he believed the stocks had no intrinsic value, and that he could find no offices of the company, and offering twenty-five dollars for the lot. The parties, plaintiff and defendant, afterward met at Pottstown, when the stocks mentioned were sold to Latshaw for fifty dollars. It is alleged by plaintiffs that, at the time of transfer, Latshaw was asked by Saylor, 'What is there in this stock, that you appear so anxious to have it? You laughed at me when I bought it;' and that he replied, 'I want it as a relic of my father's effects. It has no value, and no office or officers of the company;' and that these representations were the inducement to sell them to him. At this time Latshaw had Lindsay's offer of two dollars per share for the 750 shares of railroad and coal company stock. The other stocks had no market value, nor does it appear that the companies are still in existence. The plaintiffs could only find certificates for 800 shares of the railroad and coal company stock, but the assignment to Latshaw covered them all; but, because of the missing certificates, Latshaw could only realize on 800 shares of the railroad and coal company stock, for which he received \$1,200 from Lindsay. The bill prays for a reassignment of said shares, and for an injunction to prevent further transfers. The master dismissed the bill for want of jurisdiction, holding that there was a complete and adequate remedy at law. Exceptions were filed by plaintiffs.

"In *McGowin v. Remington*, 12 Pa. St. 56, Judge Bell, in speaking of cases for the recovery of chattels by a proceeding in equity, said: 'The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but illy supplied by an award of damages; and that chancery always interferes where, from the nature of the subject, or the immediate object of the parties, no convenient measure of damages can be ascertained, or where nothing could answer the justice of the case but the performance of a contract in specie.' There are exceptions to the well-settled principle of law that equity will not enforce specific execution of contracts relating to chattels, as was ruled in *Foil's Appeal*, 91 Pa. St. 434, *Appeal of Goodwin Gas Stove & Meter Co.*, 117 Pa. St. 514, 12 Atl. 786, and other cases; but we fail to find that plaintiffs have brought themselves within any of the excepted cases. To the plaintiffs these stocks have no special

or peculiar value, and were not purchased for any special purpose. The only object of their purchase was to make money for them, and hence their only value to plaintiffs is what might be realized from a resale. When they bought, plaintiffs thought they were worthless, and did not even know that the companies had an existence; and therefore, if there was nothing else in the case but a mere breach of contract, plaintiffs would have a complete and ample remedy at law for the loss sustained, if any. This damage could be readily ascertained, as appears by the testimony in the case. It is no answer to say that the stocks other than the railroad and coal company stock have no market value, and that the damage on that account could not be ascertained, for it is apparent that as to them defendant made no fraudulent representation, for he knew nothing of their value, nor do the plaintiffs, and, were it not for the railroad and coal company stock, this suit never would have been brought. In the language of the master: 'The wrong, therefore, against which they complain, is the acquirement of the coal stock from them for a nominal price. If they be paid the full value of the coal stock, they will, under their own showing, be entirely compensated for all damages consequent upon any wrong of the defendant.'

"Can the bill be sustained upon the ground that the defendant Latshaw was a trustee ex maleficio, or upon the ground that he had practiced a fraud in procuring the stocks? He occupied no fiduciary relation to the plaintiffs. What he said at the executors' sale had nothing to do with plaintiffs' purchase, and after that he was acting towards them as an individual, and their relations were simply that of vendor and vendee. He was not bound to disclose his knowledge of the value of the stocks, provided he did not make fraudulent representations, or suppress the truth when it was his duty to speak. Plaintiffs had opportunities for informing themselves of the condition of the various companies, but they appeared to have taken but little interest in the matter. Was he guilty of such fraud as will entitle the plaintiffs to the relief asked for? It is true that a confidential relation is not necessary to establish a constructive trust, and that a trust may arise from actual fraud; but this fraud alone will not be sufficient to warrant relief, unless the parties relied upon the fraudulent representations which were the inducements to their contract. In *Adams, Eq.* (5th Amer. Ed.) p. *174, it is said: 'The jurisdiction for rescission and cancellation arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation, and it is exercised * * * for setting aside executed conveyances, or other impeachable transactions, where it is necessary to replace the parties in statu quo;

and in such cases, though pecuniary damages might be in some sense a remedy, yet, if fraud be complained of, there is jurisdiction in chancery.' The author instances amongst cases of this character the procuring contracts to be made, or acts to be done, by means of willful misrepresentation, either express or implied, etc. But to constitute a case of this kind there must be a representation, express or implied, within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract or act. Tested by this rule, have the plaintiffs a standing in a court of equity? According to the evidence, the coal company at all times had an office in Philadelphia, which was given in the city directory; and it further appears that, some time after the purchase by plaintiffs, Mr. Edelman visited New York to inquire about the stocks, having with him one of the certificates for the coal company stock. It thus appears that plaintiffs had means of information open to them, and that they investigated the matter. How can it be said, therefore, that they relied on Mr. Latschaw's representations as to value rather than on their own knowledge? In *Clapham v. Shillito*, 7 Beav. 148, it was ruled that 'cases have frequently occurred in which, upon entering into contracts, misrepresentations made by one party have not been in any degree relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party.' In the case under consideration, plaintiffs held the stocks for four years, had made investigation, and must have been convinced, without any representations from Latschaw, that the stocks were worthless. It is also stated in *Adams*, Eq. 358, that a mere misstatement by the buyer of his motive in purchasing, or in limiting the amount of his offer, will not bring the case within the class of cases in which equity will grant relief; and for this he cites *Vernon v. Keys*, 12 East, 632, where the vendee 'falsely and deceitfully represented to the vendor that he was about to enter into partnership in the same trade with other persons whose names he would not disclose, and that these persons would not consent to his giving the plaintiff more for his interest than a certain sum, whereas, in truth, neither A. and B., with whom he was then about to enter into partnership, nor any other intended partners of his, had refused to give more than that sum, but had then agreed with the defendant that he should make the best terms he could with the plaintiff, and would have given him a larger sum; and in fact the defendant charged them with a larger price in account for the purchase of plaintiff's in-

terest.' Held, that an action on the case did not lie for this false and deceitful representation by the bidder of the seller's probability of getting a better price for his property, for it was either a mere false representation, or at most a gratis dictum, of the bidder upon a matter which he was not under any legal obligation to the seller to disclose with accuracy, and on which it was the folly of the seller to rely.

"There is another reason which is fatal to the plaintiffs' contention. It is apparent that plaintiffs are seeking to recover damages for their loss, and not to recover the specific chattels sold. It is not alleged nor shown that the stocks have to them any especial value apart from their money value, and plaintiffs will be placed in statu quo when they are paid what they have lost in money. In *Mackintosh v. Tracy*, 4 Brewst. 59, it was held that 'in cases of fraud, especially where the fraud relates to sales of personal chattels, and where the relief sought is merely compensation in damages, if the remedy at law is adequate, relief is not ordinarily granted in equity.' See, also, 2 Pars. Cont. p. 782. We are of opinion that the master did not err in dismissing the bill; and now, April 13, 1898, the exceptions are overruled, and the report of the master is confirmed, at the costs of the complainants."

Chas. Hunsicker, for appellants. Hallman & Place and Jacob V. Gotwalts, for appellees.

PER CURIAM. The prayers of the plaintiffs' bill could not be granted, even if the plaintiffs had a cause of action cognizable in a court of equity, because the stock sought to be recovered had already been sold, and was, at the time the bill was filed, held by innocent purchasers. But, if the facts upon which the cause of action was grounded were all true, there was a complete and adequate remedy by an action at law, and for that reason there is no jurisdiction in equity. The opinion of the learned court below is a sufficient vindication of the correctness of the conclusions reached, and, for the reasons therein stated, the decree is affirmed. The contest was only over the coal shares. There was no real controversy as to the other shares. The decree of the court below is affirmed, and the bill of the plaintiffs is dismissed, at the cost of the appellants.

(180 Pa. St. 24)

PHILLIPS, to Use of HAVERHILL SAFE-DEPOSIT & TRUST CO., v. HENRY.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

DURESS—WHEAT CONSTITUTES—WHO MAY PLEAD—ASSIGNEE FOR BENEFIT OF CREDITORS.

1. Friends of a debtor who had obtained goods by false representations were informed that creditors in a foreign state threatened to resort to criminal proceedings if they were not

secured. They informed the debtor of the threat, and advised him to assign certain claims to such creditors, which he did. *Held*, that such assignment was not void as being made under duress.

2. Where a debtor assigns claims to creditors to pay just debts, his assignee for the benefit of creditors cannot, without his authority, claim that the assignment of such claims was obtained by duress.

Appeal from court of common pleas, Montgomery county.

Framed issue, in which Marshall A. Phillips, trading alone as Marshall A. Phillips & Co., to the use of Haverhill Safe-Deposit & Trust Company, is plaintiff, and Louis B. Henry, assignee for benefit of creditors of Marshall A. Phillips & Co., interpleaded, is defendant. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiff, defendant appeals. Affirmed.

The opinion of Weand, J., on the motion for a new trial, referred to in the opinion of the supreme court, is as follows:

"Marshall A. Phillips, trading as Marshall A. Phillips & Co., having a claim against the Swedeland Manufacturing Company, assigned the same to the use of Haverhill Safe-Deposit Company. Phillips & Co. subsequently made a general assignment for the benefit of creditors to Louis B. Henry. The Swedeland Manufacturing Company, admitting the indebtedness, petitioned the court for leave to pay the amount into court, which was done, and an issue framed to determine which of the rival claimants was entitled to the fund. It was not denied that the assignment to the Haverhill Safe-Deposit Company was for a debt justly due them, but it was sought to defeat the assignment because Marshall A. Phillips had been coerced into making it by threats of arrest for a criminal offense committed in another state. It appears that he was heavily indebted to eastern creditors, and that he had obtained credit or goods from them under false representations as to his financial condition. Hearing that he was about to, or had, assigned his property, his attorney and confidential clerk were informed that, unless the eastern creditors were preferred, Phillips would be arrested on a criminal charge. They so informed Phillips, and advised him to make this with other assignments of claims. Thus far the facts are not disputed.

"After hearing the testimony, we were of opinion that the allegation of duress was not sustained for several reasons. Duress exists when one, by the unlawful act of another, is induced to make a contract, or perform some act, under circumstances which deprive him of the exercise of free will. 6 Amer. & Eng. Enc. Law, p. 57. In this case there was no arrest of the person, no warrant of arrest, and no seizure of the goods or lands. Phillips was not examined as a witness, and the only evidence of constraint was the testimony of the lawyer and clerk that they had told

Phillips of his threatened arrest, and advised him to do what was requested of him. We fail to see in this that Phillips was not a free agent. Non constat that the threat had any effect upon him, or that the advice of his friends did not move him to act. The mere fact that he made the assignment of claim does not prove that he was deprived of the exercise of his will. An honest man owing a debt might wish to prefer one creditor to another, even under threats. There was therefore nothing to submit to the jury upon this point, and, if the matter had been submitted, there would have been no testimony upon which to base a finding that Phillips' mind had been so acted upon as to coerce him. He is not here to make the defense. His assignee for the benefit of the general creditors, even if we concede his standing, is not in a position to make the defense without showing such a condition of affairs as Phillips would be compelled to do were he making the contest for himself. We think, therefore, that upon this ground alone the direction was proper.

"Another reason which moved us was that, as Phillips was guilty of an offense for which he was liable to arrest, and which could have been compromised legally, the threat was that of a lawful arrest, and that, under the law, this does not constitute duress. In Story on Contracts (section 400) it is said: 'A threat by a party that he will cause another to be imprisoned is not such duress as to avoid a contract, unless the menace be of unlawful imprisonment. A threat to do a legal act, or to subject the party to the legal consequences of a refusal to make an agreement, is not duress,'—citing *Alexander v. Pierce*, 10 N. H. 494; *Eddy v. Herrin*, 17 Me. 338. Pars. Cont. p. 393, says: 'Duress by threats does not exist wherever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death, or great bodily injury, or unlawful imprisonment.' In *Walbridge v. Arnold*, 21 Conn. 431, Church, C. J., said: 'Nor had the defendants good cause of complaint that the judge charged the jury that a lawful arrest and detention, where there is no abuse of process, was no duress. This is an elementary principle.' In *Compton v. Bank*, 96 Ill. 301, it was held that a threat of a lawful arrest of a husband for a crime actually committed by him does not constitute such duress as will relieve the wife from her contract to indemnify the person injured. In New York the same rule prevails. In *Insurance Co. v. Meeker*, 85 N. Y. 614, it is said that 'the fact that a woman is induced to act by representations that such action is all that will save her son from state prison, or by threats on his part to commit suicide, does not, in a legal sense, constitute duress. A threat to prosecute for an offense of which the party admits he is guilty is not legal duress to avoid a contract.' *Vosburgh v. Brewster*, 5

Alb. Law J. 198. A contract is not avoided by a threat of lawful imprisonment. Knapp v. Hyde, 60 Barb. 80. The same doctrine prevails in Maine. Mere threats of criminal prosecution, where no warrant had been issued, nor proceedings commenced, do not constitute duress. Higgins v. Brown, 78 Me. 473, 5 Atl. 269. In Thorn v. Pinkham, (Me.) 24 Atl. 718, it is contended that the note was obtained by duress, and that the consideration was illegal. Suppose the embezzler had been plainly told that, unless he paid or secured the amount that he had stolen, he would be prosecuted for the theft, and thereupon gave the note. That would not have been duress. It is not duress for one who believes that he has been wronged to threaten the wrongdoer with a civil suit; and, if the wrong includes the violation of the criminal law, it is not duress to threaten him with a criminal prosecution. In Bodine v. Morgan, 37 N. J. Eq. 426, it was held 'that threats of a lawful arrest do not constitute duress,' etc. We think, under these decisions, therefore, there was nothing to submit to the jury—First, because there was no evidence that Phillips had been constrained of his free will; and, second, if he was constrained, it was not duress in law; third, his assignee cannot make the defense without Phillips' consent and acquiescence, for he might ratify and confirm the act. And now, December 23, 1893, motion for a new trial is overruled, and judgment is directed to be entered on the verdict that plaintiffs are entitled to receive the amount of money paid into court, less record costs."

Henry C. Boyer and John A. Clark, for appellant. James B. Holland and John M. Dettra, for appellee.

PER CURIAM. The testimony in this case is far short of the kind of testimony which is necessary to make out the defense of duress. There was no imprisonment or restraint of the body, no process of arrest against the party, no prosecution for any criminal offense instituted, no officer of the law ready to arrest, no threat of any kind made by this particular plaintiff, and no threats by anybody made directly to the person affected. There was only a threat to resort to criminal proceedings, made in another state, to certain friends of the party, by counsel for certain creditors, and communicated by them to their principal. Moreover, Phillips, the party affected, is not setting up the defense, or authorizing it to be done. The defense is made by one who is merely an assignee for the benefit of creditors, and we are of opinion that such a person cannot plead this defense for the purpose of setting aside an otherwise legitimate transfer of property made by his assignor to pay an honest debt. The opinion of the learned court below on the motion for a new trial contains the expression of sufficient reasons for the binding in-

struction to the jury to render a verdict for the plaintiff, and upon that opinion, and the suggestions above made, we affirm the judgment. Judgment affirmed.

(156 Pa. St. 603)

IN re ORDER OF FRATERNAL GUARDIAN'S ESTATE.

Appeal of TULL.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

CORPORATIONS — QUO WARRANTO PROCEEDINGS — RECEIVERS.

In quo warranto proceedings against a corporation, the court has no jurisdiction, upon motion of the commonwealth, to appoint a receiver thereof. *Com. v. Order of Vesta*, 27 Atl. 14, 156 Pa. St. 531.

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the Order of Fraternal Guardians. In quo warranto proceedings against said corporation, Joseph L. Tull was appointed receiver. From a decree confirming an auditor's report on the account of the assignee, refusing to award the balance of the assigned estate in his hands to the receiver, Tull, the latter appeals. Dismissed.

James M. Beck and F. Carroll Brewster, for appellants.

MITCHELL, J. The Order of Fraternal Guardians was incorporated in 1888, by a decree of the court of common pleas No. 3 of Philadelphia, as a beneficial and protective association under the act of April 29, 1874, and apparently did a large business until 1892, when it got into difficulties, and in September of that year made an assignment for the benefit of its creditors. The assignee proceeded diligently to liquidate the assets, and on November 19th of the same year filed his account, showing the fund for distribution, which is now before the court. Prior to the assignment, however, in May, 1892, the commonwealth, through the attorney general, instituted proceedings by quo warranto in the common pleas of Dauphin county, which resulted, on January 25, 1893, in a judgment of ouster, and on the same day the appellant was appointed by the same court as receiver. The sole question now before us is whether the fund in court should be awarded to the receiver, for him to distribute to the creditors and members of the association. The auditor refused to so award it, and in this he was clearly right. The case is not distinguishable in principle from *Com. v. Order of Vesta*, 156 Pa. St. 531, 27 Atl. 14. The common pleas of Dauphin county, as shown in that case, had no jurisdiction to appoint a receiver in the quo warranto proceedings on the motion of the commonwealth, and the appellant therefore was without authority, as such receiver, to take the fund. The present appeal was taken before the an-

nouncement of our decision *vs. Conn. v. Order of Vesta*, and, as the appellant was responsible to the court which appointed him, he was justified in having the law definitely settled before giving up the apparent duties of his trust. He should not, therefore, be burdened with the costs of this appeal. Appeal dismissed; costs to be paid out of the funds of the assigned estate.

(160 Pa. St. 12)

In re STONG'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

EXECUTORS—LIABILITY—DISOBEYING WILL.

Testator directed that after his wife's death the estate should be invested in land securities, but the active executor continued after her death, until his own, nearly two years later, to accept interest on two overdue personal bonds. The surviving executor was delayed in getting the estate's papers till after approval of deceased's account; but then, by prompt action, he could have saved the estate whole on the bonds. He delayed, however, to take judgment on them till the obligor's realty had been incumbered by other judgments, the entry of which at different times gave notice to creditors that the obligor was growing weaker financially. *Held*, the surviving executor was chargeable with the loss on the bonds.

Appeal from orphans' court, Montgomery county; Aaron S. Swartz, Judge.

In the matter of the estate of Philip Stong, deceased. Appeal of George W. Stong, surviving executor, from a decree on settlement of his account. The decree affirmed.

The facts are stated in the following opinion of Aaron S. Swartz, J., below:

"The controversy is raised by the following exception to the auditor's report: 'The learned auditor erred in not surcharging the accountant with the sum of \$733, being the credit claimed by the accountant as the amount not collected on the Wilson bonds.' The facts material to the issue are not in dispute. They may be stated as follows: Philip Stong died, testate, October 3, 1887. His widow died on September 18, 1888. The testator gave to his wife his entire estate for life, with the privilege of using so much thereof as may be necessary for the comfortable maintenance of herself and his niece Alice Dotts. Upon the death of the wife the will makes the following disposition: 'I order and direct that, upon the death of my said wife, my said executors shall set apart, out of the balance or residue of my estate, the sum of twelve thousand dollars, and safely invest the same upon good real-estate security, and pay over the interest accruing thereupon semiannually to my said niece Alice Dotts, daughter of my sister Susar, during the full term of her life.' Among the assets of the estate were two bonds,—one with confession of judgment for \$600, given by Thomas Wilson on November 1, 1883, payable in one year; the other without such confession, made by the said Thomas Wilson,

for \$355, dated April 6, 1882, also payable in one year. Algernon S. Jenkins, the executor, was a man of business experience, and he had the possession and the custody of the Wilson bonds. Interest was paid on the \$600 bond to November 1, 1883, and on the other bond to April 6, 1889. The last interest was paid to Mr. Jenkins on the 10th of April, 1889. Mr. Jenkins died July 9, 1890. The surviving executor made demand for the Wilson papers after the death of Mr. Jenkins, but they were not delivered to him at that time. As soon as he received them he handed them over to his counsel, Mr. Rogers. The bond with the confession of judgment was entered of record March 10, 1891, and on April 29, 1891, Thomas Wilson confessed judgment on the other claim by giving a bill single, which was entered the same day. At the testator's death Thomas Wilson was the owner of a farm in Horsham township containing sixty-one acres. He also owned a house and lot in Hatfield township. There was a mortgage of \$2,000 on the farm, and one of \$1,600 on the house and lot. There was also a judgment of \$600 entered April 6, 1887. These properties were appraised at \$9,500 in 1891, and were fully as valuable in 1887 as in 1891. The situation as to liens against the Wilson properties remained unchanged at the time of the widow's death, in September, 1888; but on April 1, 1889, a judgment for \$1,300 was entered; April 1, 1890, one for \$200; May 28, 1890, one for \$200; September 15, 1890, one for \$350. Mr. Wilson made an assignment for the benefit of creditors on May 1, 1891. The sale of the real estate by the assignee realized a sufficient fund to pay all the judgments prior in time to the Stong liens, and paid, on the Stong judgment of \$600, \$181.48. The judgment of \$200 entered May 28, 1890, did not participate in the distribution. Mr. Wilson's real estate was released from this claim, so the auditor finds. The accountant purchased the farm at \$1,500 over and above the mortgage incumbrance, making the purchase money \$3,500 and the overdue interest on the mortgage of \$2,000 at the time of the sale. He now holds the farm for sale, and will take \$6,000 for it. He spent in permanent improvements over \$100. The accountant says, 'Jenkins had all to do with the papers. I had nothing at all to do with the papers until after Mr. Jenkins died. * * * I don't know whether they were judgments or not. * * * Before his death Jenkins attended to it himself. I gave the Wilson matter no attention.'

"From the recital of these facts it is apparent that the entry of the bond for \$600 prior to April 1, 1889, and the reduction to judgment of the bond for \$355 prior to said date, would have saved both bonds to the testator's estate. Again, if the bond for \$600 had been entered of record prior to April 1, 1890, it would have been paid in full. After the death of the widow, in September,

1888, it became the duty of the executors 'to set apart \$12,000, and safely invest the same upon good real-estate security.' The auditor finds that the whole principal estate did not exceed \$12,000. Why was this plain direction of the testator disregarded? The accountant answers that he is excusable because the coexecutor had the custody of the papers and collected the interest; but this will not do, for, by the will, a joint duty is cast upon the executors, which they agreed to perform when they accepted the appointment. That a direction to invest in good real-estate security for the life of Alice Dotts imposed a joint duty cannot be denied, and, under our authorities, one executor could not relieve himself from all responsibility in the matter by intrusting the whole duty to his coexecutor. In *Weigand's Appeal*, 28 Pa. St. 471, the testator directed his executors to secure \$500, and pay the interest yearly to his daughter for life. One of the executors, a son, owed the father \$500 on a bond. The coexecutor made no effort to collect the bond and secure the fund. The money was lost through the insolvency of the executor so indebted to the estate, and the coexecutor was held liable to the legatee for the loss. *Weldy's Appeal*, 102 Pa. St. 454, is to the same effect. In such cases the nonacting executor is not liable for the default of his coexecutor, but he is responsible for his own negligence, because the loss resulted from joint negligence where a joint duty was imposed. So, in *Estate of Fesmire*, 134 Pa. St. 83, 19 Atl. 502, where the testator directed an investment 'in good real-estate security,' there was a joint duty imposed to secure such investment. The court say: 'When they put it in Kerper's power to collect the money on the mortgage, it became their duty to see that it was again invested in "good real-estate security," and, if they had not neglected this duty, the loss would not have been sustained. They did neglect it. The embezzlement was made possible because they neglected it, and their liability grows out of their negligence.' Ordinarily, an executor is liable for his own acts and omissions, and not for those of his associates; and it may well be, as the auditor intimates, that the accountant is not liable for the negligence of his coexecutor, Mr. Jenkins; but, as already shown, this is not the test of liability in the case before us. The inquiry is, was the accountant himself negligent? The auditor finds no evidence of negligence. We cannot agree with him. 'As a general rule the measure of care and diligence required of a trustee is such as would be pursued by a man of ordinary prudence and skill in the management of his own estate. *Fahnestock's Appeal*, 104 Pa. St. 46. It is equally well settled, however, that a trustee who invests the funds belonging to a trust on personal security does so at his own risk. This is so well settled that a citation of authori-

ties is unnecessary.' *Law's Estate*, 144 Pa. St. 490, 22 Atl. 831. If it were not for the explicit directions in the will, there might be some excuse for continuing the investment as made by the testator. The direction to invest safely in good real-estate security leaves the accountant without any excuse for his omission. But suppose there was no immediate necessity to change these personal securities into investments designated by the will; does the delay, under the facts and circumstances, indicate ordinary prudence and skill? The accountant confesses his entire ignorance of the matter. He did not even know whether the bonds were judgment bonds. 'I did not give the Wilson matter any attention.' The interest on the \$600 bond was due March 1, 1889. It remained unpaid. All other persons holding judgments against Mr. Wilson entered them of record. These executors alone did nothing to protect their claims, although the failure to pay interest should have stirred them to action. There was no difficulty in their way, at least so far as the \$600 bond was concerned. All that was necessary to secure the debt was to carry the bond to the office for record. If this had been done at any time between the death of the testator, in 1887, and April 1, 1890, the money would not have been lost. The Wilson failure was not the result of some sudden misfortune. His financial standing grew weaker and weaker, as indicated by the successive entries of judgments against him. There was thus ample notice of danger to creditors. If the executors had exercised the care and prudence of others similarly situated, the loss could not have occurred. *Long's Estate*, 6 Watts, 46. It may be said that suit was necessary to protect the bond of \$355. This may or may not be so. If the debtor was willing to give a judgment for \$600, it is likely he would have given one for the smaller bond. If he accommodated others as early as 1887, why should he refuse the executor of the testator as late as 1890? All we know as to this matter is that no effort whatever was made to comply with the explicit direction of the testator. An unsuccessful effort would excuse. Without effort the accountant is without excuse. It is clear that, if the diligence exercised after the death of Mr. Jenkins had been applied before that time, the loss would not have occurred. We conclude that the accountant was negligent in his disregard of the duties imposed under the will, and he was negligent in his failure to take the usual and ordinary steps to protect or collect the assets of the estate of the testator."

George W. Rogers, for appellant. N. H. Larzelere and M. M. Gibson, for appellees.

PER CURIAM. The decree in this case is affirmed on the opinion of the learned court below. Judgment affirmed.

(159 Pa. St. 594)

In re ORDER OF FRATERNAL GUARDIANS' ESTATE.

Appeal of SHEELER et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

BENEFIT ASSOCIATION—ASSIGNMENT—DISTRIBUTION AMONG MEMBERS.

Where the members of a benefit association receive certificates, maturing in 28 years, binding each member to continue his certificate in force for that time, and to pay any assessments that may be made, and providing that, if the member shall comply with all the requirements of the association, he shall, at the end of $3\frac{1}{2}$ years from date of his certificate, receive a sum not exceeding one-eighth of the sum mentioned therein, and shall, at the end of each succeeding $3\frac{1}{2}$ years receive a like amount, the funds of the association, on its making an assignment 4 years after organization, will be distributed among the members in proportion to the amounts paid in by them, though a part only of the certificates have run $3\frac{1}{2}$ years.

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the Order of Fraternal Guardians. From a decree overruling exceptions to the report of the auditor on the account of the assignee, Charles R. Sheeler and others, members of the order whose certificates had run over three and a half years, appeal. Affirmed.

The report of the auditor, J. F. Hartmann, Esq., with the exceptions thereto, was as follows:

Report.

"Before proceeding with the discussion and determination of the questions which have arisen upon the distribution of the fund in this case, the auditor believes it would be well to state briefly the history of the Order of Fraternal Guardians. The 'Order of Fraternal Guardians' was chartered on the 1st day of December, A. D. 1888, by the court of common pleas, No. 3, of Philadelphia county, the charter thereof being recorded on the 3d day of December, A. D. 1888, in the office for the recording of deeds, etc., in and for the city and county of Philadelphia, in Charter Book No. 13, page 589, etc. In their application for a charter the incorporators stated that they were citizens of the commonwealth of Pennsylvania, and were desirous of becoming incorporated under the provisions of an act of assembly of the commonwealth of Pennsylvania, entitled 'An act to provide for the incorporation and regulation of certain corporations,' approved the 29th of April, A. D. 1874, and the supplements and amendments thereto, and set forth: Section 1. The name of this corporation shall be the Order of Fraternal Guardians. Sec. 2. The purposes of the said corporation shall be the maintenance of a society for beneficial or protective purposes to its members from funds collected therein. Sec. 3. The principal place where the business of said corporation is to be transacted shall be in the city of

Philadelphia. Sec. 4. The existence of said corporation shall be perpetual. It shall have succession by its corporate name, subject to the power of the general assembly to revoke its charter according to law. It shall have power to maintain and defend against judicial proceedings. It shall have power to make and use a common or corporate seal, and alter the same at pleasure. It shall have power to hold and transfer such real estate and personal property as the purposes of the corporation may require: provided, that the clear yearly value or income of the real estate shall not exceed \$20,000. It shall have power to enter into any obligation necessary for the transaction of its ordinary affairs. It shall have power to appoint and remove such subordinate officers and agents as the business of the corporation may require, and may allow them a suitable compensation. It shall have power to make by-laws, which shall not conflict with the constitution and laws of the United States and of this commonwealth, for the regulation of its affairs, the management of its property, the maintenance of good order and harmony among its members in their relation to the corporation, and the enforcement of the payment of assessments, dues and other indebtedness to the corporation; and may provide means for the enforcement of such by-laws by fines, suspension, or expulsion from membership, after due notice and trial. There is no capital stock, nor any shares of stock.

"In the constitution of the supreme lodge, as amended and revised February and March, 1890, the objects of the order are stated to be: First. To unite in the bonds of fraternity and guardianship all white persons of good moral character and sound physical health, who are socially acceptable, and who are between the age of eighteen and fifty-five years. Second. To establish a benefit fund by assessments upon its members, from which (1) each member who has complied with all lawful requirements of the order shall receive the benefit of a sum not exceeding one-eighth of the amount named in his benefit certificate for each three years and a half he continues such certificate in force; (2) upon the decease of any member entitled to benefits, a sum equal to one-eighth of the amount named in his benefit certificate shall be paid to such person or persons as he shall have designated, in addition to, and independent of, any matured benefits which may have been received: provided, that such person or persons shall be related to, or dependent upon, him for support. By the general laws of the supreme lodge, there was established a benefit fund, from which each beneficiary member was entitled to receive matured or death benefits, in conformity with the laws of the order. He might apply for and receive a benefit certificate or certificates, maturing in twenty-eight years from the date of issuance, in the sum either of \$5,000, \$4,000, \$3,000, \$2,000, or \$1,000, as he might elect. The

benefit fund was raised by assessments, levied upon the members of the order by the authority of the supreme executive committee, to whom was delegated the power of levying and calling assessments for the benefit fund and general fund, as the committee might deem necessary. This power was conferred upon the supreme executive committee by section 4 of article 3 of the constitution of the supreme lodge. The funds thus raised by assessments were to be deposited by the supreme secretary in a depository named by the supreme executive committee.

"By an agreement entered into between the Order of Fraternal Guardians and the Commonwealth Title and Trust Company, the latter were to become the custodians of the said benefit fund, to be invested by them in such United States bonds, state, county, or city securities, or such bond or mortgage, or other reliable and convertible securities, as should be designated by the president of the said trust company and approved by the supreme trustees of the Order of Fraternal Guardians. The securities were to be taken only in the name of the 'Order of Fraternal Guardians,' and held in the custody of said trust company in a separate deposit or safety box, which should only be opened in the presence of the chairman of the supreme trustees, or a majority thereof, at such times as the business of the said supreme trustees might require, or when the supreme financiers required an examination of the same for their monthly audit. The benefit fund was thus surrounded by all the protections to preserve the same intact, and insure the faithful application of the same to the purposes for which it was created.

"With its business methods thus defined, the order started out upon a promising career. The membership grew rapidly, and the order gradually established itself in the confidence of the community. Assessments were regularly called by the supreme executive committee, and the benefit fund swelled to large proportions. In the spring of 1892, however, the success of the organization was checked. A bill in equity was filed against the order by several of its members, asking the court to issue an injunction restraining the order from further conducting its business, and praying the appointment of a receiver to wind up its affairs. These proceedings were terminated favorably to the order, but later on were followed by the institution of quo warranto proceedings by the attorney general of the commonwealth of Pennsylvania. These proceedings are still pending in the common pleas court of Dauphin county. On June 1, 1892, and continuously thereafter, the first installments or payments on benefit certificates matured, according to their terms. None of these matured benefits were paid by the order, for the reason, it has been alleged, that an agreement or promise not to do so was made by persons representing the order with the attorney general. The

bill in equity, filed about April, 1892, however, was a deathblow dealt to the order. From that time forward the order was not reinforced by new members, and no new blood was infused into the organization. Certificates were rapidly maturing, and their nonpayment by the order shook confidence in the organization. The supreme executive committee was confronted with a serious problem, and nothing but financial disaster appeared ahead. They grappled with the question, and the only solution of the difficulty was, in their judgment, a winding-up of the affairs of the order. This course was finally determined upon, and on the 30th day of September, 1892, the supreme officers made and executed a deed of assignment of all the effects of the order to Joseph L. Tull; the said assignment being recorded in the office for the recording of deeds, etc., in and for the city and county of Philadelphia, in Deed Book T. G., No. —, page —, etc. An inventory and appraisal of the rights and credits, goods and chattels of the assigned estate was filed in court, wherein it is shown that the appraised value of the entire assets of the order amounted to the sum of \$810,292.13. The assignee filed his first account of the trust estate on the 19th day of November, 1892, and the same is now the subject of this audit. In this account the assignee charges himself merely with the amount of cash on hand at the time the assignment was made. None of the securities that came into his hands have been converted as yet. The account was vouched by the auditor and found to be correct.

The assignee charges himself with the amount with which the benefit fund was credited.....	\$244,141 93
Also, with interest and income collected on the securities of the trust estate, and interest on deposits	6,889 01
Also, with amounts received by the assignee from subordinate lodges as assessments for August, etc..	864 50
Also, with the amounts of the September assessments paid to him	11,593 50
Also, with amount credited in inventory to general fund.....	5,897 73
Interest on general fund deposit..	10 64
And amounts received from sale of lodge supplies since filing of the inventory	1,326 92

Making the total amount of debits	\$270,706 23
On the credit side of the account, the accountant claims credit for amounts of cash paid by him for the acknowledgment and recording of the assignment, the costs paid the prothonotary for entering the bond, appraisers' fees, clerk hire, printing, and postage, the aggregate sum of.....	819 75

Which leaves a balance in his hands, to be distributed upon this audit, of.....	\$269,886 48
---	--------------

"The account of the assignee shows for distribution the sum of \$269,886.98. The discrepancy noticed is a clerical error of fifty cents, made in the addition on the debit side

of the assignee's account. There was only one creditor's claim presented for payment out of this fund, and the auditor will dispose of the same at this point. Charles Lex Smith, Esq., representing Mr. Albert S. Haeseler, presented a claim for \$450 for services rendered the order, as editor of the *Fraternal Guardian*, from December 11, 1889, to July 10, 1891, being eighteen months' salary at twenty-five dollars per month. In support of this claim Mr. Haeseler was called and sworn, and stated that he was one of the incorporators of the order, and held office therein from the time of its organization to the time of making the assignment. During the time he rendered the services for which compensation is claimed, he held the positions of supreme deputy at large and supreme organizing director of the order, for which he received compensation, according to the arrangements made with the supreme executive committee. It did not appear, however, that either the office of supreme deputy at large or supreme organizing director carried with it the duty of editing the official organ (as the *Fraternal Guardian* has been called) of the order; but, on the contrary, it was shown that Mr. Haeseler was compensated, by the direction of the supreme executive committee, for these very duties of editing the *Fraternal Guardian* at the rate of twenty-five dollars per month from January, 1892. The supreme executive committee recognized the fact that he was entitled to compensation for services as editor, as a resolution was passed to pay him \$100 in settlement of his claim. This sum Mr. Haeseler refused, inasmuch as he considered it inadequate compensation for his labors. Previous to November 23, 1889, Mr. Haeseler conducted his paper independently of the order, but upon that day the supreme executive committee passed a resolution to the effect that the '*Guardian* be hereafter the official organ of the order, and be published under the auspices of the supreme lodge, with Brother Albert S. Haeseler as editor, and on and after this date the supreme lodge assume the responsibility of its publication.' Mr. Joseph O. Smith, in his testimony, said: 'The paper was the advertising medium of the order, and was placed in Mr. Haeseler's hands because it more largely affected his department, and because he was more capable of doing the work.' There was no question of the usefulness of the paper, and the benefit it was to the order. That the services were performed by Mr. Haeseler is undisputed, and it cannot be said they were part of his official duties. That Mr. Haeseler, in other branches of his work, made sufficient money out of the order is no reason (and this seems to be the only reason offered) to disallow his claim. The only question remaining, therefore, is as to the amount he is entitled to for his services. The evidence shows that, during the time the services for which compensation is claimed were rendered, the labors of editing

the *Fraternal Guardian* were more arduous than they were later, when the paper became established. As the supreme executive committee fixed his compensation for his services in 1892 at twenty-five dollars per month, in the opinion of the auditor this amount is a fair gauge of the value of the services rendered previously, and as this sum is the amount claimed by Mr. Haeseler, the auditor thinks that it is not unreasonable, and should be allowed. The auditor, therefore, awards to Alfred S. Haeseler the sum of \$450, as compensation for editing the *Fraternal Guardian* for eighteen months, to wit, from December 11, 1889, to July 10, 1891.

"Messrs. Maires and Beck appeared at the audit, representing certain certificate holders in good standing in the order, and formally objected to the audit, and assigned the following reasons therefor: (1) That there was no legal or valid body corporate, in law, to make the said assignment, the said alleged corporation never having been incorporated conformably to law; (2) that the said assignment is invalid, as it was made by the officers of the said alleged corporation without the consent of the members and certificate holders thereof; (3) that the said assignment was made, pending proceedings in quo warranto by the commonwealth of Pennsylvania in the court of common pleas of Dauphin county, to determine by what right the said alleged corporation claimed to exercise its franchises; (4) that, fully reserving the above objections to the jurisdiction of the auditor, and to the validity of the assignment, we further object to the auditor passing upon any claims or distributing any moneys, other than for the payment of general debts due by the said alleged corporation to general creditors, other than members and certificate holders of the said order, and aver that members of the alleged corporation, who claim to participate in the distribution under their certificates of membership, are not creditors in trust, for whom the property is held under said assignment, and that the only legal method of winding up said order is by a receiver.

"Before proceeding further, the auditor thinks it proper that these questions should be disposed of, inasmuch as they affect the entire question of distribution, and raise questions as to the jurisdiction of the court over the fund in hand. As to the first question,—that there was no legal or valid body corporate, in law, to make the said assignment, the alleged corporation never having been incorporated conformably to law,—the auditor is of opinion that this is not the time nor the manner of attacking the charter of a corporation. This question is one properly to be settled by the court upon quo warranto proceedings. The second contention urged is, that the assignment is invalid because it was executed by the officers of the alleged corporation, without the consent of the members and certificate holders. The supreme

executive committee of the supreme lodge was given power, by the constitution thereof, during the recess of the supreme lodge, to exercise all the powers of that body concerning business matters. The supreme lodge is a representative body, and it alone had the power to legislate for the order. Its acts must be construed to be the acts of every member, so long as nothing was done by them to injure the rights of their constituents, or prejudice the interests of the minority. The auditor thinks that it was properly within the scope of the powers of the supreme executive committee to make the assignment in this case, and that the same was done to conserve the best interests of those whom they represented. The third objection was, that the assignment was made pending quo warranto proceedings in the court of common pleas of Dauphin county. The auditor sees no merit in this point, inasmuch as the quo warranto proceedings referred to can only affect the transactions of the corporation, in the event of an ultimate successful determination of the proceedings. To check the exercise by a corporation of its corporate franchises, nothing short of an injunction by the court will be effectual for the purpose. In the absence of any such legal prohibition, quo warranto proceedings pending are nothing more than an ordinary suit, instituted by a private individual. The fourth objection seems to be the only one that requires real serious consideration by the auditor, as it touches the question of distribution directly. It is contended that, after the payment of the general creditors of the corporation, the only legal method of winding up the order is by a receiver. It is true that the only strict and regular way of closing up a corporation is by the appointment of a receiver, upon the filing of a bill in equity setting forth the facts. In answer to this objection the auditor need only refer to Christian's Appeal, 102 Pa. St. 189, where a building association had made an assignment for the benefit of its creditors, in order to wind up its affairs. In the opinion Justice Sterrett said: 'As was well said by the learned president of the common pleas in *Re National Savings, Loan & Bldg. Ass'n*, 9 Wkly. Notes Cas. 79, such an organization is, in fact and in law, a partnership, with corporate rights, in which every stockholder is a member; and while it may be true that a stockholder may recover judgment against the corporation, and thus become, in a certain sense, a creditor thereof, he is, nevertheless, not a creditor within the meaning of our assignment laws. There is also great force in the suggestion that the appropriate method of administering the assets remaining after payment of general creditors would be through a receiver. While such a course would be strictly regular, the same result may be more directly, and equally as well, attained by the course pursued in this case.' So, in this case, it is impossible for the audi-

tor to perceive wherein the interests of all persons can be better protected than by a distribution of the funds by the auditor among those persons entitled to the same, as their interests may hereafter appear. It was apprehended, by the counsel making these objections, that distribution might be made by the auditor in a manner different from that in which the funds would be distributed should a receiver be appointed. It cannot be understood how the distribution to be made by the auditor in this case, and that which might be made under proceedings where a receiver had been appointed, could in the least affect the case. No matter what decision either may make upon the questions arising upon distribution, the supreme court will be the tribunal to finally review the question in both instances. Furthermore, it is the desire of all the parties interested, so far as the same has come to the knowledge of the auditor, that a quick and speedy distribution be made of the funds in the hands of the assignee. The appointment of a receiver would hinder and delay distribution, as well as subject the fund to additional commissions and expenses, with no benefit or advantage whatever inuring to the members or certificate holders by reason thereof. The entire funds of the order have passed into the hands of the assignee under the assignment, and he now holds the same, awaiting the determination of certain questions in reference to the distribution, which will be hereafter referred to. The order, for all practical purposes, is dead beyond all resuscitation. The various lodges composing it have been disbanded, their paraphernalia has been sold and rituals destroyed, and their officers have ceased to exercise their functions. Neither the supreme lodge nor the supreme executive committee has held a meeting since the day it was resolved to make the assignment. No one contends or believes that, after the funds in the hands of the assignee have been distributed among the members and certificate holders of the order, a reconveyance of the trust estate (which, in this case, would be a nonentity) would ever revive this defunct institution. On the whole, therefore, the auditor is of opinion that all the objections made to this audit should be overruled. In doing this, the auditor believes that the interests of all persons interested will be served, including those of the certificate holders urging the objections.

"After the payment of the claim above allowed, the commissions of the assignee, the fee of his counsel, and the expenses of the audit, the balance is payable to the certificate holders and members of the order. The claims as presented by the certificate holders may be conveniently divided into two classes, as follows: (1) Those who hold certificates upon which all dues and assessments have been paid for a period of three and one-half years or longer. This class will be designated 'matured certificate holders.'

(2) Those who hold certificates upon which all dues and assessments have been paid, but which have not run a period of $3\frac{1}{2}$ years. These will be designated 'unmatured certificate holders.' As these two classes will be frequently referred to hereafter, the auditor thought it would avoid confusion to give each class a name by which it could be identified. In calling class No. 1 matured, it will be understood throughout that this means nothing more than that the first payment was due thereon. Every person joining the order received a certificate, of which the following is a form:

"Whereas, ——— has applied for and been admitted to membership in ——— Lodge, No. —, Order of Fraternal Guardians, and has obligated himself to obey all lawful commands of this order, whether emanating from the subordinate lodge of which he is or may be a member, or from the supreme lodge, or from any other duly-constituted authority; and whereas, he has paid the sum of ——— dollars to said subordinate lodge, as an assessment on account of the benefit fund of this order, and agrees to pay further assessments of like amount, whenever lawfully called for, and agrees to comply with all the laws, rules, and usages of this order, and especially with the conditions herein set forth: Therefore, the supreme lodge of the Order of Fraternal Guardians does hereby issue unto said ——— this certificate, and declare him to be entitled to all the rights and privileges properly belonging to members of his rank and standing, including a benefit of a sum not exceeding ——— thousand dollars, from the benefit fund of this order, which sum shall be paid in the manner and upon the conditions hereinafter mentioned, to wit: First. If the said member shall comply with all the requirements of the order, he shall, at the end of three and one-half years from the date of this certificate, receive a sum not exceeding one-eighth of the amount mentioned in this certificate; and thereafter shall receive the same amount at the end of each three and one-half years he continues in good standing in the order, until this certificate matures. Second. If said member shall be in good standing at his decease, before the maturity of this certificate, a sum not exceeding one-eighth of the amount mentioned in this certificate shall be paid to ———, bearing relationship to him of ———, and whose receipt for said sum shall cancel in full all obligations existing under this certificate. This certificate shall be in force from the date of its attestation by the signatures of the supreme guardian and supreme secretary, and, if continued in force, the last payment shall mature in twenty-eight years from that date. This certificate shall be accepted by the aforementioned member in accordance with the form printed hereon. In witness whereof, we have hereunto attached our signatures, and affixed the seal of the

supreme lodge of the Order of Fraternal Guardians, this ——— day of ———, 18—.

"——, Supreme Guardian.

"——, Supreme Secretary.

"Attest: ———."

"I hereby accept this certificate, subject to the above-specified conditions, and agree to conform to all lawful requirements relating to the same, or governing the Order of Fraternal Guardians.

"——, Member."

"Hall of ——— Lodge, No. —, 18—. We hereby certify that the person named in this certificate is a member of this lodge, and that the amount of benefit named herein is the same as is named in his application for membership. We also attest his signature of acceptance, and the delivery of this certificate to him.

"——, Chief Guardian.

"——, Recording Secretary.

"Attest: ———."

"The claims of the respective contestants for the fund will be stated by the auditor, as best he can, from his recollection of the argument of counsel, respecting both classes of claims, as neither side furnished the auditor with a brief, whereby their positions, respecting the fund for distribution, were clearly defined. Those holding matured certificates claimed that, from the fact of their certificates having run for a period of three and one-half years from the date thereof, and all dues and assessments having been fully paid for that period of time, the first installment was due thereon, and, as to that installment, they were creditors of the order, and were entitled to receive the full sum of one-eighth of their certificates; that, at the time of the assignment, and also at the date of the maturity of the first installment of their respective certificates, there were sufficient moneys in the benefit fund to pay a full one-eighth on all certificates three and one-half years old. The unmatured certificate holders claimed that, inasmuch as an assignment had been made, the order stood upon the basis of an insolvent corporation, and the assets were to be divided among the members in proportion to the amounts paid in by them, regardless of the fact that, by the terms of the certificates, the matured certificate holders had complied with the terms of their certificates, and were apparently entitled to a sum not exceeding one-eighth of their certificates. Thus, having the two standpoints from which to observe the case, the auditor will proceed to discuss the merits of both sides.

"Upon joining the order each member entered into a contract to comply with all the rules and regulations of the order, and pay any assessments, unlimited in number, during the continuance of his certificate. His certificate was a contract for twenty-eight years, and there was an obligation upon every member to continue his certificate in force for this

period of time. This obligation was wisely imposed by the originators of the order, inasmuch as it created a mutuality between the members whose certificates matured first, and those succeeding them. And, in this respect, this order differs materially from other orders of a somewhat similar character, and popularly known as 'get rich quick orders.' In the latter, when the period of membership had been spent, and a certificate matured, the member, as such, terminated his relationship to the organization, except that of creditor, in the event of his claim not being paid. Upon the maturity of his certificate his payments were finished, and those that were behind him had to pay their money to cancel his certificate, without any obligation on his part to contribute towards maturing any subsequent member's certificate. In the Order of Fraternal Guardians an entirely different method was adopted. The certificate was made to cover a long period of years, and it was to be paid in eighths. The member receiving his first eighth could not immediately sever his connection with the order, because the members following him had the right to be matured likewise, and from a fund which it was his duty, for a period of twenty-eight years, to maintain by assessments, to be paid by him on his certificate, and by virtue of his membership. In this respect the duty of maturing one another was mutual, and the unmatured certificate holder had as much right to expect and depend upon the matured certificate holder to mature his certificate as the matured certificate holder had the right to take from the benefit fund the amount of his payment. The benefit fund of this order might well be likened unto the reserve fund of a life insurance company. Surely, every member had an equitable interest in a portion of the assessments paid by him into the benefit fund. His entire assessments could not be swept away by any payment of matured certificates. A court of equity would restrain such an action on the part of the officers, and compel them to levy sufficient assessments to avoid an entire depletion of the benefit fund. The certificate stipulates that, if the member shall comply with all the requirements of the order, he shall, at the end of three and one-half years from the date of his certificate, receive a sum not exceeding one-eighth of the amount mentioned in his certificate. What is meant by a sum not exceeding one-eighth? Is not this merely a maximum limit of the amount to be paid to the certificate holder? Can it be argued that a contract to pay any amount, not exceeding a certain sum, is a contract to pay that sum? The mere interrogation suggests its absurdity. It was intimated at the argument that a sum not exceeding \$625 might mean five cents. True enough, it might. But, in an uncertain matter like this, the law, in its wisdom, would say this meant a sum which could be reasonably paid, with a due regard to all the

circumstances of the case. Now, what would have been a reasonable sum to have paid the matured certificates in this instance? It appears by the appraisal that the entire assets of the order amounted to \$810,000. On the day the assignment was made there were nearly \$600,000 due to matured certificate holders. In two months more enough certificates would have matured to wipe out the entire benefit fund that it had taken nearly four years to accumulate. The payment of the maximum sum mentioned in the certificates would have plunged the order into bankruptcy. Is it at all in doubt whether, under such circumstances, a court of law or equity would compel the payment of the maximum sum on the certificates? It may be said that the supreme executive committee had power to call an unlimited number of assessments, but the exercise of it would have been disastrous to the order. Under these circumstances, the auditor cannot see how it would be possible to award the matured certificate holders the maximum limit of their certificates. The matured certificate holders claim to be creditors of the order for the amount of the first payments on their certificates, and, in support of this position, relied upon two cases: *Vanatta v. Insurance Co.*, 31 N. J. Eq. 15, and *Mayer v. Attorney General*, 32 N. J. Eq. 820. While the above appear to be two cases, they are really one, as the same case came twice before the court in settlement of the one insurance company, and they may, therefore, be considered together. In the settlement of the affairs of the New Jersey Mutual Life Insurance Company, which had become insolvent, there appeared to be three classes of claimants: (1) Endowment policies, that had matured by lapse of time previous to insolvency; (2) policies upon which, before insolvency, all payments had been made that were ever to be made, but the time of maturing the policies did not expire until after insolvency; (3) unmatured policies. In marshaling the assets, the court treated the first-named endowment policy holder as a creditor, and awarded him payment in full out of the assets, on the ground that he had terminated his membership, and become a creditor; the other two policy holders came in afterwards, pro rata. In *Mayer v. Attorney General* the court said: 'The termination of the risk and of membership effected the change in the status of the policy, from which its right to be a preferred claim is derived. Prior to such change it was entitled, as between it and the other policies, to share in the company's reinsurance or reserve fund. By such change it became a debt owing by 'he company to a third party, not bound to make further payments of premiums, and not entitled to act in the management of the business.' In the last-named case the question arose between the policy holder and an insurance company. The auditor does not think that the case of the Fraternal Guardians can be governed by the

strict rules applied to insurance companies. The Fraternal Guardians was not a corporation carrying on life insurance for profit, nor were the certificates issued to members in any sense policies. The paper a person received upon joining the order was not an incontestable and unalterable contract between the member and the order. It was subject to change and modification by the supreme lodge, whenever an amendment to the laws of the order was deemed necessary. The case of *Mayer v. Attorney General* also takes the ground that when a policy matures the holder severs his connection with the company and becomes a creditor for the amount due him. In this the case of the Fraternal Guardians also differs. The certificate holder here was a member for twenty-eight years. He was still a member after his first installment became due, and he was bound to pay further assessments, and continue to take part in the management of the order. The auditor cannot bring this case within the ruling of *Mayer v. Attorney General*. Other conditions exist here, which did not arise in that case. Apart from all that has been said, the question in this case, in the opinion of the auditor, can be decided upon other grounds than those heretofore touched upon. Regarding this order, and the certificates issued by it, in the light of a contract between the parties, the auditor thinks that there is such a premature termination of it, that the rights of the parties require an equitable adjustment. The matured certificate holders place themselves in the anomalous position of seeking the fruits of a contract, and at the same time refusing to perform its stipulations. They, with the unmatured certificate holders, by their representatives in the supreme executive committee, have made it impossible to carry out the contract entered into by the certificate holders, by reason of the assignment. There was a mutual duty existing between the two classes to mature each other, yet these matured certificate holders now claim that they are entitled to receive, from the unmatured certificate holders, three dollars for every one paid in by them, and, at the same time, by their acquiescence in the assignment, relieve themselves from all future assessments to mature those that follow. It is not the custom of courts to construe the law of contracts in this one-sided manner. There is still another and a final reason why matured certificate holders should not receive the amount of their matured benefits. This order embarked in a business, and every member contributed equally, according to his interest, towards consummating its purposes. The funds have been well preserved, and the amount now in the hands of the assignee, if there has been no shrinkage in the order's assets, is sufficient to refund every member in good standing every dollar that he paid into the benefit fund. The organization has been honestly conducted, but, through lack of confidence of

the community in enterprises of this character, it has been forced to close up its business, and distribute its assets. The officers of the order are to be complimented upon their action in deferring payment of matured certificates. The first certificates to mature were those held by the officers of the concern, and those instrumental in starting the organization. It would have been to their pecuniary advantage to have paid the certificates as they became due, but they refrained from doing so, as such action might have been followed by the appointment of a receiver, as a doubt existed whether or not such a course would not have been in excess of their charter rights. As the matter now stands, however, the organization has not been guilty of committing any ultra vires acts, and there is the greatest moral certainty that it never will be in a position to exceed its charter rights. The distribution of its funds pro rata among its members will prejudice no one. To prefer the matured certificate holders would enrich a few, at the expense of many. Equity does not commend, nor law warrant, any other than a pro rata distribution among its members of the assets of the order, and the distribution will, therefore, be made accordingly. The decision that all certificates come in, pro rata, upon the fund for distribution renders unnecessary the discussion of certain questions that could only arise in the event of the matured certificate holders being allowed the full amount of their matured payment.

"In the account will be noticed an item of \$11,598.50, with which the assignee charges himself. This amount represents September assessments collected by the assignee from various financial secretaries of subordinate lodges, some of which were collected by them previous to the assignment, and some collected from members subsequent to the assignment. While the September assessment was due on September 1st, yet the members had until the end of the month in which to pay the same. The order having made an assignment for the benefit of creditors previous to the expiration of that time, the auditor thinks that members had the right to presume that it was unnecessary for them to make further payments, as their interests were fixed and determined at the time the assignment was made. In fairness to those members, therefore, whose misfortune it was to be prompt in the payment of their September assessments, the auditor directs that repayment be made of the same to them in full, so that the entire organization will be on the same footing.

"There is no charge in the account by the assignee for commissions. The assignee appeared before the auditor, and asked for an allowance of three and one-half per centum upon the fund for distribution, as compensation, and stated the reasons upon which he based his claim. Taking into consideration the responsibility of his position, and the

large amount of security required of him, the fact that the interests of nearly eight thousand claimants are being cared for by him, and the voluminous correspondence, and the innumerable personal interviews with certificate holders, and other duties incident to his office, the auditor is of opinion that three and one-half per centum is a fair compensation for such services, and he therefore awards the assignee that amount. This commission, however, is not to be charged on the amount of September assessments in his hands, which he is directed to return in full to the members paying the same. A fee to F. C. Brewster, Esq., counsel for the assignee, of \$1,500, is also allowed out of the fund for distribution.

The amount in the hands of the assignee for distribution, as found above.....	\$269,886 48
Less September assessments.....	11,593 50

Is	\$258,292 98
From this will be deducted claim of Albert S. Haeseler, above allowed	\$ 450 00
Commissions to assignee, $3\frac{1}{2}$ per cent. on \$258,292.98	9,040 25
Counsel fee to F. C. Brewster, Esq.	1,500 00
	<u>10,990 25</u>
	\$247,302 73

Less the expenses of this audit, as follows:	
To prothonotary's costs for filing this report, and recording same..	\$ 175 00
To advertising in The Press	11 50
To advertising in Legal Intelligencer	7 20
To advertising in Record	15 00
To expenses of type-writing this report and making copies thereof, accountant's charges, and auditor's fee	2,698 94
	<u>2,907 64</u>

Leaving a net balance for distribution of.....	\$244,395 09
--	--------------

"There is, therefore, on hand the sum of \$244,395.09, to be distributed, pro rata, among claims aggregating the sum of \$745,107, which will pay a dividend of three hundred and twenty-eight one-thousandths per cent. on each claim, and will be distributed among the certificate holders, on this basis, according to the annexed schedule of distribution."

Exceptions.

"First. Because the learned auditor erred in finding as follows: 'The duty of maturing one another was mutual, and the unmaturing certificate holder had as much right to expect and depend upon the matured certificate holder to mature his certificate, as the matured certificate holder had the right to take from the benefit fund the amount of his payment.' Second. Because the learned au-

ditor erred in finding as follows: 'Can it be argued that a contract to pay any amount, not exceeding a certain sum, is a contract to pay that sum? The mere interrogation suggests its absurdity. It was intimated at the argument that a sum not exceeding \$625 might mean five cents. True enough, it might. But, in an uncertain matter like this, the law, in its wisdom, would say this meant a sum which could be reasonably paid, with a due regard to all the circumstances of the case.' Third. Because the learned auditor erred in finding as follows: 'Is it at all in doubt whether, under such circumstances, a court of law or equity would compel the payment of the maximum sum on the certificates? It may be said that the supreme executive committee had power to call an unlimited number of assessments, but the exercise of it would be disastrous to the order.' Fourth. Because the learned auditor erred in finding as follows: 'Under these circumstances, the auditor cannot see how it would be possible to award the matured certificate holders the maximum limit of their certificates.' Fifth. Because the learned auditor erred in finding as follows: 'The auditor cannot bring this case within the ruling of *Mayer v. Attorney General*. Other conditions exist here, which did not arise in that case.' Sixth. Because the learned auditor erred in finding as follows: 'Regarding this order, and the certificates issued by it, in the light of a contract between the parties, the auditor thinks that there is such a premature termination of it, that the rights of the parties require an equitable adjustment.' Seventh. Because the learned auditor erred in finding as follows: 'The matured certificate holders place themselves in the anomalous position of seeking the fruits of a contract, and at the same time refuse to perform its stipulations.' Eighth. Because the learned auditor erred in finding as follows: 'They, with the unmaturing certificate holders, by their representatives in the supreme executive committee, have made it impossible to carry out the contract entered into by the certificate holders, by reason of the assignment.' Ninth. Because the learned auditor erred in finding as follows: 'There was a mutual duty existing between the two classes to mature each other, yet these matured certificate holders now claim that they are entitled to receive, from the unmaturing certificate holders, three dollars for every one paid in by them, and, at the same time, by their acquiescence in the assignment, relieve themselves from all future assessments to mature those that follow.' Tenth. Because the learned auditor erred in finding as follows: 'The distribution of its funds pro rata among its members will prejudice no one. To prefer the matured certificate holders would enrich a few, at the expense of many.' Eleventh. Because the learned auditor erred in not deciding that the said certificate holders were entitled to be paid the full amount of one-eighth of the

certificates held by them. Twelfth. Because the learned auditor erred in reporting a pro rata distribution among all the certificate holders of the said order."

Thomas Diehl and John G. Johnson, for appellants. F. Carroll Brewster, for appellees.

PER CURIAM. All the facts necessary to a proper understanding of the questions presented by the specifications of error in this case are sufficiently set forth in the learned master's report. Twelve exceptions, filed to said report, were dismissed by the court, and distribution decreed in accordance with the schedule submitted by the auditor. Dismissal of said exceptions, all of which are recited in the first 12 specifications, and refusal to award the fund in the hands of the assignee to the holders of matured certificates, in preference to the holders of certificates which had not matured at the date of the assignment, constitute the subjects of complaint in the several specifications of error. We have considered the questions involved, and are of opinion that the findings of fact and conclusions of the learned auditor are substantially correct, and, for reasons fully set forth in his report, the decree should be affirmed. In view of the insolvency of the order, the distribution made by the court below is just and equitable. Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

(159 Pa. St. 620)

CUNNINGHAM v. FOURTH BAPTIST CHURCH.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

BUILDING CONTRACT—EXTRAS—CHANGES ORDERED BY BUILDING INSPECTORS.

After work was commenced on a church under a contract providing that no extras should be paid for unless agreed to in writing signed by the parties, city building inspectors ordered changes, a sketch of which was prepared by the architect, and the contractor was directed to make such changes. *Held* that, though there was no express contract for the extras made necessary by the order, it was the duty of the church corporation to see that the order was obeyed, from which arose an obligation to pay for the work necessary therefor, done with the consent of the corporation, under the direction of its architect.

Appeal from court of common pleas, Philadelphia county.

Scire facias on a lien by Charles Cunningham, trading as Cunningham & Co., against the Fourth Baptist Church. There was a judgment of nonsuit, and, from the refusal to take it off, plaintiffs appeal. Reversed.

De Forrest Ballou, for appellant. William E. Tolan and H. K. Fries, for appellee.

STERRETT, C. J. This case is here on appeal from the refusal of the court to take off the judgment of nonsuit. It appears that in June, 1889, the corporation defendant en-

tered into a written contract with James Hood for certain alterations and additions to its church buildings, in which contract it was provided that no extra work should be paid for unless agreed to in writing, and signed by the parties. Plaintiffs were subcontractors under Hood for certain stonework, for which they were to receive \$1,900, all of which was paid after completion of the work. During the progress of the work a certain change in the structure of the stonework was ordered by the building inspectors, a sketch of which was prepared by defendant's architect, and thereupon plaintiffs were directed to make the change thus ordered, and go ahead with the stonework, all of which they did; but, on account of said change in the structure of the stonework so ordered by the building inspectors, they incurred an increased outlay for labor and materials not included in their contract with Hood, for which they were not paid, and thereupon they filed the lien on which this scire facias was issued. The defense was that the so-called "extra work," specified in the lien, was not ordered or contracted for by the corporation defendant, or by any one authorized to bind it therefor. The court, being of opinion that no sufficient evidence of such contract was given, nonsuited the plaintiffs, and afterwards refused to take off the judgment of nonsuit.

Conceding, for the sake of argument, that the learned court was right in holding that there was no sufficient evidence of an express contract to pay for the increased outlay necessitated by the change in structure of the stonework ordered by the building inspectors, it does not follow that the defendant, as owner of the building, was not bound to pay therefor. The change, prompted by considerations of safety, etc., and ordered by officers of the city, invested to a certain extent with the police power of the state, was not a matter as to which either the owner of the building or its architect or contractors could exercise any option. The order, unappealed from, was final and conclusive on all parties, and had to be obeyed. The plaintiffs could not proceed to carry out their contract for the stonework in disregard of the order of the inspectors. It thus became the duty of the defendant to see that the required change was made, and accordingly its architect, as the testimony shows, prepared a sketch thereof, and the plaintiffs, in charge of that branch of the work, were directed to make the change accordingly. They did so in good faith, with the knowledge and acquiescence of the corporation defendant, and under the direction of its architect. There appears to be no good reason why they should not be paid for the materials and labor required in carrying out the order of the building inspectors. In the circumstances disclosed by the testimony, the law imposed on the defendant the duty of seeing that the order was obeyed, and from that arose an ob-

ligation to pay those who furnished the necessary material and did the work under the direction of its architect in charge of the improvement. The testimony returned with the record is quite sufficient to have carried the case to the jury, and hence there was error in refusing to take off the judgment of nonsuit. Judgment reversed, and a procedendo awarded.

(159 Pa. St. 590)

In re MULLER'S ESTATE.

Appeal of WENDEROTH.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

DECEDENT'S ESTATE—EVIDENCE OF DEBT—DECLARATIONS—RES GESTÆ.

1. Evidence that claimant, the father-in-law of decedent, handed money to the person superintending the settlement for the purchase of a house by decedent, and that the money was used in payment of the purchase price, does not make out a prima facie claim against decedent's estate.

2. A statement then made by claimant that he was loaning this money to decedent, is not admissible to show the alleged loan, it not having been said in the presence of decedent.

3. Nor can such statement be considered part of the res gestæ, it having no necessary connection with the settlement then being made.

Appeal from orphans' court, Philadelphia county.

Settlement of the account of Otto J. Muller, executor of Emil J. Muller, deceased. From a decree disallowing the claim of Wiegand E. Wenderoth, he appeals. Affirmed.

B. F. Fisher, for appellant. M. J. O'Callaghan, for appellee.

STERRETT, O. J. As was well said in *Carpenter v. Hays*, 153 Pa. St. 432, 25 Atl. 1127: "Claims against a dead man's estate, which might have been made against himself while living, are always subjects of just suspicion; and our books, from *Graham v. Graham*, 34 Pa. St. 475, to *Miller's Estate*, 136 Pa. St. 239, 249, 20 Atl. 796, are full of expressions by this court of the necessity of strict requirement of proof, and the firm control of juries in such cases." It was therefore incumbent on appellant, asserting his right, as a creditor of the estate, to participate in the distribution, to substantiate his claim by competent and sufficient evidence. We think he failed to furnish the necessary proof. The learned auditing judge found against him, and that finding was approved by the court in banc. We are now asked to reverse the finding of fact thus approved. To warrant us in so doing,—especially in such circumstances as are presented in this case,—it is not sufficient to show that grave doubts exist as to the correctness of the adverse finding; clear error therein must be shown. It is conceded that shortly after decedent's marriage to appellant's daughter the former bought the house and lot from the sale of which the fund for distribution was

raised. At the settlement for that purchase, superintended by William E. Knowles in the office of the German American Title & Trust Company on or about the 5th of November, 1888, appellant handed Mr. Knowles \$1,200, which was used in payment of the purchase money; but whether this was the money of appellant or of the decedent, or whether it was a loan or a gift, there is no competent evidence. It is claimed that the fact of producing and handing over the \$1,200 by appellant, and its use as part of the purchase money for the house, to which the decedent was about taking title, made out a prima facie claim against the estate; but we cannot so regard it. Nor do we think it was competent to supplement such evidence by proving that appellant, when he handed the \$1,200 to Mr. Knowles, said he was loaning same to his son-in-law, to assist him in buying the house, etc., unless it was also shown that this was said in the presence and in the hearing of the decedent. The testimony of Mr. Knowles not only leaves it in doubt whether the decedent was even present when said statement was made by appellant, but, aside from that, there is nothing in his testimony that would warrant the inference that, if present, decedent heard, and by his silence impliedly assented to the correctness of, the statement so made. In answer to the question whether he was sure decedent "was there at that time," Mr. Knowles answered: "I could not say positively. There are so many people there in the morning in the settlement department,—eight or ten a day." There was no error in not considering appellant's statement to Mr. Knowles as part of the res gestæ. It had no necessary connection with the settlement, the business then being transacted; nor does it appear that appellant was there for any other purpose than that of handing over the \$1,200 for his son-in-law, to be applied as part payment of the purchase money. Any statement he may have then volunteered to make, not in the presence or not in the hearing of his son-in-law, cannot, in any proper sense of the term, be regarded as part of the res gestæ. It was rather in the nature of a self-serving declaration, and therefore not entitled to any consideration as evidence in support of appellant's claim against the estate. 1 Whart. Ev. § 259. For these and other reasons given by the court below, we are satisfied the conclusion there announced is correct, and the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(159 Pa. St. 585)

CRAWFORD v. SIMON.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

MORTGAGES—PAYMENT TO EXECUTOR—RELEASE AND SATISFACTION—PENALTY FOR REFUSAL.

1. The payment by a mortgagor of the debt, with interest and costs of entry of satisfaction

thereon, to one of the executors of the mortgage is sufficient to entitle him to such an entry, though made without the consent of the other executor.

2. Upon such payment it is the duty of such other executor to join in an entry of satisfaction of the mortgage, and his refusal so to do renders him liable to the penalties prescribed by the act of 1715.

3. It is no defense to an action for such penalty that the executor, apprehending that the coexecutor would misapply the money, requested the same to be paid to him.

Appeal from court of common pleas, Philadelphia county.

Action by Susan Crawford against William Simon. From a judgment for plaintiff, defendant appeals. Affirmed.

In the charge of the court below the facts appears as follows: Plaintiff executed a mortgage upon her property to Mrs. Simon and her son William, who is the present defendant, for \$1,750. The mortgage was given to them as coexecutors and cotrustees under the will of her husband and his father. The mortgage was for one year. At the expiration of that time, William, this defendant, demanded payment of the mortgage, and the plaintiff procured the money, with the interest up to date, and appointed a time and place, of which she notified him, where she would pay all that was due. One of the coexecutors and trustees of the mortgagees, Mrs. Simon, was there at the appointed time, but defendant said that he would not come there or satisfy the mortgage unless he got the money. The plaintiff paid the money to the executor and trustee who was there. Defendant had possession of the bond and mortgage, and did not surrender it until the lapse of a year afterwards. The mortgage was never satisfied.

Charles F. Linde, for appellant. Andrew J. Maloney, for appellee.

GREEN, J. The payment of the mortgage debt, together with interest thereon and cost of satisfaction, made by the plaintiff to Sarah Simon, the defendant's coexecutor, was a perfectly legitimate and efficacious payment. It extinguished the debt, and entitled the plaintiff to an entry of satisfaction, under the act of 1715, and to the penalties prescribed by that act if such satisfaction was wrongfully refused. It was not necessary that the payment should be made to the defendant because he was made one of the executors. A payment to his coexecutor alone was legally efficacious to discharge the debt, with or without his consent. *Fesmyer v. Shannon*, 143 Pa. St. 201, 22 Atl. 808. When the payment was made it was his duty to produce the bond and mortgage, to deliver them to the mortgagor, and to join in an entry of satisfaction on the record. He not only did not do either of these acts, but he positively refused to do either of them after formal notice was served upon him that in the event of his refusal he would be held responsible for damages to the full

amount of the mortgage, which is the penalty prescribed by the act of 1715. All the facts which were necessary to bring the case within the act of 1715 were fully established on the trial, and were uncontradicted. The learned judge of the court below was entirely right when he said to the jury: "I charge you as matter of law that it was the duty of this defendant to satisfy that mortgage. It was fully paid,—debt, interest, and charges,—and it was his duty to satisfy it. Hence, the plaintiff is entitled to recover a verdict." The answers to the points were also strictly correct. The flimsy pretext of the defendant that he had an honest apprehension that his mother would misapply the money would have been no defense if it was true, because the payment of the debt to his coexecutor discharged it, so far as the mortgagor was concerned, and it had the same legal effect as if it had been paid to him, or to both executors jointly. But it was not true. According to his own testimony, he was indebted to his mother then, and she had never received any of the money of the estate, and had, therefore, never misapplied any of it. Nor had he the slightest reason to suppose she would. The whole testimony in the case proves that the defendant's refusal to surrender the bond and mortgage and to enter satisfaction was wanton, malicious, obstinate, and entirely unreasonable and unjustifiable in any point of view. It was for the punishment of just such conduct as this that the penalties of the act of 1715 were imposed, and it would be difficult to conceive of a case in which they could be more deservedly imposed than in this one. The case was correctly tried in all respects by the learned court below. Judgment affirmed.

(159 Pa. St. 533)

COMMONWEALTH, by McCREARY, Treasurer, v. THOMAS POTTER, SONS & CO.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

TAXATION—EXEMPTIONS—MANUFACTURING CORPORATIONS—LICENSE TAX.

1. Where a manufacturing corporation opens a store, it becomes a dealer in goods, wares, and merchandise, within the meaning of the acts providing for mercantile licenses.

2. Where such a corporation sells other goods than of its own manufacture, it subjects so much of its capital used, and its business done, outside of the legitimate business of a manufacturing corporation, to the same taxation that other persons or corporations engaged in the business they enter upon are required to pay.

3. The penalty for the nonpayment of a license tax is not incurred until disposal of the appeal from the appraisalment.

Appeal from court of common pleas, Philadelphia county.

Action by the commonwealth, by G. D. McCreary, treasurer, against Thomas Potter, Sons & Co., to recover a license tax, and the penalty for nonpayment thereof, assessed against defendant as a dealer in merchandise.

From a judgment for plaintiff, defendant appeals. Reversed in part.

J. Campbell Lancaster and Wm. Henry Lex, for appellant. J. Edward Carpenter and W. U. Hensel, Atty. Gen., for appellee.

WILLIAMS, J. It is true, as appellant contends, that a mercantile license is a tax; but it is a tax levied on a mode of doing business, and not upon persons. By the act of 1830 it was imposed only on dealers in foreign goods, wares, and merchandise. The act of May 4, 1841, extended the tax to all dealers, whether the articles sold by them were of foreign or domestic production. The extent to which manufacturers were affected by this tax was a question that was settled by the act of 1846, by providing that sales made by a mechanic or manufacturer of his own products did not subject him to the mercantile tax unless he kept a store, or sold goods manufactured by others to an extent exceeding \$1,000. Under these acts it was held that a manufacturer might sell his own products at his factory, or send them to a commission merchant for sale, without liability to the tax, (*Com. v. Campbell*, 33 Pa. St. 380; *Norris v. Com.*, 27 Pa. St. 494;) but, if the manufacturer keeps a store or warehouse, where he sells goods manufactured by others, as well as those made by himself, he is liable to assessment as a dealer, (*Osborn v. Holmes*, 9 Pa. St. 333.) The appellant is a manufacturer of oilcloths. It conducts a store at some distance from its factory, in which it deals in this class of goods. The assessment by the mercantile appraiser affirms that the business done at this store includes not only the sale of the articles produced by the appellant, but the dealing in the products of other manufacturers. The appellant, in the affidavit of defense, does not deny that this is the character of its business, but insists that, as it is incorporated under the laws authorizing the incorporation of manufacturing companies, it is not within the purview of the laws relating to mercantile taxes. But the exemption enjoyed by manufacturing companies is confined to the plant used for the manufacture of its goods, and the business of making and selling done there. When such a corporation goes beyond the line thus indicated, it subjects so much of its capital used, and its business done, outside of the legitimate business of a manufacturing corporation, to the same taxation that other persons or corporations engaged in the business thus entered upon are required by law to pay. This has been so frequently, and so recently, passed upon by this court, that a citation of the cases is unnecessary. Among the latest of them, however, are *Com. v. National Oil Co.*, 27 Atl. 374, and *Com. v. Savage Fire Brick Works, Id.*, (in which opinions were filed at the October term, 1893.) Such a corporation, when it opens a store, becomes a "dealer in goods, wares, and mer-

chandise," within the meaning of the several acts above cited, and must pay the same license or other tax that a natural person would be subject to in the same business. Corporations often find it convenient to open stores in connection with their business. Many of the coal and iron companies, lumber companies, leather companies, and similar corporations employing a large number of men, open stores mainly to supply their employees. When this is done, it is the uniform practice to assess such store, in the name of its owner, whether a person, firm, or corporation, with a mercantile license. As it is the object of the law to levy this tax on the business of the merchant or dealer, it is unimportant who the dealer may be, or whether the dealing is done in the name of a natural or an artificial person. The court below laid down the law correctly, and the judgment is affirmed, except as to the penalty. This is an appeal from the appraisal for which the law provides, and, until disposed of, the penalty is not incurred. The judgment is reduced to \$100.50.

(159 Pa. St. 605)

REILLY et al. v. DALY.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

CONTRACTS—ACTION—PLEADING—AFFIDAVIT OF DEFENSE.

1. In an action on a written contract, an affidavit of defense which merely alleges that it was signed by defendant "in the haste and excitement of the court room, and does not contain the agreement as made," is insufficient, as there is no allegation therein of fraud or misrepresentation, or that defendant was induced by any parol promise, which was subsequently broken, to sign.

2. As a person is not liable upon an unaccepted order for the payment of money, an allegation in the affidavit of defense in an action thereon that the drawer was largely indebted to defendant at the time is a sufficient defense to the order as an equitable assignment of the fund in his hands, as he is not bound therein to go into a specification of the indebtedness.

3. An affidavit of defense setting up a release is insufficient, unless either a copy of the release is annexed, or its contents disclosed, or there are given some particulars from which its applicability can be determined.

4. Act May 31, 1893, (P. L. 185), only provides that judgment may be taken and execution issue upon indebtedness which is admitted, and where affidavits of defense are insufficient, judgment cannot be entered under this act.

Appeal from court of common pleas, Philadelphia county.

Action by Mary G. Reilly and others, to the use, etc., against Patrick K. Daly. From a judgment for plaintiffs, defendant appeals. Reversed.

The facts of the case are as follows: "The defendant (appellant) was executor of the will of Thomas Costigan, deceased, and the legal plaintiffs are the legatees and devisees under that will. The defendant filed three accounts as such executor, which were adjudicated by the orphans' court for Philadel-

phia county. At the audit of the last two of said accounts, the questions arose which affect this case. In the second account the defendant claimed credit, *inter alia*, for \$1,576.98, being five per cent of the proceeds of certain real estate sold by him as executor, to which claim the plaintiffs objected, claiming that the defendant was entitled only to two and one-half per cent. on said proceeds. The defendant admitted the force of the objection, and, in order to save himself the unpleasant consequences of a surcharge, requested the plaintiffs to withdraw their objection, which they did; and, in consideration of their so doing, he made the agreement in writing to pay the counsel fee of Henry M. Boyd, his counsel, so that the estate would not be called upon for any counsel fees. The said court allowed Boyd a fee of \$440.00, which was paid out of the balance for distribution, but which the defendant should have paid, according to his said agreement, and this suit was brought to recover the same. * * * The defendant filed his third and final account as executor, containing an overcharge for commissions amounting to \$116.50. The plaintiffs objected to this, whereupon the defendant again admitted the force of the plaintiffs' objection, and again, to avoid a surcharge, made an agreement somewhat similar to the agreement last mentioned, by which he agreed to pay the said \$116.50 to the plaintiffs, to reimburse them for said overcharge. This is the second item of the plaintiffs' claim. After the audit of the last-mentioned account, but before the adjudication thereof had been filed, it was found that the defendant had charged a greater amount for expert witness fees in a proceeding before a road jury than the amount actually expended by him. This excess amounted to about \$200, and the defendant claimed that he had paid same to Boyd. To avoid a surcharge for same, an agreement somewhat similar to the other two was made, but with this difference: Boyd, the defendant's attorney, gave to the plaintiffs an order on the defendant, Daly, for \$173, to be paid out of the fee allowed to Boyd in the said adjudication of the last account. Which fee so allowed was to have been paid out of the moneys in the defendant's (Daly's) hands."

Albert E. Peterson, for appellant. J. C. Stillwell, for appellees.

GREEN, J. It must be confessed that the plaintiffs displayed but little wisdom in accepting the defendant's promises to pay them for excessive charges in his accounts, instead of corrections of the accounts by the decree of the auditing judge. But, whether wise or unwise, the defendant's promise to pay whatever fee should be allowed to his counsel out of his commissions, and that the estate should not be charged with any amount as a fee to his counsel, was in writing, and his affidavits

set forth no real defense to it. It is of no consequence to say that it was signed by him "in the haste and excitement of the court room," and "does not contain the agreement as he made it." Such allegations are totally insufficient to set aside written agreements. There is no allegation of fraud, misrepresentation, or mistake, or that he was induced by any parol promise, which was subsequently broken, to sign the agreement; and nothing short of such defenses could be heard against the contract. We think the affidavits disclose no defense against this part of the claim.

As to the item, \$116.50, for excessive commissions charged in defendant's second account, he makes no defense at all, except the general release subsequently asserted, which will be presently considered. As to the item of \$173, it is founded upon a written order given by Boyd, defendant's counsel, on the defendant, for the payment of that amount of money out of the fees allowed him in the adjudication made by the orphans' court. The claim is only made upon the order, and not upon any promise of defendant to accept such an order, or any order, drawn by Boyd. It was never accepted by Daly, and therefore he is not liable upon it as an order for the payment of money. *Maginn v. Bank*, 181 Pa. St. 362, 18 Atl. 901; *Hazleton Co. v. Union Imp. Co.*, 143 Pa. St. 581, 22 Atl. 906. As an equitable assignment of a fund, it is of no avail against the affidavit of defense which alleges that the acceptance was refused because Boyd was largely indebted to him. We do not think it was necessary for the defendant to go into a minute specification of such indebtedness in an affidavit of defense, as the unaccepted order created no *prima facie* liability on Daly's part which he was bound to dispel by alleging a specific set-off. Any indebtedness from Boyd to him which did not leave the clear sum of \$173 due to Boyd would be a sufficient reason for refusing to accept; and, as there is nothing on the record showing such an amount of indebtedness affirmatively, a denial of it is enough to carry the question to a jury, where the whole subject can be heard and determined.

So far as the alleged releases are concerned, they amount to nothing, for several reasons, one of which is alone sufficient to demonstrate the inadequacy of their allegation: The alleged promises of the defendant to pay were outside of the balances determined by the accounts to be due to the heirs, and therefore any releases of such balances would be no reply to such promises. Moreover, the affidavits do not annex any copies of the releases, nor disclose their contents, nor do they give any particulars from which their applicability to the defendant's promises of payments can be determined.

It is not clear that judgment can be entered for the plaintiffs under the act of May 31, 1893, (P. L. 135.) That act only provides that judgment may be taken for such amounts

of the plaintiff's claim as are admitted to be due, and that execution may issue for such admitted indebtedness, with a right to proceed to trial for the remainder of the claim. It was doubtless passed to settle all doubts upon that subject, as there were different opinions relating to it. But it would be inapplicable to this case, because these affidavits do not admit anything to be due. While, in our opinion, they are insufficient as to two items of the claim, they are not admissions of the correctness of those items, and literally the case is not brought within the terms of the act. We feel obliged, with some reluctance, to reverse the judgment, because of the situation as to the third item of the claim. Judgment reversed and procedendo awarded.

(159 Pa. St. 612)

ALLEN et al. v. KIRWAN et al.

(Supreme Court of Pennsylvania. Feb. 12, 1894.)

SALE—THE CONTRACT—WHEN COMPLETE.

When one person, by letter to another, states that he has a few jars, and offers to sell him some, without mentioning any particular quantity, a telegram from the latter ordering a certain quantity does not, until the order is accepted by the former, create a contract to deliver binding on him.

Appeal from court of common pleas, Philadelphia county.

Suit by Richard J. Allen and another against E. F. Kirwan and others. From a judgment for plaintiffs, defendants appeal. Reversed.

William M. Stewart, Jr., and John G. Johnson, for appellants. James H. Shakespeare, for appellees.

GREEN, J. The learned judge of the court below gave a binding instruction to the jury to find a verdict for the plaintiffs for the full amount of their claim. If the various telegrams and letters given in evidence constituted a binding contract between the parties, there would probably have been no material error in the instruction, as there was no other defense made than that there was no contract for 500 gross of jars, as claimed by the plaintiffs. This brings us directly to the question whether any actual contract was established by the telegrams and letters. The first communication that passed between the parties was a letter from the defendants to the plaintiffs, dated Baltimore, June 12, 1891, in the following words: "Gentlemen: We wired you the other day regard to caps, and we hoped to have heard from you with order. We have a few jars that we can offer you at this time for immediate acceptance, at \$8.00 for 1 qts., 11.00 for 2 qts., complete; delivered at Philadelphia. Terms sixty days, or less; two per cent. for cash, in ten days. Caps same price as before quoted. Awaiting your orders, we are yours, truly,

Kirwan & Tyler." To this letter plaintiffs replied next day by telegram, as follows: "Philadelphia, June 13, 1891. Kirwan & Tyler: Letter 12th instant just received. Enter order for five hundred gross complete goods; also, will you give privilege of duplicating same, not later than middle of next week? R. J. Allen, Son & Co." On June 15th, the plaintiffs, having received no answer to their telegram of 13th, telegraphed again to defendants, as follows: "Philadelphia, June 15, 1891. Kirwan & Tyler, Baltimore: Are awaiting answer to that portion of our telegram of 13th instant wherein we ask if you would give us the privilege of duplicating the order now with you, up to the middle of this week. R. J. Allen, Son & Co." On the same day, the defendants telegraphed the plaintiffs as follows: "R. J. Allen, Son & Co., Philadelphia: We can only enter order for 250 gross. Will advise as to balance by wire Wednesday." Also, on the same day, the defendants wrote the plaintiffs as follows: "Baltimore, Md., June 15, 1891. Mess. R. Allen, Son & Co., Philadelphia, Pa.: Your telegram at hand, and, in reply, we wired you that we had only two hundred and fifty (250) gross of caps that we could enter your order for definitely at this time, but will wire you Wednesday morning if we have any more to spare. We are now dickering for another lot, and, if we can get them, we will be pleased to give you the entire quantity. Please send us shipping instructions for the two hundred and fifty (250) gross. Yours, truly, Kirwan & Tyler." On the same 15th of June, the plaintiffs wrote the defendants, on receipt of their telegram, as follows: "Kirwan & Tyler, Baltimore, Md.: Telegram just received this afternoon. We undoubtedly expect the 500 hundred gross as ordered, we having ordered promptly upon receipt of your order, and in accordance therewith. As for option, we will await your advices until Wednesday by wire as per telegram received. Please advise us where the goods are to be received. Yours, truly, R. J. Allen, Son & Co." To this letter the defendants answered the next day, by letter, as follows: "Baltimore, Md., June 16, 1891. Messrs. R. J. Allen, Son & Co., Philadelphia, Pa.—Gentlemen: Your favor of the 15th at hand. In reply, would say that, if you will refer to our letter, we wrote you that we only had a small quantity bodies to spare. We have not at this time five hundred gross. As we wrote you last night, if we are able to secure the balance of the bodies, we will wire you in the morning, and hope to be able to supply you. Yours, truly, Kirwan & Tyler." On the same 16th day of June, the plaintiffs wrote the defendants as follows: "Philadelphia, 6th Mo., 16th, 1891. Kirwan & Tyler, Baltimore, Md.—Gentlemen: Yours of the 15th inst. received this morning. You spoke of our order as being only for caps, but it is for complete goods, and would refer you to our telegram of June 13th. We

wrote you yesterday that we expected undoubtedly the 500 gross of completed goods as ordered, and that we await your advice tomorrow, Wednesday morning, respecting the option we asked for of 500 gross additional. In our letter of yesterday, we asked you where the goods are, which please answer; and, when hearing from you, we can then answer your question as for shipping instructions, as stated in last sentence of yours of 15th inst. Yours, truly, R. J. Allen, Son & Co." To this letter the defendants wrote the following reply: "Baltimore, Md., June 17, 1891. Messrs. R. J. Allen, Son & Co., Philadelphia, Pa.—Gentlemen: Your favor of the 16th at hand. As we wrote you on the 15th, we cannot furnish but two hundred and fifty (250) gross of complete jars. These jars are now stored in Jersey, and we can ship them whenever it suits you. We have been unable to get any further jars as yet, and, unless we do, we cannot, of course, furnish the other two hundred and fifty (250) gross. We are still trying, however, and, as soon as we have any more to offer, will advise. Yours, truly, Kirwan & Tyler." On the 18th June, the defendants also wrote the plaintiffs the following letter: "Baltimore, Md., June 18th, 1891. Messrs. R. J. Allen, Son & Co., Philadelphia, Pa.—Gentlemen: Your favor of the 17th is at hand. We do not see how we can deliver anything we do not possess. We only have the two hundred and fifty gross, and these we will give you at any time, and will do our best to secure the other two hundred and fifty gross. If we are able to do so, will gladly let you have them. Trusting this explanation may be satisfactory, we are yours, truly, Kirwan & Tyler."

The contention of the plaintiffs in this action of foreign attachment, brought by Allen, Son & Co., is that a binding contract was made by which the defendants Kirwan & Tyler were bound to deliver 500 gross of jars to them, in consequence of their telegram of June 13th to Kirwan & Tyler to enter order for 500 gross. There was no telegram or letter from Kirwan & Tyler by which they ever agreed to sell that many gross, and, unless a legal obligation on their part to sell that many arises out of their letter of June 12th and the plaintiffs' telegram of June 13th, the plaintiffs have no case. In their letter of the 12th, the defendants say they have a few jars which they can offer for immediate acceptance, at the prices named. To this, plaintiffs reply by telegram, "Enter order for five hundred gross." Of this order there was no acceptance. Does such an offer, followed by such an order, unaccepted, obligate the defendants to deliver the whole quantity ordered? The statement of this question seems to furnish its own answer. As long as the order was unaccepted, there was no agreement to deliver 500 gross. The offer was to sell "a few" gross. Such an offer was of an indefinite quantity. It gave the plaintiffs a right to name a quantity, and,

if the quantity named was accepted by the defendants, they would be bound to deliver that quantity. But, if the quantity named was unaccepted, how could the defendants be legally bound to deliver the quantity named? At what point of time, and in what words, did the plaintiffs ever agree to deliver 500 gross? Not by anything occurring after the order, because all of the telegrams and letters of the defendants after their original letter of June 12th were a continual and constantly repeated assertion of their inability to deliver that quantity, because they did not have them, and could not get them. Not by the original letter of June 12th, because in that they did not offer to sell any definite quantity. By consequence, in order that they should become legally bound for any definite quantity, no matter whether large or small, their assent to that particular quantity must be obtained. They said they had a few jars to sell. What does that mean? It is very clear it does not mean 50 jars, or 100, or 1,000, or any other particular number. It is impossible to understand how it can certainly and definitely mean the particular number 72,000 jars. The plaintiffs' contention is that it does have such legal meaning, because they indicated that number in their order, and that this alone bound the defendants to that number. They say "a few" authorized them to fix 72,000. But the answer is a few does not authorize the plaintiffs to bind the defendants to any definite number without their consent, and, until such consent is obtained, the defendants are not bound. Not a solitary authority or text writer's opinion is offered by the plaintiffs in support of their contention, nor is it believed any such can be found. On the contrary, a number of cases quite analogous in the character of the questions raised are cited by the defendants, and seem to control the determination of the subject. Thus, in the case of *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, the defendants wrote to the plaintiffs as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full cargo lots of eighty to ninety-five barrels, delivered in your city, at 85 cents per barrel, to be shipped per C. & N. R. Co. only. At this price, it is a bargain, as the price in general remains unchanged. Should be pleased to receive your order." To this the plaintiff replied by telegraph the next day: "Your letter of yesterday received and noted. You may ship me 2,000 barrels Michigan fine salt, as offered in your letter. Answer." The plaintiff sued for failure to deliver, and filed a statement of claim, setting out the letter and telegram, and also alleging that he was accustomed to buy salt in large quantities, and that 2,000 barrels was a reasonable quantity for him to order, which the defendants might reasonably expect him to order from their knowledge of his business. To this statement, the defendant demurred, and the demurrer was sustained, on the

ground that the letter and statement did not make out a contract. This case is very closely in point with the present. We think the case of *Slaymaker v. Irwin*, 4 Whart. 380, is ruled upon a principle sufficiently analogous to give it force in the present contention. There *Slaymaker* wrote to *Irwin*: "We will take one hundred tons of Washington pig metal, the same quality as that received last year from you, at thirty dollars per ton, delivered at *Wrightsville*, as early in the spring as the navigation of the river will admit of; and the further quantity of one hundred tons at any time between the first of July and the first of October." To this, *Irwin & Huston* replied in a few days: "We will have no metal to deliver after the spring freshet, or, in case of no freshet in the river, in the canal immediately after. Therefore it will be necessary for you to say what quantity you will take on spring delivery. Our terms are thirty dollars per ton if delivered in arks at *Wrightsville*. An immediate answer is requested, as we are receiving orders daily, and are unable to decide the quantity we may have to sell." In answer to this, *Slaymaker* wrote: "Your favor of 15th inst. was duly received, from which we learn that you will not have any metal for sale after the spring delivery, and in which you inquire what quantity we will take at that time; in reply to which we say we will take three arks if delivered in that way, which we would really prefer, or one hundred and fifty tons if delivered by the canal. The terms proposed we will comply with." To this no answer was given, and *Slaymaker* brought suit to recover damages for the nondelivery of 150 tons. Here was a request for a definite order. Such an order was given in either of the alternatives suggested by *Slaymaker*, but this court held the contract was not complete without a further reply from them. Mr. Justice Sergeant, delivering the opinion, said: "The last letter, of February 22d, did not complete the transaction. It suggested a new proposal, and required another communication from the defendant to produce that effect. It might not suit the defendant to furnish one hundred and fifty tons in the spring, and no one but himself could say that it would. He has not said so. He has left the plaintiff's letter unanswered and the transaction unfinished." So, in this case, it might not suit the defendants to furnish 500 gross of jars, and no one but they could say that it would. But the case is stronger than *Slaymaker v. Irwin*, because the defendants did answer the order for 500 gross, by saying they could not send them because they did not have them. They made immediate and persistent attempts to get them, but could not succeed. And the case is still much stronger than any of the other cases because the defendants did agree to furnish 250 gross, which was all they had or could obtain, and the plaintiffs accepted that number. They certainly had no legal right

to insist upon more when the defendants had no more, and so informed the plaintiffs, and had never agreed in any manner whatever to give them more. It would be a perversion of justice to hold that they were legally bound to do what they had never agreed to do, and what they told the plaintiffs at once they could not do; and especially is this so in view of the fact that they made earnest efforts to get the additional 250 gross in the market, so as to accommodate the plaintiffs in their desire, and only failed to do so because they could not be had. Other cases having more or less analogy are cited for the appellants, viz.: *Beaupre v. Telegraph Co.*, 21 Minn. 155; *Ashcroft v. Butterworth*, 136 Mass. 511; *Ahearn v. Ayers*, 38 Mich. 692,—but it is unnecessary to review them, as the question is too simple and easy of solution upon the plainest principles. We are clearly of opinion that no contract for the delivery of 500 hundred gross of jars was ever made between these parties, and therefore the jury should have been instructed to render a verdict for the defendants. The assignments of error are all sustained. Decree reversed.

(160 Pa. St. 47)

FULLAM v. ROSE.

(Supreme Court of Pennsylvania. Feb. 23, 1894.)

ACTION BY EXECUTOR—EVIDENCE—DEFENSE OF COVERTURE.

1. In an action by an executor to recover money deposited by testator with defendant for safe-keeping, defendant may introduce the executor's inventory and appraisement to show that the claim in suit was omitted therefrom.

2. A certified copy of the adjudication of the executor's account is competent to show that a claim founded on a judgment note signed by the testator subsequent to the deposit was awarded to defendant out of the fund for distribution.

3. Coverture is no defense to an action to recover money deposited for safe-keeping.

Appeal from court of common pleas, Philadelphia county.

Action by Richard Fullam, executor of the last will of Luke Otis, deceased, against Anna Maria Rose. Judgment for plaintiff. Defendant appeals. Reversed.

J. C. Gallen and S. Davis Page, for appellant. James E. Gorman, for appellee.

STERRETT, C. J. This action, brought by the executor of Luke Otis, is on a sealed instrument, executed by the defendant June 23, 1886, of which the following is a copy: "Know all men by these presents that I, Anna Maria Rose, wife of Michael Rose, do hereby acknowledge that I have in my hands the sum of one thousand dollars belonging to my brother Luke Otis, he having deposited the same with me for safe-keeping, which moneys are payable to him, or his heirs or assigns, on demand at any time." In his statement, plaintiff avers that on said date defendant received from her brother \$1,000,

and thereupon executed said acknowledgment, which was "in the possession of said Luke Otis at the time of his death, and now in the possession of plaintiff;" that, as executor of said Otis, he demanded payment of said sum, which was refused. The pleas were nonassumpsit, payment with leave, and coverture, on all of which issue was joined. On the trial, plaintiff gave in evidence the paper in suit, his letters of administration, etc., and rested. To maintain the issue on her part the defendant introduced testimony tending to prove that on January 10, 1887, she sent for her brother, and returned to him the \$1,000 referred to, and in addition thereto gave him \$25, which he at first refused to take; that she then asked for the paper she had given him, and he replied it made no difference between them; that he had torn it up, or would tear it up; that defendant's husband then drew a receipt, which was signed, and alleged to have been afterwards lost. It was not produced at the trial, but there was some testimony tending to show that, shortly after it had been given, it was seen by one or two of the witnesses. It is unnecessary to refer specially to the testimony tending to prove payment of the \$1,000 in controversy, and circumstances connected therewith, or to other facts and circumstances, testified to by defendant's witnesses, tending to corroborate the direct evidence of payment. It is sufficient to say that the testimony, if believed by the jury, was quite sufficient to warrant a verdict in favor of defendant.

For the purpose of further corroboration, defendant offered in evidence the inventory and appraisement filed by plaintiff as executor of Luke Otis, for the purpose of showing that the claim in suit was omitted therefrom; also, a certified copy of the adjudication of plaintiff's account as said executor, for the purpose of showing that defendant was a creditor of the estate and a distributee under said adjudication, and that no claim was made against her in any form on the paper in suit. These offers were both objected to by plaintiff, and excluded by the court. This we think was clear error. The omission of the claim in suit from the inventory was a circumstance, the benefit of which the defendant was entitled to. If unexplained, it might, in connection with other testimony, have an important bearing on the question at issue. The adjudication of plaintiff's account and the facts connected therewith appear to be quite pertinent to the defense. The former would have shown that a claim founded on a judgment note signed by plaintiff's testator, dated July 10, 1890, for \$1,500, payable one year after date, with interest from July 10, 1889, amounting, in all, to \$1,665, was then presented by defendant, and awarded to her out of the fund for distribution. It will be observed that this note is dated over three years after defendant alleges she paid to her brother the money

claimed in this suit. If the latter was never paid, as plaintiff contends, and defendant was still indebted to her brother in 1890, it is difficult to understand why he should give her the judgment note for \$1,500; and, if the claim in suit was still outstanding at the time of the adjudication, it is still more singular that plaintiff did not present it against her. It is no justification of the ruling complained of to say that these and other matters were susceptible of easy explanation. The proposed evidence should have been received, and then explanation, if any were needed and could be given, would have been in order. The fourth and fifth specifications are sustained. There is no merit in the first three specifications. A married woman who accepts money for safe-keeping, and refuses to return it when demanded, cannot take refuge behind the plea of coverture.

We also think the defendant's case was unduly prejudiced by the manner in which it was submitted to the jury. It was not necessary to suggest that her defense depended solely on the veracity of her principal witness. Apparent inconsistencies, and even contradictions, in the testimony of witnesses, do not necessarily imply willful falsehood. As a general rule, it is the safer and better course to instruct the jury that it is their duty to reconcile such discrepancies and contradictions, if it can be fairly and satisfactorily done, as it can in a great majority of cases. Failing in that, it is their duty, from all the light before them, to determine whether the witness should be believed by them or not. In other words, it is the province of the jury to pass upon the credibility of witnesses who testify before them. Judgment reversed, and a venire facias de novo awarded.

(160 Pa. St. 94)

HOFFMAN v. WHELAN.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

PLEADINGS—AFFIDAVIT OF DEFENSE.

In an action to recover assessments for mutual insurance of live stock, the affidavit of defense is good where it denies the existence of the indebtedness for which the assessment is alleged to have been made.

Appeal from court of common pleas, Delaware county.

Action by John W. Hoffman, receiver of the Harrisburg Mutual Live-Stock Insurance Company, against Timothy Whelan, to recover certain assessments. From a judgment denying a motion for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Horace L. Cheyney, for appellant. Isaac Johnson, for appellee.

PER CURIAM. There was no error in refusing to enter judgment against the defendant for want of a sufficient affidavit of

defense. In his statement of claim, plaintiff alleges that the assessments which he seeks to collect were levied for the purpose of paying the death losses of certain specified horses. In substance, the affidavit of defense denies the existence of any such indebtedness, and avers that, at the time said assessments were made, there was no such indebtedness by the company, nor is there now, and that the very claims for which said assessments were made have been paid. Assuming (as we must for the purposes of this case) that these averments are true, they constitute a substantial traverse of the plaintiff's claim, as presented in his statement. Judgment affirmed.

(100 Pa. St. 57)

SHEDWICK v. PROSPECT METHODIST
EPISCOPAL CHURCH.

(Supreme Court of Pennsylvania. Feb. 26,
1894.)

REFORMATION OF DEED—COSTS.

Plaintiff, having agreed with representatives of defendant church to give it four lots, signed a deed, prepared by defendant by mutual understanding, without looking at it, which, by mutual mistake, included five lots. Defendant, on notification, took no steps to learn if there was a mistake, but put plaintiff to his proof. On the trial the persons who had represented defendant testified for plaintiff. *Held*, that plaintiff was entitled to costs.

Appeal from court of common pleas, Delaware county; Thomas J. Clayton, Judge.

Suit by James O. Shedwick against the Prospect Methodist Episcopal Church to reform a deed. From the part of the decree which refused plaintiff costs, though reformation was granted, plaintiff appeals. Reversed.

W. B. Broomall, for appellant. Isaac Johnson, for appellee.

STERRETT, C. J. There cannot be any doubt as to the correctness of the body of the decree reforming the deed so as to exclude lot 289, which the grantor evidently never agreed or intended to donate and convey to the grantee, and thus make it, what both parties at first intended it should be, a conveyance of lots 285, 286, 287, and 288. The only complaint is as to the last clause of the decree, wherein it is "ordered, adjudged, and decreed that the plaintiff pay the costs of this suit." The learned master reported in favor of a decree imposing one-half of the costs on each of the parties, but the court thought that the inclusion of lot 289 in the deed as executed and delivered was due to the negligence of the plaintiff in signing and delivering the deed without reading it. It should be remembered, however, that on application of two members of defendant's

committee, plaintiff agreed to donate to the church three lots, and a few days afterwards, on application of one member of the committee, he agreed to add to his gift lot 288. In that negotiation it was mutually understood that the defendant would have the deed prepared and presented for execution. This was done, but, by some unexplained mistake, lot 289 was included; and the plaintiff, having entire confidence in the integrity and accuracy of the church people and their scrivener, who appears to have been one of them, executed and delivered the deed in the firm belief that it was correct. The mistake was doubtless mutual, as the learned master has found, and was not discovered until about 10 years thereafter. It was then defendant's duty to resort to every means of information within its reach for the purpose of ascertaining whether the mistake, of which it was informed by plaintiff, had in fact been made. If its own records did not furnish the desired information, it should have applied to those by whom it was represented in the negotiation for the property. The two members of the committee, George B. Russell and James E. Thomas, who called on plaintiff, and negotiated the gift, were both within reach; but it does not appear that defendant, or any one in its behalf, applied to them, or either of them, for information. Both of these gentlemen were before the master, and by their testimony corroborated the plaintiff, and sustained his averment of mistake in the preparation of the deed. If that information had been sought and obtained in the outset, as it evidently might and should have been, we cannot believe the defendant would have hesitated to voluntarily correct the mutual mistake. That would have ended the matter, as it should have been, without the expense incident to the litigation which a different line of policy necessitated. Instead of doing what, in the circumstances, should have been done, the defendant, actuated at least by a spirit of indifference, entrenched itself behind the deed, and called upon the plaintiff to make full proof of the alleged mutual mistake. He accepted the burden, and proved the fact in issue to the entire satisfaction of the learned master and the court below. The finding of the master is not even questioned in this court. It is virtually conceded to be correct. In view of all the circumstances, we are unable to see any reason for departing from the ordinary rule in equity that the successful party is entitled to costs. On the contrary, we think there are good reasons why the rule should be enforced. That may be done by substituting the word "defendant" for the word "plaintiff" in the last line of the decree. As thus amended, the decree is affirmed, with costs, including the costs of this appeal, to be paid by the defendant.

(160 Pa. St. 73)

BRADLEY v. WEST CHESTER ST. RY. CO.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

EXECUTION FOR COSTS—MASTER'S FEE—EXEMPTIONS.

Where plaintiff's bill to restrain a trespass on his premises was dismissed at his costs, including the master's fee, the decree is, as to the master's fee, on the implied contract to pay such fee, and hence plaintiff is entitled to exemption against an execution therefor under the act of 1849.

Appeal from county court of common pleas, Chester county; Joseph Hemphill, Judge.

Bill by D. Hlester Bradley against the West Chester Street-Railway Company. From an order for the sale of property claimed by plaintiff as exempt under an execution for costs, he appeals. Reversed.

Monaghan & Hause, for appellant. Wm. M. Hayes and R. T. Cornwell, for appellee.

STERRETT, C. J. Plaintiff's bill to restrain defendant company from trespassing on his premises was so proceeded in that it was dismissed at his costs, including the master's fee of \$250. On an execution afterwards awarded against him for said costs, he claimed the benefit of the \$300 exemption, and property to that amount was appraised and set apart to him. Exceptions to that allowance were sustained; and, for the purpose of collecting the master's fee, the sheriff was ordered to sell the property which had been appraised and set apart as aforesaid. From that order this appeal was taken.

The question thus presented is whether, as against the execution for master's fee, the plaintiff was entitled to the exemption accorded to him by the sheriff. If he was, the order complained of was improvidently made, and should be reversed. The learned judge appears to concede that under the provisions of the exemption act of 1849 a plaintiff is entitled to exemption against an execution for costs, upon the ground that, when he invokes the services of a public officer, there is an implied promise or contract to pay him such fees as by law he is entitled to for the services rendered, but he thinks no such implication arises as to the fee of a master in equity. In that, we think he is mistaken. The compensation of a master, as respects the party who has it to pay, is costs, and not a fee. *Janes' Appeal*, 87 Pa. St. 428. In that case it was said: "When a party in a litigated case is adjudged to pay costs, his liability is not restricted to the disbursements and expenses which the opposite party may be entitled to receive, but extends to the officers of the court for services rendered therein. When these united sums are taxable in the case, they constitute 'the costs' for which he is liable. In one gross sum, he pays both. * * * As against

the party compelled to pay them, all the items are costs." As an item of expense in an equity case, the master's fee is included in the general costs of the suit. 14 Am. & Eng. Enc. Law, 965. While the bill in this case was to restrain the commission of a tort, there is no reason for treating the decree against the unsuccessful plaintiff, for costs, otherwise than as a judgment for a debt on contract express or implied. In that respect, there is no ground for a distinction between law and equity. A judgment against an unsuccessful plaintiff in trover is a judgment on contract, as respects the costs; and, upon an execution to recover the same, he is entitled to claim the benefit of the exemption law. *Lane v. Baker*, 2 Grant, Cas. 424. In that case, Mr. Justice Black said: "A party is not a trespasser because he sues another for trespass. Costs against the plaintiff are not like damages against the defendant. We are of opinion that a judgment for costs is to be considered in the same light as a judgment for debt on contract, so far as the exemption law affects the rights of the parties. The fact that the costs accrued in an action for tort makes no difference." To the same effect is *Pierce's Appeal*, 103 Pa. St. 27. That was a bill to dissolve a partnership, and resulted in a decree against the appellant for money, together with costs including the master's fee, and this court said: "Where no element other than debt upon contract enters into a judgment or decree for the recovery of money and costs, or for recovery of costs against a plaintiff who failed to establish his case, the party is not subject to attachment. Nor, in this respect, is there any distinction between costs and fees. If the fees are not paid or secured at the time of service by the officer, his claim upon the party at whose instance the service was rendered is not among the matters excepted out of the operation of the statute. When the fees remain unpaid, to be collected as costs recovered by a party, though the officer may have execution against the losing party, it shall be of the same nature as if issued by the person who recovered the judgment or decree. An examiner or master's allowance for his services is on the same footing." Right to exemption rests on same principle. It is unnecessary to refer specially to the numerous cases cited by the appellee wherein it has been held that certain persons are excluded from the benefit of the exemption law, viz. defendants in mechanics' liens, in ejectments, in judgments for overdue taxes; defendants in actions for tort; constables against whom judgment has been obtained for official misconduct or negligence; defendants claiming exemption out of property conveyed in fraud of their creditors, etc. They all stand upon satisfactory grounds, peculiar to each class, but entirely different from that occupied by the plaintiff in the case at bar.

Without further elaboration, we think the master's fee should be treated as part of the costs which the unsuccessful plaintiff was decreed to pay; that, by invoking the services of the master, said plaintiff impliedly agreed to pay him therefor, and hence no element other than that of debt on contract entered into the decree against him for costs, and he was therefore entitled to the exemption that was accorded to him by the sheriff. It follows that the decree specified in the assignment of error should be reversed. Decree reversed at appellee's costs.

(160 Pa. St. 85)

HASLET et al. v. KENT et al.
(Supreme Court of Pennsylvania. Feb. 26, 1894.)

LIMITED PARTNERSHIP — PROPERTY CONTRIBUTED AS CAPITAL—SCHEDULES.

1. Under Act June 2, 1874, (P. L. 271.) as supplemented by Act May 1, 1876, (P. L. 89,) permitting subscriptions to the capital stock of a limited partnership to be in "real or personal estate, mines or other property," contributions to the capital cannot be made in personal property of a company, subject to its indebtedness.

2. Under the provision of the act that, when the capital contributed is property, there must be a schedule, with a description and valuation, an item, "Bills receivable, \$2,206.17," without mention of the debtors or further description, is insufficient.

Appeal from court of common pleas, Chester county; Joseph Hemphill, Judge.

Action by Haslet, Flanagan & Co. against Samuel C. Kent and others, partners as J. N. Remsen & Co., Limited. Judgment for plaintiffs, notwithstanding the affidavit of defense. Defendants appeal. Affirmed.

George B. Johnson, for appellants. Monaghan & Hause, for appellees.

STERRETT, C. J. The defendants, sued as general partners, denied their liability as such, and claimed to be a limited partnership association, properly organized under the act of June 2, 1874, (P. L. 271,) and its supplement of May 1, 1876, (P. L. 89.) They thus assumed the burden of setting forth in their affidavit of defense such compliance with the provisions of the act as entitled them to the benefit of exemption from liability as general partners. Instead of doing so, however, we think their affidavit discloses non-compliance with the requirements of the act and its supplement in two important particulars: First, that at least part of the property alleged to have been contributed as capital is not such property as is contemplated by the supplement of 1876; and, second, that they have not properly scheduled all the property which is alleged to have been subscribed or contributed to the capital of the association. In Exhibit D, which is attached to, and made part of, the affidavit of defense, it appears that "the total amount of capital subscribed is \$3,900, all of which was

fully paid in cash or personal property into the R. B. Chambers Company, Limited, as described in said articles of association, and is now represented by the personal property hereinafter scheduled; and the respective rights, interests, and shares of the aforesaid members to and in the said association, and the capital and profits to be derived therefrom, are as follows: Samuel Kent, 16 shares,"—to which is added the names of the remaining six subscribers, and the number of shares subscribed by each, respectively. As stated in the certificate, the amount of capital subscribed for by each is as follows: "The said subscribers having purchased the personal property of the R. B. Chambers Company, Limited, * * * and assumed the payment of all the liabilities of the said R. B. Chambers Company, Limited, have contributed the said property, fully described in the schedule hereto annexed, to this company, subject to the payment of the liabilities of the R. B. Chambers Company, Limited." The schedule referred to is headed thus: "Schedule of personal property contributed by Samuel C. Kent, Thomas Gawthrop, John N. Remsen, Samuel K. Chambers, John J. Chambers, George R. Chambers, and Mary R. Jackson, having been purchased by them of the R. B. Chambers Co., Limited, subject to the payment of its debts and liabilities, and in the same manner with all the bills receivable and book accounts, late of said company, contributed to J. N. Remsen & Co., Limited, as part of the capital of said association, as follows." Then follows an itemized inventory and appraisal of numerous articles of personal property, aggregating \$3,874.90. To this is appended the following:

Summary Statement.	
Capital invested.....	\$3,900 00
Notes and accounts payable.....	2,468 92
Profit in stock.....	21 01
	<hr/>
	\$6,389 93
Stock per inventory.....	\$3,874 90
Bills receivable.....	2,206 17
Cash in bank.....	308 86
	<hr/>
	\$6,389 93

It is manifest from their own showing that much of the so-called "property" subscribed and contributed by the defendants to the capital of the association in question is not such property as is contemplated by the supplement of 1876. The personal property purchased from the R. B. Chambers Company, Limited, subject to the debts and liabilities of that company, means what may be left, if anything, of the assets of the said company after all its debts and liabilities are paid. Such property as that is of no avail in aiding the business or paying the creditors of J. N. Remsen & Co., Limited. At best it is not presently available, and may never be. In *Vanhorn v. Corcoran*, 127 Pa. St. 255, 18 Atl. 16, one of the scheduled items was: "Isaac N. Kline et al., doing business as A. H. Hellman & Co., paid in merchandise, lumber, book accounts, and bills receivable, transferred to

this association, \$21,609.18, and in cash, \$3,390.82, making a total subscription of \$25,000." Referring to this item, Mr. Chief Justice Paxson said: "A creditor looking at this description could not form any estimate of its quantity, character, or value. For all practical purposes, it might as well have been omitted."

* * * The defendants "merely contributed their interest in a firm with estimated assets of \$75,000, and certain debts of \$53,000. The value of the difference between the two was the alleged contribution of \$21,609.18. * * * The whole of it, in equity, was liable to creditors, and could not be withdrawn from them without fraud until the last dollar of the debts of the firm was paid; so that, instead of property, the defendants contributed a mere equity, to wit, what was left of the assets of the firm after the payment of its debts. * * * Had the certificate set forth that their contribution consisted of their interest in a firm subject to the payment of its debts, it would have conformed to the truth, but it would not have been a compliance with the act of 1876. That act contemplates such contributions as shall be available to aid the business, and pay the creditors, of the limited partnership. Of what use was this contribution? It could not properly be made available until the debts were paid." Substantially the same principle is recognized in *Maloney v. Bruce*, 94 Pa. St. 249; *Rehtuss v. Moore*, 134 Pa. St. 472, 19 Atl. 756; *Cock v. Bailey*, 146 Pa. St. 338, 23 Atl. 370; *Lafin & Rand Co. v. Steytler*, 146 Pa. St. 443, 23 Atl. 215; *Gearing v. Carroll*, 151 Pa. St. 79, 24 Atl. 1045. In the latter the description of property contributed contained estimated valuations of certain contracts, which were "subject to further expenses."

It is scarcely necessary to notice the lumping item, "Bills receivable, \$2,206.17," etc. Any creditor seeking information as to the character and value of the company's assets might safely assume that the item, "Notes and accounts payable," meant not less than \$2,468.92 liabilities, the amount at which it is scheduled; but what could he know as to the value of the item, "Bills receivable?" Not the name of a single debtor is given, or anything stated that would be of any service in endeavoring to ascertain whether the "bills receivable" were worth anything or not. But further comment is unnecessary. Unless we are willing to let the act of 1876 become a cover for fraud, and a snare for the unwary, we should adhere emphatically to what we have heretofore said as to the scope and meaning of the act. As was said in *Maloney v. Bruce*, supra, the property contributed was intended as the equivalent of cash, and the plain object of the provision requiring a schedule was to enable creditors to ascertain precisely of what the property consisted, and to judge of its value. If parties seek to have all the advantage of a partnership, and yet limit their liability as to creditors, they must comply strictly with the requirements of the

act. Where property has not been contributed, scheduled, and valued as it directs, there is no payment of the capital. The learned judge of the common pleas was entirely correct in the view he took of the case. Judgment affirmed.

(100 Pa. St. 60)

PHILLIPS v. HALL et al.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

PROPERTY OF WIFE — LIABILITY FOR HUSBAND'S DEBTS—LOAN BY HUSBAND TO WIFE — REMEDY OF CREDITORS.

1. Property purchased by a wife with profits arising from keeping boarders in a house rented and supplied with necessities by her, with her own funds, is not liable for her husband's debts.

2. The fact that a husband furnished his wife with money to assist in paying the price of a farm bought by her does not authorize his creditors to levy on the growing grain and other personalty on the farm.

3. A husband acquires no title to the products of his wife's farm managed by her for her own benefit because he voluntarily bestows labor on it.

Appeal from court of common pleas, Chester county; Joseph Hemphill, Judge.

Sheriff's interpleader by Sarah J. Phillips against Augustus R. Hall and George W. Carpenter. From a judgment for plaintiff, defendants appeal. Affirmed.

The specifications of error were as follows: "(1) The court below erred in disaffirming defendants' second point, viz.: 'It appears from the evidence that, of the purchase money of the farm upon which these crops were raised, \$650 were the earnings of the claimant while married, which earnings in law belonged to her husband, so that he was and is the owner of the said real estate to that extent, and the ownership of the claimant to said crops produced thereon is partial, and, as to them, your verdict must be for the defendants.' (2) The court below erred in disaffirming, as 'irrelevant,' defendants' third point, viz.: 'All the partnership business which was carried on by William H. Phillips, agent, prior to 1887, in which the property of Sarah J. Phillips was invested, was, as a matter of law, the business of the said William H. Phillips, and any property or profit derived therefrom was his, and is liable for his debts; and, if the jury find that any of the property here claimed arose from such partnership business, as to such property their verdict must be for the defendants.'"

Chas. H. Pennypacker and Walter F. Hall, for appellants. J. Carroll Hayes and Wm. M. Hayes, for appellee.

STERRETT, C. J. For many years past, the trend of legislation, as well as judicial decision, in relation to the rights and powers of married women, has not been in the direction of permitting a wife's separate property to be seized and sold to pay her insolvent

husband's debts. In any view that can be reasonably taken of the testimony in this case, there is nothing in it that would have justified a verdict against the plaintiff. It clearly appears by the uncontradicted evidence that the property—consisting of live stock, farming implements, grain in the ground, etc.—seized by the sheriff on the execution against plaintiff's husband never belonged to him, but is his wife's separate property, acquired by her with her own money, or on the credit of her separate estate. After attaining her majority, she received from her guardian \$4,500. Subsequently, she received from the estate of an aunt \$600. In 1881, five years after her husband's failure, she received \$1,600 from the estate of another aunt; and, in 1887, \$2,000 from the estate of her uncle,—in all, \$8,700. The farm on which was kept the personal property in controversy was purchased by and conveyed to her. She paid on account thereof \$4,250 in cash, and gave a mortgage for the residue,—\$6,000. Her husband testified that he had no money in it; that he never owned anything since he made the assignment for benefit of his creditors. Plaintiff herself testified that the property levied on was her own; that her husband never owned it, or any part of it; that she had money of her own,—\$7,000 or \$8,000. This and other testimony to the same effect was undisputed. It appeared, however, that \$650 of the money paid on account of the farm was realized by plaintiff from keeping boarders during a period of six or seven years after her husband failed; but, in the same connection, it was shown that she leased and paid the rent of the boarding-house property, furnished the necessary supplies, etc., with means of her own. The small return thus produced by the investment of part of her separate estate, etc., in keeping a boarding house, belonged to herself, and not to her husband, and his creditors have no claim upon it. In *Silveus v. Porter*, 74 Pa. St. 448, a wife owning a tavern stand entered into a copartnership, and with the profits thereof purchased property which was claimed by her husband's creditors. It was held that the property thus purchased was not liable for her husband's debts. So, too, a husband who, in the enjoyment of the marital relation, is permitted to live and be maintained upon the property of his wife, managed by her for her own use and benefit, does not acquire a title to the products merely by the labor which he voluntarily bestows upon it. *Rush v. Vought*, 55 Pa. St. 437. To the same effect are numerous other cases, among which are *Wleman v. Anderson*, 42 Pa. St. 318; *Sixbee v. Bowen*, 91 Pa. St. 149; *Welch v. Kline*, 57 Pa. St. 432; *Wayne v. Lewis*, (Pa. Sup.) 16 Atl. 862; *Seeds v. Kahler*, 76 Pa. St. 262; *Shuster v. Kaiser*, 111 Pa. St. 215, 2 Atl. 110. But, supposing plaintiff's husband had furnished her with \$650 to assist her in paying purchase

money of the farm. His creditors could not avail themselves of the money thus advanced by levying on the grain in the ground, and other personal property on plaintiff's farm, belonging to her, and in which her husband never had any interest.

There is nothing in the testimony that would have warranted the learned court in affirming, as presented, either of the points recited in the specifications of error. Instead of showing that the \$650 mentioned in the first of said points was "the earnings of the claimant," in the sense intended to be conveyed by these words, the testimony tends to show that the sum named represents the income or earnings of that part of her separate estate which was invested in and used by her in carrying on the business of keeping the boarding house. As we have already seen, her husband had no interest therein that was liable to seizure by his creditors. In the other point, the learned trial judge was requested to charge, as matter of law, that "all the partnership business which was carried on by William H. Phillips, as agent, prior to 1887, in which the property of Sarah J. Phillips was invested, was the business of the said William H. Phillips, and any property or profit derived therefrom was his, and is liable for his debts." In view of the uncontradicted evidence, it would have been error to have given such instruction. Judgment affirmed.

(160 Pa. St. 65)

DARLINGTON v. DARLINGTON.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

POWERS UNDER WILL—EFFECT OF NONEXERCISE—DEVISE—PRESUMPTION OF ACCEPTANCE—EJECTMENT—EVIDENCE.

1. A mere power of sale under a will does not work a conversion of realty into personalty until exercised.

2. Acceptance of a devise by the devisee will be presumed.

3. Evidence that a widow, who had been devised certain land by her husband, orally agreed to give it to her son in settlement of a controversy between them is incompetent in action by her to recover such land.

4. In an action by a widow to recover land devised to her by her husband, evidence of an agreement relating to such land between defendant and the executor of the husband's will is incompetent.

Appeal from court of common pleas, Chester county; William B. Waddell, Judge.

Ejectment by Lydia Ann Darlington against Joseph H. Darlington. Judgment for plaintiff. Defendant appeals. Affirmed.

J. Carroll Hayes and Wm. M. Hayes, for appellant. Alfred P. Reid, for appellee.

STERRETT, C. J. To maintain the issue on her part the plaintiff gave in evidence, inter alia, deed of March 28, 1805, from Benjamin Hawley and wife to Joseph Dar-

lington, for the land in controversy, being part of a larger tract patented to said grantor. Also, will of Joseph Darlington, probated May 12, 1821, devising same to his wife for life, remainder in fee to his children, of whom his two sons, Job G. and Caleb, were the survivors. Also, deed of February 5, 1807, from Job G. Darlington and wife to his brother, Caleb, for his undivided interest in same. Also, will of Caleb Darlington, probated December 11, 1890, by the residuary clause of which he devised same land as follows: "All the rest, residue, and remainder of my estate, real, personal, and mixed, I give devise and bequeath to my brother, Job G. Darlington, and to his heirs forever." Also, will of Job G. Darlington, dated December 13, 1890, and probated February 13, 1891, wherein he directed—First, that all his just debts and funeral expenses should be paid by his executors; and, second, "In order to enable them to pay the same, I do authorize and empower them to sell all my real and personal estate," etc. He then gave four small legacies, aggregating \$360, and disposed of the residue of his estate as follows: "Then all the residue and remainder of my estate I do give and bequeath to my wife, Lydia Ann Darlington, to her, her heirs and assigns." Independently of the land in controversy, the estate of Caleb Darlington, who died December 1, 1890, was sufficient to pay all his debts and legacies, and, in addition thereto, \$836.12 to the estate of Job G. Darlington, his residuary legatee. The land in dispute was not sold by the executor; and, so far as appeared at the trial in November, 1892, there were no debts or funeral expenses unpaid, or anything else requiring the exercise of the power of sale contained in the will. The learned president of the common pleas was of opinion that the record evidence, consisting of the said deeds, wills, etc., introduced by the plaintiff, made out a prima facie legal title in her to the land in controversy, and he accordingly instructed the jury that her title was sufficiently established, and their verdict should therefore be in her favor. This instruction is the subject of complaint in the first and second specifications of error. In the absence of any countervailing evidence on the part of the defendant, tending to show title in him, we think there was no error in the instructions complained of. The evidence showed that her husband, seized of the land in controversy, devised the same to her in fee. There was no conversion of the land into personality by anything contained in his will. It contains no direction to his executors to sell the land in question. It gives them merely power to sell, "in order to enable them to pay" his debts and funeral expenses. To work a conversion of real estate into personality there must be either (a) a positive direction to sell; or (b) an absolute necessity to sell in order to execute the will; or

(c) such a blending of realty and personalty, by the testator, in his will, as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money. In the first, the intention to convert is expressed; in the latter two it is implied. Where the result is to change the course of inheritance, the law does not favor conversion, and it will be presumed only so far as is necessary to effectuate the intention of the testator. *Hunt's Appeal*, 105 Pa. St. 141; *Swift's Appeal*, 87 Pa. St. 503; *Perot's Appeal*, 102 Pa. St. 256; *Wilkinson v. Buist*, 124 Pa. St. 253, 16 Atl. 856; *Fidler v. Lash*, 125 Pa. St. 87, 17 Atl. 240. A bare power of sale, such as that given in the will under consideration, like a discretionary power, does not work a conversion until exercised. *Sheridan v. Sheridan*, 136 Pa. St. 14, 19 Atl. 1068; *Peterson's Appeal*, 88 Pa. St. 397. In this case there was no sale under the power given in the will, nor does it appear that there was or is any necessity to exercise the power. It therefore follows that the land in controversy passed as realty to the plaintiff, devisee thereof under her husband's will.

Defendant's points for charge recited in the third and fourth specifications were rightly refused. In the former, binding instruction to find for defendant is requested; in the latter, the court is asked to say that the verdict must be for defendant, because there is no evidence of plaintiff's acceptance of the real estate, or of her election to take the same. For obvious reasons, neither of these points could have been affirmed. We have already seen that plaintiff's claim of title, etc., was sustained by the evidence; and, as devisee under her husband's will, her title was complete without proof of either acceptance or election to take. The presumption is that every devisee has accepted the bounty of his or her devisor; but, if evidence of acceptance were necessary, plaintiff's assertion of title by bringing this suit is sufficient. The subjects of complaint in the remaining six specifications are the rejection of the several offers of evidence recited therein respectively. The obvious answer to each of these offers is that the statute of frauds is a bar to the admission of such evidence for the purpose of showing title out of the plaintiff. The written agreement of the executor recited in the tenth specification could not affect her right, and was therefore not admissible against her in this action. Nor is there anything in the case on which estoppel can be grounded. Plaintiff acquired nothing under the agreement referred to, nor did defendant lose anything thereby to which he was entitled. His allegation of the insolvency of Caleb Darlington's estate, recited in said agreement, etc., proved to be unfounded, as appears by the decree in *Darlington's Estate*, 147 Pa. St. 624, 23 Atl. 1046, to which we have been referred. The case was carefully and accurately tried, and there ap-

pears to be nothing in the ruling of the court below, of which the defendant has any just reason to complain. Judgment affirmed.

(100 Pa. St. 33)

In re IRWIN'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

COMPETENCY OF WITNESS — TRANSACTIONS WITH DECEDENTS.

Under Act May 23, 1887, § 5, cl. B, providing that where a party to a contract is dead, and his rights therein have passed to a party on the record, who represents his interests in the subject in controversy, the surviving party to such contract is not a competent witness as to any matter occurring before his death, the surviving wife of deceased, who is also a creditor, and one of the administrators of the estate, which is insolvent, cannot testify, in a proceeding to surcharge the administrators' accounts with certain horses claimed by her sons by gift from her, as to a contract between her and her husband, whereby she obtained title to such horses.

Appeal from orphans' court, Chester county; Joseph Hemphill, Judge.

Exceptions by Jonas Chamberlain, guardian of John A. Irwin and Bayard Irwin, to the account of Margaret A. Irwin and James B. Stewart, administrators of the estate of Robert Irwin, deceased, and to an auditor's report thereon. From a judgment sustaining such exceptions, the administrators appeal. Affirmed.

The opinion of Hemphill, A. L. J., referred to in the opinion of the supreme court, is as follows: "At the time of Robert Irwin's death, two horses that had been worked and kept upon his farm were claimed by his sons as their separate property by gift from their mother, and her title was based upon an agreement made between herself and the decedent, her husband. The exceptor claims that the administrators should be surcharged with the value of these horses, which were not included in the inventory filed. The sons' title to these horses rests entirely upon the testimony of Margaret A. Irwin, their mother, and one of the administrators of their father's estate; and, exceptions having been taken to her competency to testify as to the agreement made between herself and her husband, the report was referred back to the auditor to pass upon the question. The auditor, in his supplemental report, finds Margaret A. Irwin to be a competent witness, because—First, her interest is not adverse to that of the defendants; and, secondly, she was called to testify against her own interest. To this finding exceptions have been taken. The interest against which Mrs. Irwin testified was that of a creditor of her husband's estate, which, being insolvent, the reduction of the assets by the loss of these horses would consequently reduce her dividend. If testifying against interest was alone the test of competency, Mrs. Irwin would be a good witness, for the sixth section of the act of May 23, 1887, provides

that 'any person who is incompetent under clause E, of section 5, by reason of interest may nevertheless be called to testify against his interest, and in that event shall become a fully competent witness for either party.' It is not, however, upon the ground of interest that her testimony is objected to, but because her husband, the other party to the contract or agreement, is dead. Her interest, against which she was called to testify, has arisen since the death of her husband; while the title of both herself and sons to the horses rests upon the agreement made by her with her husband, now dead, who cannot, therefore, testify, and whose rights and interests have passed to his legal representatives. In *Sutherland v. Ross*, 140 Pa. St. 385, 21 Atl. 354, Justice Clark, delivering the opinion of the court, says: 'In clause E of the fifth section of the act of May 23, 1887, it is provided in the plainest manner that where any party to a thing or contract in action is dead, and his rights thereto or therein have passed, either by his own act or by the act of the law, to a party on the record, who represents his interests in the subject in controversy, neither the surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of the deceased party, except in certain specified cases, shall be a competent witness to any matter occurring before his death.' Now the thing or matter in action here is the right or title of the sons to the two horses in dispute, which they claim by gift from their mother, and which she alleges she procured from her husband under a contract with him. Robert Irwin, the decedent, was a party to that contract or agreement, and his rights under it have, by the act of the law, passed to his administrators, parties on the record who represent his interest in the subject in controversy; and it follows from the expressed words of the statute that Margaret A. Irwin, who is the surviving or remaining party to the contract or agreement, is not, in this case, competent to testify to any matter occurring before the death of her husband, who is deceased; for the title of her sons as well as her own to these horses is dependent upon the agreement made between herself and her husband. Mrs. Irwin was therefore incompetent, not only under the words and settled policy of the statute, but as a person 'whose interest is adverse to the said right of the deceased.' The claim of the sons to these horses depending entirely upon the testimony of Mrs. Irwin, and she, for the reason given, being incompetent to testify, the administrators must be surcharged with their value. There was sufficient evidence, in our opinion, outside of the testimony of Mrs. Irwin to justify the auditor in finding that the two-horse wagon had been purchased and paid for by Mrs. Irwin with her own money, and the exception relative to that item is therefore dismissed. The report is referred

back to the auditor for the purpose of surcharging the administrators with the value of the horses in dispute, and making distribution of the balance among those legally entitled thereto."

W. S. Harris, for appellants. Gibbons Gray Cornwell and R. T. Cornwell, for appellee.

PER CURIAM. The controlling question in this case is whether Margaret A. Irwin, one of the administrators, was a competent witness to testify to the alleged agreement between herself and her husband, since deceased, whereby she became the owner of the two horses, which, as she alleges, she afterwards gave to her sons, who, in their own right, claimed them against the estate, and obtained possession of them. The facts upon which the question arose are clearly and concisely stated in the opinion of the learned judge of the orphans' court; and his disposition of the question itself is so satisfactory that nothing can be profitably added to what he has so well said. Having held that, in the circumstances, the witness was incompetent to testify, and thus prove title in herself to the horses which she afterwards gave to her sons, and there being no other proof of said agreement, the order surcharging the administrators with the value of the horses was a necessary sequence. Decree affirmed, on the opinion of the court below, with costs to be paid by appellants.

(100 Pa. St. 39)

In re PUBLIC ALLEY IN BOROUGH OF WEST CHESTER.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

MUNICIPAL CORPORATIONS — OPENING STREETS — PROCEEDING—REPEAL BY IMPLICATION.

Act May 16, 1891, in relation to the laying out, opening, etc., of streets and alleys (sections 1, 8, 9,) provides that municipalities have power, whenever necessary "in the" laying out, etc., of streets or alleys, to take private lands or material, to lay out, establish, or re-establish "grades of" streets and alleys, and, on petition of a majority of the owners of abutting property, "to grade, pave, curb, macadamize, and otherwise improve," and to open, widen, straighten, or extend streets or alleys. *Held*, that such act did not repeal, by implication, Act June 13, 1836, under which streets and alleys are laid out, opened, etc., by a jury appointed, on petition, by the court of quarter sessions, but merely provides an additional method of opening streets and alleys.

Appeal from court of quarter sessions, Chester county; Joseph Hemphill, Judge.

Petition by J. L. Kugel and others to the judges of the court of quarter sessions for the opening of an alley in the borough of West Chester and the appointment of a jury of viewers. There was a judgment dismissing exceptions by U. H. Painter and others to the report of the jury and proceedings, and the exceptors bring the case to the supreme

court for review on writ of certiorari. Affirmed.

The opinion of Hemphill, J., referred to in the opinion of the supreme court, is as follows:

"The borough of West Chester was incorporated by an act of assembly passed March 28, 1799; but neither this act, nor any of the supplements thereto, conferred upon its corporate authorities the power to lay out, open, or widen streets or alleys within its limits, and as it has never been brought within the provisions of the general borough law of 1851 and supplements, either by its own action or act of the legislature, its streets and alleys have consequently been laid out, opened, and widened under the general road laws of the commonwealth. On May 16, 1891, the legislature passed an act entitled 'An act in relation to the laying out, opening, widening, straightening, extending or vacating streets and alleys, and the construction of bridges, in the several municipalities of this commonwealth,' etc. This act, the exceptants contend, prescribes a new, uniform, and exclusive method for the laying out, opening, widening, etc., of streets and alleys in all the municipalities of this commonwealth, renders inoperative in said municipalities the provisions of the general road law of June 13, 1836, and ousts the jurisdiction of the court of quarter sessions, transferring the proceedings from it to either the court of common pleas or to the municipal authorities. The act of 1891, says the supreme court in Hanover Borough's Appeal, 150 Pa. St. 204, 24 Atl. 669, 'is an affirmative act, conferring additional and cumulative powers on municipalities of all grades, but repealing no prior statute expressly, nor any portion thereof by implication, unless the system provided by it is so inconsistent with that previously existing as to make it impracticable for them to stand together.'

"The question then is, does there exist such an irreconcilable inconsistency or repugnancy between the act of 1891 and those provisions of the act of 1836 which have heretofore governed the laying out, opening, etc., of streets and alleys in the borough of West Chester, that they cannot stand together, and that the latter is therefore repealed by implication? Under the act of 1836, streets and alleys were laid out, opened, etc., by a jury appointed, upon petition, by the court of quarter sessions. Has the act of 1891 prescribed a different and inconsistent mode? All the powers conferred by this act, relative to the laying out, opening, and widening of streets and alleys, are to be found in its first, eighth, and ninth sections. The first provides 'that all municipal corporations of this commonwealth shall have power whenever it is deemed necessary in the laying out, opening, widening, extending or grading of streets, lanes or alleys, * * * to take, use, occupy or injure, private lands, property or material.' No power is here conferred to lay out, open, etc., streets and alleys; but when that power al-

ready exists, and is being exercised 'in the laying out, opening,' etc., an additional power is conferred upon the municipality, if 'it shall be deemed necessary,' 'to take, use, occupy or injure private lands, property or material.' Nor is the power claimed conferred by the eighth section. The first paragraph of that section provides that 'every municipal corporation shall have power to lay out, establish or re-establish [not streets and alleys, but] grades of streets and alleys;' and the second empowers said corporations, 'upon a petition of a majority of property owners in interest and number, abutting on the line of the proposed improvement, * * * to grade, pave, curb, macadamize and otherwise improve any public street or public alley,' etc. The ninth section does, however, authorize said municipalities 'to open, widen, straighten or extend streets or alleys, or parts thereof, within its limits, and to vacate the same,' but only 'upon the petition of a majority in interest and number of owners of property abutting on the line of the proposed improvement.' But even this section does not authorize municipalities to lay out or ordain streets and alleys, but only 'to open, widen, straighten or extend' them when laid out; and though it should be held that in the power to open is included the power also to lay out, still this would be only an additional, and not the sole and exclusive, method. As was said by the supreme court, in commenting upon this section, in *Hanover Borough's Appeal*, supra, where the laying out, opening, etc., of streets was regulated by the act of April 3, 1851, (General Borough Act:) 'There is nothing repugnant in the existence of two methods of initiating the improvement. * * * A precise analogy is to be found in the city of Philadelphia, where streets may be opened, on their own motion, by councils, or by the court of quarter sessions upon petition; and doubtless similar double methods coexist in other municipalities of the state. Repeals by implication are never favored, and the implication would have to be very strong indeed to justify a court in adjudging an implied repeal of the power to lay out, open, and widen streets, which has existed in some form from the colonial days, and is an essential part of our modern conception of a municipality of any grade.' The act of 1891 apparently assumes that the power to survey, lay out, and ordain streets and alleys in the municipalities of the commonwealth already exists somewhere; and that power it does not pretend to alter or interfere with, as its provisions become available only after that power has been exercised by the proper tribunal, and the streets and alleys have been surveyed and laid out. Being of the opinion, therefore, that the act of 1891 merely provides an additional method for the opening of streets and alleys in municipalities, and does not, by implication, repeal the provisions of the act of June 13, 1836, relating to the same, the exceptions are dismissed, and the

report of the jury is confirmed. On motion of Cornwell & Cornwell and Wm. T. Barber, of counsel for opponents of said alley, the court seals an exception to the order of the court, dismissing their exceptions to the report of the jury of view, and confirming the report."

William T. Barber and Cornwell & Cornwell, for appellants. Butler & Windle and Monaghan & Holding, for appellees.

PER CURIAM. The single question presented by this record is whether the jurisdiction of the court of quarter sessions to lay out and open streets and alleys in the borough of West Chester under the general road law of June 13, 1836, was abrogated by the act of May 16, 1891, (P. L. 75,) entitled "An act in relation to the laying out, opening, widening, straightening, extending or vacating streets and alleys, and the construction of bridges, in the several municipalities of this commonwealth," etc. After a careful consideration of the subject, and for reasons which are entirely satisfactory, the learned judge of the court below came to the conclusion "that the act of 1891 merely provides an additional method for the opening of streets and alleys in municipalities, and does not, by implication, repeal the provisions of the act of June 13, 1836, relating to the same" subject. The logical result of this conclusion was the decree dismissing exceptions to the report of the viewers, and confirming their report. All that is necessary to be said on the controlling question in the case will be found in the clear and able opinion of the learned judge of the quarter sessions, and on that we affirm the decree.

(160 Pa. St. 55)

COMMONWEALTH ex. rel. FERNBERGER v. BUTTERWORTH.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

CORPORATIONS—ELECTION OF DIRECTORS — CUMULATIVE VOTING.

Const. 1874, art. 16, § 2, gave such existing corporations as should thereafter hold their charters subject thereto the benefits of its provisions. Section 4 provided that in all elections of directors 'each shareholder may cast the whole number of his votes for one candidate.' Act May 20, 1891, (P. L. 101,) made salaried officers of a corporation eligible to the office of director. *Held* that, the fact that in 1892 a corporation, which existed prior to 1874, elected two of its salaried officers directors was not such a submission to the provisions of the constitution of 1874 as to authorize cumulative voting for directors.

Appeal from court of common pleas, Philadelphia county.

Action in quo warranto at the relation of Henry Fernberger against James Butterworth to contest defendant's election to the office of director of the Fire Association of Philadelphia. There was judgment for de-

tendant on a hearing of the information and answer, and relator brings certiorari. Affirmed.

Following is the information and the answer thereto:

"Henry Fernberger, who sues in this behalf for the commonwealth of Pennsylvania, this — day of March, A. D. 1893, comes here into court, and for the said commonwealth gives the court here to understand and be informed as follows:

"(1) That James Butterworth since the 13th day of January, A. D. 1893, has exercised, and still does exercise, the franchises, rights, and privileges of a director of the Fire Association of Philadelphia, a corporation created by authority of law, and having its chief place of business in the city of Philadelphia, without lawful authority; and that on the day and year last aforesaid the above-named Henry Fernberger was, and still is, a stockholder in the said Fire Association of Philadelphia, and was, in due and regular form of law, elected a director of the said Fire Association of Philadelphia agreeably to the provisions of the several acts of assembly relative thereto; but, notwithstanding said election of the said Henry Fernberger, the said James Butterworth has for the time aforesaid used, and still does use, the franchises, rights, and privileges aforesaid, and during the said time has usurped, and does usurp, on the commonwealth therein, to the great damage and prejudice of the constitution and laws thereof.

"(2) And the said Henry Fernberger, who sues in this behalf for the commonwealth of Pennsylvania, this — day of March, A. D. 1893, comes here into court, and for the said commonwealth gives the court to further understand and be informed that the Fire Association of Philadelphia is a corporation created by authority of the following special or private acts of assembly of the commonwealth of Pennsylvania: March 27, 1820, (P. L. 108); April 3, 1833, (P. L. 120); April 13, 1838, (P. L. 372); March 22, 1845, (P. L. 205); January 24, 1849, (P. L. 680); January 26, 1849, (P. L. 25); April 9, 1849, (P. L. 510); April 22, 1856, (P. L. 524); March 31, 1858, (P. L. 189); March 7, 1860, (P. L. 115); April 13, 1868, (P. L. 886); February 24, 1869, (P. L. 239); May 5, 1871, (P. L. 572); April 17, 1873, (P. L. 796.) And that said Fire Association of Philadelphia has its chief place of business in the county of Philadelphia. That until the enactment of the act approved May 20, 1891, no officer or salaried employe of the said company was eligible to the office of a director of the said company. That by law the stockholders of said company are authorized annually, on the second Friday of January in each and every year, to elect thirteen directors of the said company; and that on the 8th of January, A. D. 1892, said corporation did accept the benefit of the said act of assembly of the commonwealth of Pennsylvania approved

May 20, 1891, (P. L. 101,) entitled 'An act authorizing salaried officers of private or business corporations to concurrently serve as directors therein,' and the said stockholders did then and there in pursuance of the provisions of the said act of May 20, 1891, elect Theodore H. Conderman, then vice president, and a salaried officer of said Fire Association of Philadelphia, to be director thereof, and did then and there elect William Muir, then secretary of the agency department of the said company, to be a director thereof, and they served their entire term as such directors. That thereby the said Fire Association of Philadelphia, by virtue of article 16, § 2, of the constitution of Pennsylvania, became subject to all of the provisions of the said constitution, and that by article 16, § 4, of said constitution it is provided that in all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate, or distribute them upon two or more candidates, as he may prefer. That upon the 13th day of January, 1893, the annual meeting of the stockholders of the said Fire Association of Philadelphia was held for the election of thirteen directors. At said election the above-mentioned Henry Fernberger voted 722 shares cumulatively for himself alone, making 9,386 votes cast for himself thereon, and voted also 4 shares as follows, viz. for himself 48 votes, and for E. C. Irvin 4 votes; and the said Henry Fernberger received also 10 other votes as director, whereby said Henry Fernberger received 9,444 votes for director of said Fire Association of Philadelphia. At said election said Henry Fernberger deposited in the ballot box a ballot voting for himself thirteen times on 81 shares of stock standing in his own name, making in all 1,053 votes; and he also, by virtue of proxies held by him from the following named stockholders, deposited in the ballot box ballots voting for himself thirteen times on each share of stock standing in their names, as follows: Andrew Kaas, 100 shares; Frederick Reutschler, 2 shares; Lewis Schiffler, 9 shares; John W. Koons, 10 shares; Geo. K. McIlwain, 10 shares; Charles I. Beebe, 11 shares; Charles I. Beebe, (trustee,) 22 shares; E. Brick, 3 shares; Joseph Louchheim, 7 shares; Leopold Bamberger, 10 shares; Emanuel Strauss, 9 shares; Mark Strass, 3 shares; Fredk. Krauter, 20 shares; Wm. Welcher, 34 shares; Emma Abrams, 3 shares; Mary W. Fouche, 7 shares; Annie E. Barry, 5 shares; Catharine C. Barry, 2 shares; Therese B. Barry, 2 shares; Andrew Miller, 39 shares; Louis Strauss, 3 shares; Ellz. Huntzinger, 4 shares; Emily B. Volk, 2 shares; Mary E. Vernier, 2 shares; Wm. B. Kelghley, 3 shares; Cornelia Vernier, 2 shares; James H. Miller, 12 shares; Rebecca C. Miller, 1 share. Upon said 418 shares the number of votes thus deposited in the ballot box for said Henry Fernberger was

5,484, being 13 times 418, the number of said shares; and said Henry Fernberger in like manner deposited a ballot voting for himself twelve times on four shares in the name of W. I. Ruhl, on a proxy from him, making 48 votes. At the same time Mahlon Young, on proxies held by him on the stock standing in the name of the following persons, viz.: Mahlon H. Dickinson, 220 shares; Geo. H. Horn, (executor,) 66 shares; Mary H. Nichols, 2 shares; Alexander M. Fox, 16 shares,—also voted the same cumulatively thirteen votes on each share for said Henry Fernberger, deposited in the ballot box separate ballots for him therein, aggregating 3,952 votes on said 304 shares; and some person, whose name is unknown to said Henry Fernberger, deposited in the ballot box 10 votes for him; whereby these 9,444 votes were, at said election, cast for Henry Fernberger for director of the said Fire Association of Philadelphia, all of which votes were on written or printed ballots, duly deposited in the ballot box at said election. At the same time the following named persons received the number of votes set opposite to their names respectively, viz.: E. C. Irvin, received 6,513 votes; Robert Porter, received 6,509 votes; Theodore H. Conderman, received 6,509 votes; Samuel H. Reed, received 6,509 votes; James Whitaker, received 6,509 votes; Jesse Lightfoot, received 6,509 votes; John D. Ruoff, received 6,509 votes; Charles W. Pickering, received 6,509 votes; H. A. Stevenson, received 6,509 votes; William Muir, received 6,509 votes; John McKinny, received 6,509 votes; Isaac S. Sharp, received 6,509 votes; James Butterworth, received 6,499 votes. That at the time of their said election the said Theodore H. Conderman was vice president and a salaried officer of the said company, and the said William Muir was secretary of agency department, and a salaried officer of said company. That by virtue of said election the thirteen persons receiving the highest number of votes as directors of said company were then and there duly elected as such, to wit, the above-mentioned Henry Fernberger, E. C. Irvin, Robert Porter, Theodore H. Conderman, Samuel H. Reed, James Whitaker, Jesse Lightfoot, John D. Ruoff, Charles W. Pickering, H. A. Stevenson, William Muir, John McKinny, and Isaac S. Sharp, and the said James Butterworth received a less number of votes than any of the said thirteen persons, and said James Butterworth was not elected a director of the said Fire Association of Philadelphia, but, notwithstanding the said election of the said thirteen persons above named, the said James Butterworth, since the 13th day of January, A. D. 1893, has exercised, and still does exercise, the franchises, rights, and privileges of a director of the said Fire Association of Philadelphia, and during the said time has usurped, and does usurp, on the commonwealth therein, to the great damage and prejudice of the con-

stitution and laws thereof. Whereupon the said relator, Henry Fernberger, for the said commonwealth, does make suggestions and complaint of the premises, and prays due process of law against the said James Butterworth in this behalf to be made to answer to the said commonwealth by what warrant he claims to have, use, and enjoy the franchises, rights, and privileges aforesaid."

Answer of defendant: "Philadelphia County—ss.: (1) I admit the truth of the facts averred in section 1 of the information, excepting the averment in that I exercise the franchises, rights, and privileges of a director of the Fire Association of Philadelphia without lawful authority, and usurp on the commonwealth; and except also the averment that the above-named Henry Fernberger was, in due and regular form of law, elected a director of said association, as is in said information stated. (2) I admit the truth of the facts averred in paragraph 1, § 2, of the information, as to the date of the charter of the Fire Association, and of the supplements thereto. (3) I am willing to admit, though not positively acquainted with all the facts, the truth of the averment in section 2 of the information as to the number of votes cast cumulatively for the relator, as to the parties who voted thus cumulatively, and as to the number of shares voted for the other parties nominated as directors of the said Fire Association of Philadelphia. (4) I aver that the charter of the said association provides that the votes of the stockholders for directors shall be by ballot; and for the election of directors, and for the deciding of all questions in the general meeting of the stockholders, they shall be entitled to one vote for each share of stock by them respectively held; and upon the advice of counsel I aver that there was no right to vote shares of stock of said Fire Association of Philadelphia cumulatively for the said Henry Fernberger; that the total number of votes cast for him was less than eight hundred; that he was not elected a director of said Fire Association; that at the election of said Fire Association I was elected, in common with Messrs. Irvin, Porter, Conderman, Reed, Whitaker, Lightfoot, Ruoff, Pickering, Stevenson, Muir, McKinney, and Sharp, a director of said Fire Association, to serve for one year. (5) I admit that at the time of said election of directors Theodore H. Conderman was a vice president and salaried officer of said association, and that William Muir was secretary of the agency department, and was a salaried officer of the company; but I aver that upon the day of their election as directors their terms of office as vice president and secretary of the agency department, respectively, expired. I admit, however, that after their election as directors at the time stated in said information the said Conderman and Muir were re-elected to their respective offices of vice president and secretary of the agency department for the year beginning

the 13th day of January, A. D. 1893. (6) The said Fire Association of Philadelphia has its chief place of business in the city of Philadelphia, and its stockholders are authorized annually on the second Friday of January in each year to elect thirteen directors thereof. I admit that on the 8th day of January, 1892, said association did elect as one of its directors the said Conderman and the said Muir as directors of said association, and that on the same day, and after such election, the said Conderman was elected vice president of said association, and that the said William Muir was elected secretary of the agency department by the board of directors of said company, and that both of said offices have salaries attached thereto. (7) I deny that the Fire Association of Philadelphia, by virtue of said election, or by virtue of article 16, § 2, of the constitution of Pennsylvania, or otherwise, became subject to article 16, § 4, of said constitution. Upon the advice of counsel, I aver that the said Fire Association of Philadelphia, which was incorporated prior to the passage of the act entitled 'An act to consolidate, revise, and amend the penal laws of this commonwealth,' approved the 31st day of March, 1860, and of course prior to the adoption of the present constitution of the commonwealth, was not in any way, by reason of anything that it has at any time done, subject to article 16, § 4, of said constitution, or to any of the provisions of said constitution which in any way impaired, altered, or affected its charter. (8) The Fire Association of Philadelphia did not on the 8th day of January, 1892, or at any other time, accept the benefit of the act of assembly of the commonwealth of Pennsylvania approved May 20, 1891, (P. L. 101.) It is true that on that day it did elect as directors the two persons above named, who were afterwards elected to salaried offices, as above stated; but, upon advice of counsel, I aver that said election of directors and officers was in pursuance of its chartered power, and that it did not in any way, in law, amount to the acceptance of acts of assembly of the commonwealth of Pennsylvania passed subsequently to the enactment of the existing constitution of the commonwealth."

Const. 1874, art. 16, § 2, provides that "the general assembly shall not remit the forfeiture of the charter of any corporation now existing, or alter or amend the same, or pass any other general or special law for the benefit of such corporation, except upon the condition that such corporation shall thereafter hold its charter subject to the provisions of this constitution." Section 4 provides: "In all elections for directors or managers of a corporation each member or shareholder may cast the whole number of his votes for one candidate or distribute them upon two or more candidates as he may prefer."

James W. M. Newlin, for appellant. Isaac S. Sharp and John G. Johnson, for appellee.

PER CURIAM. On presentation of the suggestion in this case the defendant was ruled to show cause why a writ of quo warranto should not be issued against him, as therein prayed for, etc. The case having been heard on the suggestion and defendant's answer, the rule was discharged, and thereupon this certiorari was issued. An examination of the record has satisfied us that the case was rightly disposed of by the court of common pleas. Its judgment is therefore affirmed, and it is ordered that the relator, Henry Fernberger, pay the costs.

McGURK v. McGURK.

(Court of Chancery of New Jersey. Feb. 12, 1894.)

DIVORCE—GROUNDS—DESERTION.

1. Cruelty and verbal abuse are condoned by subsequent cohabitation.

2. Where a woman married 19 years leaves her husband and four children, for a third time, because, as she avers, he accused her of bringing beer into the house, and called her a drunkard, and in spite of her daughter's solicitations, made at her husband's request, remains away more than two years from the house he has kept ready for her, he is entitled to a divorce.

Bill by Frank McGurk against Rose McGurk for a divorce. Decree for petitioner.

John A. Dennia, for petitioner. Norman L. Rowe, for defendant.

GREEN, V. C. These parties were married in Jersey City on February 19, 1871. They resided in that place and cohabited together as man and wife until about February, 1890. About that time she left her home and her children, and went to her mother's, and remained away about two weeks, and then, at the request of her daughter, returned to her home. In March following, she again went away, and stayed about four weeks, when she again returned to her husband, and remained until July, 1890, when she left her husband, her children, and her home, and has ever since resided elsewhere, and since which time the parties have not cohabited or lived together. The defendant testifies that the reason of her going away on the previous occasions was that her husband had been cruel to her, and called her vile names. This is denied by the husband, but, if it was true, the offense was condoned by her returning and resuming her duties as a wife. The only excuse given for her last departure is that there was a quarrel over a pitcher of beer which he charged her with bringing there, which she denied, and she gives as her reason for deserting her husband and her home that on that occasion he called her a drunkard.

The facts in this case fail to disclose any sufficient excuse for the wife acting as she did on the occasion of her last separation. It bears all the indicia of having been willful. It was the third time she had deserted

her husband. On the two first occasions, she responded to the solicitations of those who visited her, and returned. After the third and last occasion, McQuirk says he sent for her by Father Smith, Mrs. Larissee, and his daughter. Father Smith was not examined as a witness, and Mrs. Larissee says she did not go to see defendant after she left home the third time. But the daughter did go to see her mother, and urged her to return. The defendant refused to do so, saying she was not going to waste her young life with him. The petitioner kept a house ready for her from July, 1890, till August or September, 1892. I think, under the circumstances of these repeated desertions, the petitioner has discharged his duty in trying to induce his wife to come back, and that his conduct was not acquiescent. She repulsed all his advances, and has continued to remain away. She has shown but little of the feelings of a mother, in her want of interest in the welfare of her children, of whom there are four living. I think the petitioner is entitled to a decree.

(32 N. J. E. 508)

HAWKINS v. YOUNG.

(Court of Chancery of New Jersey. Feb. 12, 1894.)

WILLS—DESCRIPTION OF PROPERTY—EXTRINSIC EVIDENCE.

Testatrix's direction to her executor to sell her house and lot in N., and out of the proceeds pay certain legacies, empowers him, in the light of evidence that she owned no realty except a house and lot in B., a suburb of N., to sell and make title to the B. property.

Bill by Sandford Hawkins, executor of the will of Sophia Stiles, deceased, against William H. Young, for specific performance of a contract. Decree for complainant.

Oscar Naundorff, for complainant. Chas. F. Herr, for defendant.

GREEN, V. O. This suit is brought by Sandford Hawkins, sole executor of the last will and testament of Sophia Stiles, late of Milford, in the state of Connecticut, deceased, against William H. Young, for the specific performance of a contract in writing between them for the sale and purchase of a house and lot in Bloomfield, Essex county, N. J. The property belonged to the testatrix. Mr. Young declined to accept the deed therefor, executed by the complainant, on a question raised as to the power of the executor to convey the premises. The testatrix, by her will, having given five pecuniary legacies, amounting in all to \$2,000, provided by the eighth clause of the will as follows: "I direct my executor to sell my house and lot in said Newark, and to apply the proceeds thereof in payment of the above pecuniary legacies." By the ninth clause, all the rest, residue, and remainder of her estate she gave to four of the legatees, or the survivor of them.

It is a rule that, in order to discover the intention of the testator, the court may put

itself in the place of the party, and then see how the terms of the will affect the property or subject-matter, and for this purpose evidence outside the will is admissible to show the nature and extent of his property. *Leigh v. Savidge*, 14 N. J. Eq. 125. Evidence was given that the testatrix had once lived in Newark, but at the time of executing her will she had for some time been a resident of Milford, Conn. Some eight years before her death, she had purchased the house and lot in Bloomfield, which is a suburb of Newark. That she had no other real estate, and had never owned a house and lot in Newark. Her personal estate amounted to a little over \$800. It is clear from the will that it was the intention of testatrix (1) that the pecuniary legacies were to be paid from the proceeds of the sale of her house and lot; (2) to empower her executor to sell her house and lot. She had no house and lot in Newark, and in locating it there there is a misdescription. But by striking out the words misdescribing it, viz. "in Newark," we have left a power of sale of her house and lot. If she had had more than one house and lot, the intention of the testatrix could not have been ascertained by eliminating the words "in Newark," but as she had but the one, viz. the one in question, her intention to refer to it seems to me to be clear. In the case of *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 710, the testator had devised lot No. 6 in square 403, with the improvements thereon. He did not own that lot, but did own lot No. 3 in square 406. The latter was improved; the other, not. He had disposed of all the rest of his estate. And the court, disregarding the misdescription, determined there was enough in the circumstances, with the remaining words, to show that it was his intention to devise the property he did own. See, also, *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, and cases in *Browne, Par. Ev.* I incline to the opinion that the other evidence offered is not admissible, under the authority of *Miller v. Trav-ers*, 8 Bing. 244, but it is unnecessary to decide the point. I am of opinion that the executor has power, under the eighth clause of the will, to give a good title to the testatrix's house and lot in Bloomfield. Assuming that all parties in interest have been made parties to this suit, such deed will give the parties a merchantable title.

McGRAIL v. McGRAIL.

(Court of Chancery of New Jersey. Feb. 12, 1894.)

DIVORCE—ADULTERY—SUFFICIENCY OF EVIDENCE.

While the positive testimony of the wife's adultery may be so improbable as to raise grave doubts of its truth, it being also explicitly denied by her and the alleged paramour, yet, if other acts of infidelity are clearly proved against her, and the witnesses giving such direct testimony are disinterested and otherwise unimpeached, the court is justified in founding a decree thereon.

Petition by Francis McGrail against Jane McGrail for divorce for defendant's adultery. Granted.

Foster M. Voorhees, for petitioner. R. F. Henry, for defendant.

GREEN, V. C. The petition charges the defendant with adultery in November and December, 1891, at a certain house in East Jersey street, in Elizabeth, with one Jerkelson, and in February, March, and April, 1893, at the same place, with Martin Shannon. These parties were married in August, 1867, and continued to reside together until the year 1889, when the husband left his wife on the ground, as he alleges, that she had become a common drunkard. He was the owner of the house in which they lived, and permitted her to remain therein, and retain the rents for her own use. She almost immediately thereafter brought an action against him for maintenance and support, and some time after that he filed an answer and cross bill charging her with adultery. He was granted a divorce in this court upon the charge made, (22 Atl. 582,) which, on appeal to the court of errors and appeals, was reversed, (25 Atl. 963.)

The petition in this cause was filed June 29, 1893, and alleges acts of infidelity other than those charged in the former suit. The evidence in this case shows that the defendant occupied the front room on the first floor of the house, and that she rented out the remaining portions thereof, there being two other rooms on the first floor and some rooms on the second floor. The stairs from the second floor lead into the middle room of the first floor, and another flight out into the back yard. The evidence in this case tends to show an intimacy on the part of the wife, while thus living alone, with several men, and that she was in the habit of having such company until late hours of the night. The testimony clearly shows that whatever affection she may ever have had for her husband had been entirely extinguished, and that she was addicted to the intemperate use of liquor. The man named in the petition (Jerkelson) is a Norwegian by birth, whose correct name seems to be Severon Turtleson, and who is also called Thompson, but there is no question as to the identity of the individual. Counsel made a motion to amend the pleadings by inserting his correct name, which may be done if necessary. This man formed the acquaintance of the defendant by going to the house to see a friend of his who lived there, and was a frequent visitor. The testimony implicating him is by two witnesses. Mrs. Rebecca McKelvey says that Turtleson (whom she calls Thompson) used to visit Mrs. McGrail, and that she (the witness) was introduced to him by the name of Thompson. That she (the witness) occupied a room up stairs, and the defendant the front room down stairs. That the middle room,

which the stairs from her quarters led into, was at the time unoccupied; and that on one evening in November, 1891, at about half past 9, she went down stairs to lock up the apartments, as she usually did, and on this occasion took some coffee to offer the defendant; and, after going down stairs she passed into the front room, where she found this man Thompson in bed with the defendant. The defendant refused to take the coffee, and said that she wanted some whisky, but told the witness to ask Thompson to take it, but he said he did not want any, but wanted to go home; whereupon the witness told him to get dressed, and she would let him out of the house. That both he and the defendant were undressed and in bed at the time, and his coat was on the table. Witness then went back to her room, where she remained for a short time, and then returned, and when she got down stairs again he was dressed, and had his watch in his hand, but could not see what time it was; and that she (the witness) looked at it, and found it was near 10 o'clock. When the witness came down stairs the first time, she found Thompson and defendant together in bed. They were both undressed, his coat was on the table, his shirt was off, and he was all undressed except his drawers and undershirt; and he wanted to go home, but the defendant did not want him to leave, and he asked the witness to let him out. The defendant's intimacy with this man does not rest solely upon the testimony of this witness. Charles Peterson, who, some time in the fall of 1891, occupied the middle room on the first floor, which adjoins the room of the defendant, testifies that he knew Turtleson, and that he was there at the house, and on one occasion in December he came there at about 9 o'clock in the evening, and stayed until 5 o'clock the next morning; and that he heard Turtleson and the defendant in the next room during the night. About 11 o'clock Turtleson went out, and came back again, as he supposed, with something to drink, and they were talking and laughing during the night, so that the witness could not sleep. That he went out in the yard about 5 o'clock in the morning, and, as he was standing in a gateway between the front and back yards, he saw Turtleson come out of the door leading from the defendant's rooms to the stoop, and in that way pass out into the street. The defendant and Turtleson were both examined as witnesses, and denied all improper intimacy in a general way; but this testimony of Mrs. McKelvey and Peterson is otherwise unimpeached, and must be taken as sustaining the first charge in the petition. The testimony of Mrs. Decker and her daughter, if credible, leaves no room for doubt as to the second charge. They are unimpeached as credible witnesses, and the story is not discredited by any testimony other than that of the defendant and her alleged paramour. The story is, however, so improbable, that, in

the light of the decision of the court of appeals in the former case between these two parties, I should much hesitate whether it could properly be made the basis for a decree. Taken, however, in connection with the other testimony, its positive character, the want of motive on the part of the witnesses to falsify, the habits of intoxication of the defendant, and other circumstances impeaching her fidelity to her marriage vows, lead me to a belief in the truth of the statements. The testimony of the girl is that she heard a scuffling and a fall upon the floor of the room in which Shannon and the defendant were. The witness was on the stoop, and the window of the room, her mother says, was partly open. Miss Decker says she heard the voice of the defendant. It may be that these parties, being on the floor in each other's embrace as the result of the contention or scuffling, gave way to the indulgence of their passion, regardless, if indeed they were aware, of the danger of their act being witnessed by any one on the stoop.

MULFORD et al. v. BROWN et al.

(Court of Chancery of New Jersey. Feb. 17, 1894.)

LOST MORTGAGE—ACTION TO FORECLOSE—PROOF OF PAYMENT.

A bond and mortgage, made in March, 1872, were due in one year; the mortgagee lived in another county, but had an agent in the county where the mortgaged lot was; the agent remitted the first interest payment; the mortgagee was at times insane, did not do business after 1873, and died in 1879; the bond and mortgage were not found among his papers; the mortgagor deeded the lot to his son-in-law (defendant) in 1891; the mortgagee's executor (complainant) was informed of it in 1892, and demanded payment at once, and sued to foreclose; and the mortgagor died in 1893, before complainant could get his testimony. The agent testified that he received the first interest payment, and that he was used to forward papers to the mortgagee as soon as recorded. Complainant's theory was that the mortgagee received the papers, and, in a fit of mental aberration, destroyed or mislaid them. Defendant offered no evidence of payment, and relied on complainant's lack of proof of an interest payment, or demand therefor, after August, 1872. A witness testified that defendant said he knew about the mortgage, that it was not paid, and that he had been advised to keep quiet, as it would soon outlaw. Defendant denied the conversation, and testified that he never knew of the mortgage till complainant demanded payment. *Held*, that the weight of evidence was against the theory of payment.

Bill by H. Maria Mulford, Charles H. Mulford, and Aram G. Sayre, as executors of John R. Mulford, deceased, against John W. Brown and wife and others, to foreclose a lost mortgage. Final hearing on the pleadings and testimony taken before a master. Decree for complainants.

Charles A. Rathbun, for complainants.
Frederick E. Marsh, for defendants.

v.28a.no.9-33

PITNEY, V. C. The bill in this case is founded on a bond and mortgage bearing date the 15th day of March, 1872, to secure the payment of \$1,000 in one year, with interest payable semiannually, executed by Michael Bock and his wife, of Newark, to John R. Mulford, of Madison, Morris county, N. J., covering a lot of land on Ridge street, in the city of Newark, 80 feet front and 100 feet deep. Mulford, the mortgagee, died on the 16th of November, 1879, testate of a will, by which he appointed his wife, Mrs. H. Maria Mulford, his nephew, Charles H. Mulford, and his former counsel, Aram G. Sayre, his executors, (the complainants herein.) No trace was found among his papers of either the bond or mortgage set forth in the bill of complaint, except an item of interest paid thereon in August, 1872, found in a statement rendered by Mr. Sayre to Mr. Mulford of interest moneys collected by him for Mr. M. Its existence was entirely unknown to his executors until June, 1892, when its record was discovered quite by accident, as will be stated further on. At that time Mr. Bock, the mortgagor, was alive, but had previously conveyed the premises, by deed dated October 24, 1891, to his son-in-law, the defendant John W. Brown. The complainants, through their solicitor, immediately upon discovery of the record, called upon Mr. Brown for payment of the mortgage, and negotiations for a settlement were pending for several months. The bill was filed December 31, 1892, and the answer March 11, 1893. Notice for the examination of witnesses was given by complainants for the 25th of April, and proceeded at that time, two witnesses being examined, then adjourned to the 9th of May, and further adjourned until the 17th of May, and further adjourned until the 21st of June, when it was closed on part of complainants. Mr. Bock died on the 16th of May, 1893. It would thus appear that the loss to the defendants of the evidence of Mr. Bock, the mortgagor, was not due to any failure of the complainants to prosecute their suit with reasonable industry.

The loss of the bond and mortgage is accounted for by the complainants as follows: Mr. Mulford, who, at his death, was somewhat advanced in years, lived at Madison, in Morris county, and was in the habit of loaning money on bond and mortgage in Newark. For that purpose he employed Mr. Sayre, a counselor at law, and the evidence satisfies me that all of his Newark transactions passed through the hands of Mr. Sayre, and the interest was all paid to Mr. Sayre, and forwarded by him to Mr. Mulford; and all principal moneys paid off were paid in Mr. Sayre's office, either to him personally, or to Mr. Mulford or his wife at the office. At or before the date of this mortgage, Mr. Mulford became subject to occasional disturbances in his mind, so that at times he was unfit to do business, and after 1873 he did

not attempt to do any business. It was all conducted by his wife and Mr. Sayre, and Mrs. Mulford had previously given her personal attendance with him in his various business transactions. Mr. Sayre has a recollection of preparing and procuring to be recorded this particular bond and mortgage. He has no recollection of ever seeing them after they were so prepared and recorded, but he recollects of receiving the first payment of six months' interest in August, 1872. His practice was to forward the bonds and mortgages, as soon as recorded, to Mr. Mulford, until the latter years of his life, when he kept the bond in order to indorse the interest on it, and forwarded only the mortgage to him. The theory of the complainants is that this Bock bond and mortgage was taken by Mr. Mulford from Mr. Sayre's office, and, in one of his fits of mental aberration, was lost, destroyed, or mislaid by him. The defendants offer no proof of payment, either oral or written. They rely entirely upon the fact that there is no proof on the part of the complainants of any payment of interest after August, 1872, and argue that the principal and interest must have been paid off at maturity, and the bond and mortgage given up canceled, and that Mr. Bock, the mortgagor, neglected to have it satisfied of record, and afterwards lost it; but they fail to show where he procured the money to pay it, or that he was in a condition to pay it off in one payment, and it is somewhat strange that his daughter, Mrs. Brown, who, I infer, lived at home, should have no recollection of its payment. They argue that the failure of either Mr. or Mrs. Mulford to demand the interest on this mortgage after August, 1872, indicates that it must have been paid. On the other hand, the complainants reply that Mr. Mulford may not only have lost the mortgage, but entirely forgotten its existence, and that his wife may never have known of it.

If the case rested upon so much of the evidence as has been stated, I should feel inclined to the opinion that the defendants had failed to prove the payment of the mortgage. But there is other evidence upon that subject, which seems to me to have a material bearing upon the issue of payment or nonpayment. Mr. George E. Clymer, a solicitor of this court, was employed by the finance department of the city of Newark to perfect title to lands acquired by the city under the provisions of the Martin act, and for that purpose it became his duty to examine the titles and search for incumbrances upon a great many different parcels of land. In June, 1892, he was engaged in hunting up the title to a particular lot of land, and mistook for the lot he was searching the premises covered by the mortgage in this case, and found the record of this mortgage from Bock to Mulford, and saw that Mr. Mulford was therein described as living in Morris county. Just at that time

he casually met in the register's office Mr. Charles A. Rathbun, solicitor of the complainants herein, who lives in Madison and practices in Newark, and happened to be the counsel of Mrs. Mulford, one of the complainants. Mr. Clymer asked Mr. Rathbun if he knew Mr. Mulford, and called his attention to this mortgage. Mr. Rathbun thereupon called Mrs. Mulford's attention to it. Mr. Clymer also very shortly after saw Mr. Brown, who appeared, by the record, to be the owner of the premises, and had two interviews with him, in the course of which he ascertained that he had made a mistake, and that he had nothing further to do with the mortgaged premises. He swears that in one of those interviews he mentioned to Brown that there was a mortgage on the property held by Mr. Mulford, and that Mr. Brown told him that he knew it; that the property had come to him from his father-in-law, and that the matter of the adjustment of the Mulford mortgage was in the hands of Judge Thomas S. Henry; and that Judge Henry had told him to be quiet, and the matter would soon outlaw; that a bond and mortgage would outlaw in 20 years, and this had but a short time longer to run,—and that he (Clymer) told Mr. Brown that that depended on the circumstances of the case; that a payment of interest or on account would bring the matter within the statute, no matter what Judge Henry said. He further says that Mr. Brown told him that the mortgage had never been paid. Pressed on cross-examination, Mr. Clymer said that he was quite sure that Mr. Brown had said that the mortgage was not paid, and gave, as near as he could, the language used by Mr. Brown, thus: "When I referred to the mortgage, he (Brown) then said, 'Yes, I know about that; it has never been paid,' and that Judge Henry had told him that it would outlaw in twenty years. Q. Did he use the word 'paid?' A. Yes, sir; I think he did." Mr. Clymer's evidence is attacked on the ground that there is reason to believe that he and Mr. Rathbun have some sort of collusion to resuscitate a stale claim on speculation, but there is not the least evidence to warrant the charge. He appears to be entirely disinterested, and the evidence shows that he was by no means a willing witness. In opposition to this evidence, however, Brown swears positively that no such conversation ever took place. He does not attempt to give a different version of it, but he denies positively that Mr. Clymer mentioned the Mulford mortgage, or any mortgage whatever, to him, or that Judge Henry's name was mentioned. He goes so far as to deny that he had ever heard of the mortgage until demand was made upon him by the solicitor of the complainants herein, and that was some time after his interview with Clymer. Now, I am unwilling to believe that Mr. Clymer manufactured his story out of the solid. I might have been willing to be-

lieve that he misunderstood Mr. Brown, and that Mr. Brown did not intend to say to him that the mortgage had never been paid; but that is something quite different from believing that Mr. Clymer manufactured a story out of the solid. And it is here to be observed that Mr. Brown had it in his power to support one part of his sweeping denial by producing Judge Henry to swear that there never had been any consultation between him as counsel and Mr. Brown as client as to this mortgage, and that he never had advised him that it would outlaw in a short time. For these reasons I come to the conclusion that the weight of the evidence is against the theory that the bond and mortgage have been paid.

With regard to attempting to ascertain the degree of blame resting upon the one party or the other for the loss of these instruments, I am unable to see that there is any more blame resting upon the complainants' testator for losing this bond and mortgage, upon the theory of its nonpayment, than there is upon the mortgagor for failing to have it canceled of record, and for losing it, upon the theory of its being paid. I will advise a decree for the complainants.

(73 Md. 461)

BRADY v. BRADY et al., (three cases, Nos. 19, 21, and 23.) NAYLOR et al. v. SAME, (No. 20.) SADTLER et al. v. SAME, (No. 22.)

(Court of Appeals of Maryland. Jan. 12, 1894.)

WILLS—NATURE OF ESTATE—LAPSING AND ADEMP-
TION OF LEGACIES.

1. A wife does not take absolutely under a will giving her all of testator's estate for life, with power to dispose of the profits and any of the goods and chattels, where a further clause directed the payment of a certain amount to a son after the expiration of the life estate, and pointed out the sources of payment.

2. Testator gave a life estate in all his property to his wife, and a legacy to a son, to be paid after the expiration of such estate. *Held*, that a payment out of the property by the wife to the son operated as a satisfaction, pro tanto, of the legacy.

3. A specific legacy of all the cows of testator lapses where none of the cows owned by testator at the execution of the will were living at his death.

4. Where a will gives testator's wife power "to dispose of any of the goods and chattels," and the wife disposes of horses, a specific legacy of these horses fails.

5. A bequest in trust of all the "ground rents of which I shall die seised" vests in the beneficiary all the ground rents which testator possessed at the time of his death.

6. A lease for 99 years of a ground rent, after a devise of it, does not operate as an ademption of the devise.

Appeals from circuit court of Baltimore city.

Bill by John W. S. Brady in his own right, as surviving administrator of the estate of Samuel Brady, Sr., deceased, as trustee under the will of said Samuel Brady, Sr., and as administrator of the estate of Ann Mary Proctor Brady, deceased, widow of said Samuel Brady, Sr., against Arunah S. A.

Brady and others, to obtain a judicial construction of certain provisions of the will of said Samuel Brady, Sr. From the decree, plaintiff appeals, and defendants file cross appeals. Affirmed in part, and reversed in part. Argued before ROBINSON, C. J., and BRYAN, McSHERRY, PAGE, and ROBERTS, JJ.

Wm. A. Fisher, W. Cabell Bruce, and D. K. Este Fisher, for appellant. F. W. Story, W. P. Lewis, Jr., F. C. Slingluff, J. I. Yellott & Son, Barton & Wilmer, and S. H. Lauchheimer, for appellees.

ROBERTS, J. The record in this case brings before this court for review and determination five appeals taken by various parties in interest from the decree passed by the circuit court of Baltimore city. The questions presented by these appeals have been argued together, and will be disposed of as hereinafter indicated. The bill was filed for the purpose of obtaining a judicial construction of certain provisions of the last will of Samuel Brady, Sr., late of Baltimore county. The testator executed his will on the 1st of November, 1802, and died in December, 1871, and now, after the lapse of more than 20 years since his death, doubts have arisen as to the construction proper to be placed upon certain parts of his will. The bill is filed by John W. S. Brady, in his own right, as the surviving administrator with the will annexed of the estate of Samuel Brady, Sr., and as trustee under the several trusts of said will, and as the administrator of the estate of Ann Mary Proctor Brady, deceased, widow of said Samuel Brady, Sr. The defendants are all the other parties interested in the estate of said testator. In the prior appeal the questions presented for consideration arise under the provisions contained in the first and second clauses of the will, which read as follows: "Firstly. After the payment of my debts and funeral expenses, I do give and bequeath to my dear wife, Ann Mary Proctor Brady, for and during her natural life, all my estate, real, personal, and mixed, with power to receive, take, and collect the rents, issues, and profits thereof, and the same to dispose of, in all respects, as she may think proper, and with power, also, to use at her discretion, exchange, dispose of, and renew any of my personal goods and chattels requisite to the comfort and enjoyment of herself and family. I further give and bequeath unto my said wife, her heirs and assigns, forever, my two slaves, Priscilla Jones and Ann, her daughter, to be by her disposed of, by will or otherwise, as to her may seem best for their welfare. After the said life estate shall have expired, my will is: Secondly. I give and bequeath unto my son Benjamin Franklin Brady, now in California, and his heirs and assigns, forever, the sum of sixteen thousand dollars, (\$16,000,) to be paid to him or them within three years after the death of my wife, said sum to be provided for as follows, to wit: Firstly, the cash on hand

belonging to the estate as far as the same will suffice; secondly, the money realized from the payment or sale of promissory notes, and the sale of my Baltimore city stock, and other stocks and mortgages and other securities, which I hereby authorize and direct shall be sold for that purpose; thirdly, all the money I have loaned my son John William S. Brady, to be devoted to said fund; and, fourthly, the proceeds of sale of my Pimlico Road farm, which I also will and direct shall be sold, the whole, or so much of the above as may be necessary, to be devoted to the payment of the said sum of sixteen thousand dollars, hereby devised to my son Benjamin, his heirs and assigns, forever; and this devise is intended to be his entire share of my estate, and to except him as coheir to the balance." After the death of the testator, letters of administration cum testamento annexo were granted to John W. S. Brady, and Samuel W. Brady, Jr., who qualified and proceeded with the settlement of the estate. On December 17, 1872, they passed an account in the orphans' court of Baltimore county, by which the entire residue of the personal estate, after paying debts, funeral expenses, and costs of administration, was distributed and delivered over to the testator's widow. It appears from the testimony that the entire supervision of this residue, and also of the real estate of which the testator died seised, was, at the instance and on behalf of the widow, taken by her son Samuel W. Brady, Jr., who continued to give his attention to it until his death, which occurred December 30, 1890. The testimony shows that all of the Baltimore city stock, all of the Franklin Bank stock, and three shares of the Frederick Turnpike stock were sold, and the proceeds delivered to the widow. Mrs. Brady, the widow of testator, died August 3, 1892. At the time of her death no part of the residue which had been turned over to her by the administrators remained, except one share of the Chesapeake Bank stock, three shares of Frederick Turnpike stock, the library, certain furniture of small value, and some old farming implements. The balance of the residue had been, by the widow, either consumed, lost, or destroyed through use and decay, or applied in payment of taxes and other expenses on the real estate of testator, which was largely unproductive. The widow had also advanced out of said residue, to testator's son Benjamin, the sum of \$7,000 on account of the legacy of \$16,000 which had been bequeathed to him. Since the death of Samuel Brady, Jr., in December, 1890, his widow, Helen S. Brady, has sold the farming implements for the sum of \$18, the furniture has been in part sold and partly divided, by consent of the parties interested, and the library remains to be delivered to the parties entitled under the will.

The question now arises as to whether the personal representatives have made such disposition of the residue of the personal estate of their testator as was contemplated by him;

and, secondly, was the testator's widow entitled to receive said residue, and treat it as if the items constituting the same, and the title thereto, vested absolutely in her? These questions, while not entirely free from difficulty, are, we think, easy of solution. We think the testator never intended to authorize his personal representatives to deal with the residue of his personal estate in the manner in which they have, nor did he have it in contemplation that his widow was ever to have any such dominion over said residue as she has asserted. In seeking to ascertain the testator's intention, recourse should be had to the entire will; otherwise, a very narrow and unnatural construction will follow, utterly at variance with the objects sought to be accomplished by the testator, and the true meaning of his testament. Taking the provisions of the first and second clauses of this will, it is clear, beyond all doubt, that in the first instance the testator intended to make "provisions requisite to the comfort and enjoyment of his widow and family," and in the second, in equally clear and express terms, to bequeath, as a legacy to his son Benjamin, the sum of \$16,000. The first and second clauses should be read together, for the reason that neither is capable of proper construction without the aid of the other; but, considered together, proper regard being had to the provisions generally of the whole will, there does not appear to be much difficulty in ascertaining the testator's true meaning. Yet we do not think that the first clause, taken by itself, admits of any such construction as that which governed the conduct of the administrators in turning over the residue of the personal property to the widow. The testator says: "After the payment of my debts and funeral expenses, I do give and bequeath to my wife, Ann Mary Proctor Brady, for and during her natural life, all of my estate, real, personal, and mixed, with power to receive, take, and collect the rents, issues, and profits thereof, and the same to dispose of, in all respects, as she may think proper." Therefore, the power "to receive, take, and collect" can by no possibility refer to anything more than the rents, issues, and profits of the whole estate. These the widow is empowered "to dispose of, in all respects, as she may think proper." Then follow the words, "and with power, also, to use at her discretion, exchange, dispose of, and renew any of my personal goods and chattels, requisite to the comfort and enjoyment of herself and family." Here we have an absolute control over the rents, issues, and profits of the entire estate, and only a power, in her discretion, to exchange, dispose of, and renew the "goods and chattels" to an extent requisite to the comfort and enjoyment of herself and family. It is proper here to remark that a power conferred must not be confounded with an estate conveyed. The power of the widow to use and employ the life estate is broad and comprehensive, but not sufficiently so to change the character of

the estate which she took under the will. The power to use confers no authority to consume or destroy, unless a reasonable use is the consumption or destruction of the subject of the bequest. If, however, any doubt could be entertained as to the testator's intention respecting the estate which his widow took, reference need only be had to the provisions of the second clause of the will, which is preceded by these suggestive words: "And, after the said life estate shall have expired, my will is." Then follows the clause in which provision is made, in express terms, for a legacy of \$16,000 to be paid to testator's son Benjamin, his heirs and assigns, forever, within three years after the death of the widow. The legacy is clearly demonstrative in character, and its sources of payment are distinctly and definitely pointed out, and the testator, in the latter part of the second clause, says that "this devise is intended to be his [Benjamin's] entire share of my estate, and to except him as coheir to the balance." Like restrictions will be found in various clauses of the will, and notably the twelfth, imposed by the testator upon the interest which Benjamin takes under the will. The items of account which go to make up the residue of the personal property turned over to the widow by the administrators, as disclosed by the inventory, list of debts, and the account, are mainly those which the testator had dedicated to the payment of Benjamin's legacy, and were not intended to be destroyed or consumed by their use or appropriation by the widow. The terms employed by the testator in creating this legacy not only point out the funds from which it shall be paid, but they indicate, in the plainest manner, how the funds themselves shall be applied. When he names the first class he says, "the cash on hand belonging to the estate, as far as the same will suffice." He does not, however, refer to any balance remaining unspent or undisposed of, but a fund, the issues and profits of which should go to the widow during life, and, at the expiration thereof, the cash on hand at the time of his death to be applied in payment of the legacy, so far as the same may be sufficient for the purpose. In no part of this testament is there any reference to a sale of stocks, mortgages, promissory notes, and other securities, save that which is to be found in the second clause; and, after referring to them, he says, "which I hereby authorize and direct shall be sold for the purpose of supplying a fund from which Benjamin's legacy shall be paid." Here he gives a clear and distinct assertion of his wishes and intentions, and it appears to us difficult to misconceive or misconstrue them. The second clause then continues: "Thirdly, all the money I have loaned my son John W. S. Brady, to be devoted to said fund; and, fourthly, the proceeds of sale of Pimlico Road farm," which, however, the testator, after executing his will, sold, and the legacy as to this fund became and was

thereby adeemed. If the construction contended for by the appellant in the first of these appeals be the one proper to be applied,—that is to say, that the course pursued by the administrators in turning over said residue to the widow was in accordance with the true meaning of the testator, and that the widow was authorized to dispose of said residue as stated,—then the testator, in putting into his testament the second clause thereof, acted without proper motive and in an unmeaning manner in providing for a legacy which, by a preceding clause, he indicated should never be paid; but if he was prompted, as we think he was, by a worthy motive, and was seriously seeking the discharge of what he considered a duty to his son Benjamin, in providing a fund from which said legacy was to be paid, then he only intended that his widow should receive, take, and collect the rents, issues, and profits of his entire estate for and during her natural life, with power to exchange, dispose of, and renew his personal "goods and chattels." In the use of the term "goods and chattels" we think it clear that the testator did not mean to include therein any property which, by the language of the second clause, he has provided shall constitute part of the funds from which Benjamin's legacy is to be paid. With this restriction upon the term, it is entitled to its usual legal signification.

In the construction of the first and second clauses of the will we have been referred to no authority bearing upon the subject, nor have we thought it necessary to sustain our views by reference to many authorities, as, in our opinion, the language of the will itself supplies all that is requisite to guide us in ascertaining the testator's meaning. The question is not, however, a new one. In *Constable v. Bull*, 3 De Gex & S. 411, the language of the will was: "I give, devise, and bequeath unto my dear wife, Mary Ann Constable, all and every my estate and effects, goods, chattels, houses, lands, moneys, etc., and whosoever the same may be at the time of my decease, for her sole, separate use and benefit. I further give, will, and direct that, at the decease of my said wife, whatever remains of my said estate and effects shall go to, and be equally divided, share and share alike, between, the following persons hereinafter named," etc. It was held that this gave only a life estate to the widow. Again, in the case of *Bibbens v. Potter*, 10 Ch. Div. 733, Emily Bibbens, by her will, gave her sister, Ann Maria Bibbens, all her estate and effects, both real and personal, for her own use and benefit, absolutely. By a codicil made afterwards, and directed to be taken as a part of her will, she added: "After the death of my sister, Ann Maria Bibbens, I give, devise, and bequeath all property of mine which may then be remaining to," etc. The vice chancellor held that, construing the will and codicil together, the gift to Ann Maria

was cut down to a life estate. And in *Gouldie v. Johnston*, 109 Ind. 427, 10 N. E. 296, the language of the will was: "I give, grant, and bequeath to my wife, for her use during her natural lifetime, all the rest and residue of my estate, real and personal, not mentioned in Item No. 1 of this will, she to have the control and management of the same; and at her death all of said personal estate remaining," etc., "shall go to and be equally divided among my grandchildren," etc. The court held that the controlling words of the will were, "for her use during her natural lifetime," and that there were no other words of equal power in the instrument. In the case of *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 1 New Eng. Rep. 20, the supreme court of Rhode Island was called upon to construe the will of Mrs. Burnside, by which she devised and bequeathed all her property, real and personal, to her husband, Gen. Burnside, for life, "with full power and authority, at pleasure, to sell, transfer, and convey any portion of my personal property and estate, execute the requisite conveyances thereof, receive the proceeds of any such sale or sales, and apply and appropriate the net proceeds thereof to and for his own use, benefit, and behalf forever." All the estate of the testatrix remaining at the decease of Gen. Burnside is given to her mother for life, and then to other persons and charities. *Durfee, C. J.*, delivering the opinion of the court, says: "We think, however, that when, in a will, the gift to the first taker is expressly limited to him for life, it is not enlarged into an absolute gift by the mere annexation of a power to him to dispose of or appropriate the fee or capital, at least when the power is only a power to dispose of or appropriate the fee or capital during his life; for, as has been well said, 'An express bequest of an estate for life negatives the intention to give the absolute property, and converts the superadded right of disposition into a mere power.' *Denson v. Mitchell*, 28 Ala. 360."

We are constrained to hold in this case that the administrators have wholly misapprehended their duty in transferring to the widow the residue of the personal estate, and in allowing her to use and consume it as she has, but they should, with the restriction we have imposed as to the "goods and chattels," have invested said residue, or have retained the investment, as made, safe and reliable, so as to secure the issues and profits to the widow for life, and the principal, after her death, to pay Benjamin's legacy, and thus have fulfilled the design of the testator as expressed in his testament. If the administrators had complied with the provisions of article 93, § 10, of Code, they would have found complete protection, and have followed the plainly expressed intention of the testator. The advancement of \$7,000 made to Benjamin by the widow in

her lifetime must be taken to be paid on account of his said legacy, and when a proper accounting shall be had by and between the said Benjamin and the surviving administrator, according to the views herein expressed, and the first, second, and third sources of payment of said legacy, pointed out by the testator in the second clause of his will, shall fail to yield a sum sufficient to discharge said legacy after deducting said advancement, then the unpaid balance is wholly lost to said Benjamin, and there remains no fund from which it can be paid. It results necessarily, from what we have said, that if, as we think the record shows, the whole personal estate was worth \$19,315.63, and we deduct therefrom the household and farming chattels, valued at \$3,656.85, and also the debts and expenses of the settlement of the estate, amounting to \$3,646.59, there remains the sum of \$12,105.09, subject to be credited with the sum of \$7,000 advanced to Benjamin on account of his legacy, and there will yet remain due to Benjamin the sum of \$5,105.09 on his legacy, for which the administrator must account to said Benjamin. If the data contained in the record, to which reference has just been made in ascertaining the balance due Benjamin, should, on the further trial of the cause, be found to be incorrect, such errors will be corrected by the court below, such data being employed for the sole purpose of illustrating the method by which the balance due on Benjamin's legacy should be ascertained. We think the record clearly shows that the administrators were, at the time they turned the residue of the personal estate over to the widow, aware that the widow was only entitled to the issues and profits of the notes, stocks, and securities, during her natural life, of which the testator died possessed, as by their account they ask to be credited with the same "as sole legatee for and during her natural life." If she was entitled only to a life estate, the testator never could have contemplated their destruction or consumption, especially as he has clearly indicated the purpose which they were intended to subserve, sufficient to discharge said legacy after deducting said advancement, then the unpaid balance is wholly lost to said Benjamin, and there remains no fund from which it can be paid.

The only questions presented by the appeal of Helen S. Brady, administratrix of Samuel Brady, Jr., have been correctly disposed of by the court below. She is entitled to receive the library, and the same should be delivered to her. The specific legacy of all the cows of the testator to his son Samuel is lost to said administratrix, for the reason that none of the cows owned by the testator at the date of the execution of his will were living at the time of his death. *Kunkel v. MacGill*, 58 Md. 123. The legacy of three good horses to the said Samuel, which were turned over to the widow by the

administrators, and by her used or disposed of, and not in existence at the time of her death, was, in consequence thereof, lost. The horses constituted a part of the "goods and chattels," which the widow was entitled to use, and in their use she was not restricted by any provision contained in the second clause of the will. The farming implements still in existence at the death of testator's widow, and which he owned at the time of his death, were sold by the said Helen S. Brady, and for them she must, as administratrix, account, as part of the estate of her decedent. The farming implements were a specific bequest to him, and only so far as the subject of the bequest is lost or destroyed does the legacy fail.

We come now to the consideration of the questions which arise on the appeals of Lewis H. Naylor and others, and of Mary E. Sadtler and others. The controversy here turns upon the construction proper to be placed upon the eighth and ninth clauses of the will. By the eighth clause the testator says: "I bequeath to my sons John and Samuel, their heirs and personal representatives, all my ground rents of which I shall die seised and possessed, in trust and confidence for the sole and separate use of my daughter, Margaret O. Brady, for and during her natural life," etc. Margaret O. was unmarried at the date of the execution of the will, and subsequently married Dr. Naylor, and, dying, left surviving her said husband and four children. We think the court below has declared the testator's true intent and meaning in the construction placed by it upon the eighth clause of the will, and we concur in holding that all the ground rents of which the testator died seised passed to the trustees therein mentioned for the benefit of testator's daughter Margaret O., except the rent reserved on the Caroline street lot. Code, art. 93, § 321; *Dalrymple v. Gamble*, 68 Md. 528, 13 Atl. 156; *State v. Robinson*, 57 Md. 502; *Oakes v. Oakes*, 9 Hare, 666; *Chase v. Stockett*, 72 Md. 240, 19 Atl. 761; *Campbell v. State*, 62 Md. 7, note supplying omission in 57 Md. 502. We are of opinion that the testator's intentions respecting the disposition of the Caroline street lot have been expressed in terms that require neither argument nor authority to assist in giving to the same a proper construction, which we think the court below has correctly announced. The lot out of which this rent was created was, by the provision of the ninth clause, devised in trust for the benefit of testator's sons Jefferson and Thomas, and his daughter, said Margaret, and the subsequent lease of it did not have the legal effect of an ademption of the devise. The lease was for 99 years, renewable forever, and the reversion contained in the lessor, subject to the conditions contained in the lease. This, of course, wrought only a change in the tenure of the estate, and the rent reserved passed

under the devise contained in the ninth clause.

After careful examination we have found no error in the disposition made by the court below of other questions argued at the hearing of these appeals, and not discussed in this opinion, and think the court below has correctly determined the same, but, for the reasons herein assigned, we will reverse the decree, in so far as it relates to the construction of the first and second clauses of the will, as stated in the first and second paragraphs of the decree, and as to the other paragraphs of the decree we affirm the same. It follows that in No. 21 the decree must be reversed, with costs, and in Nos. 19, 20, 22, and 23 the decree must be affirmed. Decree affirmed in part, and reversed in part, and remanded for further proceedings in compliance with this opinion.

(63 Conn. 385)

HALLENBECK v. GETZ.

(Supreme Court of Errors of Connecticut. Oct. 25, 1893.)

PAWNBROKERS—"RECEIVING" UNLAWFUL INTEREST.

Under Gen. St. §§ 3003, 3005, prohibiting a pawnbroker from receiving more than 25 per cent. per annum for loans on chattels, and providing a penalty for violating such provision, a pawnbroker is not liable unless he has actually received the unlawful interest.

Appeal from court of common pleas, Hartford county; Calhoun, Judge.

Action by William H. Hallenbeck against Jacob Getz to recover a penalty for the taking of unlawful interest on a loan on personal property. A nonsuit was granted, which the court refused to set aside, and plaintiff appeals. Affirmed.

H. D. Middleberger and H. O'Flaherty, for appellant. J. L. Barbour, for appellee.

ANDREWS, C. J. This is an action brought to recover a forfeiture under sections 3003 and 3005 of the General Statutes. The complaint alleges, in substance, that the defendant was a pawnbroker in the city of Hartford; that on the 23d day of November, 1889, the plaintiff delivered to the defendant, by way of pledge or pawn for a loan of \$8, a double-barreled gun of the value of \$60; and that the defendant, as such pawnbroker, took and received from the plaintiff the sum of \$1.50 for the use of said sum of \$8 for one month, which sum was more than the lawful rate of interest chargeable by law for the use of money loaned by pawnbrokers on personal property. There was a second count, under which no claim was made. The complaint claimed damages to the treble value of the gun. The answer denied all the averments in the complaint, except that the defendant was a pawnbroker. Issue was joined to the jury. All the evidence offered by the plaintiff, so

far as it bears on the question of taking or receiving interest by the defendant, is this: The plaintiff testified: "My name is Wm. Watson Hallenbeck. On the 23d day of November, 1889, I was the owner of a double-barreled shotgun worth sixty dollars. On that day I pawned the gun with Mr. Getz for a loan of eight dollars. Mr. Getz gave me the eight dollars, and a pawn ticket by which I was to pay him nine dollars and fifty cents in thirty days for a return of the property. I sent John Hendron with a ten-dollar bill and the pawn ticket, and told him to get the gun pawned with Getz which the ticket called for. He did not return the gun to me. It has never been returned. He brought back to me the ten-dollar bill. I wrote Getz a letter afterwards, making a further demand for a return of the property, but received no reply." John Hendron testified: "I am an expressman. On May 23, 1890, I was sent for to go to Pratt & Whitney's shop. I went and saw Mr. Hallenbeck. He gave me a pawn ticket and a ten-dollar bill, and told me to go and get the gun he had left in pawn with Mr. Getz, the pawnbroker. I went to Getz's place, and I asked for the gun. Getz asked me how much I was going to pay on it. I told him nine dollars and fifty cents. He said that was not enough; that he ought to have more; that he had been at expense in keeping and cleaning the gun; and that I might have it for twelve dollars. I told him I had only ten dollars, and could not pay any more, and asked him if he would not let me have the gun. He said 'No,' and I came away, and went back and saw Hallenbeck and told him what I had done, and gave him back the ten-dollar bill. He got me to put my name and the date on the back of the ticket, and paid me fifty cents for my services." The plaintiff then rested his case, and the defendant moved for judgment as in a case of nonsuit, which motion was granted by the court. Afterwards there was a motion to set aside the nonsuit, which being refused, the plaintiff appealed to this court.

We think the nonsuit was properly granted. The evidence failed to show that the defendant had taken or received any unlawful interest. He had not taken or received any interest whatever. He had not even received the amount of the loan. The statute which fixes a rate of interest beyond which, if a pawnbroker takes interest, he is liable to a forfeiture, is penal in its nature, and must be construed with reasonable strictness. Any statute which imposes a penalty for the doing or omitting an act is penal. Especially is it so when an action for the penalty may be brought by a common informer. 3 Bl. Comm. 160; Dwar. St. (Potter's Ed.) 73, 74. But, wholly apart from the rule of construction applying to penal statutes, the nonsuit was correct. The word "take" has, indeed, very many shades of meaning. The precise meaning which it

is to bear in any case depends upon the subject in respect to which it is used. In this statute it means, as we think, that the pawnbroker, in order to be liable to the penalty, must take the unlawful interest in such a manner that he gets it into his possession. He must take it in the sense of receiving it. The pawnbroker must have parted with it. Unless this is done, and the pawnbroker has received the interest into his possession, the penalty of the statute is not incurred. Merely asking for the forbidden rate of interest, or demanding it, or charging it on an account book, is not enough. "To take" means, in its general sense, "to get into one's possession or power; to acquire; to obtain; to procure;" while to "receive" means "to get by a transfer; as, to receive a gift, to receive a letter, to receive money." In ordinary cases the correct construction is given to a statute by reading the words in which it is expressed in their general and popular sense. There is no error in the judgment appealed from. In this opinion the other judges concurred.

(62 Conn. 234)

WOOD v. WOOD et al.

(Supreme Court of Errors of Connecticut. Sept. 9, 1893.)

WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEES.

Testator's will reserved to his wife and daughter, as could be agreed with his son, property now occupied by "my son and family," the premises to be kept in repair and taxes paid by the son, and, when no longer occupied by any member of "my family," to be sold, and the proceeds divided among "my heirs." Held that, by the expression "my family," testator did not intend to include his son, but his wife and daughter only.

Suit by Bradford R. Wood, Jr., executor of the estate of Bradford R. Wood, deceased, against Samuel Wood and others, heirs, for a construction of testator's will. Heard on questions reserved.

C. Thompson, for plaintiff. M. W. Seymour and H. H. Knapp, for defendants.

ANDREWS, C. J. Bradford R. Wood, a long time resident of Albany, N. Y., died there on the 26th day of September, 1889, possessed of considerable real estate in that place, and also of a house and certain real estate in Westport, Conn. He left a will, duly executed to pass real estate, made on the 11th day of April, 1879, with a codicil thereto, made on the 15th day of the same month, and a second codicil dated July 29, 1885. In the original will, after sundry bequests, he gave all the rest and residue of his estate to his five children, Samuel, Thomas G., Elizabeth H., Bradford R., Jr., and J. Hamden, share and share alike. No reference was made in the will to his real estate in Connecticut. The second codicil, which is the subject of the present inquiry, is as follows: "In relation to my property at

Westport, Fairfield county, Connecticut, a house and several acres of land, and now occupied by my son Samuel and family, I reserve the same for the joint or several use of my wife and daughter (therewith) as can be agreed upon with said son, in summer or in any other season of the year, as they so choose, elect, or agree; the said premises to be kept in good repair by my said son, and the taxes duly paid, and when to be no longer occupied by any member of my family, or desired, then to be sold at the best terms, and the avails to be legally divided among my heirs, if any living, and, if none, to be appropriated to the best purpose my executor can devise, or I might approve if living." Prior to the date of this codicil, one of the five children, J. Hamden Wood, had died leaving no issue. At the date of this codicil the other four children were living, and the testator's wife, Eliza. The son Samuel was married and had children, and lived in the testator's house at Westport, where he continued to reside until the testator's death, paying no rent therefor. His wife, Eliza, died before the testator, on the 25th day of March, 1887. The daughter, Elizabeth, died shortly after her father, on the 5th day of August, 1890. She was unmarried, and had always lived with her father, as a part of his family, until his death. Bradford R. Wood, Jr., was never married, and during the last few years of his father's life had lived with him as a member of his family. Whether the son Thomas G. was married or otherwise is not stated.

In the interpretation of a will, the essential object is to arrive at the intention of the testator; and there is no way by which that intention can be ascertained but the language of the instrument itself. As no part of the original will is set out save the residuary clause, we are compelled to ascertain that intention, as best we may, from the codicil alone. All the parties in the case assume that by the codicil in question the testator intended to create an estate in the Westport property in some persons. On the part of the executor it is contended that the estate so intended was to vest in the testator's wife and daughter only; on the part of Samuel Wood it is contended that such estate was to vest in the wife and daughter and himself. The testator directed, in respect to this Westport place, that "when to be no longer occupied by any member of 'my family,' or desired, then to be sold," etc. If the contention of the executor is correct, then the property should now be sold, but, if the contention of Samuel is correct, the property cannot now be disposed of. The contention turns upon the construction to be put upon the term "my family," as used in the clause just above quoted. If, by that term, the testator intended to exclude his son Samuel, then the claim of the executor is sustained, but, if he intended to include Samuel in that term, then the claim of Samuel

is sustained. In construing a will, or any other writing, words are to be given their primary and common meaning, unless there is something in the context to show that they are used in some other meaning. The word "family," in its common and primary meaning, is: "That collective body of persons who form one household, under one head, and one domestic government, including children and servants." Cent. Dict. "That collective body of persons who live in one house, and under one head or manager; a household, including parents and children and servants." Webster Dict. This is also the meaning given to this word by the law decisions in this state and in the state of New York and in other states, (*Cheshire v. Burlington*, 31 Conn. 326; *Hart v. Goldsmith*, 51 Conn. 479; *Spencer v. Spencer*, 11 Paige, 159; *Kain v. Fisher*, 6 N. Y. 507; *Bowne v. Witt*, 19 Wend. 475; *Poor v. Insurance Co.*, 2 Fed. 432; *Bradlee v. Andrews*, 137 Mass. 50; *Bates v. Dewson*, 128 Mass. 334;) and it does not include adult children living separate and not forming a part of the same household, (*Smith v. Wildman*, 37 Conn. 384; *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. 452; *Andrews v. Andrews*, 7 Helsk. 234.) The testator, in the earlier clause of this codicil, in referring to the family of his son Samuel, uses the word strictly according to its common and legal meaning. Such use demonstrates that the testator knew the meaning of that word. There is another rule applied in the construction of wills,—that, when a word is used once in a will with a certain meaning, it will be held to have the same meaning when used in other parts of the will. If the word "family," when referring to the son's family, means only that collection of persons who lived in his house at Westport, then the same word, when referring to the testator's family, must be understood to mean only that collection of persons who lived in the testator's house in Albany. The testator uses the word "family" in these clauses as though he had in mind more than one family, and intended a distinction between them. In the first clause the expression is "my son Samuel and family;" in the latter clause the expression is "my family." On the one hand the son's family; on the other his own family; "my family" placed over against "son Samuel and family." This contrast makes it very highly probable, if not certain, that the testator did not intend to include his son Samuel in the expression "my family," as used in his codicil. This view is strengthened by other considerations drawn from the will. The original will divided the bulk of his property among all his children, share and share alike, thus showing that the testator did not intend to prefer one child to another, but to preserve equality among them in the distribution of his estate. A life use by Samuel of the Westport property would to that extent render the shares unequal,

and so far be inconsistent with the general scheme indicated by the testator.

It is suggested by counsel for Samuel that the testator had never required him to pay rent for the use of the Westport place, and this is urged as a reason why it is probable that the testator intended to have Samuel remain on that place simply by paying the taxes and keeping it in repair. Taking all the facts together, the contrary seems much the more probable conclusion. It appears that Mr. Wood was supporting some or all his other children without charge at his house in Albany. The idea of equality among his children would lead him to so frame his will that, when the support of his other children at the house in Albany ceased, the free use of the house in Westport by Samuel would also cease.

It is suggested, further, that the testator made no change in his will after the death of his wife. But this is as much an argument against Samuel as it is in his favor. If the testator, by the expression "my family," did not intend to include Samuel, then there was no occasion to change the codicil.

Upon the whole case we think that, since the death of his sister Elizabeth H. Wood, Samuel Wood has had no estate in the Westport property by reason of said codicil, and we so advise the superior court. In this opinion the other judges concurred.

(63 Conn. 329)

STATE v. KEENA.

(Supreme Court of Errors of Connecticut. Sept. 9, 1893.)

ARSON—INDICTMENT—OCCUPANCY OF HOUSE.

An information which fails to state the name of the occupant of the house, or any other facts showing its occupancy by another than defendant, is radically defective, and not curable by verdict.

Appeal from superior court, New Haven county; Prentice, Judge.

John Keena, convicted of arson, appeals. Reversed.

C. S. Hamilton and W. L. Green, for appellant. T. E. Doolittle, State's Atty.

ANDREWS, O. J. Every information for a criminal offense must set forth all the essential ingredients of the crime charged with reasonable certainty. If it fails to do this, it is bad on demurrer, or on a motion to arrest the judgment. *State v. Costello*, 62 Conn. 128, 25 Atl. 477. The essential ingredients of the crime of arson are, the voluntary and malicious burning of an occupied dwelling house, and that the house be the house of another than the accused. 2 Swift, Dig. side p. 304; 3 Co. Inst. 66. From these elements it appears that arson is an offense against the security of a dwelling house as such, and not against the building as property. It has regard to the occupation instead of the ownership; or rather, in the

contemplation of this offense, the occupier is the owner. *State v. Toole*, 29 Conn. 342; *State v. McGowan*, 20 Conn. 245, 246; *Snyder v. People*, 28 Mich. 106. And so essential is it to the idea of arson that the house burned be the house of another, that one does not commit this crime by burning the house occupied by himself. *State v. Lyon*, 12 Conn. 487; *State v. Fish*, 27 N. J. Law, 323; *Breeme's Case*, 2 East, P. C. 1026; *Sullivan v. State*, 5 Stew. & P. 175; *Bloss v. Tobey*, 2 Pick. 320, 325.

Counsel for the accused urge that the present information is bad because it does not give the name of any occupier of the house burned. They expend the principal force of their argument in seeking to show that, as there is no name of an occupier given, it does not appear that the house was an occupied one. Whether or not they are correct in that argument, we have no occasion to decide. For another reason, we think the omission to state the name of the occupier of the house renders the information fatally defective. It does not appear that the house burned was the house of another than the accused. In this particular, the name of the occupier is a necessary averment. Either the name of the occupier must be stated, or there must be other averments from which it is made to appear that the house burned is the house of another person. In this information there are no such averments. Without them, it is clearly bad, because it does not charge the crime of arson. And it is a defect which is not cured by the verdict. "It is a general rule of pleading at common law—and upon a question of pleading at common law there is no distinction between civil and criminal cases—that where an averment which is necessary for the support of the pleadings is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue without proof of this averment, there, after verdict, the defective averment which might have been bad on demurrer is cured by the verdict." *Heyman v. Queen*, 8 Q. B. 102. "The expression 'cured by verdict' signifies that the court will after a verdict presume that the particular thing omitted or defectively stated in the pleadings was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which the verdict was given. And the particular thing which is presumed to have been proved must always be such as can be implied from the allegations of the record by fair and reasonable intendment." *Jackson v. Pesked*, 1 Maule & S. 234.

The other errors assigned are immaterial. In overruling the motion in arrest of judgment, the superior court erred, and the judgment is reversed. The other judges concurred.

(83 Conn. 221)

RANDELL et al. v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. Sept. 9, 1893.)

TAXATION—RULE OF ASSESSMENT—ADOPTION BY CITY—CONFLICT WITH STATUTE—EFFECT.

1. On appeal from an assessment of plaintiff's land, evidence is admissible to show that the city in which it lay had adopted the rule of assessing land at only one-half its value, though Gen. St. § 3831, provides that all property shall be assessed at its full value; plaintiff contending that the rule adopted was violated in his case.

2. In case of such a violation of the rule of assessment adopted, the court will reduce plaintiff's assessment so as to do justice, though by so doing it sanctions the city's violation of the statute providing that property shall be assessed at its full value.

Case reserved from superior court, Fairfield county.

Appeal by Rufus Randell and others from the action of the board of relief of the city of Bridgeport in the matter of the assessment of appellants' real estate for taxation. Reserved on a finding of facts.

G. Stoddard and W. D. Bishop, Jr., for plaintiffs. H. H. Knapp and M. W. Seymour, for defendant.

CARPENTER, J. This is an appeal from the doings of the assessors and the board of relief of Bridgeport. The only parts of the complaint material to notice are the fourth and sixth paragraphs. As amended, they are as follows: "(4) Said board of assessors valued said two parcels of property at one hundred and twenty-five thousand dollars, an amount fifty-six thousand two hundred and fifty dollars in excess of the appellants' valuation, and an amount largely in excess of a just, fair and reasonable estimate of the value of said property." "(6) Said valuation of said board of assessors, and said action of said board of relief in refusing to reduce the same, are unjust, unfair, and unreasonable, and therefore illegal." The substituted answer denies the material parts of the complaint. The finding is, in substance, as follows: On the 1st day of October, 1891, it was, and ever since has been, the uniform rule of the board of assessors and board of relief of the city and town of Bridgeport to value all property, for the purposes of taxation, at one-half of the fair market value of such property at the time of such valuation. The said boards of assessors and relief applied said rule in valuing said property of the plaintiffs for taxation at \$125,000; and, in placing said valuation upon said property, said board of assessors and board of relief found and fixed the fair market value of said property on the 1st day of October, 1891, to be \$250,000, and one-half said fair

market value to be \$125,000. The court found the fair market value of the property in question on the 1st day of October, 1891, to be \$125,000, assuming the question of the fair market value to be a question of fact to be decided upon all the evidence. All evidence to prove the rule of valuation in Bridgeport for the purposes of taxation, and that one-half the fair market value of the property in question was less than \$125,000, was objected to by the defendant, and the finding on those points is contingent on the admissibility of that evidence.

We think the evidence was properly admitted. It seems the better way, in cases like this, to let the facts be proved, and then determine the law applicable to the facts, rather than to anticipate the law on a question of evidence. Moreover, the facts are clearly material, as tending to show the alleged grievance of the plaintiffs. There are two ways in which a taxpayer may be wronged in levying taxes. An assessment may conform to the statute generally, and the individual may be assessed in excess of the statutory requirement. A wrong of that description is easily redressed. But when the town disregards the statute, and establishes a rule of its own, assessing the property at one-half of its actual value, and then assesses an individual at the full value of the property, while the injury is the same, the application of the remedy becomes more complicated. Practically, the only way to redress the wrong is to reduce the assessment, and that makes the court seem to disregard the statute; while, if the wrong is not redressed, there is a denial of justice, and the court practically ignores the statute giving an aggrieved party an appeal, and practically ignores the statute which provides that "said court shall have power to grant such relief as shall to justice and equity appertain." Gen. St. §§ 3831, 3863. Thus we are in a dilemma. If we choose one horn of it, a public statute is violated,—not so much by the court as by the town,—but by an apparent approval of the court as to one individual; and that by an express command of another statute, and by the dictates of justice. If we take the other horn, the court itself violates a remedial statute, and becomes in a measure a party to the wrongdoing. Under the circumstances, we do not hesitate to choose the former, and to redress the wrong. We are not without precedents for this. *Manufacturing Co. v. Strafford*, 51 N. H. 455; *Manchester Mills v. Manchester*, 58 N. H. 38. The superior court is advised to render judgment for the appellants. Inasmuch as the appellants valued the property for the purposes of taxation at \$68,750, we advise the superior court not to reduce the assessment below that sum. The other judges concurred.

(63 Conn. 374)

PRICE v. HEUBLER.

(Supreme Court of Errors of Connecticut. Oct. 25, 1893.)

SALE—RETENTION OF POSSESSION—RIGHTS OF CREDITORS.

Though possession of goods sold is retained by the seller, the sale, which is valid except as to creditors of the seller, can be attacked by them only by a legal attachment or legal levy of execution, followed by proceedings to appropriate the avails thereof to payment of their debts.

Appeal from court of common pleas, Hartford county; Walsh, Judge.

Action by James Price, Jr., against Julius Heubler. Judgment for defendant. Plaintiff appeals. Affirmed.

C. W. Briscoe and J. W. Johnson, for appellant. J. L. Barbour, for appellee.

ANDREWS, C. J. This is an action in the nature of trover, claiming to recover the value of six cases of tobacco. The plaintiff was a deputy sheriff of the county of Hartford. On the 5th day of November, 1886, he had in his hands and possession at East Windsor, in said county, thirteen cases of tobacco, which on that day were replevin out of his possession upon a writ of replevin in favor of the present defendant. The plaintiff claimed the lawful possession of the cases of tobacco by virtue of two writs of execution against one Joseph Bassinger, of said East Windsor,—one in favor of Horace Barber, of said town; the other in favor of E. C. Sheldon, of Springfield, Mass.,—and he had levied on the same as the property of the said Bassinger. The action of replevin was brought against the said Horace Barber. Upon the trial of the replevin case the then plaintiff (now defendant) claimed to be the bona fide purchaser of all the cases of tobacco from Bassinger. Mr. Barber, the then defendant, disclaimed any right as to six out of the thirteen cases, and as to the other seven cases claimed that, even if there had been a sale thereof by Bassinger to Heubler, there had been such a retention of the possession thereof by Bassinger that the sale was fraudulent and void as against him, and that he might lawfully levy upon them to satisfy said execution. The issue so made up was in favor of Mr. Barber. The present action is brought to recover the value of the six cases of the tobacco which were taken out of his hands by the replevin, and in respect to which Mr. Barber disclaimed.

Granting, as we do for the purposes of the present inquiry, that there was such a retention of the possession of the tobacco by Bassinger that it might be taken by attachment or on execution by any of his creditors, yet the sale, as between him and Heubler, was a valid one. It was good against all the world except a creditor of Bassinger; and such a creditor could successfully attack the sale only by a legal attachment, or by a legal levy of an execution upon it, followed by law-

ful proceedings to appropriate the avails thereof to the payment of that creditor's debt. *Ahern v. Purnell*, 62 Conn. 21, 25 Atl. 393. Whether or not such a levy had been made, and such proceedings had, (up to the time the replevin was served,) in respect to the six cases of tobacco, for which this action was brought, was the issue made by the second defense. On that issue there was evidence upon both sides. We must take it for granted that the jury was properly instructed as to the law applicable to the question of fact involved in the issue, because no complaint is made in that respect. All the considerations bearing upon the evidence offered were doubtless urged to the jury,—as, that an officer's return of his doings on any lawful process is entitled to a high degree of credit; that the officer himself, although nominally a party, is really a disinterested witness; and that the officer was corroborated by other witnesses,—and, on the other side, that the witnesses were interested, and were persons less worthy of credit than the officer, and everything else which the ingenuity of counsel could suggest. It was a question of fact for the jury, and these were arguments for the jury to weigh. We cannot assume that they did not consider them fully and fairly. It is more than likely that opposing counsel urged contrary arguments upon the attention of the jury. We think there was evidence on the part of the defendant which, if the jury believed it, was sufficient to warrant them in coming to the verdict which they rendered, and that a new trial should not be granted. "Whenever there is a conflict in the evidence, or different inferences may be drawn therefrom, the determination of the jury will not be interfered with, unless it appear that it is against the clear weight of the evidence, or was influenced in some way by passion, prejudice, mistake, perversion, or corruption." *People v. Fish*, 125 N. Y. 136, 26 N. E. 819; *Waters v. Bristol*, 28 Conn. 404. The other judges concurred.

(63 Conn. 310)

PECK v. PIERCE et al.

(Supreme Court of Errors of Connecticut. Sept. 9, 1893.)

DOCUMENTARY EVIDENCE—ACCOUNT BOOKS OF DEFENDANT'S TESTATOR—DECLARATIONS.

1. On an issue as to whether defendant's testator had paid the note in suit, which was given as part of the price of land, entries in testator's account book in his handwriting, charging him with the price of the land, describing it, and crediting him with certain items, the sum of which balanced said price, and one of which was the same as the amount of the note, though this latter was not expressly referred to, was admissible in connection with evidence that the note was given as part of the consideration, and that the various items of the consideration paid corresponded with the items in the account.

2. On an issue as to whether defendant's testator had paid interest on the note in suit

during certain years, it was proper to show by the testimony of defendant, after he had testified that defendant's account book contained no entry of such payments by testator, that said book contained frequent entries as to interest paid to others, the fact that all payments of interest by testator had not been entered there merely affecting the weight of the testimony.

3. The fact that defendants identified testator's account book, and "laid the same in evidence" without objection, does not make all the contents thereof evidence which may be considered by the court in making its findings, defendants having afterwards called the court's attention to specific entries, and argued their admissibility, without claiming that they were already in the case.

4. Though the court expressly states that certain entries in an account book which were not in evidence, but which were seen by him, did not influence him in his finding, such statements will not be regarded as conclusive, and a new trial will be granted, unless it appears that such entries could not have prejudiced appellant.

5. Declarations by the deceased maker of the note that he had been unable to get statements from the payee, plaintiff's intestate, who was his agent to collect rents in another state, as to what deductions were made from the rents collected, were admissible to show that indorsements of payments on the note were made without the maker's knowledge, and as bearing, consequently, on the question whether the note had been previously paid. Andrews, C. J., dissenting.

Appeal from superior court, Fairfield county; Prentice, Judge.

Action by Edward H. Peck, administrator, against Alexander Milne. Defendant having died pending the suit, William B. Pierce and others, his executors, were substituted as defendants. From a judgment for defendants, plaintiff appeals. Reversed.

S. Fessenden and G. A. Carter, Jr., for appellant. E. L. Scofield and O. L. Reid, for appellees.

TORRANCE, J. In 1886, Alexander Milne made and delivered to E. N. Peck a note, of which the following is a copy: "Stamford, Conn., March 26th, 1886. For value received, two years after date I promise to pay to E. N. Peck or order two thousand dollars, with interest. Alexander Milne." Before suit was brought upon the note, Mr. Peck died, in January, 1890, and the note was found uncanceled among his papers, having upon it the following indorsements: "Rec'd Mch. 26th, '87, interest, \$120." "Rec'd April, '88, interest, \$120." "Rec'd Mch. 26th, '89, interest, \$120." In April, 1890, the administrator of Mr. Peck brought suit against Mr. Milne on the note. The present suit is a continuation of the suit then brought, Mr. Milne having died in April, 1891, during its pendency, and is defended by the executors of Mr. Milne. The only question in issue was whether or not the note had been paid by Mr. Milne in his lifetime. The case was tried to the court, and the only evidence given related to this issue. The defendants claimed that the note was given as part of the consideration upon a sale of real estate in the city of New York made by Peck to Milne for the price of \$30,-

000; that this price was paid by Milne's assuming certain mortgages upon the property, amounting to \$20,000, by his transferring to Peck a mortgage upon another piece of real estate for \$8,000, and by giving the note in suit; that on May 7, 1887, Milne paid the note by delivering to Peck, who received the same in full payment of the note, a check for \$1,000, which was paid in due course, and a note for \$1,000, which was paid in November, 1887; and that the note in suit was not delivered up at the time of payment because Peck did not then have it with him, nor afterwards because of the neglect and oversight of the parties. All this the plaintiff denied. Judgment was rendered for the defendants, and the plaintiff brings this appeal.

Five reasons of appeal are filed, but, as the fifth does not comply with the requirements of section 1135 of the General Statutes, but is a mere general assignment, it will not be considered. The other reasons of appeal will be considered in the order of their assignment.

Under the fourth reason of appeal we think the plaintiff is entitled to a new trial, and this ordinarily would render it unnecessary to consider the others; but, as the questions involved in them may again arise upon a new trial, we have concluded to express our views as briefly as possible upon them also.

The first assignment relates to the admission of the following entries on pages 166 and 167 of the account book of Mr. Milne, and in his handwriting:

1888, Feb. 1.	House and lot 215 West 18th St.	\$30,000	
"	" Paid on acc.	\$ 8,000	
"	" " E. N. Peck and		
"	" " brother.	9,500	
"	" " " " " " " " " "	2,000	
"	" Due Mrs. ———, mort-		
"	" gage.	10,500	
		<hr/>	
		\$30,000	\$30,000

If these entries, either alone or in connection with other evidence in the case, are intelligible, then, if they are also relevant, they are admissible, under our statute, as memoranda made by Milne in his lifetime. *Setchel v. Kelgwin*, 57 Conn. 473, 18 Atl. 594. The deed and the other evidence in the case make it quite clear that these entries refer to the purchase of the New York property, and, read in the light of that other evidence, the entries themselves state the price of the property, the payment of that price, and, to a certain extent, the mode of payment, and the amounts which made up the full price. Now, the plaintiff, as we understand the record, disputed the fact of the purchase of the New York property, as well as the fact that the note formed a part of the consideration for it; and these entries are certainly relevant upon the former fact, because they refer to such a purchase. But the plaintiff says they were offered to prove the payment of the note, and that they do not in any manner refer to the note, and for this reason are not relevant on the question of its payment. Standing by themselves, they do not

show a reference to the note; but this, of itself, does not necessarily make them inadmissible. As one step in their proof, it was necessary for the defendants to show that there was such a real-estate transaction, including, of course, the price paid, and how it was paid if paid at all, and these entries are clearly relevant for that purpose, and, for aught that appears from the record, may have been offered for that purpose alone, for they were offered generally. But we think they were admissible also, in connection with the other evidence, to show that the note formed part of the consideration for the real estate, and had been paid as part thereof. The other evidence showed that the note was given as part of that consideration, and that the balance was made up by the transfer of a mortgage of \$8,000 to Mr. Peck, and by Mr. Milne's assuming two mortgages, —one for \$9,500 and one for \$10,500; and these entries show payments of amounts corresponding exactly to the amounts of these mortgages and this note. That the \$2,000 item was apparently paid to E. N. Peck and brother, and did not, as it stood, expressly refer to the note, did not necessarily destroy its relevancy, although it might affect its weight. It might be shown by other evidence to refer to the note, and to nothing else, just as we think the item of \$8,000 paid on account might have been shown to refer to the mortgage transferred to Mr. Peck. In a precisely analogous case subsequently, both parties offered outside evidence to prove that the word "interest" in the receipt of April, 1888, hereafter mentioned, referred to the interest indorsed upon the note, and did so properly, we think.

The second reason of appeal relates to the testimony of the witness Pierce. The defendants denied that Mr. Milne had paid interest on the note in 1888 and 1889, and thus denied the correctness of the last two indorsements. As tending to show the truth of their claim, they called Mr. Pierce's attention to the account book of Mr. Milne. He testified in substance, and without objection, that it contained no entry of any payment of interest to Mr. Peck. The defendants then offered to show by him, that said book contained frequent entries of the payment of interest to others; that is, as we understand, to show that the book contained entries of very many, although not of all, payments of interest made by Mr. Milne to others. To this evidence the plaintiff objected, unless it was shown, in substance, that all payments of interest made by Mr. Milne had been so entered. It seems to us that the evidence thus objected to is of the same nature as that to which this witness had just previously testified without objection. The absence in such a book of any entry of payment of interest to Mr. Peck tended, to some slight extent, to show that no such payment had been made; and the frequent presence of such entries of payments of interest to oth-

ers, even though all such payments were not entered, was a fact of like nature, and would also tend, in some slight degree, to the same conclusion. The fact that all payments of interest were not entered upon the book would, generally speaking, go to the weight, rather than to the admissibility, of the evidence in both cases. We think the evidence was admissible for what it was worth, without first showing that all payments of interest were paid by check or entered upon the account book.

The third reason of appeal relates to the testimony of Mr. Ritch concerning certain declarations of Mr. Milne. For many years before the note was given, and down to the time of Mr. Peck's death, he (Peck) had been the agent of Mr. Milne, looking after Mr. Milne's real estate, collecting the rents, and rendering to him monthly statements and making monthly settlements. Now, with reference to the last two indorsements of interest on the note in suit, the defendants claimed that, if any such interest was in fact received or applied by Mr. Peck, the same was applied by him from the rent money, and without the knowledge of Mr. Milne, and that he rendered his statements in such a way that he could have done so without the knowledge of Mr. Milne. In support of these claims they asked Mr. Ritch: "Did Mr. Milne ever make any statement to you in reference to the accounts which Mr. Peck rendered to him for rents collected?" The witness answered as follows: "I had a conversation with him in regard to Mr. Peck's accounts immediately after Mr. Peck's death. Mr. Milne asked me if I could get him a reliable real-estate agent in New York who could collect his rents and make returns; that he had been wholly unable to get statements from Mr. Peck showing what deductions were made from the rents received; and that he had to take checks from Mr. Peck without a knowledge on his part of how his account stood. There is no complete statement." The plaintiff objected to the question and the answer, but we are here concerned only with the answer. The plaintiff now says the declarations were inadmissible because they related merely to the inability of Mr. Milne to get correct statements of account, and not to the payment of the note, and because they were too general, and do not refer to the statements made in April, 1888, and March, 1889, when the indorsements in dispute were made. We think the evidence was admissible under our statute. Its generality goes to its weight only. The declaration was, in form and in effect, that he had been unable to get any correct statements from Mr. Peck. This covered the statements for April, 1888, and March, 1889, as well as others. It had a bearing, however slight, upon the question whether the interest could or might have been applied on the note from the rents without the knowledge of Mr. Milne, as claimed by the

defendants; and this again, of course, had a bearing on the question of payment.

The fourth reason of appeal, and the last to be considered, relates to the action of the court in taking under its observation certain entries in the account book of Mr. Milne, which the plaintiff claims were not evidence in the case. To show that interest had been paid on the note by Mr. Milne in April, 1888, the plaintiff introduced the following receipt in the handwriting of Mr. Milne: "Received, Stamford, 27th April, 1888, balance of rents for current month, less interest. Alexander Milne." The plaintiff claimed that the interest therein referred to was interest paid on the note in suit, while the defendants denied this. The court finds that "there was nothing in evidence showing any other indebtedness from Mr. Milne to Mr. Peck upon which interest was due or payable at or near the date of said receipt, and there was no direct evidence offered explanatory of the reference to interest in said receipt, or to indicate what was meant thereby. No entries in Mr. Milne's book were referred to by the defendants as throwing any light upon the matter, and the language of the receipt was left open to such speculation as to its meaning as the transaction of the parties in evidence, concerning which Mr. Peck kept no accounts, and Mr. Milne only an incomplete and unbusinesslike one, furnished ground for." The court further finds as follows:

"While the court had the case under consideration for its decision, the following entries in said account book kept by Mr. Milne, to which attention had not been called during the trial, came under his observation:

1887. July 1. Mortgage acc. with protested notes in First National Bank of Stamford.....	\$5,035 00
Interest to be paid semiannually.	
Amount paid on mortgage.....	72 00
	\$4,963 00

John A. Holmes, due 1 July, 1888.	
1887. March 26. N. L. Hart's bill, search and mortgage, Darien.....	79 70
March 30. Paid 1st Nat. B'k, Stam- ford, on acc. of int.....	42 50
July 1. Paid 1st Nat. B'k, Stamford, on acc. of int.....	72 70
Oct. 1. Paid 1st Nat. B'k, Stamford, on acc. of int.....	72 50
Dec. 1. Paid 1st Nat. B'k, Stamford, on acc. of int.....	75 80

"And in 'quarterly statements of assets,' the following item:

1887. Sept. 1. Mortgages due John A. Holmes	\$5,035.
--	----------

"An examination of the entries in the book failed, and nothing in the other evidence in the case served, to throw any light upon these entries, or upon the nature of the transaction to which they pertained. The court therefore dismissed them from his mind, so far as the decision of the case was concerned, and did not in any manner consider them in arriving at his decision. After

the case was decided, the court, in a conversation with counsel for the plaintiff, called his attention to said entries as possibly affording some clue to the solution of the question discussed by counsel as to the meaning of the interest reference in said receipt."

The plaintiff claims—First, that these entries were not evidence in the case at all; and second, that they were taken into consideration by the court below, and consciously or unconsciously influenced its decision to his harm. Were the entries evidence in the case? It appears that attention was not called to them at all during the trial. For aught that appears, neither court, counsel, nor parties, during the trial, knew of their existence. In short, it would seem that, if they became evidence at all, they became such when the book was first laid in evidence, and merely by force of the fact that they were contained within its covers. This involves the claim that when the book was thus laid in evidence, as it is called, without objection, every entry of every kind within its covers necessarily became evidence in the case; and this seems to be the view taken of the matter by the defendants, for in their brief they say: "The book was in evidence without objection, and the court had the right to consult any entry therein in determining the facts in issue." Under the facts of this case, we cannot assent to such a claim. It is founded upon this statement in the record: "The defendants identified a certain book of accounts as the account book, and the only account book, kept by Mr. Milne, and as being wholly in his handwriting, and laid the same in evidence." What does the phrase "laid the same in evidence," as here used, mean? No more, we think, than that the book identified as Mr. Milne's account book, kept in his handwriting, was now before the court ready for use, as the material source of such entries therein as should be subsequently offered in evidence. It meant no more, in effect, than is meant in every-day practice when a writing to be offered in evidence subsequently is identified and marked as an exhibit in advance of its being so offered. So all concerned seem to have understood the matter, and we know of no rule of law or of practice which requires us to give to this phrase, under the circumstances of this case, any more extended meaning. Of course, this act of laying the book in evidence might have been attended with the result now claimed by the defendants if the parties had so agreed or intended; but it is not found, nor from the facts found can it be fairly inferred, that they did so intend, or that they so understood the matter; and, after all, the question should be, how did the parties understand the matter at the time? The book covered several years of time, and presumably contained many entries of various kinds, some relevant, perhaps, and some not; and it can hardly be presumed that the plaintiff, in entire ignorance of what these entries

were, intended to admit them by not objecting to the book as such, or by failing to ask at that time what entries would subsequently be offered in evidence. The subsequent conduct of the court and of the parties clearly shows that the matter was not understood at the time as the plaintiff now claims that it was, for, after the book was laid in, the defendants called the attention of the court to certain specific entries, and thereupon the plaintiff objects to them, and the court hears the parties, and overrules the specific objections, precisely as if the entries were then being offered for the first time; and the defendants make no claim that the entries are already in the case, as would have been natural had they supposed they became evidence when the book was first laid in. Subsequently, also, the trial judge seems not to have considered the entries here in question as in the case, for he says he dismissed them from his mind, so far as the decision was concerned. In short, we think it clearly appears from the record that the contents of the book were not laid in evidence when the book was laid in; and from this it follows that the entries in question were not evidence in the case at all.

This brings us to the question whether the fact that the trial judge saw these entries, and dealt with them in the manner stated on the record, entitles the plaintiff to a new trial. We think the fairest way to deal with this question, under the circumstances, is to treat the case as we should one where evidence had been improperly admitted, and, after the trial, but before the decision, such evidence had been either expressly ruled out, or disregarded, so far as the same can be done, by the court. In such cases the question is, does it fairly and with reasonable certainty appear upon the record that the party complaining could not have been harmed by the action of the court? Unless it does so appear, a new trial will ordinarily be granted. *Richmond v. Stable*, 48 Conn. 22; *Buckingham's Appeal*, 60 Conn. 143, 22 Atl. 509. In the case at bar, if we take the statement of the trial judge as conclusive upon the question whether his decision was influenced at all by the entries in question, then it does clearly appear that the plaintiff was not harmed by the action of the court of which he here complains. Now, there can be no sort of doubt that the trial judge intended to, and did, so far as it is possible for any one to do such a thing, dismiss these entries from his mind, and did not consider them in arriving at his decision, and that he was fully persuaded that he had succeeded in the attempt. This court, however, has in cases like this, with a good degree of uniformity, refused to accept such statements as conclusive, on the ground that "the operations of the human mind are so subtle, and the influences which affect it so difficult to be appreciated, that it is utterly improbable, not to say impossible," for the

party making them to know whether the evidence influenced him or not; holding that all that such statements can mean is that the maker of them was unconscious of the influence. *Harris v. Town of Woodstock*, 27 Conn. 571; *Jacques v. Railroad Co.*, 41 Conn. 66; *Borough of Norwalk v. Blanchard*, 56 Conn. 461, 16 Atl. 242. In view of these decisions, and others that might be cited from our own reports, and concurring, as we do, in the reasons therein given for declining to accept such statements as conclusive, we cannot accept the statement of the trial judge in this case as conclusive. This being so, it follows that the question in each case of this kind must be determined by a consideration of the facts in the particular case bearing upon the question, there being no general rule applicable to all cases.

Now, in the case at bar, although we do not think, in view of all the evidence in the case as it appears of record, that the receipt of April, 1888, was of such transcendent importance as the plaintiff now seems to claim, still it was an important piece of evidence in his favor. As matters stood at the close of the evidence, a strong argument in favor of the plaintiff's contention might be drawn from it. The case was a somewhat close one, peculiar in some of its aspects, and its decision involved the consideration of questions upon which the evidence would be rather evenly balanced. Any evidence, therefore, which in any degree, or at least in any essential degree, weakened the inference to be drawn from the receipt, would necessarily, or at least very probably, affect the result of the trial unfavorably to the plaintiff. Now, the entries in question, as they stand in the book, and as the court saw them, without explanation or qualification, would, we think, tend to show, or at least to suggest, some sort of an inference that the word "interest" in the receipt did not or might not refer to the interest indorsed upon the note, but might refer to interest upon some other account. The trial judge appears to have regarded them "as possibly affording some clue to the solution of the question as to the meaning of the interest reference in said receipt." Now, it is manifest from the record that, to some extent at least, and for some purposes, the trial court did consider these entries. For how long a time the court had them under consideration does not appear. Under all the circumstances, we think it does not appear from the record with reasonable certainty that the plaintiff could not have been harmed by the action of the court below, and that the interests of justice will be promoted by granting a new trial. There is error, and a new trial is granted.

CARPENTER, FENN, and BALDWIN, JJ., concurred. ANDREWS, C. J., concurred in the result, but was of opinion that the testimony of Ritch should not have been received.

(63 Conn. 453)

FRITTS v. NEW YORK & N. E. R. CO.
(Supreme Court of Errors of Connecticut. Dec. 18, 1893.)

REMAND FOR NEW TRIAL—ISSUES TRIABLE.

All issues are retriable on a new trial granted without limitation.

Appeal from district court of Waterbury; Bradstreet, Judge.

Action by Henry Fritts against the New York & New England Railroad Company for negligence in causing plaintiff's horses to run away. Judgment for plaintiff. Defendant appeals. Reversed.

For former appeal, see 26 Atl. 347.

The finding of the court below is as follows: Upon the new trial of this case, in a hearing in damages before the court in pursuance of the order of the supreme court of errors herein, defendant, for the purpose of reducing the damages of the plaintiff to a nominal sum, offered to introduce evidence to show that the injuries to his property, complained of by plaintiff, were not caused by any negligence on its part; and also evidence to show that said injuries were caused by plaintiff's contributory negligence. He also claimed that plaintiff was bound to prove all items of damage before he could be entitled to judgment for the same. The court refused to receive such evidence of defendant, and overruled said claim, and ruled that under the decision of the supreme court of errors in this cause, on the appeal to it taken from the former decision of this court, this court in this trial could only hear evidence as to the market value of the horses caused by their running away in the manner stated in the finding of the judge who heard the case on the former trial, since this was the only matter as to which the supreme court of errors found this court to have erred in said former trial. To each of these rulings defendant duly excepted.

Edward D. Robbins, for appellant. Webster & O'Neill, for appellee.

TORRANCE, J. This case was before us at a former term upon appeals taken by both parties. *Fritts v. Railroad Co.*, 62 Conn. 503, 26 Atl. 347. We then held that there was no error on the defendant's appeal, while on the plaintiff's appeal we held there was error, and granted a new trial. When afterwards the case came up in the court below the defendant claimed a right to a retrial of the entire facts, but the court overruled that claim, and whether it erred in so doing is the one question presented by the present appeal. By reference to the record in the former appeal in this case it will clearly appear that none of the errors alleged by either party affected in any way the facts found and made part of the record. There had been no mistrial, so far as the facts were concerned. The alleged errors related entirely to the action of the court below in

v.28a.no.9—34

applying the law to the facts found. In both of these respects the record referred to was precisely like the record in *Zaleski v. Clark*, 44 Conn. 218. Under the old practice, for some years, at least, prior to 1882, such cases were constantly brought up by motions in error or by motions for a new trial, at the election of the parties. Theoretically, perhaps, under that practice, the appropriate method for bringing up such cases was by a motion in error. See the note to *Zaleski v. Clark*, 45 Conn. 405. In practice, however, and in favor of motions for a new trial, the distinction was in most cases neither insisted upon by the court nor observed by the parties. When, however, the errors related to and affected the trial of the facts, it was, as a rule, required that the case should be brought up, whenever it could be, by a motion for a new trial, rather than by a motion in error. *Ward v. Donovan*, 45 Conn. 559. But, as before stated, for many years prior to 1882 cases wherein the errors alleged did not in any way affect the trial of the facts were constantly brought up without objection by motions for a new trial, rather than by motions in error, and, if error was found, a new trial was granted. The following are a few of the cases of this kind, selected at random from a few volumes of our reports: In 15 Conn., the case of *Wheeler v. Spencer*, (page 28.) In 42 Conn., the cases of *Langdon v. Strong*, (page 356;) *Brady v. Barnes*, (page 512;) and *State v. Ferria*, (page 560.) In 43 Conn., the cases of *Merriam v. City of Meriden*, (page 173;) *Wheeler v. Wheeler*, (page 503;) and *Hitchcock v. Holmes*, (page 528.) In 44 Conn., the cases of *Zaleski v. Clark*, (page 218;) *Mitchell v. Stanley*, (page 312;) *Sanford v. Gilman*, (page 461;) and *Buckingham v. Osborne*, (page 183.) In 45 Conn., the cases of *Shepard v. New Haven & Northampton Co.*, (page 54;) *Peters v. Stewart*, (page 103;) *Zaleski v. Clark*, (page 397;) and *Trowbridge v. Bosworth*, (page 166.) In this last case the supreme court advised a new trial, although the case appears to have been before it upon a motion in error. In all these cases there was a finding of facts by the court, committee, or auditor. The errors in all of them were not such as to affect this finding in any way, but consisted wholly in the application of the law to the facts found; and all of them, except the last-named case, were brought up by motions for a new trial. These and numerous other cases of a like nature that might be cited clearly show that this court, under the old practice, constantly heard such cases upon motions for a new trial, and constantly advised new trials therein, although there had been no mistrial at all as to the facts found. The present statute relating to appeals to the supreme court abolished these motions, substituting therefor one uniform method by way of appeal, and, as a consequence, abolished all the distinctions which had their

origin in the differences between these motions. Under this statute, as before, this court still has the power, in cases of the kind we have been considering, either to reverse the judgment merely, or to grant a new trial; and it can now exercise this power unhampered by the form of the procedure adopted to bring the case up. Gen. St. § 1135. Furthermore, under the old practice prior to 1882, this court, if it advised a new trial, could do so either with or without conditions and qualifications. *Chambers v. Campbell*, 15 Conn. 427; *Zaleski v. Clark*, 45 Conn. 397. This power it still possesses under the present practice. Under the former practice, also, as a general rule, if a new trial was granted without qualification it meant a retrial of the entire facts; and this was true, as appears by the cases cited, whether the errors did or did not affect the finding of facts. *Zaleski v. Clark*, 45 Conn. 397. We think this still is, and ought to be, the rule. It is of great importance to all concerned that the rule upon this subject should be plain, simple, easily understood, and capable of ready application. The rule as recognized and enforced in the last-named case is of this nature, and ought to be adhered to.

It follows from what has been said that this court, when the former appeal in the case at bar was before it, had the power to reverse the judgment merely, or to grant a new trial, with or without qualification. It chose, however, to grant a new trial, and the question is whether it granted such trial without qualification or not. For the answer to this question we must look to the language used by this court in granting the new trial. The opinion in the former appeal, after disposing of one of the plaintiff's claimed errors, closes as follows: "But we think that the lessened market value of the horses in consequence of the runaway was a proximate and legitimate element of damage. * * * In this last particular there is error on the plaintiff's appeal, and a new trial is granted." It is manifest, we think, from this language, that the effect and scope of the new trial thus granted is not expressly limited or qualified in any way. The error found and pointed out is indeed confined to one part of the case, but the scope and effect of the new trial are not in express words so confined. If, then, any such limitation exists, it must exist by necessary implication. It is said that the court cannot have intended to grant a new trial as to the facts of the case, because they had all been fairly found already, and were not affected by any of the claimed errors, and that these last could be corrected without requiring a retrial of the facts. This was undoubtedly a good reason why this court might have contented itself with reversing the judgment merely, or with granting a qualified new trial in express words; but, in the light of the cases hereinbefore cited, it can-

not fairly be urged as a reason for annexing by implication to the new trial granted a qualified or limited scope. The language employed is without limitation or qualification. If such implication exists in this case, it must also have existed in *Zaleski v. Clark*, and in all the other cases like it, hereinbefore cited; and yet this court in those cases never recognized any such implication. We think the language used fairly imports a new trial without qualification or condition.

It is claimed, however, that certain cases previously decided by this court are in conflict to a certain extent with this view of the case. In *Grane v. Transportation Line*, 50 Conn. 341, this court held that the facts could not be retried, as it did likewise in *Taylor v. Keeler*, 51 Conn. 397, and in other cases that might be cited. But, as these were all motions in error under the old practice, where the judgment had been reversed merely, without granting any new trial, they have little or no bearing on the present question. The case of *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419, is the only case which can be claimed to support the plaintiff's contention. The action in that case was brought for the reformation of a deed, and, if reformed, then for damages for the breach of the covenants in the deed. A special finding of all the facts bearing upon the right to have the deed reformed was made, and the court below decided that upon them, as matter of law, the plaintiff was not entitled to have the deed reformed. The finding was silent as to the amount of damage, if any, which the plaintiff had sustained in case he was entitled to have his deed reformed; and of course, if error was found, the case would have to be opened, at least to the extent of giving the plaintiff opportunity to prove the amount of his damage. On appeal to this court from that judgment it was held that the court below, in deciding as above stated, had erred, and a new trial was granted in the following language: "And that a new trial should be granted, at which the court of common pleas may reform the deed as herein indicated, and thereupon render judgment for damages for the breach of the covenants now in said deed contained." When the case came again before this court, (61 Conn. 399, 24 Atl. 328,) it was held, in effect, that this language, under the circumstances, limited the new trial granted to a trial of the question of damages, and did not extend to the right to retry the facts already found. Now, whatever else this last case decided, it is quite certain that it did not overrule *Zaleski v. Clark*, 45 Conn. 397, nor was it intended in the opinion to say anything to weaken the force of the salutary rule in that case recognized. The case (61 Conn. 399) assumes the existence of the rule, for the question was whether or not the language used in granting the new trial brought the case

¹ 24 Atl. 328.

within the rule. It was simply a question of construction, and under the circumstances the court construed the language as granting only a qualified new trial. We still think that construction was the proper one, although the language used may perhaps be susceptible of a different one. At all events, we think the case at bar comes clearly within the rule, and that the court below erred in refusing to permit a retrial as claimed by the defendant. The judgment appealed from is reversed, and a new trial is granted. The other judges concurred.

(63 Conn. 365)

Appeal of CRANDALL et al.

(Supreme Court of Errors of Connecticut. Oct. 25, 1893.)

WILLS—CONTENTS AS EVIDENCE OF CAPACITY—CREDIBILITY OF WITNESS.

1. The contents of a will may be considered on the questions of undue influence and of testator's mental capacity.

2. The evidence of attesting witnesses is entitled to no greater weight on the question of testator's mental capacity than that of any other persons present.

Appeal from superior court, Windham county; Hamersley, Judge.

Petition by Caroline Crandall and others for probate of the will of Ebenezer Farrows, deceased. The will was approved and admitted at probate court, and an appeal taken to the superior court, where it was set aside by a jury. Proponents appeal. Affirmed.

O. E. Searls and J. H. Potter, for appellants.
E. M. Warner and L. B. Cleveland, for appellees.

CARPENTER, J. This is an appeal from a probate decree establishing the last will and testament of Ebenezer Farrows. The will was attacked on two grounds,—mental incapacity and undue influence. On the trial to the jury, the proponents of the will presented to the court several requests to charge the jury. These requests were not complied with, in terms, and the appellees insist that they were not complied with in substance. The jury returned a verdict against the will, and the appellees appealed to this court. The reasons of appeal allege that the court erred in respect to each of the six requests. We will consider the requests in their order.

The first request is as follows: "The jury have nothing to do with the equity or inequity of the testamentary dispositions of property, provided they believe from the evidence that the alleged testator had sufficient mental capacity to make a will, as explained in these instructions, and that the will was made of his own free will by the testator." This request is somewhat ambiguous. At least, its precise meaning is obscure, so that, if given literally, it might, and probably would, have been misleading or confusing. If, by the request, it was intended that the jury should be instructed that the terms of

the will should be entirely disregarded, in considering the evidence tending to prove and to disprove capacity or undue influence, the request, clearly, should not have been complied with. Mr. Chamberlin, in his work on American Commercial Law for Business Men, (on page 854,) says: "If the will was written by the testator himself, the character of its contents is the highest evidence of his capacity or incapacity." And we may add that even if the will was dictated by the testator, and its provisions, under all the circumstances, seem to be just and reasonable, that certainly is a circumstance tending to prove capacity, and to disprove undue influence, precisely as an absurd or unreasonable will tends to prove the contrary. Such seems to be the teaching of 1 Swift, Dig. 140: "If the disposition of the estate be very unreasonable and improper, as giving it to strangers, or all to one child, this will be a strong circumstance from whence to infer undue influence and want of understanding." It may be suggested that the meaning is that if the jury find from all the evidence, giving the character of the contents of the will its due weight as evidence, that the testator had sufficient testamentary capacity, etc., then the equity or inequity of the disposition of the estate should not invalidate the will. If that is its true meaning, we think counsel were singularly unfortunate in their use of language. It is not probable that the court so understood the request, and it is quite certain that, if the charge had been given as requested, the jury would not have so understood it without considerable explanation. The court is not bound to charge in the language of a request, when the language will be likely to be misunderstood without further explanation. It is apparent that the word "evidence," as used in the request, signifies that given by witnesses, as distinguished from the contents of the will. While the latter is evidence, in a broad sense, yet it is manifest that the word was used in a more limited sense. As thus used, the obvious meaning of the request is that the contents the will should be excluded as evidence on the main issue. That is not law, and the instruction was properly refused.

The second request is: "The jury should give special prominence to the testimony of the three attesting witnesses, both upon the question of capacity and of undue influence, because they were present at the time and place of the execution of the will, and had the means and the opportunity of judging of the testator's capacity, and are regarded in the law as placed around the testator in order that no fraud may be practiced upon him in the execution of the will, and to judge of his capacity." The effect of a compliance with this request would have been to place the attesting witnesses upon a higher plane, in the estimation of the jury, on the question of capacity and of undue influence, than other witnesses, although the latter may have had

equal, or even superior, means of knowledge. That was, in effect, the claim of the appellees, and they now claim that the refusal of the court to comply with this request was an error which entitles them to a new trial. We are aware of no principle of law, or of any adjudged case, which will justify this claim, as broadly as it is here made. In the eye of the law, all witnesses of equal intelligence, and with equal means of knowledge, are equally credible. Had there been three other witnesses present, and their attention had been called to the condition of the testator, precisely as was that of the attesting witnesses, we know not why their testimony would not have been entitled to the same consideration on the question of capacity and of undue influence. As the case stood, the attesting witnesses were present when the will was executed, and had an opportunity to observe the condition of the testator at that precise time. The other witnesses were not present, and had no such opportunity. So far as that matter was concerned, the appellees had the full benefit of it; for the jury were fully and clearly told that the question was as to the condition of the testator at that time, and that, the nearer to that time the witnesses observed him, the more important was their testimony. We know of no other advantage that those witnesses had in respect to the questions in issue. The appellees cite and rely upon *Field's Appeal*, 36 Conn. 277. But that case does not sustain their claim.

The third, fourth, fifth, and sixth requests were fully complied with by the court. As no question of law is presented under them, it is unnecessary to notice them further. There is no error in the judgment appealed from. The other judges concurred.

(68 Conn. 369)

ALLEN v. WOODRUFF.

(Supreme Court of Errors of Connecticut. Oct. 25, 1893.)

PLEADING—AMENDMENT ON APPEAL FROM JUSTICE —ATTACHMENT OF PERSON—NEW TRIAL.

1. Gen. St. § 893, provides that no attachment shall be granted against the body unless each cause of action in the complaint be such that execution may issue against the body of defendant on the judgment founded thereon. Section 1023 allows plaintiff to amend by inserting new counts which might have been originally inserted. Section 879 provides that, on appeal from a justice, either party may amend by introducing any equitable right, cause of action, defense, or set-off. *Held*, that on appeal from a judgment of a justice for plaintiff in an action in which defendant's body was attached, where no release of the attachment was made, there could not be an amendment by the introduction of a cause of action which would not authorize attachment or execution against the body.

2. A new trial cannot be refused because the amount involved is small, where the question is not as to the amount, but as to the right of recovery.

Appeal from court of common pleas. Hartford county.

Action by Isaac A. Allen against William B. Woodruff under Gen. St. § 1347, allowing an attachment against the body of defendant in an action for fraud in contracting debt. There was judgment for plaintiff in the justice court, and on appeal to court of common pleas. Defendant appeals. Reversed.

C. H. Briscoe and J. P. Andrews, for appellant. T. E. Steele and J. Hamlin, for appellee.

BALDWIN, J. The plaintiff's original complaint stated a cause of action under the statute for fraud in contracting a debt with intent not to pay it. Under this the defendant, a citizen of another state, while transiently here, was taken into custody on a writ of attachment against his body, and gave special bail. His appeal from the adverse judgment of the justice of the peace vacated that judgment, and the final judgment which he must abide in order to exonerate his bail now became that to be rendered in the appellate court. The appeal transferred the cause to that tribunal, not for the revision of errors, but for a full trial on whatever issues might there be raised. The bond for prosecution of the appeal secured only the costs of suit. *Lobdell v. Lake*, 32 Conn. 16. For the ultimate judgment the bail bond still stood as the plaintiff's security, as fully as would have an attachment of property had one been made. Had the appellant not entered the appeal, the appellee could have done so, and thus secured a judgment in his favor. Gen. St. § 973. Under these circumstances, and while the defendant's personal liberty was under the control of his bail, the plaintiff filed an amendment to his complaint by adding a new count in contract for the original debt, without charging any fraud in contracting it. Objection was made to the allowance of the amendment on two grounds,—that it changed the cause of action, and that it was in conflict with Gen. St. § 893; but the court overruled the objection, and the defendant thereupon filed an answer to the complaint as amended, and went to trial.

Under Gen. St. § 879, as construed by this court in *Bennett v. Collins*, 52 Conn. 1, a complaint in a case appealed from a justice of the peace may be amended by introducing any cause of action which might have been thus declared on had the suit been originally brought in the appellate court. That the ground of action thus set up is a different one from that heard before the justice is not, standing alone, important under our present statute. Gen. St. § 1023. It may, however, become important under certain circumstances, and the defendant claims that such circumstances existed in this case. Section 21 of the practice act contains the provision now found in Gen. St. § 893, that "no attachment shall be granted against the body unless each cause of action in the complaint be such that execution may issue against the

body of the defendant upon the judgment founded thereon." The general statute of amendments allows the plaintiff to "insert new counts in the complaint or declaration which might have been originally inserted therein." *Id.* § 1023. Before the passage of the practice act, counts in tort could never be joined with counts in contract. As to cases pending before a justice of the peace, that act made no change in this respect. One of the rules adopted to carry it into effect, (Practice Book, p. 18, c. 6, § 1,) which has since been incorporated in Gen. St. § 1024, provides that "complaints founded on a tort may be amended so as to set forth instead a cause of action for a breach of contract arising out of the same transaction or subject of action;" but this refers, not to the addition of a new count, but to such an amendment of the statement of the cause of action as will make it a statement of another cause of action, thus substituting a new cause for the original one, sounding differently, though founded on the same transaction. The theory of the practice act is that claims arising out of the same transaction may be presented most conveniently in a single narrative or complaint, and that separate counts are required only "where separate and distinct causes of action (as distinguished from separate and distinct claims for relief founded on the same cause of action or transaction) are joined." Practice Book, p. 12, c. 2, § 4. If, then, the amendment allowed by the court of common pleas was justifiable, it must be by virtue of Gen. St. § 879, for under section 1023 no new count could be added which could not have been inserted in the original complaint while it was pending before the justice. The practice act, like every other statute, must be construed as a whole. It made some radical changes in our system of legal procedure, and sought to anticipate and provide for such inconveniences as might otherwise result. The new power which it granted to unite claims sounding in tort and claims sounding in contract in the same action, unless some new safeguard were interposed, might, by an abuse of the writ of attachment on mesne process, virtually restore the discarded remedy of imprisonment for debt. By section 898 such a safeguard was effected, and this part of the act, like every other, is to be "favorably and liberally construed." Practice Book, p. 21, c. 8, § 4. Its obvious intent was to prevent the enforcement of contracts under any circumstances by an attachment of the body. In the case now before us the bill of particulars shows that the original claim against the defendant arose in 1851, and was a charge of \$10 for hire of a man and team. \$25.50 was added for 42 years' interest. Had the defendant been sued in his own state, he could presumably have interposed a plea of the statute of limitations. It was therefore important to obtain jurisdiction over him here, and in such a manner as to compel him to abide the judgment, since the courts of Massachu-

setts construe the act of congress as to the faith to be given to judgments obtained in sister states, as not embracing those rendered by a justice of the peace. *Warren v. Flagg*, 2 Pick. 448. The course taken by the plaintiff was adapted to secure this end. He sued on the statute for fraud in contracting a debt of \$31, attached the defendant's body, and exacted special bail. Fraud was the gist of this action. *Armstrong v. Ayres*, 19 Conn. 540, 546. Where a debt is contracted by fraud, this statute virtually preserves the old remedy of imprisonment for debt. *Cowles v. Day*, 30 Conn. 408, 412. Judgment was rendered in the plaintiff's favor for \$31 and costs. After the appeal had been entered, and while the recognizance of bail was in full force, he obtained leave to amend by adding a count in contract, which he could not have originally inserted in his complaint. The judgment now appealed from was recovered on the second count only, and was for \$35.50—the full sum claimed in the bill of particulars—and costs. It was recovered upon a complaint containing a count in tort as well as a count in contract, and under a writ directing an attachment of the body, and by virtue of which the body had been attached. No amendment of the writ was sought to strike out this direction. No release of the attachment was made before the amendment was filed, and none afterwards, unless it was affected by operation of law. The defendant was a stranger to our laws, and might well suppose that his bail was still held, notwithstanding the change in stating the cause of action. It is our opinion that an amendment of the complaint at a time when the defendant's bail remained undischarged was in violation of the spirit of section 898 of the General Statutes, and that the court of common pleas had no power to allow it. The plaintiff's counsel stated in the argument before us that from the time of filing the second count he considered the attachment as abandoned, but nothing appears upon the record to show any act or declaration on his part from which an abandonment can be inferred except the amendment itself.

As the nature of the writ, and the use which had been made of it, forbade the addition of any count in contract, we have not found it necessary to consider the questions argued at the bar,—whether the second count was upon a claim arising out of the same transaction as that which was the foundation of the first count, or out of a transaction connected with the same subject of action. The plaintiff contends that, if there was error in the allowance of the amendment, no new trial should be granted, since the amount in controversy is but \$10 and interest. It is true that new trials may be refused where the only question is as to the amount of the recovery, and the sum in dispute is trivial. But in this case the question is as to the right of recovery. The parties are at issue on a charge of fraud. Upon the trial in the court

of common pleas the plaintiff failed to recover a verdict upon that issue, and the defendant has a right to insist on another opportunity to meet and disprove the accusation. There is error in the judgment of the court of common pleas, and a new trial is ordered. The other judges concurred.

(63 Conn. 356)

COLLINS v. RICHMOND STOVE CO.

(Supreme Court of Errors of Connecticut,
Sept. 9, 1893.)

**SET-OFF AND COUNTERCLAIM — QUANTUM MERUIT
— PLEADINGS.**

1. The amount paid by defendant to third persons for articles furnished by them to plaintiff, to be used by him in the construction of machinery for defendant, cannot be set off against the price of the machinery, unless plaintiff requested defendant to pay for them. Baldwin, J., dissenting.

2. In an action for the price of goods manufactured and delivered, the common counts, accompanied by a bill of particulars, are sufficient to warrant a recovery on a quantum meruit, though the contract declared on is not established.

Appeal from superior court, New London county; before Justice Torrance.

Action by James P. Collins against the Richmond Stove Company to recover the price of machinery constructed for and delivered to defendant. The declaration contained the common counts in assumpsit, with bill of particulars, and also a special count on contract. There was judgment for plaintiff, and defendant appeals. Affirmed.

S. Lucas, for appellant. D. G. Perkins, for appellee.

ANDREWS, C. J. The plaintiff is a manufacturer of various kinds of machinery. In the year 1892 he made for the defendant a pendant drill, a horizontal drill, and extension sockets. In doing the work certain castings were necessary. They were obtained by the plaintiff from other parties,—Vaughn & Son, one Converse, and one Bard. The plaintiff directed these other parties to charge the articles ordered by him to the defendant. In the language of the finding, these articles were all ordered by the plaintiff, and delivered to him, and by his order charged to the defendant by the several parties from whom the articles were obtained. When these last-described parties rendered to the defendant their monthly bills, the charges so ordered to be made by the plaintiff were shown to the plaintiff by the defendant, and the plaintiff was asked whether the amounts were correct or not. If correct, the item was checked as such, and thereupon the defendant gave said parties credit on its books for such amounts, and charged them to the plaintiff. Shortly after so crediting said parties with their respective charges against it as aforesaid, the defendant rendered its bill of said charges to the plaintiff, and the plaintiff thereupon notified the de-

fendant that he would not pay nor allow said charges, because it was the duty of the defendant to pay them under the agreement between it and himself. Subsequently to this notification, but before this suit was brought, the defendant paid said parties the amount of their charges. In this suit the defendant claimed to recover the amount of these charges of the plaintiff by way of set-off to his claim against it. Upon this point the plaintiff claimed to have proved that the defendant had charged said bills to the plaintiff upon its books without his knowledge or consent; that, as soon as he knew of this, he informed the defendant that he would not pay the bills, nor allow them in his account with the defendant, because it was the duty of the defendant to pay them; and that the defendant subsequently, with full knowledge of all the facts, and of the claims of the plaintiff upon this point, paid the bills. The plaintiff further claimed to have proved that he proposed to the defendant to perform the labor only in making the two drills now in question, and the extension sockets, if ordered, for \$600, the defendant furnishing all the castings therefor, and that he honestly and in good faith believed that the defendant so understood him, and assented to this proposition; and claimed that, if the defendant in fact believed him to make and agree to the proposition as claimed by the defendant, then such belief was due to a mistake or misunderstanding between the parties, which then prevented the formation of any contract.

Upon the question of set-off the defendant claimed, and asked the court to charge the jury, that if the bills of Vaughn & Son, Bard, and Converse were for things charged to the defendant by order of the plaintiff, and, as between him and it, it belonged to the plaintiff to pay them, and the defendant in good faith credited those bills to those parties on its books, and charged them to the plaintiff, it could recover in this suit by way of allowance or set-off for their several amounts, notwithstanding the fact that the plaintiff informed the defendant before it paid them that he would not pay the bills. Thus far we have followed the finding. So far as the charge bears upon the question presented upon the record it was as follows: "The plaintiff claims in this case, by the complaint and bill of particulars, to recover of the defendant for certain work done and materials furnished to the defendant at its request. He claims that he made a contract with the defendant to make two drills for \$550, and the extension sockets, if called for, for \$50 more; making \$600 in all. He claims that the contract included only the work on the drills and sockets, and did not include the cost of the casting necessary, nor the countershafts, belt shifters, and idler, nor the cost of erecting the drills and putting up the countershafts, idler, and belt shifters ready for use. He claims that the castings were to be paid for by the defendant, and that the counter-

shafts and idler, and the fitting up the same and the erection of the drills in the defendant's shop, were extras, outside of the contract, and were ordered by and to be paid for by the defendant at regular rates. He claims that he made the drills and sockets according to contract, and that he made and put up the countershafts, the idler, and the belt shifters, and erected the machines, ready for use, in the defendant's shop, as requested. On the other hand, the defendant claims to have proved that it was expressly agreed that the contract price of \$550 included the drills complete, set up in the shop, with the countershafts, idler, and belt shifter put up and complete, ready for use; and that the agreement included the drills complete, ready for delivery, with the setting of them up in the shop, and the necessary countershafts, belt shifters, and idler. If you find that the plaintiff entered into a contract to furnish and put up these drills complete, including the extension sockets, the countershafts, the idler, and belt shifter, for \$550, as claimed by the defendant, then you will be brought to the consideration of the defendant's counterclaim. This is made up of certain bills which the defendant claims to have paid on account of the plaintiff, at his request, amounting to \$237.95. If you find that the bills of Vaughn, Converse, and Bard were bills due from the plaintiff to these parties, which it was the duty of the plaintiff to pay, and that the plaintiff expressly or impliedly requested the defendant to pay them on the plaintiff's account, or that the plaintiff consented to such payments, and that they were made, then, in your verdict, you should allow the defendant for the amount that it so paid. Or, if you find that the plaintiff, with or without authority, express or implied, from the defendant, had these bills charged to the defendant, and that they ought to have been paid by the plaintiff, and subsequently the defendant in good faith paid them for the plaintiff, believing that the plaintiff would credit it with such payments, then such payments should be allowed to the defendant. If, however, these bills were bills of the plaintiff, and ought to have been paid by him, and the defendant paid them officiously, voluntarily, and of its own motion, without any request, express or implied, of the plaintiff, and without his knowledge and consent, and without any subsequent ratification on his part, or against his approbation, then it cannot recover for such amounts as it so paid. One cannot officiously and voluntarily, of his own mere motion, pay the debt of another, without or against his consent, express or implied, and then recover of him for such payment."

It has been necessary to set out the material parts of the record at some length in order that the questions made by the defendant may clearly appear. Counsel for the defendant insist that the court erred in not charging the jury as requested by it, and in

the charge as actually given. The request for instruction which was offered by the defendant made the liability of the plaintiff for, and the right of the defendant to recover, the amounts paid by it to Vaughn & Son and the others depend on the good faith of the defendant in making those payments. We do not, however, understand that the good faith of the defendant in making those payments furnishes the rule of liability. The plaintiff is not liable to the defendant for those amounts, because the defendant paid them in good faith. He is liable for those payments, if at all, because he had requested the defendant to make them. Such a request may have been express or implied. If the defendant made those payments without any such request, it cannot recover them of the plaintiff. One person cannot make another his debtor by paying a debt of the latter without his request or consent. *Winsor v. Savage*, 9 Metc. (Mass.) 346; *Brown v. Fales*, 139 Mass. 21, 29 N. E. 211; *Richardson v. Williams*, 49 Me. 558; *Smith v. Poor*, 37 Me. 462; *Taylor v. Baldwin*, 10 Barb. 626; *Lewis v. Lewis*, 3 Strob. 530; *Kenan v. Holloway*, 16 Ala. 53; *Durnford v. Messiter*, 5 Maule & S. 446; *Stokes v. Lewis*, 1 Term R. 20; *Osborne v. Rogers*, 1 Saund. 264, note; *Chit. Cont.* (11th Ed.) 881. There was no error in disregarding the request for a charge.

Instructions given to a jury upon any question must always be considered with reference to the claims made by the parties on the trial; and so much of the instruction as bears upon the particular question should be considered as a whole, otherwise the real import of the instruction as intended by the court or as understood by the jury would not be fairly ascertained. It would be very misleading to take one sentence or one paragraph of a charge and subject it alone to examination, without reference to what preceded or what followed it. The charge actually given, when examined in this way, seems to be free from error. That part of the charge which has reference to the question of set-off pretty readily divides itself into three paragraphs. The first one is clearly correct, for it lays down the rule of law exactly as we have just shown it to be, namely, that the defendant could not recover the amounts claimed by it in its set-off unless it had paid those amounts upon some request of the plaintiff. The third paragraph is also free from error, because it states the converse of the same proposition. If the defendant could not recover unless there had been some request by the plaintiff, then certainly it could not recover if it had made the payments voluntarily and officiously. But the defendant lays hold of the second paragraph, and, taking it out of its relation with the other paragraphs, says it is erroneous. In this paragraph the court told the jury that, "if the bills of Vaughn & Son and the others ought to have been paid by the

plaintiff, and the defendant in good faith paid them for the plaintiff, believing that the plaintiff would credit it with such payments, then such payments should be allowed to the defendants." This was an almost literal compliance with the request for an instruction to the jury which the defendant had made. The court adopted the words of the request, and then, in a dependent clause of the same sentence, used other words which seem intended to convey to the jury an illustration of what would constitute good faith. Standing alone, and upon its face, this paragraph was erroneous in so far as it had adopted the language of the defendant's request. It did not give the jury the correct ground on which the defendant might recover, and in that respect was more favorable to the defendant than the defendant was entitled to have it. But it was, in effect, just what the defendant had requested. The defendant's counsel, however, passing over that part of the language used by the court which was their own request, although contained in the same sentence, seeks to make a very adroit argument that the other part was erroneous and improper. He says that a direction to the jury to allow these payments, if they were made by the defendant "believing that the plaintiff would credit it with such payments," was equivalent to telling the jury that, if these payments were made by the defendant when it did not believe the plaintiff would credit it with them, the payments should not be allowed; and that this was erroneous, because the jury could not be expected to find that the defendant believed the plaintiff would credit it with such payments. This argument proceeds upon what seems to us to be a perversion of the purpose for which these words were used by the court. This clause of the sentence was apparently intended to explain the clause which immediately preceded it. Grammatically it is in apposition with the preceding clause,—a part in apposition with the whole,—an example illustrating a general statement. The court obviously so intended it, and the jury must so have understood it. To take such a clause, and to treat it as though it were a separate and independent instruction to the jury, is wholly inadmissible. Besides, it is directly hostile to the request which the defendant had made. If the jury could not be expected to find that the defendant believed the plaintiff would credit it with payments, how could the jury be expected to find that the payments were made in good faith? But perhaps consistency should not be required in a matter of this kind. If it could be granted that the argument was a legitimate one, it is acute and ingenious; so ingenious, indeed, that it is without force. It overshoots the mark. We feel sure the jury never suspected this clause in the charge to have the meaning which counsel now attribute to it. It is much more likely that the jury under-

stood this part of the charge to be just what it appears on its face to be,—a recognition by the court of the request made by counsel,—and that the defendant was helped, rather than harmed, by it. Ordinary jurymen are not indulging in refinements or subtleties. They do not draw one conclusion from a whole sentence, and then an entirely hostile conclusion from a part of the same sentence when separated from its connection. Reading this part of the charge in connection with the paragraphs that preceded and followed it, we think the jury could not have been misled.

The court further charged the jury that, if there was an honest mistake by the parties as to what the contract really was, the plaintiff understanding it as claimed by him, and the defendant understanding it as was claimed by its counsel, there was then no meeting of the minds of the parties, and hence no contract; and that in such case the plaintiff would be entitled to recover of the defendant, for the work done by him, and such materials as he furnished in the work at its request, such a sum as they would be reasonably worth. The defendant objects to this on the ground that there was no quantum meruit count in the complaint. This objection cannot be sustained. The bill of particulars was fairly applicable to the count for work and services, or to the count for materials furnished. *Vila v. Weston*, 33 Conn. 42; *McVane v. Williams*, 50 Conn. 548. There is no error in the judgment appealed from.

CARPENTER, FENN, and THAYER, JJ., concurred.

BALDWIN, J., (dissenting.) In my opinion, the third reason of appeal is well founded. It was undisputed that the third parties who furnished the materials had charged them to the defendant by order of the plaintiff, and, that, before the defendant paid them, it was notified by the plaintiff that he would not pay them, nor allow the defendant for them if it should pay them. The defendant thereupon asked the court, in substance, to instruct the jury that if the materials were charged to it by the plaintiff's order, and, as between it and the plaintiff, it was the plaintiff's duty to pay for them, the defendant should be allowed what it had paid for them, after crediting them on its books in good faith, notwithstanding such payment was made after notice from the plaintiff that he would not pay the bills. The important point thus presented was as to the effect of notice before payment. The court properly declined to give the charge requested, for, in omitting any direct mention of payment, it was inaccurate in form, and then instructed the jury to allow the set-off, if the plaintiff was liable to pay the bills, and had expressly or impliedly requested the defendant to pay them on his account,

or had consented to such payment, or if the plaintiff was liable to pay the bills, and had had them charged to the defendant, and it had paid them in good faith, believing that the plaintiff would credit it with the amounts so paid; but not to allow the set-off if the defendant paid the bills officiously, without the plaintiff's request and consent, and without his ratification or against his approbation. An implied request is often a matter of legal fiction. "If money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him by himself paying the amount, a request may be implied." 1 Chit. Pl. 350; *Post v. Gilbert*, 44 Conn. 9, 14. In the present case, if the parties furnishing the materials, charged, by the plaintiff's direction, to the defendant, bills which it was the duty of the plaintiff to pay, in consequence of which the defendant in good faith gave them credit for such charges on his books, the law would raise an implied request from the plaintiff to the defendant to pay them; and this legal consequence of such a state of facts should, I think, have been stated to the jury in explanation of the phrase "impliedly requested." Such an implied request is unaffected by any declaration to the contrary on the part of the party against whom it is implied. It seems to me, therefore, that the charge was erroneous in making the right of set-off dependent on the defendant's belief, at the time of its payments, that such payments would be credited to it by the plaintiff. In the face of an express notice given by the plaintiff that, if the defendant paid the bills, he would not repay the defendant, the defendant could not have believed that the plaintiff would give it credit for them, while yet it might well believe that the law would compel him to allow them in account, though paid "against his approbation." The majority of the court regard the clause in the charge as to the defendant's belief as simply giving an example of what would constitute or indicate good faith in making the payments. But if the instructions in regard to good faith required any illustration by example, it seems to me insufficient, if not misleading, to rely on that given alone. Good faith could equally have been shown by payment under an honest belief that the law would enforce reimbursement, though no credit were given on the plaintiff's books, and the defendant knew that he would withhold, or even had refused, his approbation. I think that the jury should have been instructed as to the effect of the notice not to pay, given before payment, and that the instructions given, bearing on this point, as to the plaintiff's request or approbation, and the belief of the defendant, were such as may have served only to direct attention to matters not decisive of the issue. I am therefore of opinion that a new trial should be granted.

(33 Conn. 377)

CONKLIN v. DAVIS et al.

(Supreme Court of Errors of Connecticut. Oct. 25, 1898.)

WILLS—CONSTRUCTION—CAPACITY OF LEGATEE TO TAKE BEQUEST—OBJECTIONS NOT RAISED BELOW—CHARITABLE BEQUESTS.

1. Testator, who left seven grandchildren, two being the children of two of his sons, and five the children of a deceased daughter, after giving certain legacies, gave "the remnants of said estate to be divided pro rata among the heirs." *Held*, that they took per stirpes, and not per capita.

2. In an action for the construction of a will, an objection by those claiming the residuary estate that charitable corporations to whom testator had made bequests did not show capacity to take cannot be raised in the supreme court when not raised in the court below.

3. Gifts in trust to the "poor" and to the "Sunday school" of a designated church are charitable gifts, and valid, within Gen. St. § 2951, providing that gifts "for the maintenance of the gospel," of a "school of learning," or as a general "public and charitable use" shall forever remain to the uses for which they have been granted. *Carpenter, J., dissenting.*

4. Where a testator gave funds to the "trustees" of a certain church in trust for the poor of the church, though the trustees named were incapable, as such, to take and hold the fund, it would not affect the validity of the gift, as they might hold it as individuals described by the name of the office. *Carpenter, J., dissenting.*

Case reserved from superior court, Hartford county.

Action by Hamilton W. Conklin, executor of the will of Joseph W. Dimock, deceased, against Frank H. Davis and others. Heard on case reserved.

C. M. Joslyn, for the executor. E. H. Hyde, Jr., for heirs claiming per capita. E. D. Robbins, for heirs claiming per stirpes. E. B. Bennett, for sundry legatees.

FENN, J. This is a reservation for advice concerning the construction, validity, and effect of the following language contained in the last will and testament of Joseph W. Dimock, late of Hartford, deceased: "I hereby give to each of my seven grandchildren [naming them] two thousand dollars each. [Then follow bequests to two nieces, not in question.] I give the trustees of the First Baptist Church in Hartford, in trust for the poor of said church, the sum of \$500; I give to the Baptist Domestic Miss. Society the sum of \$500; also, the Baptist Foreign Miss. Society the sum of \$500; also, the Baptist Home Mission Society the sum of \$500; also, the Sunday school of the First Baptist Church the sum of \$500, under the supervision of the trustees of said church,—and the remnants of said estate to be divided pro rata among the heirs." The superior court, upon a hearing had before it, made a full finding of facts, unnecessary to recite at length, but from which it appears that, after payment of all the debts, charges, and legacies, a residue of the estate will remain; that the seven grandchildren named are the heirs at law and next of kin of the testator; that five of them are

children of the deceased daughter of the testator, and claim that such residue should be divided per capita, and the other two are sons, respectively, of deceased sons of the testator, and claim that such division should be made per stirpes; that the "Deacons of the Baptist Church in Hartford," is "a corporation duly organized under a charter granted by the General Assembly of Connecticut in May, 1811, and that under its charter it is authorized to hold estate, given to or otherwise vested in them, in trust for the use and benefit of said church, provided that the income of such estate shall by them be expended for the support of the gospel ministry in said church, and for building and repairing a suitable house of public worship for said church, and for no other purpose whatever; that said corporation represents the church, which has long been designated and known, both by its members and the general public, as the 'First Baptist Church in Hartford,' and that among the members of said church, in common speech, the persons who hold the estate and funds for the use and benefit of the church are called the 'trustees' of the church; that said corporation for many years has held funds in trust, the income of which has been expended yearly by the corporation in assisting members of said First Baptist Church who are poor and unable to support themselves; that said corporation for some years has held a fund, the income of which has been expended yearly in support of the Sunday school of said church, under the supervision of said corporation." And the court also, as a conclusion from facts specially recited, found that the testator intended his gift to the "Trustees of the First Baptist Church" to be to the "Deacons of the Baptist Church in Hartford," and his gift to the "Sunday school of the First Baptist Church, under the supervision of the trustees of said church," to be to the "Sunday school of the First Baptist Church," under the supervision of the "Deacons of the Baptist Church in Hartford;" his gift to the "Baptist Domestic Mission Society" to be to the "Connecticut Baptist Convention;" his gift to the "Baptist Foreign Mission Society" to be to the "American Baptist Missionary Union;" and his gift to the "Baptist Home Mission Society" to be to the "American Baptist Home Mission Society." And it was further found that "no evidence was offered on the trial as to the amount of funds or property held or enjoyed by any of the corporations claiming under the will, nor as to the income received by any of said corporations from any funds or property." Upon this finding the only contested questions presented to us by the reservation are—First, whether the division of the remainder of the estate among the grandchildren shall be per capita or per stirpes; second, whether the corporations other than the Deacons of the Baptist Church in Hartford can take the bequests intended for them, respectively, it ap-

pearing from their charters (in evidence) that the amount of property which they can hold is expressly limited, and their power to take these bequests not having been proved by showing the amount of their property now held to be within the limits fixed; third, whether the trusts, respectively, for the "poor" and for the "Sunday school" of the First Baptist Church, are valid.

It is a settled principle of construction that when the language and purpose of a will permit, if the testator's intention is in doubt, the statute of distributions is to be taken as a guide, and the rules of inheritance followed. This principle was clearly laid down in *Lyon v. Acker*, 33 Conn. 222, and has been affirmed in repeated instances appearing in the subsequent volumes of our Reports; and although, as was said in *Lyon v. Acker*, "perhaps there is no class of cases where precedents have so little weight as in the construction of wills," for that very reason, perhaps, there is none where principle, underlying precedent, should have so much. While it is needless, therefore, to refer more at length to the cases in which the question has arisen since *Lyon v. Acker*, which are all consistent with each other, it is important that our present decision should be based upon the principle on which they rest, and so be consistent with them. Hence, it would be sufficient to say that, where the testator directed "the remnants of said estate to be divided pro rata among the heirs," it must at least be doubtful whether he intended such division to be one at variance with the statute of distributions. How can it be clear that such was his purpose when the language itself is apt, in all its parts, to denote a distribution in accordance with such statute? But we will go further, and say that, looking at mere probabilities, the provisions of the will, taken as a whole, render it more likely than otherwise that the testator did intend a division of the remainder of his estate in accordance with the statute, per stirpes and not per capita. He gave to each of his grandchildren (naming them) an equal sum. He then gave legacies to two nieces, concerning which no question arises, and then the other bequests recited. He seems to have been confident that there would be a residue not specifically disposed of, and he provided that this should be divided among the heirs. If by "the heirs" he had intended something different from what he would have done if he had said "my heirs,"—not his heirs according to their respective rights, as such, by the rules of inheritance, taking as heirs would take by descent,—but had intended that, though next of kin, they should take otherwise and in a different indicated proportion, some greater and some less than such rules prescribe, and so, in fact as legatees rather than as heirs, it would seem much more natural either to have made the bequests to others, without naming the grandchildren, and then be-

queathed them, by name, his entire remaining estate as residue, or if, for any reason not apparent on the record, he had preferred not to do this, to have used, instead of "pro rata among the heirs," some such expression as "between my said grandchildren equally," or "among my grandchildren, all to share alike." Failure to employ such or equivalent language fairly indicates the absence of such intent, as, on the other hand, the use of expressions appropriate to denote a division in accordance with the statute of distributions raises an implication that such division was desired by the testator. It was suggested, however, in argument, that this construction gives no effect to the term "pro rata." But, in order to give it effect in favor of a per capita division, it would be necessary to construe the term as meaning an equal, instead of a proportionate, sharing; for, if we apply to it the true meaning,— "in proportion," or "according to the share of each,"—it is surely quite as apt to denote a per stirpes division, which is in proportion to the share of each, as defined by the rule of law which has existed in this state for two centuries, and become so thoroughly familiar to all as to seem a principle of natural justice, as a per capita one, which can only be claimed to be proportionate to amounts, not different, but identical, the legacies to each of the grandchildren named being the same sum, \$2,000. And in this connection it may be worthy of notice that, in each of the two cases to which counsel claiming a per capita division have called our attention as the only ones which they have been able to find where the words "pro rata" have been judicially considered when used to designate in a will the proportional shares of the devisees, (*Rosenberg v. Frank*, 58 Cal. 387, and *Ellis v. Meadows*, 84 N. C. 92,) the term "pro rata" was aptly used, because legacies of different amounts had been made to the various legatees named.

The next question for our consideration is whether the corporations other than the Deacons of the Baptist Church in Hartford, can take the bequests intended for them, respectively; the only objection urged in this court being that on the trial in the court below there was no evidence that the amount of their property now held was within the limits fixed by their respective charters. In reference to this objection it is sufficient to say that none of the parties respondent in any way pleaded or claimed such restriction on the trial in the court below, but the case was allowed to be closed without any evidence being offered upon it by those claiming the residuary estate. In *White v. Howard*, 38 Conn. 342, 344, 362, the heirs at law upon the trial did insist upon such incapacity of certain societies named to take, and this court said: "We are not satisfied that this inquiry can be legitimately made collaterally in a proceeding of this sort; nor do

we assent to the claim that the burden is on the society to show its capacity to take in this respect." We therefore hold that the objection stated is not well founded.

The remaining question relates to the validity of the bequests for the "poor" and to the "Sunday school" of the First Baptist Church. It is claimed by counsel for those of the heirs who contest the validity of these gifts that the Deacons of the Baptist Church in Hartford, whom the court below found to be intended by the testator in using the language, "Trustees of the First Baptist Church," could not take, because the corporation was limited, not only as to the amount of property which it might hold, but was also expressly prohibited from taking money for any other purpose than the support of the gospel ministry and the maintenance of a church building; and that, therefore, "any intention of the testator to give to this corporation a bequest for the poor and a bequest for a Sunday school is an illegal intention, and such bequests are void." It is said, further, that a gift to a Sunday school is void because it is not even a voluntary association, and there is no one to receive it. So far as relates to the gift in trust for the poor of the church, there can be no doubt that such a gift is charitable, (*Gen. St. § 2951*,)¹ and that the class to be benefited is sufficiently definite and certain. *Goodrich's Appeal*, 57 Conn. 285, 18 Atl. 49; *White v. Howard*, supra; *Colt v. Comstock*, 51 Conn. 352; *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846. Such being the case, if the trustees named were incapable to take and act as such, it would not affect the validity of the gift. The court would supply trustees. *Agricultural School v. Whitney*, 54 Conn. 345, 8 Atl. 141; *Goodrich's Appeal*, supra; *Dailey v. City of New Haven*, 60 Conn. 314, 22 Atl. 945. It could therefore do the contesting heirs no good were we to defeat, in part, the wish of the testator, by deciding the trustees chosen by him incapable to take as such and to hold this fund, as the court below finds that for many years other funds have been held in trust, the income of which has been expended in assisting members of said church who are poor and unable to support themselves. We do not find it necessary to do this, because, if there be a doubt whether the relief of the poor of the church is a part of the support of the ministry of the Gospel of Him who declared that at His coming in glory, when before Him should be gathered all nations, he who had given meat

¹ *Gen. St. § 2951*: "All estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for the preservation, care, and maintenance of any cemetery, cemetery lot, or of the monuments thereon, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever."

to the hungry, drink to the thirsty, lodging to the stranger, clothing to the naked, and visitation to the sick and in prison, to the least of the brethren, should be accounted as having done it unto Him, and should be blessed of the Father, and inherit the kingdom prepared from the foundation of the world, there can, we think, be no doubt of the competency of the trustees intended to take as individuals, described by the name of their office as "deacons" or "trustees,"—a principle recognized and followed in *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489, 3 Atl. 557, where the court said, (page 492, 53 Conn., and page 557, 3 Atl.): "The office of selectmen is continuous by law. The persons from time to time constituting the board of selectmen of the town of Bridgeport are joint trustees in perpetual succession." Also, in *Agricultural School v. Whitney*, supra, where, the selectmen of the town of Mansfield having been named as trustees of a charity, the court (page 345, 54 Conn., and page 141, 8 Atl.) speaks of them as "the persons who should at any time hold office as selectmen of that town,"—a gift very different in the character of the trustees named from that of *Dailey v. City of New Haven*, supra, which was to the "City of New Haven." The gift to the "Sunday school" we regard as clearly charitable, within the meaning of the statute, and that it might be held such under either of three provisions thereof, as being for "the maintenance of the ministry of the gospel," or of a "school of learning," or as a general "public and charitable use." That it is not incorporated or is a voluntary association is of no consequence. Whether it could take directly without such incorporation, and not being such association, it is unnecessary to determine, for it was the plain intent of the testator that it should not so take. Nothing can, however, be more certain than the class of beneficiaries intended or the object to be promoted. Such benefit is to be bestowed, and such object attained, "under the supervision of the trustees" (the deacons) of the church, who were therefore intended as the holders of the fund in trust; and the same principle is applicable in behalf of the legality of such trust, as we have previously stated in reference to the gift for the poor.

The superior court is advised—First, that the division of the remnant or remainder of the estate should be made among the grandchildren per stirpes, and not per capita; second, that the bequests to the "Baptist Domestic Miss. Society," the "Baptist Foreign Miss. Society," and the "Baptist Home Mission Society" are valid gifts to the corporations intended by the testator, namely, the Connecticut Baptist Convention, the American Baptist Missionary Union, and the American Baptist Home Mission Society, respectively; third, that the bequests in trust for the "poor" and to the "Sunday school" of the First Baptist Church are each valid, and

the persons from time to time, in succession, holding the office of deacons of the Baptist Church in Hartford, commonly known as the "First Baptist Church in Hartford," are competent to take and hold in trust, for the purposes named, the respective amounts so bequeathed. The other judges concurred, except CARPENTER, J., who dissented upon the last point.

(63 Conn. 423)

LEE BROS. FURNITURE CO. v. CRAM.
(Supreme Court of Errors of Connecticut. Dec. 13, 1893.)

CONDITIONAL SALE—FAILURE TO RECORD—EFFECT
—RIGHTS OF BONA FIDE PURCHASER.

Pub. Acts 1893, c. 147, providing that a contract for the sale of personal property, which is conditioned that the title shall remain in the vendor after delivery, shall, unless acknowledged and recorded, be held to be an absolute sale, "except against the vendor and his heirs," does not prevent the vendor under such a contract of sale, though it is not recorded, from replevying the goods sold from one who purchased them from the original vendee without knowing that the title had not passed to the latter.

Case reserved from court of common pleas, Fairfield county; Curtis, Judge.

Replevin by the Lee Bros. Furniture Company against E. J. Cram. Case reserved for supreme court. Judgment for plaintiff.

A. B. Beers, for plaintiff. Stiles Judson, Jr., for defendant.

TORRANCE, J. On the 10th of August, 1893, the plaintiff delivered to one Skidmore, a resident of the town of Bridgeport, in this state, certain goods under a written agreement, set out upon the record, signed by Skidmore, conditioned that the goods should remain the property of the plaintiff till paid for in full. The agreement has never been recorded in the town clerk's office in Bridgeport. On the 23d of August, 1893, Skidmore, without having paid for the goods in full or at all, and without the knowledge or consent of the plaintiff, sold the goods to the defendant, who bought them in good faith for an adequate consideration, believing Skidmore to be the owner of them, and without notice to the contrary, and after he had examined and found that there was no record of any conditional sale of them to Skidmore. The plaintiff, after demand and refusal, brought the present action of replevin for the goods, and upon the facts found the case was reserved for the advice of this court.

There is but one question in the case, and that is whether the failure to record the agreement in the town clerk's office in Bridgeport made the transaction between the plaintiff and Skidmore an absolute sale. This question arises under the statute passed at the last session of the legislature of this state, which reads as follows: "Section 1. All contracts for the sale of personal property, conditioned that the title thereto shall remain in the vendor after delivery, shall be

in writing, describing the property and all the conditions of such sale, acknowledged before some competent authority, and recorded in the town clerk's office in the town where the vendee resides. Sec. 2. All conditional sales of personal property which shall not be made in conformity with the provisions of the preceding section shall be held to be absolute sales, except against the vendor and his heirs, and all such property shall be liable to be taken by attachment and execution for the debts of the vendee, in the same manner as any other property not exempted by law." Pub. Acts 1893, c. 147. It must be conceded that the agreement in question is a contract for the sale of property, within the meaning of this act; and that, by failing to record it, it was not "made in conformity with the provisions" of the first section. The first section is mandatory in its terms, and apparently, on its face, applies to all agreements of conditional sale; but it does not state what the consequence or effect shall be of a failure to conform to its provisions. To ascertain these, recourse must be had to the second section, and that provides that in case of such failure such agreement "shall be held to be" an absolute sale. That is the effect, and the only effect, that is to follow such failure. "When a statute specifies the effects of a certain provision, courts will presume that all the effects intended by the lawmaker are stated." *Perkins v. Thornburgh*, 10 Cal. 189. Furthermore, by the second section even this effect is not to follow such failure as against "the vendor and his heirs." The language is, "shall be held to be absolute sales, except against the vendor and his heirs." This language is plain, certain, and unambiguous, and no reasonable doubt can arise concerning its meaning. It means—if language is capable of expressing such a meaning—that the vendor and his heirs are excepted out of the class of persons to be affected by the prescribed consequence or effect of failure to comply with the provisions of the act. As against them, contracts of the kind described in the first section, which do not comply with its provisions, are not to be held to be absolute sales, but are to remain unaffected by the statute. Such language does not require the aid of rules of construction or of interpretation to make the intention and meaning of the lawmaker plain and clear. Interpretation and construction, in the ordinary sense, in reference to such language, are alike out of place. "If the words are free from ambiguity and doubt, and express plainly and clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." *McCluskey v. Cromwell*, 11 N. Y. 601.

Against such a construction of the statute, however, several objections have been urged by the defendant, which it may be

well to consider briefly. It is said that the statute ought to be construed as if it read "shall be held to be absolute sales except as between the vendor and the vendee or their heirs." Under the circumstances, we think this would be legislation, not interpretation. Where is the authority for such an interpretation? It is found by assuming that the legislature intended such a result, because no other would remedy the mischiefs and evils at which the statute was evidently aimed; that it intended to protect creditors and bona fide purchasers, and that this construction alone will effectuate that intent. In answer to this it must be remembered that the word "intention," when used in this connection, is susceptible of at least two meanings,—it may refer either to that which the legislature in fact intended to do, or to that intention as found from the words employed to make it manifest. Now, the question before a court is never, what did the legislature actually intend in the first sense? but, what intention has it expressed? It is always, "what is the meaning of what the legislator has said?" and not, "what did the legislator actually mean to say?" Now, if the legislature "intended," in the first sense of the word, to protect creditors and bona fide purchasers as claimed, they have failed to express that intention in any way by which it can be known to a court. Such an intent is not to be found in the words employed in this act, but, on the contrary, an opposite intent is clearly manifested. A legislative intention, not expressed in some appropriate manner, has no legal existence. We are not at liberty to speculate upon any supposed actual intention of the legislature. "We are not at liberty to imagine an intent, and bind the letter of the act to that intent. Much less can we indulge in the license of striking out and inserting and remodeling with the view of making the letter express an intent which the statute in its native form does not express." *Alexander v. Worthington*, 5 Md. 485. If the legislature had really intended to protect by this act creditors and bona fide holders to the extent claimed, we think it would have found a way to express that intent quite clearly. It had no difficulty in expressing such intention clearly in the "act relating to conditional sales of railway equipments," passed at the same session. Pub. Acts 1893, c. 119. In that act it is provided expressly that no contract of the kind therein described, "hereafter made, shall be valid as against any subsequent attaching creditor, or any subsequent bona fide purchaser for value without notice," unless the contract is evidenced by an instrument executed, acknowledged, and recorded as the act prescribed. The absence of any such clear and explicit language in the act in question in this case, passed apparently at a subsequent period in the session, is quite significant. This significant omission, coupled with the language

actually employed, leads most irresistibly to the conclusion that the legislature had no such intent as the defendant claims in passing the act now in question.

It is further said that the legislature must have intended the act in question to have some operation, else it would not have passed it; and that to construe it as we have done is to say that it can have no operation. Now, if it were strictly and literally true that the second section made the provisions of the entire act "of none effect," it would be the duty of this court to so declare, provided it clearly appeared from the language used that the legislature intended just such a result. Of course, such an intent would not be imputed nor inferred unless the language was very plain and clear. In such a case, however, if one can be supposed, the court would simply hold that the legislature had done no legislative act whatever, just as is held in cases where the legislative will is expressed in terms so vague as to convey no definite meaning. In such cases it is held that the court "may not allow conjectural interpretation to usurp the place of judicial exposition. There must be a competent and efficient expression of the legislative will." *State v. Partlow*, 91 N. C. 550. "Whether a statute be a public one or a private one, if the terms in which it is couched are so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible." *Drake v. Drake*, 4 Dev. 110. But it is not true that under the construction which we have given to it the statute can have no operation, for it will operate as against all persons except the vendor and his heirs; as, for example, in the case of the assigns of the vendor and the assigns of his heirs. At all events, it will have some operation, and all that the legislature seems to have intended it to have, and this is enough in answer to the present objection. The court of common pleas is advised to render judgment for the plaintiff. The other judges concurred.

(63 Conn. 440)

TOLLES v. WINTON et al.

(Supreme Court of Errors of Connecticut. Dec. 13, 1893.)

FIXTURES—RIGHTS OF VENDEE—ENGINE ATTACHED TO FLOOR.

Where the owner of a building placed an engine in the basement to furnish power to tenants, fastening it by bolts embedded in a foundation of stone and cement laid in the basement floor for the purpose, the engine became part of the realty, and passed by a sale thereof, though at the time of the sale the engine was not in use, being disconnected from its boiler, which was being used with an engine furnished by one of the tenants.

Appeal from court of common pleas, Fairfield county; Curtis, Judge.

Action by Ralph I. Tolles against George E. Winton and others, executors, to recover money paid upon a sale of real estate. From a judgment for plaintiff, defendants appeal. Affirmed.

Canfield & Judson, for appellants. Stoddard, Bishop & Shelton, for appellee.

FENN, J. This is an appeal by the defendants from a judgment rendered by the court of common pleas in Fairfield county. The complaint contained the common counts, under which a bill of particulars was filed, as follows: "To \$500 cash paid to Andrew L. Winton by the plaintiff upon an agreement for the purchase of certain real estate by the plaintiff from said Winton, which agreement the said Winton improperly failed and refused to consummate and carry out." The answer—a general denial—was accompanied by a counterclaim, which set up a contract for the conveyance of real estate, alleged a breach on the part of the plaintiff, and claimed \$1,000 damages. The court found that the plaintiff did refuse to consummate the contract for the reason that the defendants, between the date of the contract and the time fixed for the final payment and the delivery of the deed, removed from the premises a steam engine thereon located, and sold and delivered the same to third parties, without the knowledge or consent, and against the will, of the plaintiff; and thereupon the parties were at issue as to whether the removal of said engine from the premises legally justified the plaintiff in refusing to consummate the contract, the plaintiff claiming that the engine was a part of the realty, which claim the court below sustained, and the defendants claiming that it was personal property. This ruling of the court that the engine was a part of the realty is the only matter before us for review; for, although the defendants now insist that, even if the engine was a fixture, the plaintiff was not justified in refusing to consummate the purchase because of its removal, since its value was capable of exact appraisement, the amount of which might have been deducted from the agreed purchase price of the realty, it is sufficient to say that no such question was made in the court below; nor could it have been under the pleadings. Furthermore, the defendants are in no position to raise this question, inasmuch as they sold the remaining portion of the real estate after the commencement of the present action, but before the trial, thereby putting it out of their power to specifically perform, either wholly or in part. The facts found by the court in reference to the engine were these: "The land and buildings referred to in the contract consisted of a substantial three-story and basement brick edifice, with the ground under and about the same, situated on Middle street, in the city of Bridgeport. Said Winton had long owned the premises, and about

five years before the contract was made, and while owning the same, had occupied the first floor thereof as a feed store; and, in order to make the upper stories available for tenants needing power, he placed in the basement thereof an engine and boiler, and connected the same, by appropriate shafting and belting, with the upper stories, and thereby supplied motive power to his tenants renting the same. Said building had not been constructed originally for the use of machinery, and the interior of the building was prepared by Winton, in the manner herein set forth, for the reception of the engine and boiler, together with the belting and shafting necessary to convey the power from the cellar to the upper stories. No machinery was prepared for the use of power on the first floor, occupied by said Winton. The engine stood three or four feet from the boiler, and about two years before the execution of the contract was disconnected from the boiler by unscrewing couplings, because the tenant who then occupied the upper part of the building desired to run a small engine, placed in the upper stories, which was run, however, by steam supplied by the boiler in the basement. The engine continued so disconnected at the date of the contract. The engine was set up and attached to the property in the following manner: A cavity was dug in the basement floor, in which a solid foundation of stone and cement was laid, and in this grouting were imbedded bolts, which extended upward, passing through a timber placed on the grouting in such a manner and location as to receive the engine. The engine was then placed on the timber, and the bolts, passing through plates on the engine, were capped by nuts screwed upon them, thus fastening the engine firmly to the timber and grouting. By unscrewing the nuts the engine could be lifted from the bolts, and removed, without other injury to the building than the loss of the engine, but the bolts could not be removed without tearing up and destroying the grouting. The boiler was similarly fixed upon a foundation of grouting, and a pit was dug in the basement floor, in connection with the boiler, for ashes."

In deciding the question thus presented it is unnecessary to do more than to refer, and that but briefly, to our own Connecticut cases. In *Capen v. Peckham*, 35 Conn. 92, 93, this court, by Park, J., declared that, while "no rule can be found of universal application that clearly defines the line where an article loses its legal quality as a chattel and assumes that of real estate," yet "the great weight of authority is in favor of the doctrine that to constitute a fixture it is necessary that the article should be annexed to the freehold, as the name itself imports; but there is great diversity of opinion in relation to the degree of annexation which is essential for this purpose." It is further said that many cases hold that such annexation "must be permanently made; so much so

that the article cannot be removed without injury to the freehold." This, however, though declared essential in a great majority of cases, is not held to be so in all. "Millstones and water wheels used in milling establishments are universally conceded to be a part of the realty; still, many of them could be removed without the least injury to the freehold." Farm fences are also mentioned. It is then said that another class of cases hold the true test of a fixture to be "the adaptation of the article to the uses and purposes to which the realty is applied, and no regard is had to the character of the annexation." This rule is declared to be too extensive in its application; and the court then proceeds to suggest, as the nearest possible approximation to a rule of universal application, one which requires annexation to the freehold, but considers the degree and permanency in character of such annexation, as well as the nature and adaptation of the article annexed to the uses and purposes to which that part of the building was appropriated at the time the annexation was made, as important solely by reason of the bearing it may have upon the decision of the ultimate question (to be determined from an inspection of the property itself, and its view, in the light of surrounding circumstances) whether a permanent accession to the freehold was intended to be made by the annexation of the article, thus making such intention so determined the paramount consideration. This case was followed by that of *Manufacturing Co. v. Gleason*, 36 Conn. 86, the same judge writing the opinion, and restating and applying the same rule of intention; and the court, by the application of such rule, decided that a factory bell placed in a tower built upon the factory for the purpose, and a blower pipe conveying air from a blower to a forge, were part of the realty. Again, in *Stockwell v. Campbell*, 39 Conn. 362, the same judge again writing the opinion, this court, repeating and counting upon the same rule, and saying distinctly that "physical annexation" need not be such "as to require any actual disruption for its removal," instancing the case of doors and window blinds, held a portable hot-air furnace, placed in the cellar of a dwelling house for the purpose of warming the house, and set in a pit prepared for it in the bottom of the cellar, where it was held in place simply by its own weight, and also the smoke pipe leading from the furnace to the chimney of the house, to be parts of the realty. And there are other cases in this state in accord with these decisions; but no further citation of authority seems requisite. Applying the rule thus established to the case before us, it seems manifest that, looking at the property itself, taking into consideration the character of its annexation as recited, its nature, its adaptation to the uses and purposes to which the building was appropriated at the time the annexation was made, and the relation of the party making it to the property

to which it was annexed, (such party being the owner,) a permanent accession to the freehold was intended to be made by the annexation of the article, and that by such annexation it became, and was, a part of the realty. There is no error in the judgment complained of. The other judges concurred.

(63 Conn. 323)

HALL v. PIERSON.

(Supreme Court of Errors of Connecticut.
Sept. 9, 1893.)

DOWER—ASSIGNMENT—EXECUTOR'S SUIT TO ENJOIN.

1. The probate court's order for assignment of dower is conclusive merely of the presence of the statutory requisites of dower as contained in Gen. St. §§ 618, 621, 622, but not of the nonexistence of an equitable bar of such right by estoppel or otherwise, since, if such bar arose after the right had attached, the probate court would have no jurisdiction to consider it, and, if before, it is not bound to cast on the widow the burden of appeal; but such bar may be asserted by original suit in equity in the superior court by any one showing a sufficient interest in the estate that would be prejudiced by the assignment.

2. A bill by the executor, alleging that all or a large part of the realty in which assignment of dower has been ordered must be sold to pay testator's debts and the expenses of settlement; that the widow's acts in obtaining the order have clouded the title of such realty, and decreased its value, so that it cannot be sold for a fair valuation,—is sufficient on demurrer as a statement of complainant's title and interest as trustee for the creditors, and the injury threatened thereto.

3. The fact that the probate court has not determined the necessity of selling the real estate to pay debts does not affect the executor's right to sue in equity to remove a cloud from the title, but the deficiency of assets may be shown aliunde.

Appeal from superior court, New Haven county; G. W. Wheeler, Judge.

Suit by Henry F. Hall, executor of the will of Seymour D. Hall, deceased, against Lucy M. Pierson, formerly wife of testator, to enjoin assignment of dower to her. Judgment on demurrer for defendant. Plaintiff appeals. Reversed.

H. G. Newton and H. F. Hall, for appellant. W. L. Bennett and T. E. Doolittle, for appellee.

FENN, J. The original complaint in this action alleged, in substance, that the defendant was the former wife of Seymour D. Hall, the plaintiff's testator, and was divorced from him on her complaint; that afterwards, in the lifetime of the testator, she accepted a note for \$550, signed by the plaintiff personally, and in consideration thereof made a contract with the testator, for the benefit of his estate, in writing, but not under seal or acknowledged, by which she granted, quit-claimed, and released all right of dower and one-third interest which she might have had thereafter in or to the real property of the testator, so that she should not thereafter have any claim on his property; that, after

the death of the testator, she demanded and received payment of the note, and was then requested by the plaintiff to execute and deliver to him, as executor of the testator's estate, a deed releasing the estate from any claim on her part for dower, but that she refused to do so, and claimed the right of dower in the real estate belonging to the estate, and that she presented to the court of probate for the district of Wallingford, in which district the estate of the testator was and still is in process of settlement, a petition to have dower assigned to her, and, notwithstanding the opposition of the plaintiff, the court of probate passed an order for the assignment of dower, as prayed for in said petition, and for the appointment of distributors to set out dower to her in the real estate of the deceased, which is described. It was further alleged that "it will be necessary to sell all or a large portion of said real estate in order to pay the debts of said Seymour D. Hall and the expenses of settlement." It was also alleged that such acts constituted a cloud upon the title of the real estate, made it difficult or impossible to sell the same at a fair valuation, decreased its value to the estate, and caused loss, trouble, and expense to the plaintiff, as executor, in defending the same; and that the defendant intended to make a sale and conveyance of her pretended right to a bona fide purchaser, and thus cause further trouble and expense. And the plaintiff thereupon claimed an injunction against such conveyance, against further claim of title to dower, and further action, suit, or proceeding in any court to obtain the same; also that the defendant be required to execute a release, and that judgment be rendered that she has no right, title, interest, or claim of dower, and for pecuniary damages. Upon this complaint a temporary injunction against a transfer or conveyance only was granted by the superior court, which continues in force. To the above complaint the defendant demurred, assigning four reasons, three of which—the first, third, and fourth—were sustained by the court, and are as follows: "(1) That it does not appear by said complaint that the plaintiff, as executor of the last will of said Seymour D. Hall, has any such interest in the property and right in question as to bring this suit." "(3) That it appears by said complaint that the matters in said complaint set out have been decided adversely to the claim of the plaintiff by a court of competent jurisdiction. (4) That it appears by said complaint that said plaintiff was present, and had opportunity to present the matters in said complaint set out to the court of probate for the district of Wallingford as a defense and in opposition to the said petition of the defendant for assignment of dower; and that said court of probate, notwithstanding the opposition of the plaintiff, decided the issue in favor of the defendant, and assigned to her dower as prayed for in said petition." After

the judgment of the court sustaining the demurrer as above, an application was made to the court by Seymour D. Hall, of Wallingford, who, it was alleged, "brings this application by Henry F. Hall, his next friend," stating that he was the son of the testator, Seymour D. Hall, deceased, and the sole heir and sole legatee and devisee under his will, and asking to be joined as a complainant in the action with the executor. This application was denied by the court. Afterwards the plaintiff asked, and was refused, leave of the court to file an amendment to the complaint, alleging that the defendant, at the hearing in the court of probate, introduced no evidence, but claimed that the court of probate had no jurisdiction to determine the validity of the writing executed by the defendant, and that the plaintiff must enforce his rights growing out of said transaction in some other jurisdiction, if at all. The plaintiff, in his appeal from the adverse judgment of the court, assigns as error the various rulings aforesaid, adding: "And Seymour D. Hall, of Wallingford, by Henry F. Hall, his next friend, joins in this appeal, and in the prayer for relief thereto, so far as relates to his application to be made a party plaintiff."

The question which is fundamental in this case is that raised by the third and fourth reasons of demurrer to the complaint, which were sustained by the court below. We will therefore first examine that question. The successful contention of the defendant in that court is stated by her counsel, in their brief filed in this court, in these words: "The superior court has no jurisdiction. Jurisdiction over the matter is in the court of probate, and that court has taken jurisdiction, and has acted." It is manifest that the question here presented is of much importance, since its determination may not only be decisive of the case before us, but a clear understanding of the doctrine of the cases cited by counsel in argument, and of other cases on the subject, in this state, will be of great and far-reaching practical utility. We therefore regard it as our duty to consider it fully. It will be readily seen, we think, that questions which may arise concerning the right of an applicant (or, if application is made by those interested in an estate, or the creditors of a widow, of the person to whom it is asked that dower may be set out) to such assignment by a court of probate can be appropriately divided into three general classes: First, whether such applicant possesses the legal or statutory requisites to entitle her to such assignment; second, whether, notwithstanding such strict statutory requisites may exist, there are other grounds or equities which bar or prevent the existence of a right of dower against the estate; and, third, whether, although at the time of the decease of the person whose estate is in settlement a right of dower did exist, the applicant has subsequently parted with or estopped herself from the assertion

of such right. In reference to the first and last of these three classes of questions there can be, we think, but little difficulty in understanding the power, duty, and jurisdiction of courts of probate. Such uncertainty as there may be pertains to the second class. All questions which may arise as to whether the applicant for the set-out of dower possesses the statutory requisites to entitle her to such assignment belong to the exclusive jurisdiction of courts of probate. Those requisites are now to be found stated in Gen. St. §§ 618, 621, 622. To be entitled to dower, the person must have been the wife of the decedent, married prior to April 20, 1877, and living with her husband at the time of his death, or absent by his consent or by his default or by accident, or have been divorced without alimony, she being the innocent party, and a suitable provision must not have been made for her support before the marriage by way of jointure or a settlement of property the title to which shall not have fallen wholly or in part, in her favor, in contemplation of marriage, to take effect after the death of the intended husband, and expressed to be in lieu of dower; and she must not have, with her husband, during the marriage, entered, in the manner provided by statute, into a contract for the abandonment of common-law rights in the property of each other. Nor must she, by failure to decline to accept, as prescribed by statute, a devise or bequest to her in lieu of dower, have become debarred of her rights. Whenever application is made to a court of probate to have dower assigned, the court, as was said in *Hewitt's Appeal*, 53 Conn. 36, 1 Atl. 815, should, before making such assignment, be "reasonably satisfied" that the applicant or person to whom it is asked that dower be assigned "possesses the statutory requisites." The duty and jurisdiction of courts of probate in this regard are similar to that which such courts exercise in passing an order directing the estate of an intestate to be distributed to the persons found by them to be the heirs at law and entitled to the estate, and should, therefore, until set aside on appeal, have the same conclusive effect. *Kellogg v. Johnson*, 38 Conn. 269. It is true, even as applied to such a case, as was said in *Hewitt's Appeal*, supra, that "the assignment of dower does not establish the title of the applicant to dower in the lands assigned, any more than the setting off of lands on an execution establishes the title to the lands in the execution creditor. * * * All that is done in either case is simply to designate the lands in which dower exists in one case, if it exists at all, and to satisfy the debt in the other, if title by the levy is acquired, which depends upon the execution debtor being the owner of the lands set off. If the title in either case is disputed, further proceedings before another court would be necessary to determine it." It is again similar to a distribution, notwithstanding which the

right of the distributee might be disputed in another court, either upon the ground that the intestate did not have title which he could transmit, or that, after the devolution of title by his death, the distributee had parted with it to another,—questions which the probate order of distribution does not affect, and upon which that court has no jurisdiction to pass. *Gold's Case*, Kirb. 100; *Parsons v. Lyman*, 32 Conn. 566; *Homer's Appeal*, 35 Conn. 113; *Holcomb v. Sherwood*, 29 Conn. 418. So, not only, if under the order of the court of probate dower is set off to a widow in certain lands of her deceased husband, the question whether such lands were so the property and estate of the husband as to be subject to dower is unconcluded, but also the widow's title to dower is not settled. *Hewitt's Appeal*, 53 Conn. 37, 1 Atl. 815. What is conclusively settled by such order of a court of probate and the proceedings had thereon, and which, because within its jurisdiction, "cannot be attacked collaterally except for fraud, or set aside save by appeal," (Gen. St. § 436,) is that the person to whom the assignment of dower is made possesses the statutory requisites to entitle her to such assignment. And such proceedings also designate the lands in which, as between her and "the persons entitled to the estate," such dower interest is to be held and enjoyed. To that extent the order of the court, and the doings of the persons appointed to set out dower, "returned to and accepted by said court," do "ascertain and establish such dower." *Id.* § 619.

It would seem to result from what has already been said that if, at the time of the decease of the person whose estate was in settlement, a right of dower in such estate existed in favor of the applicant, which right was not lost in the manner expressly provided by Gen. St. § 621, namely, by failure to decline to accept a devise or legacy made in lieu of dower, the court of probate would have no right or jurisdiction to consider the question whether she had subsequently parted with or estopped herself from claiming such right. That, indeed, is the precise point of *Hewitt's Appeal*, where the question arose as between the widow and the persons who had purchased the lands in which dower was claimed, as free from the right of dower, from the guardian of the minor heirs, selling under the order of the court of probate; and, although it is stated in the opinion (page 34, 53 Conn., and page 815, 1 Atl.) that "the question is whether a court of probate in the settlement of an estate is vested with such equity powers that it can apply an estoppel in a controversy between the widow on the one part, regarding her right of dower in her deceased husband's estate, and strangers to the estate on the other, having no interest whatever in it except as purchasers of land belonging to it," (such being, in reality, the scope of the question presented by the facts,) yet it must be manifest from the

entire reasoning of the opinion that the mere fact that the appellees' only interest was that of purchasers of land belonging to the estate was regarded as in no sense vital; and that, if the appellees in that case had been the minor heirs themselves, no conveyance having been made of their interest by their guardian, and under an order of the court of probate, to third persons, and the claim had been that the widow had released her interest to them, by which they would have acquired an independent, different, and enlarged interest over that which they took by descent, the decision must have been the same. In that case it would have equally been an effort "to set aside, by the court of probate, Mrs. Hewitt's right to dower, which once existed." Page 36, 53 Conn., and page 815, 1 Atl. It would equally "grow out of a purchase of her dower lands after dower had attached." Page 37, 53 Conn., and page 815, 1 Atl. And it would be equally correct to say, as the court does: "Suppose she should claim that what purported to be a deed was obtained from her by fraud or duress, or was executed by mistake, in the belief that she was executing one instrument, when in fact she was executing another. Must a court of probate determine all these questions before the lands can be designated in which she has dower, if she has it at all? If this be so, the court of probate would be assuming the right to determine her title to dower." It is unnecessary to quote further. The whole opinion demonstrates what has been stated. See, also, *Dickinson's Appeal*, 54 Conn. 224, 6 Atl. 422. In *Mallory's Appeal*, 62 Conn. 218, 25 Atl. 109, to the claim that a certain writing between the heirs of an estate, who were also indebted to it, bound such heirs, this court, quoting as authority *Hewitt's Appeal* and other cases, said: "Courts of probate have no power to consider and act upon such matters. They can neither try titles to property, nor determine questions of estoppel; and the superior court, sitting for the trial of a case like this, takes the place of the court of probate from which it came, and can do no more than could have been done by that court." See, also, *Holcomb v. Sherwood*, *supra*; *Greathead's Appeal*, 42 Conn. 374.

But a much more difficult question is presented by the other class of questions, as to the jurisdiction and duty of courts of probate, where it is claimed that the right of dower is barred or prevented by other grounds than the want of statutory requisites. The case of *Andrews v. Andrews*, 8 Conn. 79, was a bill in chancery brought by the heirs and devisees of a decedent against his widow, for a release or an extinguishment of her right of dower in his estate. It was held that a certain agreement entered into between the parties, husband and wife, before the marriage, and ancillary thereto, did not constitute a legal bar of dower, but was entitled to the aid of a court of chancery to

carry it into effect; and the relief sought was accordingly decreed. In the opinion of the court the case of *Selleck v. Selleck* is referred to as bearing a strong resemblance in all its leading features, and as decisive. That case had not previously been reported, but is given in a note to *Andrews v. Andrews*, 8 Conn. 85, 86. In that case there was, previous to the marriage, and in contemplation thereof, an agreement in writing entered into between the parties. The marriage took effect, and after the death of the husband, who died leaving valuable real estate, the wife, who survived, received the sum mentioned in the agreement within the time therein stipulated, and thereupon executed and gave to the executors a receipt acknowledging that she had received that sum in full satisfaction of dower in the estate of her late husband, and of all claims and demands which she had or might have on the estate. The instrument was not under seal. She afterwards applied to the court of probate to have dower allotted. This application was sustained, and dower was set out to her accordingly. On an appeal taken the decree of the court of probate was affirmed, on the ground that the provision made for the wife by the agreement did not constitute a legal jointure, and was not, therefore, at law a bar of dower; and that her dower, having vested, could be released only by deed. The heirs at law then preferred their bill in chancery, stating the facts and praying for relief, which was thereupon granted. This case is referred to with approval in *Hewitt's Appeal*, and held "decisive." It would seem, on its face, to be so of the present question. But it cannot be doubted that decisions of this court subsequent to *Selleck v. Selleck* and *Andrews v. Andrews* have more clearly recognized and sustained the equity powers of courts of probate. *Beach v. Norton*, 9 Conn. 182; *Bible Society v. Wetmore*, 17 Conn. 182; *Ashmead's Appeal*, 27 Conn. 241; *Mix's Appeal*, 35 Conn. 121; *Vail's Appeal*, 37 Conn. 185; *Hewitt's Appeal*, 53 Conn. 24, 1 Atl. 815; *Chase's Appeal*, 57 Conn. 236, 18 Atl. 96; *Potter's Appeal*, 56 Conn. 1, 12 Atl. 513. But in the citation of the above authorities generally upon the subject of the equitable powers of courts of probate we will digress to say that a cautionary suggestion will not, in view of an apparently frequent misunderstanding, be inappropriate. The entire jurisdiction of such courts is statutory, special, and limited. In the exercise of such statutory jurisdiction they possess "such incidental and implied powers, legal and equitable, and such only, as are necessary to the entire performance of all the duties imposed upon them by law." *Potwine's Appeal*, 31 Conn. 381; *Hotchkiss v. Beach*, 10 Conn. 232. Such necessary incidental equitable powers, in reference to a certain class of questions, namely, those arising concerning the division of a fund constituting the assets of an insolvent estate among the creditors whose claims have been allowed by the

commissioners on such estate, have, as the result of a line of cases, including *Waterman's Appeal*, 26 Conn. 96, *Ashmead's Appeal*, supra, and *Vail's Appeal*, supra, been by this court, in *Chase's Appeal*, supra, distinctly declared to be identical with those of a court of chancery of general jurisdiction; that "it can find and enforce an equitable estoppel in favor of one and against another creditor, as fully as would the superior court upon a bill in equity for a like purpose. The principle and rules of law are the same in each court." It is added that therefore it is immaterial whether the question comes to the supreme court originally from the probate or from the superior court, the reason stated being that in this way "there is a symmetrical completion of a matter in the court in which it was commenced." It may be noticed further that the conclusion here stated by the court, as based upon previous decisions, is expressly declared by Gen. St. § 532, which is in recognition and affirmation of the common law.

But it by no means follows or is to be understood that ordinarily there is any such identity between the necessary incidental and implied powers of courts of probate and the equity powers of chancery courts of general jurisdiction. The contrary fully appears in cases referred to and quoted elsewhere in this opinion. The test is the necessity in order to discharge the duty committed in such a way as to best promote the end and policy of the law in delegating the power and jurisdiction to such statutory tribunal. Indeed, the language used in *Chase's Appeal* must be understood also in the aspect of its bearing upon the claims of counsel, based upon some dicta, which seem to have been misapprehended, in earlier cases; as, for instance, in *Beach v. Norton*, supra, which latter case this court found it necessary severely to criticize, and to overrule, so far at least as the reasoning and views were concerned, in *Vail's Appeal*, supra, saying: "The judge of the court of probate is not a chancellor. He possesses chancery powers, but they are only such as are incidental, connected with the settlement of a particular estate, and necessary for the adjustment of equitable rights, and not to find and enforce equities in the ordinary and loose sense in which that term has come to be used in the law. * * * It must be a right; one which a court of equity would take cognizance of and enforce if application could be made to such a court." The ruling in *Chase's Appeal* is to be taken as an affirmation of the above language. As so understood, the incidental equity powers of courts of probate, though they may extend to and be exercised concerning matters within the exclusive jurisdiction of such courts, and therefore be employed where no other court could use them, are themselves never other or greater than such as are recognized as equitable rights by courts of chancery, and which would be cognizable and enforceable in such courts were it not that the

particular jurisdiction concerning the subject-matter had by statute been committed to the special tribunal therefor created; while, on the other hand, by reason of the peculiar and circumscribed jurisdiction of such special tribunals, courts of probate may be, and often are, incapable of supplying as adequate equitable relief as equity courts of general chancery powers can afford.

Returning, after the above digression, to the subject more directly before us, in *Seeley's Appeal*, 58 Conn. 202, 14 Atl. 291, the court of probate refused to set out dower to the appellant. The superior court reversed the decree, and the original appellee appealed to this court. The facts were that an agreement had been entered into between the husband and wife that she should not ask for alimony, and that a certain sum should be paid her by the husband. This court held such agreement void, and sustained the decree of the superior court. Counsel for the appellants (original appellees) claimed that the question of equity involved was one which the court of probate had jurisdiction to hear and determine; and, since the decision was adverse to such appellants, and in favor of the widow, the court apparently did not deem it incumbent to determine that question. At all events, no allusion is made to it in the opinion. But in the case of *Carter's Appeal*, 59 Conn. 578, 22 Atl. 320, it is the claim of counsel for the defendant that it was held that it was within the jurisdiction of courts of probate to hear and determine questions of this character, and to order and decree accordingly. In that case there was an antenuptial contract between the appellant and her late husband, in whose estate she claimed, which was held not a jointure, and whether such a settlement of property in her favor as to bar her from dower, under Gen. St. § 622, was not determined, it being held that, if it was not so, yet it was a contract by the terms of which, in consideration of the promises made to her therein, she relinquished all claim she might have for dower in the estate; that she could not have what was given her by the contract, and dower in addition; and that, if the contract was not to be regarded as barring her right to dower, she had made her election to take what was given her by it instead of dower. A claim was made in the case that a court of probate could not enforce such an election, that being solely an equitable power, and in reference to that claim the court said, (page 587, 59 Conn., and page 320, 22 Atl.): "It is true that courts of probate do not have any general equity jurisdiction. But where an estate is in settlement before a court of probate, and an equity arises between the persons interested in such an estate incidental to and growing out of such interest, then that court not only may, but must, apply and enforce it, in order to do justice to all parties, and to settle the estate. To this extent courts of probate have the

fullest equity powers." Now, this general principle is fully sustained by the cases which this court cited in its support, and which we have already cited in this opinion, and is undoubted. The point is that the court held it applicable to and decisive of the question there at issue, namely, that the court of probate could and must enforce the election made. What, then, is an election? This court itself there defined it to be "the choosing between two rights, by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both," and further said that "the legal effect of taking one is to discharge the other." Such election to accept the provisions of the agreement would take effect by relation from the death of the husband, and would operate to prevent a right of dower in favor of the widow so electing ever beneficially attaching to his estate. It would be quite analogous to the statutory election (Gen. St. § 621) between dower and a devise or legacy made in lieu thereof, in reference to which this court had already had occasion to recognize the equity powers of a court of probate. *Evans' Appeal*, 51 Conn. 435, 439. In such a case, if the widow elect to take the legacy, it is true that she does so not as a gratuity, but as an equivalent for what she relinquishes, and as a purchaser. *Lord v. Lord*, 23 Conn. 328; *Security Co. v. Bryant*, 52 Conn. 311. "The husband has no power to give away his wife's dower, and all devises must ordinarily be subject to her right. But if the widow wishes to have the legacy she cannot claim a benefit under the will without also being compelled to make good its provisions by which her dower in the realty is given to a stranger." *Bisp. Eq.* § 298. In other words, she must ratify his gift of her dower, and enable the donee to take in the only way in which he can take at all,—by virtue of the provisions of the will in his favor. So, in case of an intestate estate, if she elects to accept the provisions of an antenuptial agreement inconsistent with her right of dower, she thereby enables the heirs at law to take the estate by descent as free and unincumbered by dower. There would seem, therefore, to be a pretty plain distinction between the effect of such an election and either a release of the right of dower once attached to the heirs or devisees of a decedent, or a contract made with the decedent during or in case of divorce after coverture, not in itself constituting a release of the right of dower, but equitably entitling those who represent the estate to such release, a decree for specific performance, or a decree passing and vesting the title in such representatives. In *Carter's Appeal* it is to be noticed that, the court of probate having refused to set out dower to the widow, she appealed to the superior court, which, as the court of probate has by statute the sole and exclusive power to order such assignment, was the only

means by which she could seek to obtain it, (*Way v. Way*, 42 Conn. 52;) that in that court a full finding of facts was made by a referee; that upon those facts she claimed to be entitled to dower, which claim was overruled by the superior court, and thereupon she again appealed to this court, before which, and upon the facts so found, it was claimed by the appellees that the antenuptial contract made between her and her husband was a jointure. This the court held it not to be, certainly in the common-law meaning of the term. It was further claimed to be a statutory bar, as a "settlement of property made in her favor," and this the court did not decide, holding it unnecessary, since "it was at any rate a contract by the terms of which she did, in consideration of the promises made to her therein, relinquish and discharge all claims she had or might ever have for dower in the estate of Mr. Carter, her late husband. She did this in plain, unequivocal words, in the present tense." If, therefore, the court had disaffirmed the previous action of the court of probate and of the superior court, it must, in order to have done so, have first decided the question whether the antenuptial agreement was a statutory bar, a question raised in good faith, and held to be one of difficulty, adversely to the appellees, and then, although the election made was equivalent, in effect have decided against them, and dismissed them from court, in a proceeding brought there by the appellant, although upon the same facts, brought to the same court in another way, they would have had a perfectly plain case; thus enabling the appellant to win a case on one ground, when the undisputed facts showed her right doubtful on that ground, and that it was only left undecided because on another equivalent ground she clearly had none. Surely it is easy enough to see why Carter's Appeal ought to have been decided as it was.

It seems manifest, also, in the light of these cases, that any attempt to decide the questions which may arise under what we have called the second class of questions, namely, those where other than strict statutory requisites are claimed to bar or prevent the existence of a right of dower against an estate, so that certain of them shall be held to be strict statutory requisites, within the exclusive jurisdiction of that court, and concerning which the action of such court, unappealed from, is final and conclusive, and others of them are held, like those arising from subsequent releases, bars, or estoppels, to rights which have once attached, not within the jurisdiction of courts of probate, would lead to constant and inexplicable confusion and uncertainty. It is far better that there should be a rule upon the subject, definite, practicable, and clear, even though it be somewhat arbitrary, and lack in theoretical perfection. It is certain that the equity powers of a court of probate are and should be restricted, broad though

they may be, along certain lines, and for the accomplishment of certain definite and definitely prescribed statutory ends. This is a necessary incident to its being a court of strict statutory jurisdiction. In *Hewitt's Appeal* a great contention in favor of the appellants was that the superior court, by virtue of section 6 of the practice act, could find and enforce an equitable estoppel, on an appeal from probate, even if the court of probate could not, and thus exercise on such an appeal full equity powers. This court denied such power, and also overruled the further contention that "courts of probate have equity powers, to be administered in all cases where equitable considerations affect the matter with which they are dealing;" and proceeded to say: "If the application is made for the assignment of dower, the court must be first satisfied that the applicant possesses the statutory requisites, without which no right of dower exists; and this power of inquiry is not exhausted, nor is this duty discharged, until the court has satisfied itself that there is no objection, equitable or legal, to the assignment of dower; for, having once acquired jurisdiction to determine the right of the party to such assignment, it becomes, as to that matter, vested with the amplest chancery powers to do full justice between all the parties before it." See also *Dickinson's Appeal*, *supra*.

Without extending this already lengthy consideration of this subject further, it must be apparent that there are, and must be, many cases falling within this second class where the equity powers of courts of probate, limited and circumscribed as they are, are inadequate to furnish full and ample equitable relief. Such courts can neither grant injunctions, quiet titles, decree specific performance, nor pass title by decree. Nor can they, as we have seen, consider at all questions of a certain class, which may, in many cases, be more or less intimately connected, and, so to speak, interwoven with other questions within their exclusive jurisdiction to determine. On the other hand, where questions as to strict statutory requisites arise, the very facts upon which those questions are presented may also, as in the case of *Carter's Appeal*, present the most cogent of reasons, other than the want of such statutory requisites, strictly speaking, why an assignment of dower applied for should not be made. On the whole, then, we deem the best and most serviceable rule upon the subject of jurisdiction, and the one which we think is fully sanctioned by authority, by analogy, and by the theory and practice of our courts, to be this: The order and decree of a court of probate, having jurisdiction of the settlement of an estate, assigning dower, unappealed from, is final and conclusive of the statutory right of the applicant to such assignment, and designates the lands in which the dower exists as against such estate. That is its conclusive extent. If,

notwithstanding the existence of the statutory requisites, there are other grounds why the right of dower should be equitably held not to have attached, and those grounds appear, the court of probate, in the first instance, may, and properly should, refuse to set out dower. It ought not, however, to do so in a fairly doubtful case, since it thereby casts a burden on the applicant for dower which she is compelled to meet by an appeal, as her only practicable remedy. If such refusal is made, and an appeal taken, which is pursued to the end, the case being finally decided upon a finding made, as in *Carter's Appeal*, it ought, however, decided, to conclude all parties from further litigation of any questions made or which might have been made in the case. The full day in court will then have been had. But, if the case is not thus pursued, the decree of a court of probate assigning dower, and the assignment thereupon made, constitute no estoppel to a party having a proper and sufficient interest in the estate, and claiming to be aggrieved, from seeking in a court of full equity jurisdiction—the superior court—such relief as may be granted to him, in a case which concedes, as fully determined by the unappealed from action of the court of probate, the possession by the applicant for dower of the statutory requisites to entitle her thereto. Where, however, the legal right to dower has attached, and it becomes inequitable for the widow to take the dower by reason of facts arising afterwards, the probate court cannot consider those facts, but must leave the parties interested against the assignment of dower to their remedy in a court of equity. We have said that this rule will accord with the previous theory and practice of our courts. We have already referred to *Seeley's Appeal*, 56 Conn. 202, 14 Atl. 291. On the other hand, on quite similar facts, in the case of *Stilson v. Stilson*, 46 Conn. 15, the superior court, on a bill in equity to enjoin the respondent against prosecuting a claim for dower where a decree setting out her dower had been obtained from the court of probate, from which decree an appeal was taken and then pending, found the facts and reserved the case for this court, which decided it in favor of the defendant, but with no intimation in the opinion that the case was not properly before the court. In *Dickinson's Appeal*, *supra*, where the claim was that a voluntary distribution not in strict accordance with the statute should nevertheless bar a statutory distribution, this court held otherwise, saying that "an heir failing to get under the distribution what he had taken by the agreement could, by a proceeding in equity, compel a conveyance of the agreed part to himself;" and added: "It is clear that, if this were not so, a court of probate would have many questions to try which it could not entertain or dispose of, and which would be entirely foreign to pro-

bate jurisdiction as now recognized. If, for instance, there had been a voluntary division, by written agreement or by deeds, the question might be made whether the agreement or deeds had not been obtained by fraud or duress, or executed under mistake, or, as suggested by the pleadings in this case, whether the agreement, if originally valid, had not been lawfully rescinded, or whether the agreement ought not to be set aside on equitable considerations. * * * The court of probate cannot go into these inquiries." If it be said that the rule which we have stated nevertheless does permit, and that recent cases, such as *Carter's Appeal*, both permit and sanction, courts of probate entering into such inquiries in certain instances, and that to this extent a concurrent jurisdiction in that court and in the superior court is recognized, that is no new doctrine, for in *Dalley v. City of New Haven*, 66 Conn. 314, 324, 22 Atl. 945, concurrent equitable jurisdiction between those courts in certain matters pertaining to trusts is expressly affirmed. As bearing more or less directly upon various aspects of this inquiry, the following other cases in this jurisdiction may also be cited: *Whiting v. Whiting*, 4 Conn. 179; *Dickinson v. Hayes*, 31 Conn. 417; *Treat's Appeal*, and *Treat v. Treat*, 35 Conn. 210; *Hart v. Hart*, 44 Conn. 327; *Prindle v. Holcomb*, 45 Conn. 111, 123; *Butler v. Sisson*, 49 Conn. 580.

Applying what has been stated, as our view of the law, to the case before us, the judgment of the superior court in sustaining the defendant's third and fourth reasons of demurrer to the plaintiff's complaint must be held erroneous. We should have been sorry to hold otherwise if the allegations of the plaintiff's proposed amendment to the complaint, which the court refused to allow, are true, to the effect that the court of probate, in granting the defendant's application to set out dower to her, sustained the claim there made by her counsel that it had no jurisdiction to determine the very question which such counsel now claim was within its sole and exclusive jurisdiction, and concerning which it is affirmed that the plaintiff is concluded by its action. The first reason of demurrer to the complaint, namely, the failure to state sufficient interest in the plaintiff to entitle him to bring the suit, was also sustained. The allegation was that "it will be necessary to sell all or a large portion of said real estate in order to pay the debts of said Seymour D. Hall and the expense of settlement," coupled with the further allegation that the defendant's acts, in claiming and in procuring an order to set out dower, have clouded the title, and made it difficult or impossible to sell the same for a fair valuation. Is this a sufficient averment of title in the plaintiff to enable him to maintain the suit? It seems to us that it is. The practice act (Gen. St. § 880) requires and directs in pleading a plain and concise statement of material

facts, not of the evidence by which they are to be proved. The material facts here are such as show an interest in the plaintiff, as, in his capacity of executor, a trustee for creditors of the estate. It is not enough, indeed, that the property may be needed for the payment of debts. It must appear that it is in fact so needed. *Johnson v. Bank*, 21 Conn. 148; *Sheldon v. Bradley*, 37 Conn. 324; *Bassett v. McKenna*, 52 Conn. 437. But what is meant by this? Surely it is not necessary to appear that it must, under all contingencies, be entirely exhausted by such payment. In the case of *Sheldon v. Bradley*, if the facts found by the committee had shown that a portion only of the one entire fund would have been exhausted in the payment of debts, can there be any doubt that the administrator's right to redeem would still have been maintained? Indeed, that very contingency is recognized, (page 339, 37 Conn.), for while the widow's right, as coplaintiff, to the relief sought by her as widow of the intestate, is denied, the court adds, in conclusion: "On the final settlement of her husband's estate in the court of probate she may possibly be able to establish a right to share in the amount recovered by the administrator in these proceedings,"—a right which it is very evident the court could not have meant might be paramount to that of any creditor. Suppose that it was necessary to sell real estate for the payment of debts, and that property greater in value than the amount of such debts was so situated that it could not be beneficially divided for the purpose of sale, under which circumstances a statute long in existence, until merged in the broader one, now Gen. St. § 600, provided for a second order by the court of probate for the sale of the whole, (Revision 1875, p. 394, § 38,) could it be claimed that the executor's or administrator's interest as trustee for creditors was limited to so much only of the real estate as might, however detrimental to the whole estate, be sold for sufficient to pay such debts, and that, as against a party claiming under a fraudulent deed, or holding an incumbrance which the estate was entitled to redeem, his right could, at the instance of such party, and against the manifest interest and presumed desire of the heirs, be so limited, circumscribed, and carved up? We think not. Executors and administrators are trustees, not for the creditors alone, "but for the benefit of all who have an interest in the estate." *Johnson v. Blackman*, 11 Conn. 357. Under Gen. St. § 577, an executor or administrator, during the settlement of the estate, stands "as the representative, in a certain sense as the trustee, of the persons to whom the law would carry the land when it had been judicially determined that it was not needed for the payment of debts." *Remington v. Bible Soc.*, 44 Conn. 517. Now, it seems to us that the complaint contains a "plain and concise statement" to the effect that it would be necessary to sell either all or a

large portion of the real estate in which the defendant claimed and obtained an order that dower should be assigned to her, in order to pay the debts and charges against the estate, and that, in consequence of her acts, the title to such real estate as it would be necessary to sell—whether all or a large portion though not all—was clouded, so that it was difficult or impossible to sell the same for a fair valuation, and that such acts had decreased its value. This is certainly an allegation that the real estate constitutes a fund or source to which it will be necessary for the creditors of the estate to resort, and that such fund has been affected and impaired. And this, to say nothing of the ultimate rights of those who take the estate after the charges are discharged, whose interests, so far as they are involved by the executor's acts, he is bound to regard, we think is sufficient; certainly that it should be held so as against a demurrer, nor for form, but for substance only, and coupled with other grounds of demurrer sustained by the court below, preliminary in their nature, (Gen. St. § 872;) for though not addressed to the writ, but to the complaint, and for matters apparent upon its face, they attack the jurisdiction of the court.

Nothing which we have said should be deemed as bearing upon the right of the defendant to ask, if she hereafter may desire, a fuller or more particular statement of the plaintiff's claim, in reference to his interest in the estate on which he relies to entitle him to maintain the suit. Gen. St. § 880. Nor does it bear upon the question of the evidence by which, if contested, such allegation is to be established. But this brings us to consider a claim made by the defendant's counsel. We quote from their brief: "But the principal objection to the complaint is that the right to decide whether the land should be sold is not in the executor, or in the superior court, but is in the court of probate. To enable the executor to sell, he must get an order, after a hearing, from the court of probate. Only when that court has ordered the land to be sold can the executor have any possible power of sale or interest in the removal of a cloud. There is no allegation here that the court of probate has ordered its sale, or determined that it is necessary to sell it. The superior court cannot usurp the power of the court of probate, and decide that it will be necessary to sell the land. This allegation in the complaint is therefore superfluous, and shows no interest in the executor." Now, not only that that which this claim requires as allegation is not the ultimate fact to be stated, but the evidential one to support that statement, but also that such evidence would not be essential to its support, has been already, in effect, twice decided by this court. In *Andrus v. Doolittle*, 11 Conn. 283, it was held that in a suit by an administrator against a fraudulent grantee of property the insolvency of the estate, and

the consequent deficiency of assets, may be proved by other evidence than the order and decree of the court of probate, this being a proper question to be tried by a court and jury. The court, (Williams, C. J., page 288,) uses very forcible language. It was said: "This brings us to the next question in this case, how is this insolvency to be proved? The defendant claims that it can be done only by the orders and decrees of the court of probate, that this is the tribunal constituted for this purpose, and that it would be almost impracticable to try the question by a jury. While this court are not desirous of embarrassing themselves or a jury with questions cognizable only by the court of probate, they are not willing to establish a technical rule by which a sure defense would be provided for the fraudulent grantee of a deceased person, and such, it is apprehended, would be the effect of adopting the principle claimed by the defendant. The administrator must inventory these articles so fraudulently conveyed. Suppose they amount to more than the debts, how can the court of probate determine this estate to be insolvent? That court cannot do it. Of course, as the estate appears solvent at the probate office, the fraudulent grantee may cover himself by this shield; and as the court of probate can make no order which will reach him, he may safely retain the property. The fact is, the court of probate can never determine the insolvency of the estate until the property is sold and the administration account settled; and if this defendant, or persons in his situation, can prevent a sale of property in this way, then the estate can never be settled; and, as the court of probate cannot decree its insolvency, he may always retain the property. From the necessity of the case, therefore, this question must be tried before the courts of common law." Again, in *Bassett v. McKenna*, supra,—an action by an administrator to set aside a fraudulent deed,—the defendant objected to the admission of the report of the commissioners on the estate, and this court, (Carpenter, J.,) in passing upon the question, said: "The court admitted it for the purpose of proving that the estate was indebted in the several amounts therein stated. By that we understand that it was admitted to show the amount of indebtedness solely for the purposes of this case. As the report of the commissioners is the only evidence of the existence and amount of the debts as between the estate and the creditors, it is reasonable that in this proceeding, the object of which is to supply the estate with funds for the payment of the debts, the plaintiff should be permitted to show the amount of the debts by the report itself. At least it is admissible for that purpose."

In view of the conclusions which we have reached in reference to the questions raised by the assignments of error in the reasons of appeal relating to the judgment on the demurrer, the other questions presented by such

reasons of appeal become immaterial. We will, however, say that it appears to us very evident that there was nothing erroneous in the action of the court in overruling the application of Seymour D. Hall to be joined as a party plaintiff. The allowance of such application, at such time, was within the discretion of the court; a discretion which, under existing circumstances, seems to have been properly exercised. Even if there had been error in this respect, the executor could not, as such, have been thereby aggrieved. It could in no wise affect his standing in court. There is error in reference to the ruling upon the demurrer, and the judgment of the superior court is reversed. The other judges concurred.

(56 N. J. L. 445)

STATE (McNEAL, Prosecutor) v. RYAN et al.
(Supreme Court of New Jersey. Feb. 28, 1894.)

VALIDITY OF TAVERN LICENSE.

A tavern license, granted by a common council at a special meeting, of which meeting and its object no general notice had been given, and a notice of a few hours only had been given to one citizen who had made a request to be heard, is annulled.

(Syllabus by the Court.)

Certiorari at the suit of Andrew H. McNeal against Richard H. Ryan and the inhabitants of the city of Burlington to review proceedings by defendant city granting license to keep a tavern. Judgment for prosecutor.

Argued at November term, 1893, before DEPUË, VAN SYCKEL, and REED, JJ.

Samuel Beldon, for prosecutor. J. W. Westcott, for defendant.

REED, J. This license was granted at a special meeting of the common council, held on the evening of July 14, 1893. An application for it had been presented at a meeting held July 6th. At the same meeting the prosecutor presented a communication requesting an opportunity to inspect the application for, and to present remonstrances against the granting of, the said license. By the terms of an amendment to the city ordinances, passed the previous June 6th, the application could be granted at any subsequent meeting. By order of the license committee, the president called the special meeting of common council held on the 14th of July. Of that meeting notice was sent to the prosecutor, which notice, he says, reached him about 9 o'clock in the forenoon of the 14th. At this meeting a written remonstrance was presented, and the counsel of Mr. McNeal asked for an adjournment in order that witnesses might be produced, and also asked for the inspection of other applications on file for the purpose of ascertaining whether the names of any of the signers upon this were upon other applications. The request was ignored, and the common council at once granted the license. I think that there was not accorded to the prosecutor a

fair opportunity to be heard. If this had been a stated meeting, or an adjourned stated meeting, the position of affairs would have been different. The prosecutor would have had the means of knowing when the next meeting would be held without any personal notice. Of a special meeting, convened upon the call of members, he had no means of knowledge, aside from a notice specially communicated or accidentally obtained. The notice given during the same day to the prosecutor hardly afforded him a fair opportunity to collect his material for an attack upon the application in the evening. Besides this, I think that, under the circumstances, his counsel should have been given a reasonable opportunity to examine the papers mentioned. But, aside from the point in respect to the reasonableness of the notice to Mr. McNeal, there is the question of notice to other citizens of Burlington. They were entitled to be heard if they desired to oppose the license; and, when the meeting at which a license is granted is a special meeting, it would seem that there should be some general notice of the meeting and its object. The license is set aside.

(56 N. J. L. 421)

STATE (POST et al., Prosecutors) v. CITY OF PASSAIC.

(Supreme Court of New Jersey. Feb. 27, 1894.)

MUNICIPAL CORPORATIONS—SURFACE DRAINS—VALIDITY OF ASSESSMENT.

1. The act of March 8, 1882, (Supp. Revision, p. 577,) and the act of 1887, p. 231, are general acts, which supersede the provisions of city charters on the same subject.

2. When a trunk sewer for both surface drainage and sewage is constructed, into which laterals may discharge, the act of 1887 gives the only mode of making the assessment.

3. The two above-stated acts provide the only legal mode in which cities can construct sewers or drains, and assess for their cost.

4. A drain for surface water only must be assessed under the act of March 8, 1882.

5. After the work is done in pursuance of an ordinance under the provisions of a city charter, the ordinance will not be set aside; but, if the assessment is speedily challenged, that will be set aside, that it may be made in accordance with the acts of 1882 and 1887.

(Syllabus by the Court.)

Certiorari at the suit of H. M. Post and others against the city of Passaic to review an assessment for a surface water drain in defendant city. Assessment set aside.

Argued February term, 1894, before VAN SYCKEL and MAGIE, JJ.

Thos. M. Moore and Wm. F. Gaston, for plaintiffs. George P. Rust, for defendant.

VAN SYCKEL, J. The writ in this case brings up the assessment for the main avenue surface water drain from the northwesterly line of Jefferson street to Park place. The improvement was ordered, and the assessment made, under and in pursuance of the provisions of the city charter.

Under the recent decision of the court of

errors and appeals in *Central Land & Imp. Co. v. Mayor, etc.*, of Bayonne, (opinion filed Feb., 1894,) 28 Atl. 713, the act of March 8, 1882, (Supp. Revision, p. 577,) is a general act, and supersedes the provisions of city charters on the same subject. Where a trunk sewer for both surface drainage and sewage is constructed, into which laterals may discharge, the act of 1887, p. 231, gives the only mode of making the assessment, and it also supersedes the charter provisions of cities, as well as the supplement of June 1, 1886, found in Supp. Revision, p. 580, pl. 371. The above-stated act of March 8, 1882, provides the only legal mode in which cities can construct sewers or drains, and, in connection with the act of 1887, p. 231, gives the only method of assessment for the work.

The drain in the city of Passaic, which is a brick drain for surface water only, should have been constructed and assessed under the said act of March 8, 1882, and not in accordance with the provisions of the city charter; but, inasmuch as it has been constructed under the city charter without objection, it is now too late to make that objection. The ordinance ordering its construction cannot now be attacked, but the assessment will be set aside, that it may be made under the act of 1882. If the relators had not interposed promptly to set aside the assessment, public policy would constrain the court to deny the right of the relators to assail the assessments.

(56 N. J. L. 416)

STATE (LEWIS, Prosecutor) v. BOARD OF CHOSEN FREEHOLDERS OF CUMBERLAND et al.

(Supreme Court of New Jersey. Feb. 23, 1894.)

STREET-RAILWAY COMPANIES—POWER OF MUNICIPAL CORPORATION TO GRANT FRANCHISE—CERTIORARI—WHO MAY MAINTAIN.

1. The Bridgeton Rapid Transit Company, organized under the act of April 6, 1886, had no right to construct a trolley road.

2. The board of chosen freeholders have the right to exercise supervision over county bridges, and, within reasonable limits, to control the mode in which such bridges shall be used. The consent of the board is a prerequisite to the right of a street-railway company to use the bridge.

3. It was the duty of the board of freeholders, before giving authority to a street-railway company to use a county bridge, to see that the bridge was safe for such use.

4. The action of the board of freeholders may be reviewed by this court, where the board clearly abuses the discretion committed to it.

5. By the lease and assignment by the Bridgeton Rapid Transit Company to the South Jersey Traction Company the latter company derived no right to use the county bridge for a trolley road.

6. A taxpayer of the city and county has such an interest in the subject-matter of this controversy as entitles him to a review of the action of the board of freeholders by the writ of certiorari.

7. Whether the traction company can use the public street for cars propelled by electric motors, without acquiring the rights of abutting landowners, is not decided.

(Syllabus by the Court.)

Certiorari at the suit of Francis M. Lewis against the board of chosen freeholders of Cumberland county, the Bridgeton Rapid Transit Company and the South Jersey Traction Company to review a resolution of defendant board. Resolution set aside.

Argued November term, 1893, before DEPUE, VAN SYCKEL, and REED, JJ.

Wm. E. Potter, for plaintiff. A. Q. Keasbey, for defendants.

VAN SYCKEL, J. This writ brings up a resolution of the board of chosen freeholders of Cumberland county, passed December 14, 1892, giving permission to the Bridgeton Rapid Transit Company, its successors and assigns, to lay double tracks across a county bridge over a navigable stream in Bridgeton, and the right to operate a street railway thereon by any mechanical power except steam. The Bridgeton Rapid Transit Company was incorporated November 23, 1892, under the act of April 6, 1886, and the supplements thereto, (P. L. p. 185.) Under this organization the rapid transit company had no right to construct a trolley road. *Green v. Inhabitants of City of Trenton*, 54 N. J. Law, 92, 23 Atl. 281. On the 20th of April, 1893, the South Jersey Traction Company was organized under the act of March 14, 1893, (P. L. p. 302.) On the 23d of June, 1893, the Bridgeton Rapid Transit Company, by a lease of that date, granted and demised to the South Jersey Traction Company, its successors and assigns, for the term of 999 years, all the property, and all the rights, powers, franchises, and privileges, of the lessor, reserving, as a rent therefor, the sum of one dollar per annum. The rapid transit company never did any work in the construction of a street railway, but after the execution of said lease the traction company proceeded with the construction of a trolley road until it was arrested in its work by the allowance of a writ of certiorari in this case.

It is the duty of the board of freeholders to erect and maintain bridges like the one referred to in this resolution, whether within or without the limits of a city. *Whitall v. Freeholders*, 40 N. J. Law, 302; *Beatty v. Titus*, 47 N. J. Law, 89. For the neglect of this duty, indictment will lie. There is nothing in the act of 1886, or in the charter of the city of Bridgeton, (P. L. 1875, p. 354,) which expressly or by implication deprives the board of freeholders of the right to exercise such supervision and control over this bridge as will enable it to perform its statutory duty. That duty cannot be performed unless the board may, within reasonable limits, control the mode in which the bridge shall be used. This bridge was constructed by the board of freeholders of Cumberland by authority of an act of the legislature passed March 14, 1867, (P. L. 1867, p. 269,) and by said act is under the control of said board. It must follow, therefore, that the

consent of the board is a prerequisite to the right of a street-railway company to use the bridge.

A large portion of the sum raised for county purposes, by taxation upon every citizen within and without the limits of incorporated cities, is often appropriated to the expense of erecting and maintaining such bridges. The duty devolved upon the board of freeholders, before passing said resolution, to see that the bridge was safe for the new use. While the courts cannot interfere with the board of freeholders in the proper exercise of their powers, their action may be reviewed when they wrongfully, illegally, or fraudulently appropriate the public moneys, or when they transcend their powers, or clearly abuse the discretion committed to them. *Lewis v. Freeholders*, 37 N. J. Law, 254; *McKinley v. Freeholders*, 29 N. J. Eq. 164. In this case it is clear from the testimony that the bridge in its present condition is not of sufficient strength to bear, with safety, the added weight and wear of a street railway, and not of sufficient width to permit of the granted use without injurious interference with ordinary travel. The case shows expressly that prior to the passage of the resolution the board of freeholders instituted no inquiry as to whether the bridge would bear the additional burden. It was not until afterwards that they employed an expert engineer, who reported that it would be unsafe to allow the bridge to be occupied by the street railway. The question is not whether, when the board of freeholders has exercised its discretion and passed its judgment upon the propriety of permitting the use of the public property in a given way, this court can review its action, but whether it can do so when it affirmatively appears that the board allowed a county bridge to be appropriated to the use of a private corporation, by which the bridge is endangered and the safety of public travel impaired, without previous inquiry to enable it to act intelligently. I think that the resolution certified was passed by the board of freeholders improvidently, in abuse of their power, and there appears to be no mode of protecting the public interest in such a case except by the writ of certiorari.

But, if the resolution adopted by the board of freeholders is without the alleged infirmity, the South Jersey Traction Company can derive no authority under it to use the bridge for its purposes. The resolution gives power to the rapid transit company to operate a street railway thereon by any mechanical power except steam. This language must be interpreted to mean, "by any mechanical power which said rapid transit company might lawfully use." As before stated, that company, under the case of *Green v. Inhabitants of City of Trenton*, supra, could not introduce the trolley system. It acquired no right, by virtue of this resolution, to apply that system, and could transmit to

the traction company no greater right than it had. The rapid transit company had the right, under the act of 1886, to carry passengers only, while the traction company, under the act of 1893, is authorized to carry both passengers and freight. It cannot be assumed that the right to use the bridge would have been granted to the latter company, the conditions being so essentially different. The traction company is without authority from the board of freeholders to use the bridge.

The only remaining question is whether, if the resolution is illegal and the subject of review, the relator has a right to intervene by certiorari. His status is that of a taxpayer of the city and county subject to taxation for the purpose of maintaining the bridge. A long line of decisions has recognized the rule that any taxpayer may prosecute a writ of certiorari to review any municipal or other official action which tends to burden his taxing district with a debt. *State v. Jersey City*, 34 N. J. Law, 390; *Seidler v. Hudson Co.*, 39 N. J. Law, 632; *State v. City of Paterson*, Id. 400; *Conover v. Davis*, 48 N. J. Law, 112, 2 Atl. 667; *Read v. Atlantic City*, 49 N. J. Law, 558, 9 Atl. 759. It is not necessary for the taxpayer to wait until the assessment consequent upon the illegal act is levied. Public policy requires that this rule should be liberally exercised in aid of those who, at their own expense, are willing to invoke this legal remedy to lessen the burden of taxation. The relator has such an interest in the subject-matter of this controversy as entitles him to the judgment of this court upon the legality of the resolution certified. In my opinion, the resolution should be set aside.

Whether the traction company can use the public street for cars propelled by electric motors without acquiring the rights of abutting landowners is a question upon which no opinion is intended to be expressed.

(N. J. E. 510)

LADY LINCOLN LODGE et al. v. FAIST
et al.

(Court of Chancery of New Jersey. Feb. 26, 1894.)

BENEVOLENT SOCIETIES—POWERS OF SUBORDINATE
LODGE—APPROPRIATION OF FUNDS.

A subordinate lodge of an order, the aim of which is "to unite fraternally all acceptable persons," may appropriate, for the support of a lodge to be organized under the same jurisdiction, part of a fund raised among its members by contribution, out of which its general expenses and sick benefits are payable, if such appropriation is not prohibited by its by-laws or the general laws of the order.

Bill by Lady Lincoln lodge, No. 702, Knights and Ladies of Honor, against William C. Faist and others. Bill dismissed.

W. D. Daly and J. Frank Fort, for complainants. Saml. Kallsch, for defendants.

GREEN, V. C. Lady Lincoln lodge, No. 702, Knights and Ladies of Honor, Hoboken,

N. J., is a voluntary association. It is organized under the jurisdiction of the grand lodge of the state of New Jersey. The order of fraternal societies known as the "Knights and Ladies of Honor" has its fountain head in a supreme lodge, which was incorporated under the laws of Kentucky April 1, 1878, a supplement to the act of incorporation being approved December 14, 1881; also, by act of incorporation under the laws of Missouri in 1885, and under the laws of Indiana in 1891. The objects of the corporation, as stated in section 2 of its articles of association, filed in the department of the state of Indiana, are "to unite fraternally all acceptable white persons, male and female; to give all possible moral and material aid in its power to its members, and those depending on its members, by holding moral, instructive, and scientific lectures, by encouraging each other in business, and by assisting each other to obtain employment; to care for the sick and distressed, and to promote benevolence and charity, by establishing a relief fund by contributions from members of the order of Knights and Ladies of Honor, from which, upon satisfactory evidence of the death of a member of said order, who is a contributor to said fund at the time of his or her death, and who has complied with its lawful requirements, a sum, not exceeding five thousand dollars, shall be paid to such member or members of his or her family, person or persons, dependent on or related to him or her, as he or she may have directed; to provide for creating a fund for the relief of sick and distressed members; and to ameliorate the condition of humanity in every possible manner." The constitution provides for the establishment of grand lodges in the different states, and for the organization of subordinate lodges under the jurisdiction of the respective grand lodges. What is known as the "relief fund" is made up of contributions of the members to the lodges, and is exclusively within the management and control of the supreme lodge, and is of the nature of a classified insurance, to which the appointee of the member is entitled on the death of the member. There is another fund, which, as I understand the constitution and laws of the order, is within the control and management of the respective lodges, being raised in each lodge by contributions from its members, or donations made thereto. This fund is called the "general fund" of the particular lodge, and from it are paid the general expenses of the lodge, and benefits which the lodge may, by its by-laws, prescribe to be paid to members disabled by sickness or other disability from following their usual business or occupation. Over this general fund of each lodge, no one has any authority or power of disposition, except the particular lodge to which it belongs, and such lodge is undoubtedly controlled in such disposition by any restrictions which may be prescribed in the by-laws of

such lodge, and, generally, that it should be for some purpose tending to carry out the general objects of the order; for it must be assumed that every contribution made by a member to the funds of the lodge has been made on the faith that it will be appropriated in no other way. *Abels v. McKeen*, 18 N. J. Eq. 462.

On January 13, 1892, Lady Lincoln lodge, at a regular meeting, (five members, by the by-laws, being a quorum for business,) by vote of 76 in the affirmative and 26 in the negative, adopted a motion "that \$1,500 of the general fund be turned over to our trustees, H. Roehm, H. Siemer, and William G. Faist, for the purpose of supporting and organizing a new lodge of Knights and Ladies of Honor," and subsequently a motion to reconsider that vote was lost by a vote of 76 to 21, and on the same evening the officers of said Lady Lincoln Lodge drew two warrants against the fund of the lodge to the order of said trustees,—one for \$1,000 and the other for \$500,—and delivered the same to the said trustees. Subsequently, certain members of Lady Lincoln lodge took their withdrawal cards, and organized a new lodge in Hoboken under the name of the "De Forest P. Lozier Lodge, No. —, of the Knights and Ladies of Honor," it being a lodge of the same order, and under the jurisdiction of the grand lodge of New Jersey; and the trustees above named, on the 24th of February, 1892, paid over the \$1,500 to the secretary pro tem. of that lodge, for the purpose of organizing and supporting it, taking a receipt specifying that as the object of such donation. Some 86 of the 318 members of the Lady Lincoln lodge withdrew from it, and organized, or became members of, the De Forest P. Lozier lodge. After this, steps were taken in the Lady Lincoln lodge to annul its former action, and notice was given to Roehm, Siemer, and Faist to return the money; but they claim that such notice was not served upon them until after they had paid it over to the representatives of the new lodge. Thereupon, this suit was brought against Roehm, Siemer, and Faist, and the De Forest P. Lozier Lodge, to recover the amount. Before paying the \$1,500 over to the new lodge, there was in the bank account of the Lady Lincoln lodge \$3,200.

On the principle that trust funds, when they have been diverted from the purposes of the trust, may be followed and recovered, so long as they may be identified, I think this action may be maintained, if there has in fact been an improper disposition of the funds of Lady Lincoln lodge. The money is still intact, and there is no dispute but that \$1,500 of the general fund of the new lodge represents the amount of the donation which was made to it by the old lodge, through Messrs. Roehm, Siemer, and Faist. This raises the question whether there has really been any improper diversion of the general fund of Lady Lincoln lodge. In the first

place, it has been appropriated for the organization and maintenance of another lodge of the same order, organized under the authority of the original charters and general constitution and laws of the supreme lodge, and under the jurisdiction of the grand lodge of the state. It is therefore appropriated to carrying out and enforcing the general objects of the order. This, however, is not conclusive, if it is an expenditure prohibited by the general laws of the order or the by-laws of the lodge. The general laws only require that part of this fund be devoted to the payment of the sick benefits to which members may be entitled. The by-laws of the Lady Lincoln lodge provide (article 3, par. 2) that the quarterly dues are fixed at \$1.50 per quarter, of which the lodge physician is to receive \$50 per quarter for the free treatment of the members. Article 4, par. 1. Members not in arrears for dues, fines, etc., and being members of the lodge for six months previous, who shall become sick, shall receive the weekly sum of \$5 per week. Should, however, the funds of the lodge become less than \$1,000, then the lodge shall say what weekly amount shall be paid. Paragraph 2. If a member should draw sick benefits for 26 weeks, then the lodge shall determine what further, if any, benefits shall be paid. Article 7, par. 1. As to the funeral of a deceased member, the lodge shall furnish two coaches, which shall be paid from the lodge funds. Outside of Hoboken, one coach will be furnished and a suitable floral tribute by the lodge. Article 10, par. 1. The two secretaries shall receive \$100 per year for their work, payable quarterly. These are the only provisions of the by-laws which relate to the expenditure of the lodge funds. There is no provision of the by-laws that the general fund of the lodge shall be appropriated to these purposes and none other. The provisions are simply that these payments are to be made, without reference to the fund from which the money is to be drawn, with the exception of the salaries of the lodge physicians. If the by-laws had provided that the general fund—which I understand to include the funds of the lodge other than those which the lodge must contribute to the grand and supreme lodge—should not be appropriated to other than certain specified purposes, the case would then come within the rule laid down by the chancellor in the case of *Abels v. McKeen*. In that case the fund had been contributed for a specific purpose, and, the purpose having been accomplished by the expenditure of a less amount than the sum raised, the court held that the trustees, in whose hands the money had been placed, had no right to expend it for any other than the specified purpose, and should repay the balance proportionately to the original contributors. The by-laws, by pledging the lodge to certain payments, in effect, charged the payments on its general fund, as the only one to which it has recourse, but this action does

not devote and appropriate the general fund to such specified purposes, and prohibit its use for other objects. If the general fund of Lady Lincoln lodge had been so low that this donation seriously crippled the finances of the lodge, and rendered it unable to make the payments which were specifically charged upon the general fund, or if the money had been donated to an object not contemplated by the organization, such action would fall within the principle of the case referred to. But there is no contention that, after this withdrawal of \$1,500, there was not a sufficient amount in the general fund to meet all payments for the purposes specified in the by-laws; and, as before shown, the appropriation was for the furtherance of the objects of the order. I am therefore of opinion that it cannot be held that the resolution of Lady Lincoln lodge contributing \$1,500 to the organization and maintenance of the new lodge was a diversion of the fund to an improper or unwarranted purpose, and will advise that the bill be dismissed.

(56 N. J. L. 440)

STATE (KENNY, Prosecutor) v. O'NEIL,
Surrogate.

(Supreme Court of New Jersey. Feb. 23, 1894.)

JUDGES—COMPENSATION—DISTRIBUTION OF FEES.

The act (P. L. 1889, p. 90) which provides that all fees authorized to be paid into court for the services of the common pleas judges, in counties where there are law judges receiving salaries in lieu of fees, shall be divided between the lay judges, does not include fees for the services of a law judge, paid under a special act providing fees for his services only.

(Syllabus by the Court.)

Application by John Kenny for mandamus to compel James H. O'Neill, surrogate of Hudson county, to pay the prosecutor, a lay judge of the court of common pleas, certain fees remaining in the hands of respondent. Heard on the return of rule to show cause. Writ denied.

Argued November term, 1893, before DEPUE, VAN SYCKEL, and REED, JJ.

Allan L. McDermott, for petitioner. John A. McGrath, for respondent.

REED, J. The fees which are the subject-matter of this rule are those which were formerly payable to the law or presiding judge of the Hudson county orphans' court. How these fees accrued, and how they now happen to be in the hands of the surrogate, will appear from a statement of the following legislation: The law judgeship in Hudson county was created by the act of 1868, (P. L. 1868, p. 363.) He was to receive a salary and no fees. By a supplement (P. L. 1870, p. 280) it was provided that the president judge should receive for every trial in the orphans' court where there were adverse parties the sum of two dollars, and for every decree upon settlement of an account the sum of four dollars. By an act (P. L. 1879,

p. 332) a salary was fixed in lieu of all fees per diem or other remuneration. It was provided that "all fees to which such judges are now entitled, shall be paid into the treasury of said counties respectively." By acts (P. L. 1886, p. 352; P. L. 1891, p. 133; P. L. 1893, p. 433) the salary was increased, but was still to be in lieu of all fees. By an act (P. L. 1881, p. 59) it is provided that all fees due to any judge shall be paid to the clerk of the court, to be paid over by him to such judge; and it is further provided that, if any of the judges of said court shall be in receipt of a fixed salary allowed by law in lieu of all fees, it shall be the duty of the clerk to pay over to the collector, for the use of the county, all fees received for services performed by such salaried judges. Under the act, the surrogate, as clerk of the orphans' court, received, during the year ending April, 1893, the sum of \$1,200 as fees for services performed by the president or law judge of the orphans' court. By the terms of the act he is directed to pay this sum, which he still retains to await the result of this proceeding, over to the county collector. The relator claims that this sum of \$1,200 should be equally divided between him and the other lay judge of the said court. He grounds his claim upon the provisions of an act of 1889, (P. L. 1889, p. 90.) This act, in its first section, enacts that, "hereafter, all such fees as are authorized by law to be paid into court for the services of the common pleas judges, in counties where there are law or president judges receiving salaries in lieu of fees, shall be equitably divided between the lay judges, except in counties where the lay judges also receive stipulated salaries in lieu of fees." The question of statutory construction is whether the fees now in the hands of the surrogate are such fees as the act requires to be divided among the lay judges. I am of the opinion that they are not. The fees mentioned in the act are those paid in for the services of the common pleas judges. The fees held by the surrogate are not received for services of the common pleas judges, but for the special services of the president judge alone. They are not court fees, receivable under the general fee bill, and which, by the act, (Revision, p. 406,) were to be divided between the judges who were in attendance when the services were rendered. They are fees paid under a special act for the services of one who was treated as occupying, by reason of his legal learning, a position of exceptional value and responsibility, and for whom a special fee bill was enacted. I think that the act would apply more appropriately to those general court fees in the division of which a president judge must participate unless cut off by statute. For this reason I think the writ should not go. This view renders it unnecessary to discuss the constitutionality of the act, which would raise the question whether counties in which the act operates form a

class, and whether an act which increases the perquisites of county judges according to a fee bill contained in a special act applicable to one county is general legislation. Rule discharged.

(56 N. J. L. 414)

**STATE ex rel. BUMSTEAD et al. v. JUDGES
OF COURT OF MONMOUTH
COMMON PLEAS.**

(Supreme Court of New Jersey. Feb. 23, 1894.)

**COURTS—TRANSFER FROM CIRCUIT TO COMMON
PLEAS.**

Where a caveat is entered to a will, and the questions involved in the controversy are certified by the orphans' court, under section 19 of the orphans' court act, into the circuit court, the latter court has no power, under the act of March 23, 1892, (Pamph. Laws, p. 224,) to send the case to the common pleas for trial.

(Syllabus by the Court.)

Application by Margaret Bumstead and others for mandamus to the judges of the court of common pleas of Monmouth county. Heard on rule to show cause. Writ denied.

Argued November term, 1893, before DEPUE, VAN SYCKEL, and REED, JJ.

Appellate and Hope, for relators. Nevins & Wilson, for defendants.

VAN SYCKEL, J. A caveat to the will of Stephen Bumstead, deceased, was filed in the orphans' court of the county of Monmouth, whereupon the questions involved in the controversy were certified by said orphans' court into the circuit court, in pursuance of the nineteenth section of the orphans' court act. Revision, p. 756. By order of the circuit court the case was transferred for trial to the court of common pleas under the act of 1892, p. 224. On the trial of the case in the pleas the issues were found in favor of the caveators, who thereupon applied to the judges of the pleas to certify the proceedings to the orphans' court, in pursuance of the twentieth section of the orphans' court act. The court of common pleas granted a new trial, and refused to certify to the orphans' court, as requested. A rule to show cause why a writ of mandamus should not issue commanding the common pleas to certify the verdict and proceedings was then granted by this court.

The act of March 23, 1892, entitled "An act to authorize the transfer of suits from the several county circuit courts to the several inferior courts of common pleas," provides: "That when any suit is or shall be pending in any circuit court of any of the counties of the first and second classes of this state it shall be lawful for any justice of the supreme court residing in that district, at his discretion, to order the process, pleadings and other papers pertaining thereto to be delivered to the clerk of the inferior court of common pleas of such county, who is thereby directed to file the same in his office, * * * and that thereupon said inferior court of common pleas shall have authority to hear and decide said suit and to proceed therein, in like manner as if the same had been originally brought in said court: provided nevertheless that said justice of the supreme court may at any time by his order remand said suit into the circuit court from which it shall have been removed; and thereupon said process,

pleadings, minute entries, and other proceedings shall be returned to and filed in said circuit court, and said suit shall therein be proceeded with according to law." It is manifest that this legislation applies exclusively to suits instituted in the circuit court, where process issued out of the circuit court and pleadings are filed in said court in the orderly conduct of the cause. It had no relation whatever to the trial of an issue sent from the orphans' court to the circuit court under the nineteenth section of the orphans' court act. In such a case there is an entire absence of process and pleadings in the circuit court. There is nothing in the act of 1892 which by expression, or by the remotest implication, gives the circuit court authority to deliver anything to the common pleas which will invest that court with power to determine the issue involved in the trial of a caveat to a will. The common pleas was without power to hear the case. The entire proceeding is coram non jure, and void. The case is still pending in the circuit court, where it must be tried according to law. The mandamus must be denied, but without costs.

JOHNSON v. CLARKE et al.

(Court of Chancery of New Jersey. Feb. 24, 1894.)

**MORTGAGES—ASSIGNMENT PENDING FORECLOSURE
—EFFECT.**

1. Where the complainant in a suit to foreclose assigns his interest to a person not a party complainant, the bill must be dismissed, unless the latter takes proper steps to establish his interest on the record.

2. The assignment of a bond and mortgage without the assignment of the note secured confers no rights on the assignee.

Bill by William Y. Johnson, receiver, against James S. Clarke and others. Dismissed.

Nelson Y. Dungan, for complainant. H. B. Herr and J. N. Voorhees, for defendants Hildebrand and Hoffman. Henry A. Fluck, for defendant Greendyke. Paul A. Queen, for defendant Sutton.

BIRD, V. C. The complainant, who is the receiver of an insolvent bank, presented this bill to foreclose a mortgage, which, together with the bond therein referred to, was given to secure the bank for advances made to the defendant Clarke. In compliance with the understanding at the time of the execution and delivery of the bond and mortgage, a loan was made to Clarke, of \$2,382.59, upon his note, which was indorsed by J. N. Pidcock. This note went to protest. The receiver found this note and the said bond and mortgage among the assets of the bank. After the filing of the bill, J. N. Pidcock made a draft for \$1,766 upon his son, John F. Pidcock, and delivered it to the receiver, with the directions that that amount was to be appropriated to the payment, to that extent, of this note. The draft was presented to John F. Pidcock, who thereupon gave his certified check to the receiver, upon the agreement that the receiver was to assign to him the bond and mortgage, and should allow the proceedings in this suit to be conducted to a decree in his (the receiver's) name. Such an assignment was made by the receiver. The receiver, however, retained, not only the possession, but the owner-

ship, of the said note, for the purpose of collecting the balance, if possible, from the maker or indorser. The amount of \$1,766 was indorsed upon said note as payment to that extent.

These facts show, first, that the complainant has no longer any interest whatsoever in this suit, and that as to him the bill, under the practice of this court, must be dismissed. If John F. Pidcock has any interest therein,—not being a party complainant, and not having taken the proper steps to establish his interest upon the record,—of course, as to him, it cannot stand. See *Fulton v. Greacen*, 44 N. J. Eq. 443, 15 Atl. 827; *Smith v. Davis*, (N. J. Ch.) 19 Atl. 541.

These facts show, secondly, that the debt which was manifested by the note was actually discharged, to the extent of the \$1,766, and that the lien of the mortgage was consequently, to that extent, at least, if not absolutely, discharged. At all events, they show that John F. Pidcock, the assignee of the bond and mortgage, took nothing of any value, from a legal or equitable standpoint, because he took no interest in the note itself, which was the principal thing, nor in any part thereof. When a debt is discharged, all securities connected therewith are necessarily released. So, too, when instruments which are merely incidental to the principal are assigned without the principal or any interest therein, such assignments confer no rights, as against the holder or maker of such principal. It would be quite absurd to say that in such case the holder of the evidence of a debt, who is also the holder of collateral securities, could separate or divide the obligation in such a manner as to subject the debtor to two prosecutions for the same debt. This would manifestly be the case if he could assign any rights in such securities, for in such case the holder of the securities could prosecute thereon, and the holder of the principal evidence of indebtedness could also prosecute. It is plain, therefore, that without the assignment of the debt, which is but the evidence thereof, the assignment of the securities confers no rights. *Stevenson v. Black*, 1 N. J. Eq. 339; *Bolles v. Wade*, 4 N. J. Eq. 459; *Den v. Dimon*, 10 N. J. Law, 156; 1 *Jones, Mortg.* §§ 804, 806, 840. So far, I only speak with reference to the rights of John F. Pidcock, to whom it is alleged that the said bond and mortgage (but not the note which they were given to secure) were assigned. The assignment itself not having been produced, I can make no reference to any other interests, beyond the facts which were either proved or admitted as above. But with respect to J. N. Pidcock, the indorser upon the note which was secured by the mortgage in question, it may be said that the pleadings and proofs establish that he became the owner in fee of the equity of redemption covered by the mortgage, and that he gave a draft upon the said John F. Pidcock for the said \$1,766, which was indorsed upon the note, as above mentioned. The receiver took this in satisfaction of the lien of the mortgage upon the premises; he stating that he did so because he supposed it was the full value of the premises. If this payment was made with the understanding between J. N. Pidcock and the receiver that the premises should be discharged, then, of course, the mortgage can have no vitality; and, if it be true that J. N. Pidcock paid the \$1,766, then, he being the owner of the equity of redemption, the mortgage is discharged pro tanto. *Bolles v. Wade*, 4 N. J. Eq. 459; *Bank v. Barrows*, 80 N. J. Eq. 98; *Traphagen v. Lyons*, 38 N. J. Eq. 613, 616. I will advise that the bill be dismissed, with costs to each of the answering defendants.

(56 N. J. L. 401)

JENNINGS v. SCARBOROUGH, Bishop, et al.

(Supreme Court of New Jersey. Feb. 24, 1894.)

RELIGIOUS SOCIETIES—PROTESTANT EPISCOPAL RECTORS—DEPRIVATION.

1. Courts of law will not interpose to control the proceedings of ecclesiastical bodies in spiritual matters which do not affect the civil rights of individuals; but when the civil rights of an individual are involved, jurisdiction is committed to the courts of law to protect those rights which the court cannot discard.

2. The call of a rector by the vestry, and the acceptance of such call, creates a contract for the payment of the stipulated salary so long as the pastoral relation continues. This contract is a civil right which the courts will protect and enforce.

3. By a canon of the Protestant Episcopal Church a rector canonically elected and in charge cannot resign his parish without the consent of the parish or its vestry, nor can such rector be removed therefrom by the parish or its vestry against his will, except upon the dissolution of his pastoral connection, in the manner and by the authority designated in other canons.

4. In the diocese of New Jersey, when there are differences between a minister and his congregation which cannot be brought to an amicable conclusion, the procedure for dissolving the pastoral relation is prescribed by canon 4, tit. 3, §§ 3, 4. Section 3 provides that when the matter cannot be amicably settled within a reasonable time the bishop shall convene the standing committee, and shall give notice to the parties to appear before them and present their proofs and arguments at such time and place as he shall appoint. Section 4 provides that when the hearing shall be concluded the bishop shall make such order in regard to the matter as he may think just and for the true interests of the church, and such order may require the rector to resign his rectorship, and may require the church to pay a sum of money to the rector; and it is made the duty of the rector and of the church and every member thereof to submit to and abide by such order, etc., with a proviso that no order shall be made unless with the advice and concurrence of at least a majority of the standing committee who shall have been present at the hearing. *Held*: (1) That by sections 3 and 4 of the canon a special tribunal was created, consisting of the bishop and the standing committee, for the hearing of proofs and arguments presented before that tribunal; (2) that the prosecutor was entitled, as of right, to present his proofs before the bishop and the standing committee, and to a hearing before that body on the proofs presented by both parties, especially as the determination of that tribunal might deprive him of property rights which inured to him in virtue of his rectorship; (3) that the order under review, having been made without hearing proofs, and not being in compliance with the procedure prescribed by the canon, was irregular; (4) that the order, being one affecting the civil rights of the prosecutor, in that, if valid under the law of the church, it terminated his contractual relation with the parish, is therefore reviewable on certiorari.

(Syllabus by the Court.)

On certiorari to review an order of the bishop of the diocese of New Jersey, dissolving the pastoral relations between the prosecutor, as rector, and the parish of Grace Church in Westfield. The order in question is in these words: "At a meeting of the standing committee of the diocese of New Jersey, held in Elizabeth, on Monday, February 27, 1893, the following order of the

bishop of the diocese in connection with the case *The Vestry of Grace Church, Westfield, versus The Reverend J. B. Jennings*, was duly considered and approved by a majority of those present, the Reverend H. H. Oberly not voting." The order standing on the minutes of the committee is as follows: "(1) The Reverend J. B. Jennings shall cease to be rector of the parish of Grace Church, Westfield, on March 15, 1893. (2) The parish of Grace Church, Westfield, shall pay to the Reverend J. B. Jennings all arrears of salary due at that time."

Argued before DEPUE, LIPPINCOTT, and ABBETT, JJ.

Craig Marsh, for prosecutor. B. F. Haywood Shreve, for defendants.

DEPUE, J. The prosecutor, an ordained clergyman of the Protestant Episcopal Church, was, in May, 1889, canonically transferred to the diocese of New Jersey, of which the defendant John Scarborough was bishop. By a vote of the vestry of Westfield, New Jersey, adopted September 29, 1890, he was called to the rectorship of that church, at the yearly salary of \$1,000. The call was accepted, and he entered upon his duties as rector on the 22d of October, 1890. By a canon of the Protestant Episcopal Church a rector, canonically elected and in charge, cannot resign his parish without the consent of the parish or its vestry, nor can such rector be removed therefrom by the parish or vestry against his will, except upon the dissolution of his pastoral connection in the manner and by the authority designated by other canons. Digest of Canons of the Protestant Episcopal Church of the United States, canon 4. The call of the prosecutor was without limitation as to time, and it is admitted that, under such a call, the tenure is for life, unless terminated by mutual consent, or the pastoral relation is dissolved as provided for in the canons. Dissensions having arisen in this church, the bishop, on the 27th of February, 1893, made an order to this effect: That (1) the Reverend J. B. Jennings shall cease to be rector of the parish of Grace Church, Westfield, on March 15, 1893; (2) the parish of Grace Church, Westfield, shall pay to the Reverend J. B. Jennings all arrears of salary due on that date. The purport and effect of this order was to dissolve the pastoral relation of the prosecutor with his parish. Whereupon this writ of certiorari was sued out. The contention on behalf of the prosecutor is that the proceedings of which this order was the outcome were not in conformity with the canons of the diocese of New Jersey. The proceedings were initiated by petition, dated February 1, 1893, and signed by all the persons who at that time were wardens and vestrymen of the church. This petition was addressed to the bishop, and asked for a dissolution of the pastoral tie existing between the prosecutor and the parish, in accordance with title 3, canon 4, of the consti-

tution and canons of the church. Canon 4, tit. 3, so far as is material to this case, is as follows:

"Of Differences between Ministers and Their Congregations. Section 1. Whenever there shall be any serious difference between the rector of any church in this diocese and the congregation thereof, it shall be lawful for a majority of the vestry or trustees to make a representation to the bishop stating the facts in the case, and agreeing for themselves and for the congregation which they represent, to submit to his decision in the matter, and to perform whatever he may require of them by any order which he may make, under the provisions of this canon, and shall at the same time serve a copy of the representation on the rector. Sec. 2. It shall be the duty of the bishop at all stages of the proceedings to seek to bring them to an amicable conclusion; in such a case the agreement between the parties, signed by them and attested by the bishop, shall have the same force as an order made under section 4 of this canon. Sec. 3. If the matter shall not be amicably settled within a reasonable time, the bishop shall convene the standing committee and shall give notice to the parties to appear before them and present their proofs and arguments at such time and place as he may appoint. He may adjourn or continue the hearing of the matter at his discretion. Sec. 4. When the hearing is concluded, the bishop shall make such an order in regard to the matter as he may think to be just and for the true interests of the church; and such order may require the rector to resign his rectorship, and may require the church to pay a sum of money to the rector; and it shall be the duty of the rector, and of the church, and every member thereof, to submit to and abide by such order, as the final and conclusive determination of all matters of difference between them: provided, that no order shall be made under this or the next succeeding section of this canon, unless with the advice and concurrence of at least a majority of the members of the standing committee, who shall have been present at the hearing. Sec. 5. If it shall be made to appear to the bishop that any agreement made under section 2 of this canon, or any order made under section 4 of this canon, shall have been disregarded by any of the parties concerned, or if application be made to him to modify such order, he may convene the standing committee, and, after hearing such further proofs and arguments as may be presented to him, make such further order as he may think proper with the same effect as an order made under section 4 of this canon."

Prior to the petition of the vestry of February 1, 1893, as early as December of the previous year, charges had been made seriously affecting the moral conduct of the prosecutor, and, pursuant to canon 2 of title 3, a committee of investigation was appointed by the bishop. This committee, by its report

dated January 6, 1893, reported that those charges had not been sustained. The petition of February 1, 1893, refers to the preceding investigation with the expression of mortification and disappointment at the result, and characterizing the prosecutor as "a priest whose worthiness rests in the fact that he has not been proven to this commission a liar and a drunkard." It also contained an allusion to the "continuation in the parish of the practices that marked the private life of the rector in other parishes." Upon the presentation of this petition the bishop, without notice, or hearing the prosecutor or his proofs, and without convening the standing committee, made an order, dated February 4, 1893, containing his decision that the prosecutor should cease to be the rector of this church on and after the 15th of February then next, and that the vestry of the church should pay the prosecutor all arrears of salary up to that date. The order of February 4, 1893, is properly referable to the second section of the canon, as an effort to obtain an amicable conclusion of the controversy between the parties. The order, with a copy of the petition, was transmitted by the bishop to the prosecutor. It was not acceded to by the prosecutor. In his letter to the bishop of February 10, 1893, he said: "I am very sorry. I would like to obey your order to resign my parish, but I cannot possibly do so under the circumstances; it would place a stigma upon my life and ministry. * * * If my case must go to the standing committee, let us have it done in accordance with the canon. Pardon me, my dear bishop, for saying I do not think your order for my resignation is in accordance with canon iv., title iii., section 4."

The bishop's order of February 4th not having resulted in an agreement between the parties, the procedure to dissolve the pastoral relation in invitum should have been under sections 3 and 4 of the canon, and not under section 5. There is a distinction of great importance between the procedure prescribed by section 3 and proceedings under section 5. By section 3, the standing committee shall be convened, and notice given to the parties to appear before them and present their proofs and arguments, and by the proviso in section 4 no order that may be made is valid, unless with the advice and concurrence of the majority of the members of the standing committee who shall have been present at the hearing. These sections constitute a tribunal, consisting of the bishop and the standing committee, for the hearing of proofs and arguments presented before it. After such hearing is concluded, the bishop may make such an order in regard to the matter as he may think to be just and for the true interests of the church, provided the same receives the concurrence of a majority of the members of the standing committee present at the hearing. Section 5 provides for the contingency of an agreement between the

parties, made under the second section of the canon, or of an order made under section 4 having been disregarded, or of an application being made to the bishop to modify such order. In either of these events the standing committee may be convened, and a rehearing be had upon further proofs and arguments. The proceeding under section 5 is by way of appeal from an order made under some one of the preceding sections, and it seems, from the language of the section, that the convening of the standing committee for that purpose, as well as the hearing of further proofs, are matters discretionary. Where the dissolution of the pastoral relation cannot be effected by amicable arrangement, through the good offices of the bishop, the only method of obtaining that result provided for by the canons of the diocese is by proceedings initiated under section 3 and conducted in conformity with the third and fourth sections. The order made by the bishop in this case for convening the standing committee in express terms notified that body to convene on Monday, the 27th of February, at 11 a. m., at the guild rooms of Christ Church, Elizabeth, under the provisions of title 3, canon 4, § 5, to consider the differences between the vestry of Grace Church and the prosecutor. The notice to the vestry, and also to the prosecutor, stated that the standing committee had been summoned according to the provisions of section 5. These notices did not conform to the requirement of section 3. They gave notice to the parties to appear before the standing committee at the time and place named, but did not notify them to present their proofs and arguments at the time and place appointed. The paper presented by the vestry to the standing committee treats the proceeding as by way of appeal, under section 5, from the bishop's order of February 4th, and not, in fact, as a hearing under section 3. The same observation will apply to the action of the standing committee. When the members came together at Elizabeth, they organized in the study of Christ Church, and, as testified by the secretary, "proceeded to formulate the principles which would guide them in the hearing," and then went to the guild room, where the parties were, and the secretary read "the rules of proceeding." On cross-examination the same witness testified that the committee had determined that there should be no argument, no counsel, and nothing but a statement of facts by the representatives of the vestry and Mr. Jennings; that the hearing should be limited to hearing those two parties. The minute certified in the return to this writ is to the same effect. It is in these words: "On motion, it was resolved that the committee, with the bishop, hear a statement of the case of the Vestry of Grace Church, Westfield, v. The Rev. J. B. Jennings, by the representatives of the parish, and also by the Rev. J. B. Jennings, without counsel or ar-

gument." The minute further states that the statement of the vestry was read, after which the Reverend Mr. Jennings made his statement and argument. The committee retired to the rectory for deliberation with the bishop. After deliberation, the bishop stated what his order was, (which is the order under review,) and that the concurrence of the standing committee was given to the order. In the depositions taken under a rule of this court it appears that the prosecutor had witnesses present ready to testify in his behalf, and there is the affirmative testimony of witnesses, whose integrity we are not at liberty to impugn, that the prosecutor took exception to the fact that he was not permitted to have witnesses, and asked an adjournment to enable him to consult counsel and prepare his case. We think that the prosecutor was not entitled to be represented by counsel at the hearing, but that he was entitled as of right to a hearing upon proofs presented before the committee, pursuant to sections 3 and 4 of the canon, especially as the result of the deliberations of that tribunal might deprive him of property rights which, under the general canons of the church, inured to him in virtue of his rectorship. We also think, although there is some conflict of testimony on the subject, the fair result of the evidence is that the prosecutor did not deprive himself of the right to such a hearing by waiver or acquiescence. The order under review, although it purports on its face to have been made under sections 3 and 4, was, for the reasons above given, irregular. The standing committee was convened under section 5; the notice to the prosecutor of the sitting of the committee stated that it was convened under that section; it contained no notice that he should produce his proofs before them, as prescribed by section 3, and the rules of procedure adopted by the committee for the hearing excluded proofs other than the statement of the case by the parties, respectively; and the prosecutor was neither permitted to call witnesses, nor to have an adjournment to enable him to prepare his case.

On behalf of the defendants the contention is that the subject-matter of the controversy is not cognizable in a court of law. The act under which Grace Church was incorporated constituted the wardens and vestrymen trustees, to whom is committed the control and management of the temporalities of the church. *Revision*, pp. 962, 963; *Livingston v. Trinity Church*, 45 N. J. Law, 230. The call by the vestry and the acceptance by the prosecutor created a contract for the payment of the stipulated salary so long as the pastoral relation subsisted. This contract is a civil right, which the courts will protect and enforce. *Worrell v. First Presbyterian Church*, 23 N. J. Eq. 96; *Miller v. Baptist Church*, 16 N. J. Law, 251-254; *Van Vlieden v. Welles*, 6 Johns. 85. Under the ecclesiastical law which regulates the tem-

poral affairs of the Episcopal Church, a rector, called and duly instituted, also has rights in the church edifice for the invasion or disturbance of which, by the wardens and vestrymen, a suit at law will lie. *Lynd v. Menzies*, 33 N. J. Law, 162, 167, 168. These contractual and property rights are vested in a rector so long as the rectorship continues, and, by the canon already referred to, that relation can be terminated only by mutual consent, or by dissolution in the manner provided for in the canons. By the canons of the diocese of New Jersey a special tribunal is established, consisting of the bishop and the standing committee, to which is committed jurisdiction to dissolve the pastoral relation between a rector and his parish, and the course of procedure by which the jurisdiction conferred shall be exercised is prescribed. The order under review purports to dissolve the pastoral relation of the prosecutor and the parish from the date named therein, and, if valid, its legal effect would be to put an end to the legal rights that were vested in the prosecutor as rector. Courts of law will not interpose to control the proceedings of ecclesiastical bodies in spiritual matters, which do not affect the civil rights of individuals, nor will they interfere with the action of the constituted authorities of religious societies in matters purely discretionary. *Livingston v. Trinity Church*, 45 N. J. Law, 230. But where, as in the present case, the civil rights of an individual are involved, jurisdiction is committed to the courts of law to protect those rights, which the court cannot discard. The cases in which courts of law have entertained actions for salary, and for disturbance of the rights of a rector in the church edifice by the trustees of the church, and the numerous cases in which the courts, by mandamus and certiorari, have intervened to protect the civil rights of members of voluntary associations, are precedents fully establishing the jurisdiction of the civil courts where civil rights are involved. In *Den v. Bolton* the court considered and adjudicated upon the jurisdiction of the classis of the Dutch Reformed Church to depose one of its ministers from the ministry, and, having found jurisdiction to that end in the rules for the government of the church, the court declined to consider the manner in which that jurisdiction had been exercised in that case, on two grounds: (1) That no rules of procedure were prescribed in the constitution of the church, and, as was said by the chief justice, "of course it is subject to the discretion of the classis;" and (2) that the remedy of the party aggrieved was by appeal to a higher tribunal of the church. 12 N. J. Law, 206-220. As already appears, the course of procedure for dissolving the pastoral relations of the rector with his parish is by the canons of the Episcopal Church specially prescribed. An order dissolving that relation, not made in conformity with the canons, is *coram non judice*. Nor is

there, by the law of the Episcopal Church, another tribunal to which an appeal may be made.

The writ of certiorari in this case was properly allowed. How far the court will go in review of the proceedings under consideration is another question. Section 4 of the canon provides that, when the hearing is concluded, "the bishop shall make such order in regard to the matter as he may think to be just and for the true interests of the church," and it is made the duty of the rector, and of the church and every member thereof, to submit to and abide by such order, provided it be made with the concurrence of a majority of the members of the standing committee who shall have been present at the hearing. With respect to the judgment that shall be pronounced by the bishop with the concurrence of the committee, after a hearing, the authority of the bishop is discretionary and supreme. The prosecutor, as an ordained minister of the church, is subject to the laws of the church, and to its constituted authorities, but at the same time he is entitled to a hearing in compliance with the laws of the church before judgment is pronounced. The proceedings on which the order in question was made were not in compliance with the canons of the church, and for this reason the order should be set aside.

(78 Md. 577)

EXCHANGE BANK OF WHEELING v. SUTTON BANK.

(Court of Appeals of Maryland. Feb. 8, 1894.)

NEGOTIABLE INSTRUMENTS—CHECKS—NOTICE OF NONPAYMENT.

1. Neither a check nor bill of exchange operates as an assignment pro tanto of the drawer's funds in the hands of the drawee.

2. An instrument drawn on a bank, directing the payment to a person named of a specified sum of money which is on deposit with the drawee, and naming no date of payment, is a check.

3. Where a check on itself is sent to a bank for collection, the bank becomes the agent of the person sending it, and is liable to the latter for damage caused by its failure to give notice to the drawer of nonpayment.

4. A failure to notify the drawer of a check of nonpayment does not discharge him from liability, unless he actually or presumptively suffers injury therefrom.

5. Where a check is sent by the payee to the bank on which it is drawn for collection, and the bank immediately fails, a transfer of a credit for the amount of the check from the drawer to the payee by the assignees of the bank does not constitute payment of the check.

Appeal from superior court of Baltimore city.

Action by the Exchange Bank of Wheeling against the Sutton Bank. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before BRYAN, FOWLER, BOYD, and PAGE, JJ.

Ed. G. Miller, and Leigh Bonsal, for appellant. Frank Woods, for appellee.

PAGE, J. This is an action of assumpsit upon a case stated for the opinion of the court, with a request to render a judgment in accordance therewith. The defendant below, being indebted to the plaintiff for certain collections made by the former on account of the latter, on the 9th day of January, 1892, mailed to the plaintiff the following instrument of writing, viz.: "The Sutton Bank. Sutton, W. Va., Jan. 9th, 1892. Pay to the order of J. J. Jones, Esq., Cash., \$936.50. Nine hundred and thirty-six and fifty cents. T. M. Berry, Cashier. To J. J. Nicholson and Sons, Baltimore, Md." The plaintiff received it on the 13th following, and on the same day forwarded it by mail to the Nicholsons, with whom both parties kept accounts, indorsed as follows: "For collection and credit account of Exchange Bank, Jan. 13th, 1892, of Wheeling, West Va. John J. Jones, Cash." On the morning of the 14th the paper was received by the Nicholsons, and was stuck upon a file where were generally placed the various checks drawn upon the house in the ordinary course of business. The defendant then had on deposit to its credit with the banking house a sum in excess of \$956.50. Later in the day, it was taken from the file, and entered to the debit of the defendant's account, but was not then entered as a credit to the account of the plaintiff. On the morning of the 14th, Nicholson & Sons were hopelessly insolvent, and about 1 o'clock of that day made an assignment to trustees, who, after they had taken possession, entered the check to the credit of the plaintiff; but at the time of the receipt of the check the Nicholsons did not have in their banking house the amount of the plaintiff's claim, in actual cash, nor at any time thereafter. The paper is now lost, and it is not known whether it was protested or not; but, if it was, no notice thereof, or of the nonpayment, was sent to or received by either the plaintiff or defendant. A demand was made by the plaintiff on the defendant for payment on the 7th of June, 1893, and until that day the defendant had no knowledge that it had not been paid. This was the only demand made on the defendant by any one.

It is not contended that the treatment of the paper by the Nicholsons or their trustees was tantamount to a payment. There was no credit given to the payees for the amount; and, under the circumstances of the case, until this was done there was no evidence that it had been accepted. Whether it be regarded as a bill of exchange or a check, it did not operate as an assignment pro tanto of the drawer's funds in the hands of the Nicholsons until it was accepted. *Moses v. Bank*, 84 Md. 580. So far as the plaintiff was concerned, there was no evidence that the Nicholsons had accepted the order upon them, and thereby agreed to become responsible to it for the amount. And apart from this, at the time the paper was

drawn, and when received by the Nicholsons, they were hopelessly insolvent; and under such circumstances a transfer of credit from the defendant to the plaintiff would have been a mere delusion. After the assignment, they ceased to be a going concern, and neither the firm nor their trustees had the right to make a transfer of credit which was wholly worthless. *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 20 N. E. 193. A check or bill is not a payment until paid, (*Mason, Banks*, §§ 544, 546; *Lewis v. Brehme*, 38 Md. 412; *Insurance Co. v. Smith*, 6 Har. & J. 166,) or unless it is accepted as such or the creditor parts with it, or is guilty of some laches by which injury inures to the drawer, (*Glenn v. Smith*, 2 Gill & J. 509.) In this case, therefore, unless it can be shown that the plaintiff has been guilty of some negligence whereby the defendant has been either actually or constructively injured, the paper having been lost, it was not improper to resort to the original cause of action. *Myers v. Smith*, 27 Md. 50.

What was the character of the paper offered in evidence? The appellee contends it is a bill of exchange. This court has stated in *Moses v. Bank*, 34 Md. 579, that "a check is denominated a species of inland bill of exchange,—not with all the incidents of an ordinary bill of exchange, it is true,—but still it belongs to that class and character of commercial paper." And in *Bull v. Bank*, 123 U. S. 105, 8 Sup. Ct. 62, in which an instrument of writing exactly similar to the one in this case was declared by the court to be a check, Judge Field, speaking for the whole court, says: "When an instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check. The chief points of difference are that a check is always drawn on a bank or banks; no days of grace are allowed, the drawer is not discharged by the laches of the holder in presenting it for payment, unless he can show that he has sustained some injury by the default, it is not due until payment is demanded," etc. *Merchants' Bank v. State Bank*, 10 Wall. 647; *Harker v. Anderson*, 21 Wend. 375; *Bank v. Bitzinger*, 118 Ill. 484, 8 N. E. 834; *Harrison v. Wright*, 100 Ind. 515; *Bank v. Coates*, 3 McCrary, 9, 8 Fed. 540; *Daniel, Neg. Inst.* § 1566; *Story, Prom. Notes*, § 487; *Morse, Banks*, § 362. We do not think what was said by this court in *Hawthorn v. State*, 56 Md. 534, is in conflict with the views here expressed. There, as well as in *Moses v. Bank*, supra, they held that a check was a species of bill of exchange,—not with all the incidents of an ordinary bill of exchange, but belonging to that class and character of commercial pa-

per; or, in other words, as was said by Cowan, J., in *Harker v. Anderson*, supra, the "bill is the genus, and the check is the species." And therefore *Hawthorn* was within the terms of the statute which made it a felony to forge an indorsement on a bill of exchange. The instrument of writing in question in this case must therefore be treated as a check. On receipt of the check, the plaintiff, with reasonable promptness, forwarded it to the Nicholsons, indorsed: "For collection and credit account of Exchange Bank, Jan. 13th, 1892, of Wheeling, W. Va." Such an indorsement constituted them the agents of the plaintiff to collect and credit, and at the same time, as drawees of the check, they were also the agents of the drawers, to pay. The plaintiff was therefore responsible for any omission of duty on the part of the Nicholsons in their capacity as collectors. As collecting agents of the plaintiff, it was their duty to do whatever was necessary in respect to demand and notice to the drawer, and for any negligence in regard to this they would be liable to the plaintiff, and not to the defendant, for such damages as might be occasioned by reason of their neglect. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459. The evidence is clear that they did not transfer the credit for the amount of the note from the defendants to the plaintiffs. If they had done this, other questions would have to be considered here, upon which we are not now called to decide, and do not intimate our opinion, and the failure to make such transfer was equivalent to a refusal to accept and pay. Under such circumstances, it was their clear duty to give notice of the nonpayment, to the drawer, in order that the drawer might take any necessary steps to protect its interest; and if they failed to do so, and loss ensued by reason of such want of notice, it falls on the plaintiff, and not upon the drawer. A failure, however, to notify the drawer of the nonpayment of a check, does not always discharge him from liability. It must also be shown that he has either actually or presumptively suffered some loss or injury therefrom. *Daniel, Neg. Inst.* § 1587, and authorities there cited; *Bull v. Bank*, supra. In the case of *Norris v. Despard*, 38 Md. 491, it is true, this court said, "If the notice be not given, it is a presumption of law that he is injured by the omission;" but they explain this remark by adding that, "In the application of the principle, courts must inquire into the liabilities of the respective parties to the check, for the purpose of ascertaining whether this injury, either actual or presumptive, could take place;" and further on, in the same opinion, "It was but just that they should give the defendant notice of the nonpayment in reasonable time before they brought their action, or to have shown that the defendant sustained no injury in consequence." *Rhett v. Poe*, 2 How. 457; *Eichelberger v. Finley*, 7 Har. & J. 385; *Schu-*

chardt v. Hall, 86 Md. 602. Here it is clear that, at the time the check reached the Nicholsons, they were hopelessly insolvent, and did not have in their banking house the amount of the check, in actual cash. Their assignment on the same day placed all their assets in the hands of trustees, and definitely fixed the status of any claim the defendant had, or could have, upon them. Under these circumstances, we can perceive no way by which, on account of the want of notice, injury to the defendant, either "actual or presumptive," could take place. The judgment below must be reversed. Judgment reversed, and judgment for the appellant for the sum of \$1,053.56, with interest from this date until paid, and costs.

(78 Md. 545)

THOMAS v. GREGG et al.

PENNINGTON et al. v. SAME.

(Court of Appeals of Maryland. Jan. 25, 1894.)

TRUSTS—RIGHTS OF BENEFICIARIES—REQUESTS OF CORPORATE STOCK.

Testator bequeathed in trust, for the use of his daughters for life, stock in a company which thereafter passed a resolution reciting that, for three years ending September, 1891, the net earnings had amounted to a specified sum, that they had been applied to the improvement of the company's property, and that therefore a dividend of 20 per cent. be declared for such period, "payable in common stock of the company." Held, that the dividend was income and not capital, and that the daughters were entitled to that earned after testator's death.

Appeal from circuit court of Baltimore city.

In the matter of the will of John Gregg, deceased. James Gregg and others, trustees under the will, filed a bill asking for directions to partition the estate according to the provisions of the will, and giving a list of the properties in their possession. Thereafter they filed a petition alleging that they had failed to include certain shares of stock, and asked that they might be permitted to amend their bill by including such shares. Permission to amend was granted, and the trustees made returns of the properties in their possession, in which such stock was included. John Marshall Thomas, executor of Annie G. Thomas, deceased, a beneficiary under the will, and Margaret Pennington, another beneficiary, joined by her husband, excepted to the return. The exceptions were overruled, and Thomas and Margaret Pennington and her husband appeal. Reversed.

Argued before ROBINSON, C. J., and FOWLER, BRISCOE, ROBERTS, PAGE, and BOYD, JJ.

Rand. Barton and Skip Wilmer, for appellants. L. M. Reynolds and Sam'l Snowden, for appellees.

BOYD, J. John Gregg died on February 11, 1890, leaving a last will and testament by which he left one-half of his property to three trustees, in trust for the sole and sepa-

rate use and benefit of his daughter, Annie G. Thomas, for and during her natural life, and after her death then in trust to grant and convey, transfer and deliver the same to the issue of her body living at the time of her death, share and share alike, etc. The other half of his property is left to the same trustees for the benefit of his other daughter, Margaret Pennington, for and during her natural life, and after her death to be held in trust for the issue of her body living at the time of her death, share and share alike, etc. In each case provision is made for the disposition of the property in the event of either daughter dying without issue. Among other provisions, the will directs the trustees to make, under the order and supervision of a court having equity jurisdiction, a division and partition of his estate into two parts. Mrs. Thomas died in July, 1891, leaving three children and her husband, who was made executor of her last will and testament. The trustees filed a petition in the circuit court of Baltimore city, asking it to take jurisdiction over the estate, and on September 15, 1891, that court did assume jurisdiction over the same. On December 13, 1892, the trustees filed a bill or petition in said court asking that they may be directed to make a partition of the estate as authorized by the will. They gave lists of the properties, bonds, stocks, etc., in their possession, including 3,352 shares of the common stock of the Baltimore & Ohio Railroad Company. On December 19, 1892, they filed a petition in which they stated they had failed to include in their bill 670 shares of the common stock of the Baltimore & Ohio Railroad Company, which were issued to them in pursuance of a resolution of the board of directors of said company passed on the 11th day of November, 1891, whereby a dividend of 20 per cent. on the common stock of the company was declared for the three fiscal years ending, respectively, September 30, 1889, September 30, 1890, and September 30, 1891, and that the 670 shares of stock were issued to, and held by, them as dividends, or earnings, on the 3,352 shares of stock mentioned in their bill, and prayed the court to permit them to amend their bill by including the 670 shares of stock, which amendment was allowed by the court. The parties in interest answered the bill as amended. John Marshall Thomas, the husband and executor of Annie G. Thomas, who died in July, 1891, claimed in his answer that, inasmuch as the said 670 shares of stock are the dividends and earnings of the 3,352 shares of stock held by the deceased in his lifetime, for the three years ending September 30, 1889, September 30, 1890, and September 30, 1891, respectively, he, as executor of his wife and in his own right, was entitled to one-half of the proportionate part of the said earnings (dividend stock) that were earned between the decease of the testator on February 11, 1890, and the decease of Mrs. Thomas on

July 8, 1891. Margaret Pennington and husband claimed that the 670 shares of stock were issued as a dividend on account of earnings and income, and that, hence, she was entitled to one-half of the same as her absolute property. Testimony was taken, and the court passed an interlocutory decree for partition, appointing the three trustees commissioners. The commissioners made their return to the court, and included one-half of the said 670 shares of stock in each of the two schedules of the trust property. Mr. and Mrs. Pennington and Mr. Thomas excepted to the return of the commissioners and trustees for the reasons set out in their answers. The circuit court of Baltimore city overruled the exception, ratified and confirmed the return, in respect to those shares of stock, and directed that they should be held by the trustees under the will of John Gregg. From this decree appeals were taken by J. Marshall Thomas, in his own right and as executor of Annie Gregg Thomas, and by Margaret Pennington and husband. The first question, therefore, to be decided is, are the 670 shares of stock issued by the Baltimore & Ohio Railroad Company to be considered as income, and vest in the life tenants, or as capital, and be held by the trustees, together with the rest of the trust estate?

Although this court has never been called upon before to decide this question, it has frequently been before the courts of England, as well as many of the courts of last resort in this country. We are not helped, but rather embarrassed, however, by the fact that so many courts have passed upon the question, as we find jurists entitled to our highest respect widely differing on the subject. It is true that some of the decisions can be reconciled by a careful examination of the facts on which they are based, yet there are others which are irreconcilable. The authorities generally agree that if the intention of the testator can be gathered from the will, it must prevail in determining such questions as are now presented for our consideration, but the will of John Gregg throws but little, if any, light on the subject. There is a class of cases that decides that when the company has the power of distributing its profits as dividends, or of converting them into capital, and it validly exercises such power, it is binding on all persons interested, and what the "company says is income shall be income, and what it says is capital shall be capital." In other words, that the intention of the company shall prevail in determining the question. This court decided in *State v. Baltimore & O. R. Co.*, 6 Gill, 363, that the directors of this company are only bound to divide such part of the net profits as they may deem proper; that they can apply any portion of the net profits not divided to any legitimate purposes of the company, and that they can expend the revenues of the company absolutely, without being bound to refund them, or they could appropriate and

agree to refund them to the stockholders, in their discretion. This statement of the power of the directors assumes, of course, that they would act in good faith. The only evidence in the case that in any way reflects upon the intention of the company is the resolution of the directors declaring the dividends, which is as follows:

"Whereas, for the fiscal years terminating September 30, 1889, 1890, and 1891, the net earnings and income of the company have amounted to the sum of \$4,545,272.34, as shown by its reports, after the payment of dividends on the first and second series of preferred stock to the amount of \$900,000, the adjustment of sinking fund accounts, and after charging to operating expenses during those years over one million dollars, expended in betterments and improvements of the physical condition of the property, and in bringing it up to a higher working standard; and whereas, after charging to 'profits and loss' of those years the sum of \$1,617,051.09,—a deduction which has been deemed proper to make by reason, mainly, of depreciation of the value of equipment, which properly should have been made during the year 1888,—there still remains of such net earnings and income the sum of \$3,311,455.23, which sum, in addition to the amounts derived from other sources, has been used in reduction of the bonded and car-trust indebtedness of the company to the amount of \$1,325,102.64, and also for the permanent improvement of the railway, and for new construction, all of which contribute valuable additions to the property and to the capital of the company: Therefore, resolved, that a dividend of twenty [20] per cent. be declared upon the common stock of this company for the period ending September 30, 1891, payable on and after 31st day of December, 1891, in common stock of the company, at the office of the treasurer, to the stockholders of record on the 30th of November, 1891," etc.

As so many different views have been expressed by the courts in passing upon the respective rights of tenants for life and remainder-men in regard to what are commonly called "stock dividends," it will be well to refer to some of the leading cases. In *Minot v. Paine*, 99 Mass. 101, what is sometimes called "the Massachusetts rule" was adopted, viz. "to regard cash dividends, however large, as income, and stock dividends, however made, as capital." The court said that the trustee needed some plain principles to guide him, and deemed the above rule simple and equitable, as well as in conformity with the prior decisions of that court. In that case the court held that the distribution of stock of a railroad company to represent improvements on the road, construction of a bridge, etc., although admitted to have been made from the net earnings of the company, should be treated as capital, and not as income, and hence should be held by the trustees, and not delivered to the life tenant.

Regular cash dividends had been paid semi-annually on the stock. This rule has not been altogether acceptable, and has been somewhat qualified or modified by subsequent cases in that state, although the general principle, as settled in *Minot v. Paine*, is still maintained. In *Daland v. Williams*, 101 Mass. 571, the directors, having voted to increase the capital stock by 3,000 shares, declared a cash dividend of 40 per cent., and authorized the treasurer to receive that dividend in payment for 2,800 shares, the remaining 200 shares to be sold. The court held that the transaction was virtually a stock dividend, and that the shares must go to the remainder-man's fund. In *Leland v. Hayden*, 102 Mass. 542, where the company had invested its surplus earnings in its own stock, and subsequently declared a dividend of that stock, the life tenant was held entitled to it. The Massachusetts court, in these later cases, determined that they can, in deciding whether in a given case the distribution is a stock or cash dividend, consider the actual and substantial character of the transaction and not its nominal character merely. See, also, *Rand v. Hubbell*, 115 Mass. 461; *Heard v. Eldredge*, 109 Mass. 258; *Davis v. Jackson*, 152 Mass. 58, 25 N. E. 21. In *Rand v. Hubbell*, Gray, C. J., in speaking of the earnings of a corporation, said: "When a distribution of said earnings is made by the corporation among its shareholders, the question whether such distribution is an apportionment of additional stock, or a division of profits, depends upon the substance and intent of the action of the corporation, as shown by its votes." In the case of *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, Justice Gray uses very much the same language, adding that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share." The court decided that the new shares issued in that case were capital. The company had paid money dividends from time to time, and had invested portions of its net earnings, incomes, and profits in the enlargement of its plant, so that its construction account exceeded \$1,000,000, being double the capital stock. The capital was increased to \$1,000,000 and, by resolution of the directors, the increased stock was awarded to the shareholders, share for share. The greater part of the investments was made prior to the beginning of the life tenancy, although the construction account was increased between \$100,000 and \$200,000 afterwards. The court practically adopted the Massachusetts rule, qualified as above stated, and decided that the new stock was capital. In Connecticut and Rhode Island, dividends of new shares, representing accumulated earnings, are held to be capital, and not income. *Brinley v. Grou*, 50 Conn. 66; *Brown's Petition*, 14 R. I. 371. In *Richardson v. Richardson*, 75 Me. 570, the court said: "The decided preponderance of authority probably concedes

the point that dividends of stock go to the capital under all ordinary circumstances." In Georgia, the Code is construed so as to follow the Massachusetts rule. *Millen v. Guerrand*, 67 Ga. 294. In England, there have been a number of decisions on this question, and they are somewhat conflicting. The earlier cases decided that an ordinary, regular, and usual dividend, whether it be cash, stock, or property, belonged to the life tenant, and that an extraordinary dividend belonged to the corpus. In the later cases the courts have examined into the real nature of the transaction to ascertain the intention of the company. In the case of *Bouch v. Sproule*, 12 App. Cas. 885, where the early English cases are reviewed, Lord Herschel quoted with approval the principle expressed by Lord Justice Fry: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power, either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested, under the testator or settlor, in the shares, and, consequently, what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital." That expression is also quoted by Justice Gray in 136 U. S., 10 Sup. Ct., *supra*. In Pennsylvania, there have been a number of decisions, beginning with *Earp's Appeal*, 28 Pa. St. 368. In that case a testator left the residue of his estate to his executors in trust, to collect the rents, income, and interest, and to pay one equal fourth part to and for the use of each of his four children during their natural lives, etc. Among the residuary estate was stock in a manufacturing company, upon which large surplus profits, over and above the current dividends, had accumulated and continued to accumulate for several years after the death of the testator. With the consent of the executors and the legatees, the capital stock of the company was increased, and new stock distributed among the stockholders in proportion to the stock held by them; the surplus earnings or profits being applied to the payment of such increased shares of stock. It was held that so much of the surplus earnings as accumulated before the death of the testator was principal, and subject to the trust, and that the accumulations after the death of the testator were as much a part of the income of the principal as the current dividends, and as such belonged to the legatees of the income for life. The court decided that the surplus earnings could be apportioned, so as to credit the capital with such as had accumulated prior to the death of the testator, and to give to the life tenant those

earnings that had accumulated after the testator's death. This case has been followed in Pennsylvania in a number of cases. See *Wiltbank's Appeal*, 64 Pa. St. 256; *Moss' Appeal*, 83 Pa. St. 264; *Biddle's Appeal*, 90 Pa. St. 278; *Vinton's Appeal*, Id. 434; and *Smith's Appeal*, 140 Pa. St. 544, 21 Atl. 441. Different results were reached in these cases, but the principles settled in *Earp's Appeal* were affirmed. Justice Paxson, in *Moss' Appeal*, after referring to the general rule that nothing earned by a corporation can be regarded as profits until it shall have been declared so by the directors, and that the stockholders have no right to claim earnings until the corporation decides to distribute them as profits, said: "But where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of the transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stock or moneys, to whomsoever was entitled to the profits." In *Van Doren v. Olden*, 19 N. J. Eq. 176, the chancellor reviewed the early English cases, declined to follow them, and said: "Chief Justice Lewis, in *Earp's Appeal*, 28 Pa. St. 368, considered the whole matter fully, and settled the law in Pennsylvania on this subject, in an opinion prepared with great ability, on what appears to me to be the correct principles to be applied in all such cases." See, also, *Ashhurst v. Field*, 26 N. J. Eq. 1. In *Lord v. Brooks*, 52 N. H. 72, the court follows *Earp's Appeal*, and says that "the reasoning in *Minot v. Paine*, is unsatisfactory to us." The case of *Hite v. Hite*, (Ky.) 20 S. W. 779, decides that "where a dividend, although declared in stock, is based upon the earnings of the company, it is, in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profits." The early New York cases are to the same effect as *Earp's Appeal*. *Clarkson v. Clarkson*, 18 Barb. 646; *Simpson v. Moore*, 30 Barb. 637; *Goldsmith v. Swift*, 25 Hun. 201. But they are not decisions of the highest court in that state, which, in *Riggs v. Cragg*, 89 N. Y. 479, declined to pass upon the question, as it was not necessary to decide it. Several of the late text-books have adopted the Pennsylvania rule as the correct one, and some of them speak of it as the American rule, although they are not correct in stating that this rule prevails in every state but Massachusetts and Georgia. *Cook, Stock & S.* § 554, note; *Beach, Priv. Corp.* § 600.

It will be seen, from an examination of the above authorities, that they differ very materially as to the proper rule to be established on the main question, as well as on minor matters. But there are some principles involved in the question concerning which most of the courts are in accord. It

is generally admitted, by those courts which are ordinarily inclined to hold stock dividends to be capital, that there may be cases in which they should be held to be income; depending "upon the substance and intent of the action of the corporation, as manifested by its vote or resolution," as was said in 136 U. S. 559, 10 Sup. Ct. 1057. There are but few cases, if any, that can properly be construed to mean that, although the stock dividends only included net earnings, and they were intended to be distributed as income, and not as capital, yet the life tenants must be deprived of them, simply because they were stock dividends. When it is possible for the court to ascertain to any certainty whether the distribution in the stock dividend includes net earnings, and, if so, what proportion, and also whether such earnings were intended to be made a part of the capital, or merely to be used temporarily, with the intention on the part of the directors of refunding them to the shareholders as income, we think it is the duty of the court to make such investigations and dispose of the stock in an equitable way between the tenants for life and the remainder-men. The resolution of the railroad company passed November 11, 1891, shows that the amount distributed was a part of the net earnings and income, received for the three fiscal years, ending September 30, 1889, 1890, and 1891, and "whereas," it was used by the directors, "therefore, resolved, that a dividend of twenty [20] per cent. be declared upon the common stock of this company for the period ending September 30, 1891, payable on and after 31st day of December, 1891." If the resolution had stopped there, it could hardly be doubted that the life tenants were entitled to at least a portion of such dividend, and are they to be deprived of all interest in the dividend simply because it was made payable in common stock of the company? We think not. This stock was intended "for the sole and separate use and benefit" of the daughters of the testator during their lives, according to the terms of the will. He wanted them to enjoy the use and benefit of his property as long as they lived. He unquestionably did not contemplate having all the income on over \$300,000 of his property added to the capital from time to time, although he knew, or was presumed to know, that the directors could use it for the legitimate purposes of the company if they deemed it proper. In his original will he expressed the wish that all investments in railroad stocks or in any other like securities left by him should be kept intact by the trustees, as they existed at the time of his death, except such as might become payable or redeemable. It is true he modified that in the codicil to his will, and authorized a sale of his stock, etc., whenever, in the judgment of all three of his trustees, a sale would be advantageous to those interested; but if he had supposed that there would be any likelihood

of his children being deprived of the income from this stock, he would never have inserted such a provision in his original will, or have made the right to sell dependent upon the judgment "of all three" trustees,—one of whom had a contingent interest in all the property after the life estate of the daughters,—although he had the most implicit confidence in them. It is clear that the testator desired his daughters to get the benefit of the income of all his property, and it is equally clear that the company intended to compensate the stockholders for the loss of the income of a definite period, used by them, by declaring a dividend to cover that period, viz. "the period ending September 30, 1891." This court has, in the case in 6 Gill, 363, *supra*, expressly decided that the railroad company can refund to the stockholders the net revenue, which had been appropriated to the purposes of the charter, and might borrow money to supply the place of that which had been used from the stockholders, or any one else. It was decided in that case that the company could give its bonds to such stockholders as were willing to receive them for their portion of the net profits thus used. On page 378 the court used the word "stock" instead of "bonds," which was probably inadvertently done; but if the company has the power to give its stockholders bonds for net revenue used, it can also issue its stock, which it has the authority under its charter to increase. If, in this instance, the company had issued bonds, the life tenants would have been entitled to their proportion, and why not of the stock issued? We think, under the circumstances, the life tenants are entitled to their shares of the stock, and the only remaining question is how can it be apportioned so as to do justice to all persons interested.

The evidence is not as full as it might be. Section 19 of chapter 123 of Acts of 1826, the charter of the company, provides that the president and directors shall annually or semiannually declare and make such dividend as they may deem proper, etc. The resolution of the directors refers to three fiscal years, ending September 30, 1889, 1890, and 1891, and then declares the dividend for the period ending September 30, 1891. It is usual for railroad companies to keep such accounts as will show their net earnings, if any, for each period of six months, as well as for the whole fiscal year. We do not think it would be proper to approximate the net earnings for a proportionate part of the six months, but if it can be accurately ascertained what proportion of the 20 per cent. dividend declared by the company was earned in each period of six months, commencing October 1, 1889, then we think it should be ascertained for each of such periods, ending March 31, 1890, September 30, 1890, and March 30, 1891. Having ascertained the amount of net earnings for those 18 months, it can readily be ascertained what proportion

of the 670 shares was earned during that time. One-half of such amount should be allowed John Marshall Thomas, executor of Annie Gregg Thomas, as her proportion, she having died in July, 1891. If the net earnings for the periods of six months cannot be definitely determined, then ascertain them for the fiscal year ending September 30, 1890, and the proportion of the 670 shares earned during that time, and Mrs. Thomas' estate will be entitled to one-half thereof. So far as Mrs. Pennington's interest is concerned, it will only be necessary to determine the net earnings for the two years ending September 30, 1890, and September 30, 1891; then ascertain what proportion of the 670 shares was earned during those two years, and Mrs. Pennington will be entitled to one-half of the same. The proportion of shares earned during the year ending September 30, 1889, must be treated as capital, and also the Thomas half for the two years ending September 30, 1890, and September 30, 1891, after deducting the number of shares to be turned over to Mr. Thomas as above directed. We think this plan an equitable one. There can be no serious difficulty in ascertaining accurately the net profits earned by the company during each fiscal year of this period of three fiscal years, and it is altogether probable that this can be determined with the same accuracy for the period of six months. So far as the Pennington share is concerned that is immaterial, but it may affect the Thomas share, as we do not deem it practicable or proper to subdivide the periods fixed by the company for dividends. Whatever those periods were, whether of six months or a year, they should be adopted. We see no objection to thus apportioning the dividends between the life tenants and remainder-men under the circumstances of this case. The resolution of the directors shows on its face that the earnings of the three years were ascertained, and the dividend declared accordingly. As the earnings for the year ending September 30, 1889, can be easily told, and as that was before the life estate commenced, it is but just, and in accordance with the intention of the testator, so far as it is shown, that such earnings be treated as capital. Such further testimony as may be necessary to meet the views herein expressed can be taken. It follows, from what we have said, that the decree of the court below, dated September 7, 1893, must be reversed, and the cause remanded, so that the views herein expressed may be carried out. Decree reversed and cause remanded.

(63 Conn. 445)

LOOMIS v. BOURN.

(Supreme Court of Errors of Connecticut. Dec. 13, 1893.)

CITY COURTS—JURISDICTION.

1. Hartford City Charter, § 11, which provides that the jurisdiction of the city court of said city shall embrace "all cases" in which the

cause of action arose within the city, gives the city court jurisdiction of a demand for \$25 for services rendered within the city, though such demand is also cognizable by a justice.

2. The jurisdiction conferred on the Hartford city court by Charter 1859, § 11, to try demands of less than \$100 in amount, is not affected by Gen. St. 1888, § 664, making all such demands cognizable by a justice, as section 709 of such revision continues in city courts all powers theretofore conferred on them.

Andrews, C. J., and Carpenter, J., dissenting.

Appeal from city court of Hartford; McManus, Judge.

Action by Hiram G. Loomis against Benjamin A. Bourn for services as civil engineer. Defendant pleaded in abatement that the amount of damages demanded was not within the jurisdiction of the court. Plea sustained. Plaintiff appeals. Reversed.

Roger Welles and Sidney E. Clarke, for appellant. James P. Andrews, for appellee.

TORRANCE, J. The appeal in this case presents but one question, and that is whether the city court of Hartford has original jurisdiction in actions at law, like the one at the bar, where the matter in demand is within the jurisdiction of a justice of the peace. The answer to this question depends upon the construction put upon the charter of the city of Hartford. Both parties agree that such jurisdiction was not given in the original charter of 1784, but the plaintiff claims that it was given by that part of section 11 of the "Charter of 1859," so called, which is here quoted: "A city court shall continue to be holden in said city * * * and shall continue to have cognizance of the cases of which it now has jurisdiction by virtue of the original charter of said city and of subsequent amendments thereof; and its jurisdiction is hereby declared to embrace all cases, either at law or in equity, whenever the cause of action shall arise or have arisen within the limits of said city, or concerns land within said limits, and one or both parties live within the same; and any suit or action that may be commenced in favor of any bank located in said city upon any writing obligatory payable by the terms of it at said bank or indorsed to said bank." 5 Priv. Laws, p. 324, § 11. By the word "jurisdiction," as here used in both of these clauses, we think original, and not appellate, jurisdiction was intended, for the appellate jurisdiction is expressly provided for subsequently in section 13 of the charter; and this word "jurisdiction," when applied, in the second clause, to equity suits, and to actions concerning land and upon writings obligatory, could not well bear any other meaning. As before stated, the city court did not possess the jurisdiction in question prior to 1859. If it now has it, it is by virtue of the section quoted. Now, the manner in which the jurisdiction of the city court is limited and defined in that section is somewhat peculiar.

Apparently, the section begins by giving or continuing to the city court the limited jurisdiction which it then had, and ends, in the second clause, by giving it a jurisdiction unlimited, at least so far as the amount or value of the matter in demand is concerned. If, therefore, we read this section just as it stands, and without reference to prior legislation touching the jurisdiction of the city court, it may well be asked whether the legislature would, in one and the same section, begin by giving a limited jurisdiction, if it meant to end by giving an unlimited one. If, however, the section is read, as it should be, in connection with this prior legislation, the objection implied in the above question will, we think, lose much of its force, and the peculiarity alluded to will be explained or accounted for. To thus read the section necessitates a brief statement of this prior legislation:

The original charter, passed in 1784, providing for the establishment of the city court, limited and defined its jurisdiction as follows: "And shall have cognizance of all civil causes wherein the title of land is not concerned, by law cognizable by the county courts in this state; provided the cause of action arise within the limits of said city, and one or both of the parties live within the limits of said city; and said city court shall, as to the causes by them cognizable, to all intents and purposes have the same powers and authorities * * * as said county courts now, or hereafter, by law shall have. And an appeal shall be allowed to either party from the judgment or determination of said city courts to the next superior court to be holden in the county of Hartford in all causes in which an appeal is now or hereafter by law shall be allowed from the said county courts." 1 Priv. Laws, p. 370, § 8. Under this charter the city court had no original jurisdiction of causes which, from the amount of their demand, were within the jurisdiction of a justice of the peace, because the county court had no such original jurisdiction. Revision 1808, p. 34, § 7; Id. p. 37, § 14. By subsequent acts and amendments, however, the jurisdiction of the city court was enlarged and extended from time to time. Thus, in 1801 and 1817, it was given jurisdiction of suits by any bank in the city upon any "writing obligatory," without reference to the amount, made payable at or indorsed to such bank. 1 Priv. Laws, 462, 466. In 1815, and again in 1835, it was given original jurisdiction in certain actions of debt for penalties and forfeitures under city by-laws, without reference to the amount. In 1853 it was provided that its equity jurisdiction should "extend to all cases wherein the cause of action arises within the limits of said city or wherein either party to the suit shall be resident of said city;" and, furthermore, that said city court should have "jurisdiction of all actions of trespass and

ejection wherein the cause of action shall arise within the limits of said city." 3 Priv. Laws, p. 396, § 7. So much of this law of 1853 as related to the equity jurisdiction was repealed in 1855, (Pub. Acts 1855, p. 23,) but this did not affect its jurisdiction over trespass cases, however small the demand might be. In 1853, also, power was given to the city court to set aside the doings of the common council in the matter of certain assessments, and to appoint a committee to reassess, and to report to it for its final approval. 3 Priv. Laws, 395. In 1856 the equity jurisdiction was again defined as follows: "Shall have jurisdiction of all suits in equity, except for relief against any judgment rendered or cause pending in the superior court," provided certain other enumerated jurisdictional facts existed. *Id.* 398. In 1857 it was provided that certain penalties and forfeitures might be recovered by an action of debt before the city court. 5 Priv. Laws, 67.

It thus appears that, prior to the alteration or amendment of the charter made in 1859, the legislature had enlarged the original jurisdiction of the city court, as defined in the charter of 1784, so as to include, among other matters, causes of action that were clearly within the jurisdiction of justices of the peace. But, in addition to these changes thus made by the amendments to the charter itself prior to 1859, it should also be noted that, at the time the section under consideration was enacted, the law relating to county courts, by reference to which the jurisdiction and law of procedure of the city court was in the original charter, in large measure, defined, had been repealed. The act of 1855, discontinuing the county courts, expressly provided that when the act should take effect "the present county courts shall cease to exist and all laws for the appointment and holding of said courts shall be of no further force and the same are hereby repealed." Pub. Acts 1855, c. 29, § 17. By chapter 28 of the Public Acts of 1855, it was expressly provided that the powers and jurisdictions of the several city courts should not be affected by any provisions of the act abolishing county courts, but that "all powers conferred and duties imposed upon said courts . . . shall be construed in the same manner as if the county courts had not been discontinued." This, then, was the condition of things at the time the charter of 1859 was passed: The law relating to county courts had been repealed four years previously, and the jurisdiction of the city court, so far as it depended upon that law, would thereafter have to be ascertained by reference to a repealed law. This would be a growing inconvenience, as time went on. The jurisdiction, as defined by the charter itself, could be ascertained only by a reference to amendments scattered through the public and private laws. Furthermore, the city court then already had original jurisdic-

tion, in many cases, of causes within the jurisdiction, of justices of the peace. It is quite reasonable to suppose that the legislature had this condition of things in view when it passed the charter of 1859, calling it an "act to alter the charter of the city of Hartford and to combine sundry public acts relating thereto." If so, we should expect that it would try to define the jurisdiction of the city court in the charter itself, so as to avoid as much as possible all reference to the repealed county court law; and this we find it did do. No express reference is made to the repealed county court law in the new charter. The jurisdiction which is "continued" is the jurisdiction which it has under the original charter and its amendments. Now, all the amendments, so far as we are aware, contain in themselves, without reference to any outside law, a definition of such jurisdiction in the cases to which they apply. It is only with regard to the jurisdiction under the original charter that any reference would have to be made to the repealed county court law. The jurisdiction is further declared, in express terms, to extend to "all cases in law or in equity," without reference to amount. In the matter of appeal from the city court to the superior court, the charter itself, without reference to any other law, limits and defines the right, and provides how and in what manner it shall be exercised. All this is in marked contrast with the charter of 1784, and clearly shows an intent to define the jurisdiction of the city court, as far as possible, in the charter itself and by express provisions. We also think the legislature meant to enlarge the original jurisdiction of the court so as to include cases like the one at bar. It already had original jurisdiction over many classes of cases within the jurisdiction of a justice of the peace, and that jurisdiction was to continue. There existed no good reason why it should not have jurisdiction over all such cases concurrently with such justices, if the legislature saw fit to grant the power. The legislature, under these circumstances, said, in express terms, "its jurisdiction is hereby declared to embrace all cases at law or in equity," etc. This language is broad enough and plain enough to include cases like the one at bar, and we see no good reason why it should not have its full force and effect.

But, in opposition to this view, the defendant urges some objections, which may now be considered. The first arises out of the peculiarity of the manner in which the jurisdiction is defined, to which allusion was made before. But this objection loses nearly all its force, if we take into account, as we should, all the circumstances to which allusion has been made, under which the charter of 1859 was passed. When this is done, we can explain, if we cannot justify or excuse, the peculiar manner in which the jurisdiction is defined. He further says that it

is hardly to be supposed that the legislature intended to confer original and appellate jurisdiction over the same class of cases, and that a result so novel, if not absurd, should be avoided, if possible. The force of this objection lies in the assumption that such a result would be either novel or absurd. If the legislature had never before brought about just such a result, the objection would have great weight; but if it has done so, and that repeatedly, the objection falls. It is done, as we have seen, in this very charter of 1859, for in certain circumstances the court is given original and appellate jurisdiction over the same class of cases. Jurisdiction original and appellate over the same class of cases was given to the superior court in 1838. Comp. 1854, p. 73. It was given to it again in 1854. *Id.* p. 75. These instances (and others might be cited) are enough to show that the assumption on which the present objection is based has no foundation.

It is further urged that the construction we have put upon the charter gives the city court equity jurisdiction over the judgments and proceedings of the superior court. In the light of the previous legislation upon the equity jurisdiction of the city court, and in view of the settled policy of the legislature to refrain from giving the power in question to inferior courts, such a construction as the defendant here claims cannot fairly be given, and ought not to be given, to the eleventh section of the charter of 1859.

Finally, it is said that if the charter of 1859 did confer jurisdiction, as claimed by the plaintiff, subsequent legislation has taken it away. In support of this claim, we are referred to the general laws subsequently passed, which provide, in substance, that all causes wherein the matter in demand is of a specified amount "shall be heard and determined by a justice of the peace," and which repeal all acts and parts of acts inconsistent therewith. The question is, did the legislature, in the general laws referred to, intend to repeal or change the provisions contained in city charters relating to the jurisdiction of city courts. We think it did not. The provisions found in the Revisions of 1866, 1875, and 1888, to the effect that the jurisdiction of city courts should not be affected by the general legislation referred to in such provisions, indicate very clearly an intent to preserve and secure to the city courts, unchanged by any mere general law, the jurisdiction conferred upon them by the charter. Revision 1866, p. 245, § 142; Revision 1875, p. 416, § 18; Gen. St. 1888, § 700. For these reasons, we think there was error in the judgment of the city court, and said judgment is reversed.

FENN and BALDWIN, JJ., concurred.

ANDREWS, C. J., and CARPENTER, J., dissented.

(63 Conn. 338)

STATE v. FISKE.

(Supreme Court of Errors of Connecticut. Oct. 25, 1893.)

ASSAULT WITH INTENT TO KILL—ELEMENTS—MALICE AFORETHOUGHT—INTOXICATION AS A DEFENSE—TESTIMONY OF ACCUSED.

1. Deliberation and premeditation are not necessary elements of an assault with intent to murder, but malice aforethought and an intent to murder are necessary.

2. On a trial for assault with intent to murder, the court charged that intoxication was no defense, but should be considered where a specific intent was necessary, and that defendant was not guilty if he was so intoxicated as to have lost his intelligence, so that there was a reasonable doubt whether he was able to form a purpose to kill, or to know what he was doing. *Held*, that the charge was not prejudicial to defendant.

3. Accused testified in his own behalf, and the court charged the jury to regard accused "as every other witness is to be regarded," and to consider his appearance, the reasonableness of his story, and, "above all, the fact that he is the accused." *Held*, that the use of the words, "above all," was not prejudicial to the accused.

Appeal from superior court, Hartford county; R. Wheeler, Judge.

George Fiske was convicted of assault with intent to murder, and appeals. Affirmed.

J. L. Barbour, for appellant. G. A. Conant and A. F. Eggleston, for the State.

CARPENTER, J. The charge is that the accused, "with force and arms, in and upon one Julius H. Clark, in the peace then and there being, willfully and feloniously did make an assault, and with a certain knife, which he, the said George Fiske, then and there had and held, did then and there willfully, and of his malice aforethought, strike, cut, and stab the said Julius H. Clark in and upon his neck and throat and other parts of his body, with intent him, the said Julius H. Clark, willfully, feloniously, and of his malice aforethought, to kill and murder," etc. A second count charges him with the same offense upon the persons of said Clark and one James Nolan. Only one offense was claimed. On the trial the counsel for the accused claimed as a matter of law that, "to convict the accused of an assault with intent to murder, the state must prove the assault to have been committed willfully, deliberately, premeditatedly, and of malice aforethought," and requested the court to charge the jury as follows: "The accused is charged with assault, with malice aforethought, with intent to commit murder. In order to sustain this charge, every element needed to convict of the crime of murder must exist and be proved, except the death of the assaulted party. There must be malice aforethought, premeditation, deliberation, and an intent to kill. If any of these elements are not proved, the accused cannot be convicted of assault with intent to murder. 'With deliberation,' means, not

hastily or rashly, but coolly and with careful consideration. 'With premeditation' means with previous design formed. Unless the accused did this cutting coolly, deliberately, and with a premeditated intent to take the lives of either Clark or Nolan, he cannot be convicted of assault with intent to murder." The court declined to charge the jury fully in accordance with this request, but, after referring to some other matters, charged them as follows: "But the state goes further, and has alleged another element of criminality in this case—the element of malice, which is not necessary in the offense known as assault with intent to kill. And if the evidence justifies you in finding that the element of malice existed in this case, beyond a reasonable doubt, as well as the assault with intent to kill, then the state will have made out the full offense as charged. I have to say to you that no deliberation or previous design or premeditation is necessary to constitute this offense of an assault with intent to kill and murder with malice aforethought. There are necessary only the assault, the intent to kill, and the malice aforethought; no deliberation being necessary."

A part of this charge, if taken by itself, was liable to be misunderstood. For instance, when the jury were told that if the element of malice existed, without the qualifying word "aforethought," it was sufficient, they might, unless that was considered in connection with all that was said on that subject, have inferred that if simple malice accompanied the assault it was sufficient. But, taken in connection with what immediately follows, such an inference was clearly excluded. While being told that no deliberation, previous design, or premeditation was necessary to constitute the offense charged, they were also distinctly told that malice aforethought was essential. The word "aforethought" is defined in the Century Dictionary as "thought of beforehand; premeditated; prepense." In Webster's International Dictionary, "premeditated; prepense." "Malice aforethought" is defined in the Century Dictionary as "actual malice, particularly in case of homicide;" in Webster, "malice previously and deliberately entertained." Thus it appears that the adjective "aforethought" describes, not the intent to take life, but the malice; and that malice must exist, must be previously and deliberately entertained when the purpose to take life is formed, and must co-operate with the blow in producing death to constitute murder. In understanding malice aforethought, malice must not be confounded with the intent to take life. It is the malice that must previously exist or be deliberately entertained; the intent may spring into existence and be immediately followed by the fatal blow, and that at common law is murder, and under our statute is murder in the second degree. To constitute murder in the first de-

gree the criminal intent must be conceived and carried into effect, so that the killing may be said to be "willful, deliberate, and premeditated."

Counsel for the accused asked the court to charge the jury that, "unless the accused did this cutting coolly, deliberately, and with a premeditated intent to take the lives of either Clark or Nolan, he cannot be convicted of assault with intent to murder. In determining this question the jury may take into consideration the evidence as to the prisoner's partial intoxication. While intoxication does not excuse a man for crime, it is proper to take it into account in determining the degree of the crime, and as tending to show whether the accused was capable of deliberation." The court properly refused to charge as thus requested. The question whether the accused was guilty of an attempt to commit murder in the first degree was practically eliminated. The sole question was whether the attempt was to commit murder in the second degree, or murder which was not "willful, deliberate, and premeditated." Indeed, no complaint was made of the refusal to charge as requested, but the complaint is of the charge as it was given. This was as follows: "Intoxication is no defense or excuse for crime; but in certain cases, where a specific intent is an element in the offense, the fact of intoxication, if shown, is to be considered. If it appears from the evidence that the prisoner was intoxicated at the time, and if you find that his state of intoxication was such that he had so far lost his intelligence, and his reason and faculties, that you have a reasonable doubt whether he was able to form and have a purpose to kill, or to know what he was doing, then you should find him not guilty of intent to kill." Whatever may be the law on this subject in other jurisdictions, the charge was quite as favorable to the accused as he was entitled to under the law of this state. *State v. Johnson*, 41 Conn. 584. The accused has no grievance in this respect.

The accused offered himself as a witness. The court said to the jury: "He is to be regarded by you as every other witness is to be regarded. You are to take into consideration his appearance, his manner of testifying, the reasonableness of his story, and, above all, you are to take into consideration the fact that he is the accused in the case; and, taking those facts into consideration, you are to give to his statements in court, or any statements made by him out of court, such effect and such force as you think they justly should have." The defendant objects to this charge on the ground that the court, by the use of the words "above all," unduly emphasized the fact that he had the interest of an accused party. We see no ground for this complaint. The accused certainly was not entitled to have his evidence regarded as the evidence of a disinterested witness. We cannot see that the judge could have

been understood as intending anything more than that. There is no error in the judgment complained of. The other judges concurred.

(160 Pa. St. 113)

BOROUGH OF McKEESPORT v. WOOD.
(Supreme Court of Pennsylvania. March 5, 1894.)

MUNICIPAL CORPORATIONS — PAVING — CONTRACT WITH ABUTTING OWNERS.

Property holders on a street having agreed to pay for paving it—each in front of his lot—to within two feet of the street-car rail, the borough ordered the improvement, and let the contract. Thereafter, it authorized the street-railway company to double its track, which was done. The city sued an owner on the agreement, and his affidavit of defense stated that, after the street had been paved in front of his lot, it was torn up, and two tracks laid. *Held* error to charge that, another track having been put down before that part of the street was paved at all, defendant was only liable for the paving to within two feet of the tracks, as laid when the street was paved.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Assumpsit by the borough of McKeesport against W. Dewees Wood to recover a certain part of the cost of repaving Fifth street. From a judgment on the verdict, plaintiff appeals. Reversed.

Early in 1890, the property owners on Fifth street, between Market and Center streets, in the borough, desired to have that street, which was then macadamized, improved and repaved with Belgian block stone. The financial condition of the borough did not permit it to assume the entire cost. Thereupon, a number of the property owners, including defendant, prepared a paper requesting the councils to pass an ordinance for the grading, paving, and curbing of the street between the points named, and in consideration thereof agreed "to pay the cost of so much of said grading, paving, and curbing as fronts our respective lots, and extends to within two feet of the rail of the tracks of the McKeesport Passenger Railway Company." The agreement was presented to the councils, and June 13, 1890, an ordinance was passed as requested; and July 29, 1890, the borough made a contract for the work. The work was commenced in July or August of that year, and was finally completed and paid for by the borough before bringing this suit. At the time the agreement was entered into, and for three or four years before that, the passenger railway company had a single track railway on the street. September 4, 1890, the councils granted the railway company the right to lay a double track on the street. By this ordinance the railway company was not bound to pay any part of the cost of this improvement. The city claimed \$1,386.41 for paying to within two feet of the tracks, as they were at the time of making the contract with defendant and others. Defendant asserted that he was only liable for \$822.23 for paying to within two

feet of the double track, as it is now on the ground. The court instructed the jury to find for plaintiff for only the cost of paving to within two feet of the two tracks.

W. B. Rodgers and R. C. Rankin, for appellant. Knox & Reed, J. M. Cook, and Edwin W. Smith, for appellee.

GREEN, J. The learned court below decided this case upon the proposition of fact that "before any considerable portion of the street was paved, and therefore the portion in front of Mr. Wood's property was paved, the street-car company, by the consent of councils, put down an additional track." The court held "that the property holders, having agreed to pay for the paving of that portion of the street that lay outside of the portion occupied by the street railway with its tracks, and another track having been put down before the paving was done at all at this part of the street, the city can only recover for the paving up to within two feet of the tracks as laid when the improvement was made." It is apparent from the foregoing that the decision was based entirely upon the ground that the city never did put down the pavement up to within two feet of the rail of the tracks of the railway company, as the street and track were when the agreement was made, and therefore they could not require the defendant to pay them as if they had done so. If the learned judge was correct in his assumption of the fact, his conclusion was certainly correct. But the borough, appealing from the decision, alleges, in the history of the case: "After the borough had entirely completed the improvement in front of defendant's property, the railway company, by virtue of its new ordinance, tore up the pavement, and laid down two tracks in place of the former single track, replacing the pavement at its own expense." Of course, if this statement of the facts is correct, the borough is entitled to recover the full amount of its claim, because then it did in point of fact lay the whole of the pavement up to within two feet of the rail of the tracks of the railway company, as the track was when the agreement was made, and was entitled, under the contract, to be paid the full price for so doing. The learned counsel for the borough, appellant, argue the case upon this assumption of fact; and of course, if they are correct in their facts, their position is well taken. But the defendant asserts in the counter statement that "before the work was done in front of Mr. Wood's property the passenger railway company laid its second track," and the learned counsel for the defendant argue their case upon that assumption.

It is rather remarkable that there should be such a radical difference in the statement and assumption of the controlling facts of the case. Counsel on each side discuss the question from their own standpoint of fact, and

therefore the question is, what was the real state of the facts? And this is a subject which is not discussed at all by the counsel on either side. The writer has read all the testimony very closely and critically, and, while he thinks that the jury would have been justified in finding that the pavement was not actually laid at the time the second track was laid, the evidence is quite uncertain and somewhat confusing on that subject. But the affidavit of defense contains such remarkable statements in reference to this matter that we do not feel at liberty to sustain the binding direction given by the learned court below to the jury. It says "that, after the street had been paved in front of the defendant's property, it was torn up, and two tracks of the said passenger railway company were laid upon said street." The same is repeated further on in the affidavit, and the charge is made that the borough and the railway company were in collusion in tearing up the pavement after it had been laid, and in laying two tracks instead of one. In view of this statement in the affidavit, so inconsistent with the theory upon which the court charged the jury, and with the present contention of the defendant, we think it was error to instruct the jury that, "Another track having been put down before the paving was done at all at this part of the street, the city can only recover for the paving up to within two feet of the tracks, as laid when the improvement was made." Judgment reversed, and new venire awarded.

(100 Pa. St. 32)

IN RE MARTIN'S ESTATE.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

WILL—CONSTRUCTION—RIGHTS OF LEGATEE.

Under a will directing the trustee to pay the income to testator's wife, providing that, if she should wish to use for her own purposes all or any of the property, she should have such power, and providing that she should, during her life, be entitled to possession of all his estate, without security, where the income is insufficient to meet her necessities she is entitled to have the deficiency made up out of the principal.

Appeal from orphans' court, Philadelphia county; Ashman, Judge.

Application of Emma R. Martin, widow of Luther Martin, for an allowance of \$1,500 out of the estate in addition to the current income. From an order allowing that sum, Luther Martin, Jr., and others, trustees under the will of Luther Martin, appeal. Affirmed.

Richard C. Dale and Samuel Dickson, for appellants. Page, Allinson & Penrose, for appellee.

MCCOLLUM, J. The learned orphans' court, in making the order complained of, simply determined that, under the will, the petitioner was entitled to have, from the

principal of the estate, the sum mentioned in the petition for the purpose declared therein, without giving security therefor. It did not decide that the provisions of the will in relation to the possession and care of the property constituted a gift to her "of so much of the principal as she might see fit to appropriate." It expressly declared that it was not necessary to do so. But the appellants contend that the order cannot be sustained, except upon a construction of the will which gives the entire estate to her to use and dispose of as she pleases, and that such is a true construction they emphatically deny. The precise question before the court was whether any portion of the principal of the estate could be lawfully applied to the maintenance of the petitioner while the income of it was insufficient "to meet her necessities." There were no facts in dispute, and the answer to the question, therefore, depended solely upon the construction of the will. It may be considered as conceded, because it is alleged in the petition, and not denied by the answer, that, in consequence of a material and possibly temporary reduction of the income of the estate for the year immediately preceding the application for the order, the sum demanded was required, in addition to the income, for her support. The petitioner is the widow of the testator, the first object of his bounty, and one of the executors and trustees appointed by his will. To her he gave the income of his estate during her lifetime, together with the power to use or occupy for her own purposes, if she desired to do so, all or any part of his property. He also gave to her the right to have, while she lived, possession of all his estate, "without being required to give security therefor." It seems to us that the power and right thus conferred furnished a clear warrant for the order in question. Manifestly, the dominating purpose of the testator in making his will was to secure to his wife a liberal maintenance from his estate. It is quite probable he thought the income of it would ordinarily be sufficient for all her wants, but he recognized that there might be a condition which would make it necessary to have recourse to the principal properly to supply them. The proviso to the clause of the will which directs the trustees to pay the income to her is adapted to such a condition, and authorizes the use of the principal for her support when the income is not sufficient for it. We do not think this proviso can be restricted in accordance with the appellants' contention. The power to use or occupy all or any part of the testator's property for her own purposes is a comprehensive power. It extends to the entire estate, and includes money and choses in action, as well as lands, horses, cattle, carriages, household furniture, and the like. It is a proper exercise of this power to order the trustees, on her application, to advance to her, from the principal, such sum as is needed for her suitable main-

tenance, whenever it affirmatively appears that the income which is primarily devoted to it is insufficient to accomplish the testator's controlling purpose. In plain words, he gave to her this power, and the order in question is not only clearly within the scope of it, but it accords with the obvious intention of the donor in conferring it. The learned counsel for the appellants seem to think that this construction of the will is fatal to the trust created by it. It is true that the exercise by the petitioner of all her rights under the will would materially reduce and qualify the duties of the trustees in respect to the care of the estate during her lifetime, and possibly the shares of the other beneficiaries might be somewhat diminished by it. But the mere apprehension of such results furnishes no ground for a construction which ignores plain and important provisions of the will, and defeats the controlling purpose of the testator in making it. Decree affirmed, and appeal dismissed, at the costs of the appellants.

(160 Pa. St. 36)

COMMONWEALTH v. COYLE et al.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

DIRECTORS OF THE POOR—APPRENTICING INFANTS.

Directors of the poor may lawfully apprentice an infant pauper to a fit person in an adjoining district.

Appeal from court of quarter sessions, Cumberland county; W. F. Sadler, Judge.

Indictment of James Coyle and others for neglect of duty as directors of the poor. From an order quashing a count of the indictment, the commonwealth appeals. Affirmed.

J. E. Barnitz, Fillmore Maust, and Wm. J. Shearer, for the Commonwealth. W. A. Kramer, J. W. Wetzel, M. C. Herman, and John Hays, for appellees.

MCCOLLUM, J. This is an appeal by the commonwealth from an order of the court of quarter sessions of Cumberland county quashing the third count of an indictment against James Coyle and others for neglect and violation of their duty as directors of the poor and of the house of employment in said county. It was the only count in the indictment in which the offense was laid as *contra formam statuti*. It was obviously framed on the theory that, in binding an infant pauper settled in their district to a person residing in an adjoining county, the defendants committed a misdemeanor in office. If the contention based on this theory is sound, it was error to quash the count. But the learned counsel for the commonwealth have not referred us to any statute which requires in express terms or by fair implication that the binding out shall be to a resident of the district of the pauper's settlement, or to a decision of any court which

sustains their claim that the officials charged with the care of the poor in one district cannot lawfully apprentice an infant pauper to a fit person in a neighboring district; nor has our own research brought to our notice any such statute or decision. It seems to us that it is at least questionable whether a restriction upon the power of the officials in accordance with the commonwealth's contention would be for the best interest of the persons most likely to be affected by it. It might often happen that such a restriction would deny to a poor child a good home, with a kind master, and thus materially interfere with his physical, intellectual, and moral advancement. We cannot say, therefore, that, if the defendants had bound young Diller to a suitable person in Adams county, they would have exceeded their lawful powers, or violated any duty they owed to the lad, or to the district they represented. If the directors of the poor knowingly or negligently bind an infant pauper to a cruel master in their own district or elsewhere, they violate their plain duty to the child, and ought to be punished for it, but their selection of a good master and comfortable home for the child in an adjoining district is not in disregard of any duty the law enjoins upon them. While the count in question included some matters fairly covered by the preceding counts, it was grounded upon a denial of the power of the defendants to bind a poor child, who was a charge upon their district, to any resident of the adjoining county; and for that reason we think it was properly quashed. The specifications of error are overruled, and the judgment is affirmed.

(160 Pa. St. 95)

GERNERT v. ALBERT.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

TRUSTS—POWER OF TRUSTEE—PURCHASE—MONEY MORTGAGE—VALIDITY.

1. A purchase-money mortgage given by a trustee is valid, in the absence of knowledge of the trust by the mortgagee, though the mortgagor is not expressly authorized to encumber the estate. *Wilhelm v. Folmer*, 6 Pa. St. 296, distinguished.

2. Where land is devised to a trustee with power to sell as he may deem to the best advantage of testator's children, and "to reinvest" the proceeds in other real estate, the trustee has the power, on reinvestment, to secure the price by mortgage.

Appeal from court of common pleas, Lebanon county; John B. McPherson, Judge.

Scire facias on a mortgage by Mary Gernert against Abraham Albert, executor and trustee of the estate of Malinda Albert, deceased. From a judgment for plaintiff for want of sufficient affidavit of defense, defendant appeals. Affirmed.

The opinion of McPherson, J., referred to in the opinion of the supreme court, is as follows:

"This is a *scire facias* upon a purchase-

money mortgage, and the defense is that the mortgage is not a lien upon the land because the land was bought with trust funds, and therefore became trust property the very instant the deed was delivered, passing at once beyond the power of the trustee to incumber it, even for the purchase money. It is no doubt true that, if a trustee has already received the legal title to land belonging to the trust, he may not afterwards incumber it, unless empowered by a court, or expressly or impliedly authorized by the instrument creating the trust; but to say, as is now said, that, if a trustee lawfully uses \$2,000 of trust funds to buy a farm worth \$3,000, he cannot bind the land by a mortgage for the balance of the purchase money unless he has received express authority to incumber, is a proposition which does not commend itself either to the reason or to the sense of fairness. In such a purchase the trustee really buys no more than he pays for. In form he receives the whole legal title, but his actual interest in the land is only what remains after he pays to the vendor, from time to time, the annual value of the mortgage. In substance, the vendor continues to be a part owner of the land. He did own the whole of it, and, while he transferred the legal title with one hand, he took back a real, definite interest with the other, so that it may truthfully be said that at no point of time was his grasp so far relaxed as to enable the trust to seize what it did not buy, and never was intended to have.

"Indeed, another fact in the transaction before us shows plainly how untenable is the defendant's position. The deed for the land (referred to in his affidavit) is made expressly subject to a widow's dower of \$890. Surely, he does not contend that the title passed to the trust free of this incumbrance; and yet, if it did not so pass, it is hard to give any reason why the vendor might not refuse to sell except subject to a second incumbrance. If the first was superior to the trust, why is not the second? In truth the transaction was a unit, the vendor saying, 'I will transfer the whole legal title to you on condition that you pay me a certain sum of money, and take the land subject to the dower which is now upon it, and subject, also, to my claim of \$1,000 for unpaid purchase money,' and the vendee saying, 'I accept these terms.' How can the latter repudiate one term of this contract on the pretense that part of it took effect, and part of it did not? In fact, the defendant did not offer any argument in support of his position, but contented himself with citing *Wilhelm v. Folmer*, 6 Pa. St. 296, as a decisive authority in his favor. The syllabus of that case is imperfect, and conveys a wrong impression; neither is the case well reported; but the facts, so far as they can be gathered, present a situation very different from the one before us. There, the trust was created by an instrument to which the vendor and vendee

were parties, and therefore the vendor knew the terms of the trust and the powers of the trustee. Here, the trust is created by a will of which the vendor is not averred to have had any knowledge; the vendor did not formally convey the land to be held in trust; and we are apparently asked to assume that the vendor knew of the trust, and knew that the trust funds were being used, merely because the vendee is described in the deed as 'executor and trustee under the last will and testament of Malinda Albert.' It would have been easy to aver the vendor's knowledge of these facts; but, as the case stands, the vendor may as readily have supposed that the vendee (who is the father of the cestuis que trustent) was applying his individual money to the purchase, and was thus enlarging the trust estate of his children. This defect in the affidavit is serious, and is enough, in itself, to distinguish the case from *Wilhelm v. Folmer*.

"But there are other differences quite as important. There, the deed was made to the trustee on February 11th, but he did not give the judgment in controversy until the 18th of that month, and it was not entered until the 25th. Being a judgment, and not a mortgage, this unexplained delay broke the continuity of the transaction, (*Love v. Jones*, 4 Watts, 465; *Jacobs' Appeal*, 23 Pa. St. 477; *Snyder's Appeal*, 91 Pa. St. 477,) thus bringing the case within the principle of *Kauffelt v. Bower*, 7 Serg. & R. 64. Moreover, while the deed to *Wilhelm* seems to have been in trust, the judgment which he gave appears to have been in his individual name, and this (it is said by the court on page 301) was the true agreement of the parties. Mr. Justice Bell says: 'By the articles stipulating the terms of the purchase, the vendor agreed to accept Samuel's judgment note, as it is called, to secure payment of the balance of the purchase money, which created a mere personal obligation binding the obligor.' An effort was made to modify this agreement by proof of an 'understanding' that the land was to be bound, but (the court goes on to say) 'were it even conceded that such a parol understanding, if properly had, could be made effective to charge the trust estate with the lien of the judgment, there is nothing in the case showing such agreement by persons entitled to make it.' In the case before us, the incumbrance is by a mortgage specifically pledging the land, and not by judgment. The mortgage is made upon the same title conveyed by the deed, whatever that title may be; it is expressly declared to be for purchase money; it was made only a few days after the deed, and both were recorded on the same day, only a week after the title passed, and thus the continuity of the transaction is undoubted. Act 1820, § 1, 7 Smith Laws, 803. A vendor can do no more than this to show his purpose not to let go his hold upon so much of his land as he has not

been paid for; and in our opinion this is enough to bind the land, even against a trustee who is buying the land in the exercise of his trust, although he may not have an express power to incumber.

"There is, however, another ground on which this affidavit may be fairly declared insufficient. The will of Malinda Albert devised to the trustee certain land in trust, and empowered him to sell it 'at such price or prices as he may deem best to the advantages of my said children, and to reinvest said proceeds in other real estate. * * *'. This power to 'reinvest' may with great propriety be held to authorize impliedly the mortgage in question. The power to reinvest is general. The trustee is not restricted to the purchase of another piece of land precisely equal in value to the price which he may receive for the farm devised; and, if he may buy a somewhat more valuable property in the belief that the purchase is judicious, he must have the power to pledge the land for the payment of the surplus. That the trust may keep the land without paying for it, and, if the mortgage had been for the whole purchase money, the defense would be equally good or equally bad, is a proposition which can hardly hope to be received with favor before any tribunal, and no court administering equity will accede to it unless compelled to do so by some rigid rule of law or by considerations of public policy. We direct judgment to be entered in favor of the plaintiff for want of a sufficient affidavit of defense, the amount to be liquidated by the prothonotary."

Bassler Boyer, for appellant. A. Frank Seltzer, for appellee.

PER CURIAM. This is a scire facias on a purchase-money mortgage given by the defendant to the plaintiff. The affidavit interposed by the mortgagor was adjudged insufficient, and rightly so, as we think. All that can be profitably said in relation to the proposition for which he contends will be found in the clear and able opinion of the learned judge of the common pleas. On that opinion we affirm the judgment.

(56 N. J. L. 422)

STATE (STROUD, Prosecutor) v. CONSUMERS' WATER CO. et al.

(Supreme Court of New Jersey. March 6, 1894.)

SPECIAL ELECTIONS—NOTICE—MUNICIPAL INDEBTEDNESS—VALIDITY OF ORDINANCE—CERTIORARI.

1. When a statute directs that notice of an election shall be given for at least six days, the method of computation is to include either the day when the notice was given or the day of the election, and to exclude the other day.

2. The amount of debt which a city can incur in the purchase of waterworks under the acts (Revision, p. 723, § 43; Supp. Revision, p. 689, § 783) is not restricted by a limitation of indebtedness contained in the city charter.

3. A city under these acts can purchase the waterworks of more than one company.

4. An ordinance providing for the purchase by a city of the property of a water company, stock in which company was held by four members of the common council who voted for the ordinance, is illegal, because opposed to the policy and intent of section 44 of the crimes act, (Supp. Revision, p. 200.)

5. It would seem that such ordinance is also voidable at common law, because its passage was for the purchase of property in which the agents of the city were interested.

6. A resident of the city who pays a poll tax only can prosecute a writ of certiorari to test the legality of such ordinance.

Certiorari at the suit of Robert Stroud against the Consumers' Water Company and the Atlantic City Waterworks Company to review ordinances of the common council of Atlantic City touching the purchase of waterworks. Judgment for prosecutor.

Argued November term, 1893, before DEPUE, VAN SYCKEL, and REED, JJ.

J. J. Crandall, for prosecutor. A. B. Endicott, for respondent Atlantic City. W. E. Potter, for respondent Consumers' Water Co. Joseph Thompson, for respondent Atlantic City Waterworks Co.

REED, J. On June 30, 1892, a special election was held in Atlantic City in respect to the acceptance of the provisions of "An act to enable cities to supply the inhabitants thereof with pure and wholesome water," and the supplements thereto. Revision, p. 720; Supp. Revision, p. 665 et seq. The provisions of the act were assented to by a majority of the legal electors voting at said election. There were at this time two water companies engaged in supplying water to the inhabitants of the city. Under color of the provisions of the act mentioned, and its supplements, the common council of Atlantic City, on October 17, 1892, passed an ordinance providing for the purchase of the property and franchise of the Consumers' Water Company for the sum of \$200,000, payable in bonds of the city; and, on December 19, 1892, passed a similar ordinance for the purchase of the property and franchise of the Atlantic City Waterworks Company for the sum of \$500,000, payable in bonds of the city. The terms of purchase contained in the respective ordinances were accepted by each of the respective companies. The ordinances mentioned are now attacked.

The legality of these ordinances is challenged upon several grounds. The first of these, in logical order, is the one which denies that the statute, under the provisions of which the municipal action was taken, was ever legally accepted by Atlantic City. The point made under this head is that the statutory notice of the special election held to obtain the sentiment of a majority of the legal electors of Atlantic City was not given,—that the notice which was given was only a five days' instead of a six days' notice. The statute (Revision, p. 725, § 52) requires notices of the special election to be set up and published at

least six days previous to the day of election. The notices were given June 24th, and the election was held June 30th. By excluding one and including the other of these days in the computation, it appears that six days' notice was given. This method of computation is the mode adopted in this state, unless the requirement is that the days shall be entire days. *Den v. Fen*, 8 N. J. Law, 303; *State v. Inhabitants of North Bergen*, 39 N. J. Law, 694, 695; *McCulloch v. Hopper*, 47 N. J. Law, 189. Nor do the words "at least six days" imply more than that six days' notice shall be given. The justice's court act requires that all summons shall be served at least five days before the time of appearance. Under this act, the true mode is to exclude either the day of service or of appearance, and to include the other. *Day v. Hall*, 12 N. J. Law, 203. Whatever differences of view, in respect to the force which should be given to the words "at least," may exist elsewhere, it is settled here that they do not change the requirement of a certain number of days' notice into a requirement that the days shall be entire. The notice was sufficient.

The next objection is that the amount of the indebtedness which will be imposed on the city by these purchases is in excess of the amount to which the city indebtedness is limited by the city charter. The charter limitation is \$35,000. The proposed cost of the two works is \$700,000. If these purchases are within the restraining clause of the charter, the ordinances are ultra vires. But an inspection of the statutes authorizing the purchase of waterworks will display an intention that the only limitation to be put upon the amount of the cost and expense of carrying out the power conferred is the limitation contained in the act itself. By the original act (Revision, p. 723, § 43) the amount of debt which could be incurred was \$80,000, and by the supplement (Supp. Revision, p. 669, § 783) this amount was changed to \$1,000,000. The express power to issue bonds up to this amount, the provision for the application of the water rents to the payment of this debt, and, indeed, the whole scope of the statutory scheme, displays a clear intent that the amount of this municipal indebtedness springing out of these purchases is controlled entirely by the terms of this statute.

The next objection is that the statute did not empower the common council to buy two water plants. We think that the statute clearly confers this power. The purpose of the act is to enable cities, if they wish to do so, to take into their own hands the supply of water. It may be supplied already by private or corporate enterprise, but this act enables the municipality itself to supply the water. The power to accomplish that purpose is plenary. The city can buy or condemn land and sources of water supply, and build its own works and lay its own pipes. It can buy a fully-equipped plant. It can buy such

plant, and additional land and water supply. It can buy two or more plants, and additional land and water sources. It can do all this, under the power granted, so long as the exercise of the power, in view of present and future municipal needs, is not so grossly abused as to call for the supervisory interposition of this court.

The next objection is that the ordinances are illegal because four of the members of the common council who voted for them were stockholders in the Consumers' Water Company. The point made is that the common council was the agent of Atlantic City in making these purchases, and that four of its members were adversely interested as part owners of the property of the Consumers' Water Company,—that the contract is voidable at the instance of the city, or a taxpayer of the city. "It is a fundamental rule, applicable to both sales and purchases, that an agent employed to sell cannot make himself the purchaser; nor, if employed to purchase, can he be himself the seller. The expediency and justice of this rule are too obvious to require explanation." *Dunlap, Paley, Ag. marg.* p. 33. Indeed, this doctrine is so entirely settled that citation of authorities would be wasted. Nor is this doctrine confined to transactions of private agents. It is applicable whenever the fiduciary relation arising out of the contract or condition of agency exists. The rule is enforced, whether the agency is public, quasi public, or private. "It is well settled," says Mr. Beach, "that directors or managers of corporations and other companies are equally within the rule which guards and restrains the dealings and transactions between trustee and cestui que trust, and agent and his principal; directors and managers being in fact trustees and agents of the bodies represented by them." 1 *Beach, Priv. Corp.* § 240. Again, in section 242, he says: "Directors are disqualified from acting in the right and behalf of themselves and of their companies at the same time; and transactions with themselves, or wherein they are interested, are voidable, either by the company, or by its stockholders, or by its creditors." A director of a corporation cannot make for himself, or for his own benefit, a contract which will bind the company. The contract may be repudiated by the company at the instance of a stockholder. *Guild v. Parker*, 43 N. J. Law, 430. The limitations upon this doctrine, as well as its applicability to corporations and their directors, is illustrated in the case of *Stewart v. Railroad Co.*, 38 N. J. Law, 505, decided in the court of errors. The Morris Canal & Banking Company had entered into a contract with Stewart to lease to him a number of canal boats, and to allow to him and to refuse to others a special drawback from the amount of tolls which were payable according to the printed rates of tolls. Stewart was, at the time of the execution of the contract, one of the directors of the Canal & Banking Company.

The doctrine announced was that this contract was voidable at the option of the company, exercised within a reasonable time. Mr. Justice Dixon, speaking for the court, said: "The vice which inheres in the judgment of a judge in his own cause contaminates the contract. The mind of the director or trustee is the forum in which he and his cestui que trust are urging their rival claims, and when his opposing litigant appeals from the judgment there pronounced that judgment must fall." It matters not that the contract may seem a fair one. Fraud is too running and evasive for courts to establish a rule that invites its presence. Again, the learned justice remarks: "The application of the rule is most frequent in the relations between vendor and purchaser, but its reason and force extend to all agents and trustees, public and private. It has not always presented itself to the minds of judges in its full scope. At times they have been seduced into listening to suggestions that the circumstances of the special case showed the absence of fraud and overreaching. At other times, they have intimated that the cestui que trust must seek his relief in equity, but the strongest intellects have enunciated the rule with its utmost vigor and in its broadest extent." As already observed, this doctrine applies not only to private agents,—to agents of corporations quasi public,—but to public agents, as well. *Mechem*, Pub. Off. § 840. One of the trustees of a school district can enter into no contract to furnish labor or materials to build a schoolhouse which will bind the district. *Pickett v. School Dist.*, 25 Wis. 551; *Currie v. School Dist.*, 35 Minn. 163, 27 N. W. 922. Where certain freeholders were appointed to constitute a board to act for certain townships, under an act for the improvement of a harbor, a contract made with a part of said freeholders to build piers, although said part was less than a majority, was held void. *People v. Overysse Tp. Board*, 11 Mich. 222. An employment, by or under authority of the common council of a city, of one of its members to render services for the city is against public policy, and no action can be maintained against the city to recover for services rendered. *Smith v. City of Albany*, 61 N. Y. 444. There was a statute making it unlawful for a member of any common council of any city in the state to become a contractor under any contract authorized by the common council, and authorizing such contracts to be declared void at the instance of the city. It was held that this statute was only declaratory of the common law, as it existed previous to its passage.

From the general prevalence of this doctrine in all classes of agencies, and the strictness with which it has been held in this state, it would seem that, aside from any statutory condemnation, the contract created by the ordinance and its acceptance is voidable. The suggestion that the passage of the ordinance was a legislative act, only, cannot

be entertained. It was a quasi judicial act. The common council, in making this purchase, were agents of the city, bound to exercise their judgment for the interests of the inhabitants of the city, uninfluenced by any adverse interest. It is not essential, however, that the voidability of this contract should be rested upon the common rule already discussed. It appears that contracts of this class have received the condemnation of the legislature. This appears by the forty-fourth section of the crimes act, in Supplement to the Revision, p. 200. This section provides that "if any member of any * * * board of common councilmen of any city * * * shall be directly or indirectly interested in furnishing any goods, chattels, supplies or property of any kind whatsoever to or for * * * city, the contract or agreement for which is made, or the expense or consideration of which is paid by, the * * * council of which such member is a part, shall be deemed guilty of a misdemeanor." While the section contains much beside, it contains clearly the provision above set forth. This language with equal clearness includes the contract in question. Four of the members of the common council of Atlantic City were interested in furnishing the property of the Consumers' Water Company to the city, the city, the expense or consideration of which is paid by the council of which these four members are a part. The invalidity of the contract, therefore, rests upon the doctrine that a contract is illegal if it be opposed to the general policy and intent of a statute. *Melliss v. Board*, 16 Q. B. Div. 446; *Milford v. Water Co.*, 124 Pa. St. 610, 17 Atl. 185; *State v. Mayor, etc., of Jersey City*, 34 N. J. Law, 390. I regard this case as directly ruled by the case last cited. The statute under which that decision was made is similar to the one already mentioned. Two of the members of the common council of Jersey City, in that case, were interested in the property purchased; in this case four. The conditions existing in that case exist in this. I may remark that the invalidity of such a contract in no way rests upon a criminal intent in those members who voted for it. I suppose none of the four had in mind the existence of this statute. The rule is one of policy, which, without regard to intention, inexorably reaches all contracts which contravene the purposes of the law. Having reached the conclusion that the ordinance for the purchase of the property of the Consumers' Water Company is invalid, the question remains whether this result affects the later ordinance for the purchase of the property of the Atlantic City Waterworks Company. I think it does. My reading of the testimony has left the impression that it is not probable that the second ordinance would have been passed, had it not been that the other ordinance had been passed and accepted. There seems to have been a

purpose to get both works, and I think each company was willing that common council should purchase the works of the other company if it purchased its own plant. The water committee of common council met the representatives of both companies together, called in the members of council, the water combine,—in regard to contracts for furnishing water. On the night when this committee reported, the first ordinance was introduced. After the passage of this ordinance, there was the purpose of purchasing the other, because the first contract had been made. The members who voted for the first, because they had so voted, were inclined to vote for the second ordinance, not only to subserve the purpose of controlling both plants, but to avoid incurring a suspicion of partiality towards the owners of the first-mentioned plant. The two ordinances seem to be so entangled in the transaction that I think the illegality of the first purchase affects the second purchase.

The remaining question is whether the prosecutor of this writ has such an interest as will support his position. He is a resident of Atlantic City, and pays a poll, but no property, tax in the city. He, however, as a resident in the city, pays all the tax which the law imposes upon him. The resident who is liable to a property tax in Atlantic City to-day may have no property taxable there the next month or the next year, and he who is now without may soon possess it. He may earn it, or nontaxable property may be transmuted into a taxable shape. It would be a narrow distinction to draw to hold that a citizen who pays a trivial property tax is a competent prosecutor, and that one who may soon be liable to pay a much greater tax is incompetent to test the legality of a transaction which will result in imposing a burden of debt upon his municipality for a generation. The city itself is represented by those who passed this ordinance, and, therefore, the only persons who will and can take measures to test its legality are residents, and the use of the writ for such a purpose should be liberally granted. The ordinances are set aside.

TRIMMER v. TODD.

(Court of Chancery of New Jersey. Feb. 24, 1894.)

EXECUTORS—RIGHT TO PROFITS OF DEVISED REALTY—ABATEMENT OF SUIT ON REMOVAL.

1. Where testator devises his realty, but his personalty is insufficient to pay his debts, his executor can appropriate the rents of the realty which fall due after testator's death to the discharge of the debts, rather than to sell the realty, or any part thereof.

2. A suit by an executor, as such, abates on his removal from office, and is suspended for all purposes where no other person is appointed to represent the estate.

Bill by Martin L. Trimmer, as executor, to enjoin Jane E. Todd from prosecuting an action at law. Injunction denied.

Charles A. Skillman, for complainant. John N. Voorhees, for defendant.

BIRD, V. C. In this case a bill is filed for an injunction restraining the defendant from prosecuting an action at law. The complainant, as executor, complains that the defendant is making use of legal proceedings to obtain an inequitable advantage. The defendant is the widow of the testator. The testator gave to her a life estate in all his lands during the term of her natural life. At the time of the death of the testator there was a peach crop coming to maturity upon the premises. The testator in his lifetime had entered into some arrangement with a third person to cultivate his farm, and take care of these peaches, for a certain proportion of the crops, including the crop of peaches. After the death of the testator, the tenant gathered and marketed the peaches, and collected the proceeds thereof, as, by the understanding between him and the testator, he had a right to do. The executor, being convinced that the debts of the testator very much exceeded his personal estate, induced the tenant to pay to him, instead of to the widow, the one-half of the peach money which he had received upon the sale of the peaches as aforesaid. Upon doing this, the executor entered into some agreement, by which he promised to indemnify the tenant. To recover these moneys, the widow brought suit against the tenant.

The executor by his bill presents these facts, and alleges that, since the personal estate is insufficient to pay the debts of the testator, it is but equitable that the rents and profits of the estate which fell due after the death of the testator should be taken by him, and be appropriated, as far as they will go, to the discharge of the debts, rather than to sell the real estate, or any portion thereof, for that purpose; insisting that the debts are a superior lien. Upon the presentation of the bill an order to show cause was awarded. When this order to show cause came on to be heard, it was shown by the answer and affidavits, and admitted by counsel for the complainant, that the executor had been removed from his office by the order of the orphans' court of the county of Hunterdon. It is also admitted that from this order an appeal has been taken. With these facts established by affidavit, or admitted, it seems quite impossible upon this application for the court to take any steps whatever. The motion for the injunction is made by the counsel for the complainant in the cause. He is complainant as executor, not in his own right. He having been removed, since the filing of the bill, from office, there is certainly an abatement of the suit. The court can therefore make no order in behalf of him, or in his interest, or in behalf of the estate which he

represented until the revivor, or until it happen that there is a complainant representing the estate of the deceased, as I understand in such a case the cause cannot be proceeded with until the cause is revived, or the abatement in some way cured. *Daniell, Ch. Pr. p. 1542.* All orders made pending such abatement will be considered nugatory, and upon application will be discharged. *Id.* In such cases a reasonable time is allowed to those interested to revive a suit, but, if no steps are taken for that purpose, the defendant may give notice of an application that, unless the suit is revived within a reasonable time, a motion will be made to dismiss the bill. *Id. p. 1543.* In these cases his position plainly is that they are representatives of the decedent, or persons who stand in a position to take his place, in case they desired to do so. No such condition exists in the case under consideration. Since the order removing the complainant in this cause from the office of executor, no other person has been appointed administrator with the will annexed, or otherwise, to take his place. Therefore, we are confronted with the fact that the suit has totally abated, and also with the fact that there is no person representing the estate of the deceased upon whom any notice for any purpose can be served. I think that the reasoning of the vice chancellor in the case of *Lee v. Lee, 1 Hare, 617*, must be regarded as conclusive upon the question as to the real status of such a case. It seems to me to be suspended for all purposes absolutely. In other words, the case is as though it had never been instituted, and every person is at liberty to act as though no bill had been filed, or any order to show cause made. The orphans' court in this case had jurisdiction of the question involved. This being so, the judgment or decree of that court is complete, and has binding force until it is annulled or reversed. *Freem. Judgm. § 328.* I think the injunction asked for must be denied, and the order to show cause discharged.

(56 N. J. L. 346)

SPURR v. NORTH HUDSON COUNTY R. CO.

(Supreme Court of New Jersey. Feb. 23, 1894.)

RELEASE OF JOINT TORT-FEASOR—RES JUDICATA.

1. In case of a joint tort, the person injured, if he accept satisfaction from one of such tort-feasors, cannot sue the other.

2. One of two tort-feasors, upon being sued, pleaded settlement by plaintiff with his defendant companion. The plaintiff replied that such settlement had been obtained by fraud. The rejoinder was that, upon bill filed by the plaintiff to set aside the settlement for fraud, it had been established by decree. *Held*, that such decree was conclusive between the plaintiff and the defendant who was not a party to the chancery suit.

(Syllabus by the Court.)

Action by Thomas Spurr against the North Hudson County Railroad Company to recover

for personal injuries. Heard on demurrer to a rejoinder. Judgment for defendant.

Argued at November term, 1893, before BEASLEY, C. J., and GARRISON, LIPPINCOTT, and MAGIE, JJ.

Wm. H. Davis, for plaintiff. J. C. & S. A. Besson, for defendant.

BEASLEY, C. J. This is an issue fashioned by a demurrer. The facts are thus stated in the pleadings:

The narr. alleges that the plaintiff, being a passenger in a street car of the defendant, was hurt by the negligent handling of said car by its servants; the act of negligence being the putting the car in such a position as to be run into by a locomotive of the Pennsylvania Railroad Company. To this cause of action, in a special plea, the defendant stated that the grievance complained of, if any such there were, was committed jointly by the defendant and the Pennsylvania Company, and that the plaintiff by his deed, and for a certain consideration therein mentioned, had released unto the last-named company all claims and demands for damages occasioned by said supposed grievance. The replication to this defense is that the release and settlement just mentioned were made and obtained from the said plaintiff by the deceit and fraud of the said Pennsylvania Company; the same being specified. To this replication the answer in the defendant's rejoinder is to the effect that, upon a bill exhibited in the court of chancery by the plaintiff against the said Pennsylvania Railroad Company to set aside the release and settlement in question, a decree was entered repudiating the alleged fraud, and validating said release and settlement. This rejoinder provoked the demurrer now to be disposed of.

It was admitted upon the argument on the legal issue thus presented that, in the language of the brief of the counsel of the defendant, "while separate suits may be brought against several defendants for a joint trespass, and while there may be a recovery against each, yet there can be but one satisfaction." For this doctrine, which is not disputable, the case, among others, of *Livingston v. Bishop, 1 Johns. 290*, was cited. Recognizing and acknowledging this principle, in reply to a plea that such a satisfaction had been received for the present joint grievance, the plaintiff replied that such settlement had been obtained from him by the fraud of the Pennsylvania Railroad Company; and this assertion led to the rejoinder that such question of fraud had been litigated between the plaintiff and that company, the result being a decree validating the settlement in question. And hereupon the counsel of the plaintiff raises in his brief the contention that the proceeding in equity resulting in the decree just stated was *res alios acta*; that, not being a party to the record, the judicial decision cannot be set up to bar his right to controvert

the validity of the settlement. This argument moves upon the ground of the ordinary principle that an estoppel by record, in order to be binding, must be mutual. But we think that this principle cannot be applied to the instance now before us. The entire substance of the injury presented by this demurrer is whether a legal settlement has obtained between the plaintiff and the Pennsylvania Company; and, touching that fact, the record before us, as between these parties, is plainly conclusive. Nor would proof by the plaintiff in the present suit that the settlement in question was vitiated by fraud unsettle in any degree whatever the adjudicated fact. Even in the presence of the most conclusive evidence on that subject, the settlement in controversy would still remain uncontestedly established.

But, again, we also think that, in a legal sense, the defendant is here claiming under the Pennsylvania Company by reason of the settlement in question, and that therefore he is, in this respect, in priority with that company. He here sets up the act of that company, and claims exemption from this suit through it. This being his status, he would have been bound by the decision in chancery if the decree had annulled the settlement on the ground of fraud; for it is obvious he could not have set up such an invalidated settlement as a bar to this action. This being so, it follows that there is plainly no want of mutuality between these litigants in the estoppel now contesting. Let the defendant take judgment in the demurrer.

(52 N. J. E. 426)

TRIMMER v. TODD.

(Court of Chancery of New Jersey. Feb. 24, 1894.)

MORTGAGE FORECLOSURE—PARTIES—PLEADINGS—MULTIFARIOUSNESS.

A person who is an executor, and who in his individual capacity holds a mortgage upon the lands of which the testator died seised, may file a bill to foreclose such mortgage; but he cannot, in such bill, ask for an administration of the estate of the testator, in whole or in part, without joining himself as executor as a party complainant, nor, in case it is alleged that the personal property is insufficient to pay the debts, without making all creditors parties defendant. Without such allegations a bill asking for partial administration is demurrable for multifariousness and for want of parties.

(Syllabus by the Court.)

Bill of Martin L. Trimmer against Jane E. Todd to foreclose a mortgage. Heard on demurrer to the bill. Demurrer sustained.

J. N. Voorhees, for complainant. Charles A. Skillman, for defendant.

BIRD, V. C. The bill in this case is filed by Martin L. Trimmer. It sets forth the fact that one Peter N. Todd, in his lifetime, gave three several bonds, each of them secured by a mortgage upon the same parcel of

land, amounting in all to \$13,000, and that afterwards the said Todd made his last will and testament, in and by which he directed payment of his debts and funeral expenses, and gave three legacies of \$250 each, and the said tract of land to his wife during her natural life, upon her paying the taxes and interest from time to time becoming due upon the said mortgages, and then making disposition of the residue of his estate, appointing the said Martin L. Trimmer as executor. The said testator died, and his will was offered for probate by the said Martin L. Trimmer, to whom letters testamentary were granted. He undertook the settlement of the estate. After he became such executor, he procured an assignment of the said bonds and mortgages to be made to himself. He alleged by his bill that the inventory of the personal estate shows that it was worth only \$366.85, and that the indebtedness of the said Todd, over and above said mortgages, amounts to about \$1,000, and that the only estate with which the same can be paid is the personal property so inventoried, and the real estate covered by the said mortgages. In this bill he not only asks that the said mortgages be foreclosed, but that the surplus money be paid over to him, that it may be administered by him as executor and used in the payment of the debts and legacies aforesaid. The bill is demurred to for multifariousness and for want of proper parties.

It will be seen, from the above statement, that the bill clearly has two objects in view. One is the foreclosure of the said mortgages, and the other is the partial distribution of the estate of the said decedent. It is alleged that these two objects are so inconsistent that the bill is necessarily multifarious. In the first place, I desire to say that it may be possible for an executor, who has a lien upon the estate which he is administering, to proceed by a bill in equity to enforce his lien, and in doing so be justified in asking for the complete administration of the estate. In an undertaking of this kind, however, it would be essential for him to appear before the court in his character as executor, as well as in his own behalf. It should also appear that all parties in interest in such an administration suit should be before the court, so that the rights of every party in interest could be determined. With these general statements in mind, it will be seen, by looking at this bill, that Mr. Trimmer does not appear as a party in the capacity of executor, but only in his individual capacity. Therefore, the condition presented is that of an individual invoking the aid of the court of chancery to enforce his debt, and also to partially administer the estate. I say partially, for all of the parties in interest, as will be seen hereafter, are not before the court, so that the extent of their interests can be determined. Now, there can be no objection to the holder of these mortgages proceeding to foreclose them, but I cannot perceive how a creditor can as-

sume the control of the estate and seek its administration until it appears upon the face of the bill that the person to whom the law has committed that trust has become delinquent, or in some way exhibited a refusal to perform the offices of the trust. So long as there is no allegation of this nature in the bill, the presumption that the trustee is proceeding in the performance of his duty according to the law must prevail. Therefore, this case must be dealt with, with respect to the subject of multifariousness, upon the ground that Mr. Trimmer has proceeded in his individual capacity. Looking at the case from this standpoint, I can come to no other conclusion than that the bill is multifarious in that it seeks, not only the foreclosure of the mortgages, but, as intimated, to take charge of the business of administering the estate. The difficulty thus suggested is not overcome by the statement in the bill that there is an insufficiency of personal estate to pay the debts, and that it will be necessary to make sale of a portion of the real estate for that purpose, together with the prayer that the surplus arising from the sale of the real estate be paid to the complainant as executor; for it is not Martin L. Trimmer as executor that makes the prayer for the sale, and for the payment of the surplus to him as such executor, but it is simply Martin L. Trimmer, the individual. This is not a refinement upon words or phrases, but it springs from the essential nature or character of good pleading. No decree can be made for or against Martin L. Trimmer as executor. As such, he occupies no position whatsoever in this bill, nor are any allegations made against him as such executor. The only possible decree that can be made for or against him is in his individual capacity. Nothing else, for a single moment, would be supposed or urged. If he had filed this bill as Martin L. Trimmer, and John Doe had been the executor, and the same allegations and prayer had been made respecting John Doe, and nothing more, I apprehend that no creditor, either a mortgagee, or judgment, or simple contract, could be permitted to assume the position claimed by Mr. Trimmer in this case, and be sustained, if there were not any allegations making it apparent that the trustee was guilty of default of some nature which a court of equity would condemn. Hence, I think that, because the complainant in this case does not also show to the court that he files this bill as executor, as well as in his own behalf, and seeks a partial administration of the estate referred to in the bill, which can only be done by him as executor, the bill is multifarious.

And as to the question of parties: It seems very evident, from what has already been said, that the executor is most essentially interested, and that the cause cannot be proceeded with from any standpoint so long as the administration of the estate is contemplated, until he is made a party, either as

complainant or defendant. Upon the question of assets and liabilities, he, above all others, has a right to be heard, and he ought to be required to speak in such a case, either affirmatively or negatively; and, in such case, the general creditors, as well as devisees and legatees, have a right to be heard. It will not do, in this particular case, to say that it will be sufficient to make the executor a party, since he has charge of the personal estate and is supposed to represent the interests of creditors; for the executor, having the lien by virtue of these mortgages, has an interest which may be proved to be hostile to the interests of the general creditors, and certainly would be so in case of a deficiency of assets, real and personal, to pay all the debts. As the same person is the assignee of the mortgages which are being foreclosed, and also the executor of the last will and testament of the decedent, whose estate is sought to be administered, he can only be made a party by making him a party complainant. The position of the holder of the mortgages and of the executor being such as is above indicated,—one that may materially interfere with general creditors' interests,—they should be made parties, in order that they may contest the claims of the complainant as the holder of such mortgage, in case there should be a deficiency of assets. The complainant cannot be heard to say that they have no lien upon the estate, for this was expressly adjudicated in their favor in the case of *Haston v. Castner*, 31 N. J. Eq. 697. Nor can he be heard to say that the creditors are numerous, for, since he has seen fit, after accepting the office of trustee, to place himself in a position that may become hostile to the interests of such creditors, he cannot complain of the consequences which flow from his own conduct; nor will such conduct make the court less vigilant in its efforts to protect the rights of the others, whose rights, under other circumstances, might safely be lodged in his keeping. It is apparent that the complainant has a right to proceed to the foreclosure of his mortgage in his individual capacity. As such, he has no other interests in this estate. He has no other interest than had his assignor before the death of Peter N. Todd. As between him as Martin L. Trimmer, and the devisees and legatees, the relation is simply that of debtor and creditor, and nothing more.

Next: As above intimated, when he, as Martin L. Trimmer simply, and as assignee of the mortgages, attempts, in addition to the foreclosure of the mortgages, to administer, in whole or in part, the estate of the decedent mortgagor in and by the same bill in which he seeks to foreclose his mortgages, he is undertaking two very inconsistent lines of work, and hence multifarious. I have dwelt somewhat upon the question presented by this demurrer, in order that I may not be understood as insisting that Mr. Trimmer, as executor, could not come into court, under the

circumstances detailed in his bill, and ask for an administration of the assets in this estate in this court. That an executor may under certain circumstances do this, I think, is beyond question, as above intimated; but whether the facts presented in this case are sufficient for that purpose I do not feel called upon to decide. When the cases of *Pearse v. Hewitt*, 7 Sim. 471-478; *Doran v. Simpson*, 4 Ves. 650-665; *Burroughs v. Elton*, 11 Ves. 29, 35; *Harrison v. Richards*, 1 Ch. App. 478; and *Walker v. Walker*, 20 Wkly. Rep. 162,—are considered they will be found to throw some light upon the questions above presented. I will advise that the demurrer be sustained, with costs.

(56 N. J. L. 303)

KEEPERS v. FIDELITY TITLE & DEPOSIT CO., (two cases.)

(Court of Errors and Appeals of New Jersey. Feb. 26, 1894.)

GIFT CAUSA MORTIS—CONSTRUCTION OF WILL.

1. The plaintiff's sister, on her deathbed, delivered to the plaintiff the key of a box, saying: "I give you the box and all it contains." The box was in another room of the house, locked in a closet, the key of which was in possession of the plaintiff's mother, with whom the sister lived. The plaintiff lived elsewhere, and, during her sister's life, made no attempt to take possession of the box. *Held*, that there was no such delivery of securities contained in the box as is essential to a valid *donatio mortis causa*.

2. A will directed that testator's property be divided equally between his daughters, each to come into possession of her share on arriving at the age of 23 years, and that, in case of the death of either before arriving at that age, her children should inherit the parent's share, but, if no issue, then the survivor of the daughters should take the other's share. *Held*, that the will gave the survivor no right to the share of her sister, dying after she had reached the age of 23 years.

Abbett, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Essex county; before Justice Depue.

Two actions: one by Lillie A. Keepers against the Fidelity Title & Deposit Company to recover on a contract; the other by the same plaintiff against the same defendant in replevin. The issues were tried together, and, from the judgments rendered, plaintiff brings error. Affirmed.

The other facts fully appear in the following statement by DIXON, J.:

The plaintiff, Lillie A. Keepers, brought two suits in the supreme court against the Fidelity Title & Deposit Company,—one, an action on contract, to recover \$418.22, the balance of \$970 which had been deposited in the Howard Savings Institution by and in the name of Minnie I. Munn; and the other, an action of replevin, to obtain possession of stock certificate No. 2,459, for 41 shares of the capital stock of the American Insurance Company, a bond made by the plaintiff to Minnie I. Munn for \$1,000, and a bond made

by John Bernreuther to James T. Van Ness for \$400, which had been assigned to Minnie I. Munn. On the trial of these suits, in the Essex circuit, it appeared that all the things in controversy had belonged to the plaintiff's sister, Minnie I. Munn; and the plaintiff testified that her sister, while upon her deathbed, at home, a few hours before she lapsed into final unconsciousness, sent for the plaintiff, who lived elsewhere, and, on the plaintiff's coming into the room, the following incident took place: "My sister turned to my mother, and said 'to get those things for her.' My mother asked, 'What things?' and she replied, 'My things in the bureau.' My mother then brought to her from the bureau drawer a handkerchief, containing some things, and then she asked my mother to leave the room, which she did. My sister then opened the handkerchief, and it contained some jewelry and a little bag. From the bag she took a tiny key, and said to me, 'You see that key.' I said, 'Yes,' and she handed it to me, and said: 'There, that key I have carried in my bosom until it is rusty. It is the key of the box, and that I give to you, and all it contains.' Then she took the handkerchief, with the jewelry in it, and held the four corners of it up, and passed it over to me, saying: 'There, I give you these. I have no more use for them.'" It further appears that, at that time, the box which this key fitted was in another room of the same house, locked in a closet of which Miss Munn's mother had the key, and that the box contained the savings bank book showing Miss Munn's deposit in the Howard Savings Institution, the stock certificate, and the two bonds, besides many other papers, some of which did not belong to Miss Munn. During Miss Munn's life the plaintiff did not ask her mother for the key of the closet, or make any attempt to assume control over or take possession of the box or its contents, nor did the box and contents ever come into her possession, but they were taken by the defendant company, as the administrator of Miss Munn. On these facts the trial justice ruled that there was not such a delivery of the things in controversy as was necessary to make a valid *donatio mortis causa*. The plaintiff also claimed that the stock of the American Insurance Company and the Bernreuther bond had been the property of her father, and, on the death of her sister, had become hers, by force of the following provision in her father's will: "Item 5. Subject to the foregoing uses and exceptions, I give, devise, and bequeath all my estate * * * to my two daughters, Lillie Alma and Minnie Ida, to be divided between them equally, share and share alike, each one to come into possession of her respective share upon arriving at the age of twenty-three years, and not before; and, in case of the decease of said Lillie or Minnie before they are twenty-three years of age, the children of said deceased shall inherit the parent's share; but, if there

be no issue, then the survivor of the two last mentioned sisters shall take the other's share, and upon each respectively arriving at the age of twenty-one years, the interest of her share shall be paid to her direct." Both sisters had passed the age of twenty-three years, and, in the division of their father's estate, the stock and bond had been transferred to Minnie, as part of her share. She died unmarried. The trial justice overruled this claim of the plaintiff. Upon exception taken to these decisions, the present assignments of error are founded.

Robert H. McCarter, for plaintiff in error.
Mr. Joyce, for defendant in error. Riker & Riker, for estate of Minnie I. Munn.

DIXON, J., (after stating the facts.) The first question for solution is whether the delivery of the key of a box containing valuable papers is sufficient delivery to constitute a valid *donatio mortis causa* of the papers, when the box is not in the presence or immediate control of the donor, and does not pass into the actual possession of the donee during the lifetime of the donor. The leading case on the subject of donations *mortis causa* is *Ward v. Turner*, (A. D. 1752,) 2 Ves. Sr. 431, where Lord Chancellor Hardwicke laid down the rule with reference to delivery, which has ever since formed the basis whereon such gifts are supported. After showing that the recognition of donations *mortis causa* by the common law was derived from the civil law, he declared that the civil law had been "received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls 'tradition;'" that "tradition or delivery is necessary to make a good donation *mortis causa*." He further said: "It is argued that, though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of a symbol is sufficient. But I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery in some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, it requires actual tradition,—delivery over of the thing. So, in all the cases in this court, delivery of the thing given is relied on, and not in the name of the thing. * * * Yet," he added, "notwithstanding, delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing." Although this doctrine has received general approval in the courts of England and of this country, yet some divergence has taken place respecting the facts which may constitute the delivery required. For the purpose of giving effect to the difference mentioned by Lord Hardwicke between articles that were bulky and those that were not, it was usually stated in the earlier cases that the delivery must

be according to the nature of the thing given, such as the thing was reasonably capable of; while in later cases, as if ignoring the ground of the distinction, it has often been asserted that the situation, as well as the nature, of the thing, must be taken into consideration, and only such delivery was requisite as, under all the circumstances, the donor could conveniently make. On this footing, it has, in some instances, been adjudged that delivery of the key was sufficient delivery for a valid donation *mortis causa* of money or documents locked in a trunk or other receptacle, not within the presence or immediate control of the donor, and not otherwise transferred to the possession of the donee. *Cooper v. Burr*, 45 Barb. 9; *Marsh v. Fuller*, 18 N. H. 360; *Jones v. Brown*, 34 N. H. 439; *Thomas' Adm'r v. Lewis*, 89 Va. 1, 15 S. E. 389; *Phipard v. Phipard*, (Sup.) 8 N. Y. Supp. 728; *Pink v. Church*, (Sup.) 14 N. Y. Supp. 337. That in this respect these cases depart from the view intended to be expressed in the leading case is, I think, manifest by noticing Lord Hardwicke's comment on *Jones v. Selby*, Finch, Prec. 300, and his ruling in *Smith v. Smith*, 2 Strange, 955. In *Jones v. Selby* the donor had called his cousin, who was his housekeeper, and two of his servants, and said, "I give to my cousin, Mrs. Wetherley, this hair trunk, and all that is contained in it," and delivered her the key thereof; and, on the strength of this, Mrs. Wetherley claimed a £500 tally as part of the contents of the trunk. This claim was allowed by the master of the rolls as a valid *donatio mortis causa*, and would have been allowed by Lord Chancellor Cowper, on appeal, except for lack of full proof that the tally was in the trunk at the time, and his conclusion that the gift was satisfied by a legacy to the donee given in a will subsequently made by the donor. On this Lord Hardwicke's comment was: "The only case wherein such a symbol seems to have been held good is *Jones v. Selby*, but I am of opinion that amounted to the same thing as delivery of the possession of the tally, provided it was in the trunk at the time." He thus seems to state that, with regard to the tally, the key was but a symbol, the delivery of which he had just declared to be insufficient, but that the circumstances showed a delivery of the trunk, and consequently of the tally, if in the trunk. *Smith v. Smith*, 2 Strange, 955, was a ruling at *nisi prius*, where the plaintiff's intestate, having lodgings in the defendant's house, had brought there furniture and plate, and had said that whatever he brought into those lodgings he did not intend to take away, but gave directly to defendant's wife. Whenever he went out of town, he used to leave the key of his lodgings with the defendant. He having died, probably out of town, (see *Bunn v. Markham*, 7 Taunt. 224,) Lord Hardwicke, then chief justice, permitted the jury to find a valid gift. This ruling accords with the view expressed in the leading case upon the idea that the

things given were too bulky for actual delivery, otherwise than by leaving them in the defendant's house, and giving him the key of the rooms. The same distinction is clearly noted in *Hatch v. Atkinson*, 56 Me. 324, and other cases.

The opinion that delivery of a key is equivalent to the delivery of documents locked up under the key is not at all supported by the views announced in such cases as *Hawkins v. Blewitt*, 2 Esp. 663, *Bunn v. Markham*, 7 Taunt. 224, and *Warriner v. Rogers*, L. R. 16 Eq. 340, where the retention of the key by the donor was deemed to negative the claim of a gift; for, to constitute a gift, there must be, besides delivery of the thing, an intention to transfer to the donee complete dominion over it, and the withholding of the key proved that no such intention existed, notwithstanding the fact of delivery. Nor is that opinion, in its general form, fully sustained by cases like *Debinson v. Emmons*, 158 Mass. 592, 33 N. E. 706, where the receptacle was in the immediate presence and control of the parties, in a room occupied by the donee, as well as the donor, and where the only external sign of the exclusive possession of the receptacle was the actual possession of the key. Under such circumstances, tradition of the key might be considered tantamount to tradition of the receptacle and its contents, without giving the same force to the tradition of the key when the receptacle was away from the presence of the parties, and in the actual possession of a third person. We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in *Ridden v. Thrall*, 125 N. Y. 572, 28 N. E. 627, that "public policy requires that the laws regulating gifts causa mortis should not be extended, and that the range of such gifts should not be enlarged." When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars' worth of property is locked up in vaults, the keys of which are carried in the owners' pockets; and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key, and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault,—the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury; around this mode, the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily-proven devices. We think the trial justice properly decided that the evidence would not warrant the jury in finding such a delivery as is essential to a

donation mortis causa. Nor was there any error in his ruling that the plaintiff had no title under the will of her father. That instrument made the estate of each of his daughters indefeasible upon her arriving at the age of 23 years. Only in case she died before that period and without issue, was there a gift over to her surviving sister. *Van Houten v. Pennington*, 8 N. J. Eq. 745. The judgments should be affirmed.

ABBETT, J., dissents.

(59 N. J. L. 241)

LIPPINCOTT et al. v. DAVIS.

(Court of Errors and Appeals of New Jersey.
Feb. 26, 1894.)

CONSTRUCTION OF WILL—RULE IN SHELLEY'S CASE.

1. The rule in Shelley's Case is applicable, without regard to the intention of the testator, whenever the situation is created that is pertinent to it.

2. The tenth section of the statute of descents has not abolished the rule in Shelley's Case in all cases, but only so far as it relates to the lineal heirs of the first taker.

3. When a will devised all the land of which testator was seised situate in a certain township, and in a subsequent clause it plainly appeared that it was not the intention to embrace in such devise a certain tract, *held*, that the latter exceptive clause controlled the former clause.

(Syllabus by the Court.)

Error to circuit court, Burlington county; Garrison, Judge.

Action in ejectment by Sarah E. Davis against Fannie Lippincott and others. There was judgment for plaintiff, and defendants bring error. Reversed.

The other facts fully appear in the following statement by BEASLEY, C. J.:

Action of ejectment tried in the Burlington circuit, before Justice Garrison, without a jury. The plaintiff below, Mrs. Davis, recovered the undivided half part of the premises. The question of title depended on the legal effect of the will of Thomas Gaskill, and that of his son, Job Gaskill. The former will, dated January 31, 1841, disposed of the lands in dispute in the following terms, viz.: "Item. I give and bequeath to my son Job Gaskill my farm, of late occupied by him, situate in the township of Northampton, in the county of Burlington, with all things properly belonging thereto, during his natural life, and afterwards to descend unincumbered to his lawful heirs, subject, however, to the payment of \$3,000 to his brother, Israel Gaskill, as hereinafter devised." "Item. I give and bequeath to my son Israel Gaskill \$3,000, to be paid to him or his legal representatives by my son Job Gaskill, or out of the farm devised to him." Job Gaskill paid the \$3,000 to Israel Gaskill, and entered into possession of the farm as devisee. Job died in 1886, unmarried and childless, leaving a will, containing the following clauses, both of which embrace and relate to the land in question:

"Item 2. I do give and devise unto my adopted son, Job H. Meirs Gaskill, son of my nephew, John G. Meirs, all the real estate of which I may be seised at the time of my decease, situate in the township of Pemberton, (except only a lot of about four acres of land, on the South Pemberton road, near the old Baptist Church graveyard, which I have set apart and had inclosed for a cemetery,) to him, his heirs and assigns. I also give and devise unto my said adopted son, Job H. Meirs Gaskill, all my cedar swamp and other out lands, in the township of Woodland, in said county of Burlington, of which I may be seised at the time of my decease, to him, his heirs and assigns." "Item 12. Whereas, my father, Thomas Gaskill, in and by his last will and testament, did give and devise unto me, during my natural life, and after my death to my heirs at law, a farm containing about two hundred and sixty acres, situate on the South Pemberton road, in the township of Pemberton, adjoining lands of M. S. Butterworth, Benjamin Haines, and others: Now, I do authorize and empower my executor, hereinafter named, to purchase said farm of my heirs, or heirs at law, provided he can purchase the same upon terms satisfactory to himself, and to receive a good and sufficient deed therefor to my said adopted son, Job H. Meirs Gaskill, and to pay for the same out of my estate."

Grey & Grey, for plaintiffs in error. M. R. Sooy and Barker Gummere, for defendant in error.

BEASLEY, O. J., (after stating the facts.) This is an action of ejectment, brought by Sarah E. Davis, the defendant in error, for the half of a tract of land situated in the township of Pemberton, in the county of Burlington. The title exhibited by her was that the premises in question had been the property of one Job H. Gaskill, who at his death had been seised in fee, and who, as to them, had died intestate; and that she was one of his two heirs at law, and as such was entitled to the one moiety thereof. To this assertion of title, the plaintiffs in error countercharged, to the effect that the above-mentioned Job H. Gaskill did not die intestate as to these lands, but, to the contrary, had devised them to one Job H. Meirs Gaskill, under whom they hold as tenants. In view of these contentions, it becomes necessary to examine and decide the two following questions, to wit: First, what estate Job H. Gaskill held in this property, and whether he disposed of it under his will. It is admitted that one Thomas Gaskill was the owner in fee at the time of his death of these premises, and that he devised them to his son, in the terms following, viz.: "Item. I give and bequeath to my son Job Gaskill my farm, of late occupied by him, situate in the township of Northampton, in the county of Burlington, with all things properly belonging thereto, during his natural life, and

afterwards to descend unincumbered to his lawful heirs, subject, however, to the payment of three thousand dollars to his brother, Israel Gaskill, as hereinafter devised." On the part of the defendant in error it is contended that, by force of this clause, the Job H. Gaskill already mentioned, and who is designated Job Gaskill by the testator, became entitled only to an estate for life. The argument in favor of this view was rested on two grounds, the first of which was that this testamentary provision, construed according to the rules of the common law, and altogether irrespectively of statutory modification, does not create a larger interest. The contention was that it plainly appears from the direction that, upon the death of the life tenant, the lands should "descend unincumbered to his lawful heirs," that the testator did not mean that the first taker should be gifted with anything more than an estate for life. It was argued that as he was prevented, in express terms, from incumbering the property devised, a testamentary purpose of giving him the fee is excluded. But this argument is founded in the theory that in such a case as the present, if the intention of the testator can be plainly discovered, the court will be bound to effectuate it. But this notion is opposed to all authority, and consequently is destitute of all force. Tested solely by the canons of the common law, the clause now under criticism would be subject to the absolute control of the rule established in Shelley's Case. That rule, it will be remembered, is this: That where an estate of freehold is limited to a person, and the same instrument contains a limitation, either mediate or immediate, to his heirs, or the heirs of his body, the word "heirs" is a word of limitation; i. e. the ancestor takes the whole estate comprised in this term. Thus, if the limitation be to the heirs of the body, he takes a fee tail; if to his heirs generally, a fee simple. The rule thus stated, it is universally acknowledged, is one of law, and not of construction, and consequently the intention of the testator in its presence is of no account whatever. If the facts called for by the rule exist, the rule is to be inexorably applied. Given a freehold for life, and a limitation in the same instrument to the heirs of such tenant, it is believed that no case can be found holding that a fee simple, by force of the rule in question, had not become vested in the first taker. If the appropriate situation be presented, the application of the rule is inevitable; so that Mr. Jarman is demonstrably justified in his statement that "as no declaration, the most positive and unequivocal, that the ancestor shall take only, or his estate be subject to the incidents of, a life estate, will exclude the rule, so a declaration that the heirs shall take as purchasers is equally inoperative to have such effect." 2 Jarm. Wills, 1185. In view of the principles thus established, it is obvious that the inference that the testator,

by directing a descent of the lands in an unincumbered condition, indicated that his son was not to become seised of the fee, has no place whatever in the inquiry before the court. In point of fact, the circumstance relied on in the present case as showing testator's intent existed, and was disregarded in the great case of *Perrin v. Blake*, 4 Burrows, 2579, which finally settled the rule of law in question; for in that instance there was an express declaration in the will that the first taker should not dispose of his estate for longer than his life. With regard to the cases cited in the brief of counsel on this head, it is proper to say that they are regarded as having no application to the facts before the court. These authorities do not in the remotest degree tend to show that, when the situation requisite to the application of the rule exists, such situation can be controlled by the intention of the testator. The conclusion of the court on this first branch of the case is that, in accordance with the rules of the common law, Job Gaskill, the son of the testator, would be entitled to an estate in fee in the lands thus devised to him.

In view of this result, the complementary question supervenes, viz.: Does the statute of this state, in its application to this case, affect or alter this result? The inquiry relates to the tenth section of the "Act relating to the descent of real estates," (Revision, p. 299.) This statutory clause has on several occasions been referred to incidentally as having the effect of repealing the rule of *Shelley's Case*, and there can be no doubt that it performs that office within the sphere of its operation, but in the aspect in which it is now present it has never heretofore received judicial consideration. This is the language of the section, viz.: "That in case any lands," etc., "shall hereafter be devised," etc., "to any person for life, and, at the death of the person to whom the same shall be so devised for life, to go to his or her heirs, or to his or her issue, or to the heirs of his or her body, then, and in such case, after the death of such devisee for life, the said lands," etc., "shall go to and be vested in the children of such devisee, equally to be divided between them as tenants in common in fee, but, if there be only one child, then to that one in fee; and, if any child be dead, the part which would have come to him or her shall go to his or her issue, in like manner." In the case now in hand the son of the testator, John H. Gaskill, who is devisee for life, died unmarried; and consequently, as we construe this statute, it is not affected by the statutory regulation just recited. By its terms this clause provides for a single class of cases; that is, as between a parent and his issue. When the situation is thus conditioned, the ancestor takes an estate for life, and his issue a vested remainder in fee. The provision has no effect beyond this, for it does not indicate in the faintest degree that any other regula-

tion than the common-law rule is to obtain, except in the single instance where there are children, or the issue of children, in whom the remainder can vest. The policy of the act seems to be to favor the lineal heirs of the devisee for life, but it takes no heed of the interest of the collateral heirs. The language of the act upon this subject is deemed by us explicit and unambiguous, and consequently there is no room for construction. The result is that, in our opinion, these collateral heirs can make no claim to these premises under the will of Thomas Gaskill, either by force of the common law or of the statute just expounded.

From these conclusions it follows that Job M. Gaskill became the owner in fee of these lands, and the remaining inquiry is whether he disposed of them by his will, or died intestate with respect to them. By the second clause of his will, Job M. Gaskill devised to Job H. Meirs Gaskill all the real estate of which he might be seised at the time of his decease, situate in the township of Pemberton, etc., "to him, his heirs and assigns." The premises in dispute are situated in the township of Pemberton, and as, according to the construction which has been given by the court to his father's will, he was seised of such premises in fee at his death, it would have plainly passed under the clause of his will just recited, if there had been nothing therein to counteract or modify the effect of that disposition; and, in fact, our conclusion is that, by the force of the twelfth item of that instrument, these premises are excepted out of the scope of the second testamentary clause above recited. The provision producing, in our opinion, this exceptive effect, is in these terms, viz.: "Whereas, my father, Thomas Gaskill, in and by his last will and testament, did give and devise to me, during my natural life, and, after my death, to my heirs at law, a farm containing about two hundred and sixty acres, situate," etc., "in the township of Pemberton, adjoining," etc., (being the premises now in dispute:) "Now, I do authorize and empower my executor, hereinafter named, to purchase said farm of my heirs or heirs at law, provided he can purchase the same upon terms satisfactory to himself, and to receive a good and sufficient deed therefor to my adopted son, Job H. Meirs Gaskill, and to pay for the same out of my estate." It is plain that these two clauses of this will are contradictory; for in the former of them he treats this property as his own, devising it to his adopted son, and in the latter he declares that such property belongs to his heirs, and directs his executor to acquire the title to it by purchase. Where two dispositions of a will are incurably repugnant, it is the latter of the two to which effect will be given. Thus, where a testator, after devising the whole of his estate to A., devises Blackacre to B., the latter devise will be read as an exception out of the first. *Cuthbert v. Lempriere*, 3 Maule & S. 158.

We think that the testator in the case before us did not intend to embrace this farm in the devise to his son, but intended it to be purchased from his heirs for the benefit of such devisee. The result is that the farm in question has not been disposed of by this testator, and that, as to it, he died intestate. The title is in his heirs at law, of which the defendant in error is one; but in that capacity she does not seem to be entitled to a moiety of the property, but only, as it would seem, to a third part. But the question with respect to the number of heirs of this land has not been examined. Let the judgment be reversed, and a venire de novo issue, etc.

(56 N. J. L. 309)

LEAVITT et al. v. DUNN.

(Court of Errors and Appeals of New Jersey.
Feb. 26, 1894.)

INSURANCE POLICY—"HEIRS."

By a policy of life insurance, the money to become due upon it at the death of the person insured was made payable to his "heirs." *Held*, that by the word "heirs" were meant the persons entitled to the surplus of his personal estate under the statute of distributions, and that the money was payable to his widow and children in the proportions indicated by the statute.

(Syllabus by the Court.)

Error to circuit court, Mercer county; before Justice Scudder.

Action by Jennie E. Dunn against Emma D. Leavitt and others. There was judgment for plaintiff, and defendants bring error. Affirmed.

John H. Backes, for plaintiff in error.
James S. Aitken, for defendant in error.

DIXON, J. This cause was tried at the Mercer circuit before Mr. Justice Scudder without a jury, upon a statement of facts, agreed to by the parties, showing that, under a policy of insurance on the life of Alexander Dunn, \$5,000 had at his death become payable to his "heirs," and had been paid to his children, with the consent of his widow, in pursuance of a stipulation that, if the widow was entitled to a share thereof, they would pay it to her. Justice Scudder decided that by the word "heirs" in this policy were intended those who, under the statute of distributions, were beneficially entitled to the personal property of the deceased; and, accordingly, judgment was rendered in favor of the widow. The correctness of this decision is the only question before this court. Different judicial views have been taken with regard to the meaning of the word "heirs," when employed in private instruments to designate those to whom personal property shall pass. In some jurisdictions, it is read in its strict, primary sense at common law, as importing the persons on whom the law casts the real estate of one dying

without a will. In other jurisdictions, it receives a broader construction, as denoting those who by law become beneficially entitled to the property of one dying intestate, and who are to be ascertained according to the nature of the property,—under the statute of descents, if it be real estate, and under the statute of distributions, if it be personalty. In still other jurisdictions, whether it shall have the narrower or the broader construction is made to depend on whether it is used as a designation of the persons originally intended, or as a designation of persons substituted for the one originally intended. In New Jersey the word has quite uniformly been construed according to the nature of the property dealt with, and without much regard to whether it was used in designating original or substituted beneficiaries. When employed in the disposition of personal property, it has been generally deemed to indicate the persons appointed by the statute to succeed to such property. *Scudder v. Van Arsdale*, 13 N. J. Eq. 109; *Welsh v. Crater*, 32 N. J. Eq. 177, on appeal, 33 N. J. Eq. 362; *Hayes v. King*, 37 N. J. Eq. 1; *Ward v. Dodd*, 41 N. J. Eq. 414, 5 Atl. 650; *Reen v. Wagner*, 51 N. J. Eq. —, 26 Atl. 467. In the opinions delivered in these cases the phrase "next of kin" is frequently used by the judges as their synonym for the word "heirs" in the disposition of personal property, but what they mean by the phrase is, not merely the nearest kinsmen, but the distributees under the statute, including both the widow and those who, by the statute, may represent deceased kinsmen. This appears from the language of the learned chancellors, in the earliest and the latest of these decisions, that "the next of kin are entitled to claim under such description [heirs] as the persons appointed by law to succeed to the personal property;" thus basing their title, not on kinship, but on the statute. Such a judicial use of the phrase has long been practiced. *Elmsley v. Young*, 2 Mylne & K. 780, 787. In New Jersey it may be accounted for by the fact that the phrase was so used in our first statute of distributions, (Patt. Laws, p. 153, § 20,) as well as in later enactments, (P. L. 1849, p. 154; Lunacy Act, Revision, p. 601, § 1.) This signification of the word "heirs," when there is no other guide to its meaning than that it points out the persons who are to receive personal property, is, we think, more likely than any other to reach the actual intention of the parties using it, and, therefore, should be approved. This rule of construction is applicable, not only to wills, but to other private writings as well, (*Sweet v. Dutton*, 109 Mass. 589,) and especially to those which, like most policies of life insurance, appear to be intended for the benefit of one's widow and children. The judgment of the circuit court is affirmed.

(56 N. J. L. 225)

BURNET v. CRANE.

(Court of Errors and Appeals of New Jersey.
March 6, 1894.)

EJECTMENT—EASEMENT AS A DEFENSE.

A mere right of way over the locus in quo will not justify its exclusive possession by the person to whom that right may belong, and its existence will not constitute a sufficient defense to an action of ejectment by the owner of the fee.

(Syllabus by the Court.)

Error to circuit court, Union county; before Justice Van Syckel.

Action in ejectment by Jonathan H. Crane against Helen Burnet. There was judgment for plaintiff, and defendant brings error. Affirmed.

The other facts fully appear in the following statement by MCGILL, Ch.:

Action of ejectment to recover possession of a triangular piece of land in the city of Elizabeth which lies between the southerly side of Westfield avenue and the former center line of Golden street. Before the opening of Westfield avenue and the vacation of Golden street, as hereinafter stated, the defendant in error was, indisputably, the owner of the land at the locus in quo, north of the center line of Golden street, and the plaintiff in error was the owner of the land south of that center line. In 1869 and 1870 Westfield avenue was laid out and opened, so that it ran across Golden street at an acute angle. Its southerly boundary reached the land of the plaintiff in error, in Golden street, about 20 feet from the point at which that boundary crossed the center of Golden street, and, continuing in the plaintiff's land that distance, crossed the center of Golden street into land of another owner, who is not a party to this suit, and, continuing therein a few feet, entered land of the defendant in error, the same being in Golden street north of its center, and continued therein a considerable distance through the defendant's land, of which distance the first 113 feet is in front of the land of the plaintiff,—that is, beginning about 4½ feet north of the center of Golden street, and running northeasterly until, at the end of 113 feet, the line is 19.2 feet north of the center of Golden street; thus forming, substantially, a triangle of the defendant's land between the land of the plaintiff, bounding on the center of Golden street, and the southerly side of Westfield avenue, the hypotenuse of which is the southerly side of Westfield avenue and the base is the center of Golden street. Upon the opening of Westfield avenue, the plaintiff in error extended her fences so as to include within them the triangle in question, and thereby took exclusive possession of the locus in quo. In December, 1887, the public easement in the land which was in Golden street, outside the limits of Westfield avenue, was surrendered by proceedings in vacation in virtue of provisions of the city charter, and thereafter the defendant

brought this suit to recover possession of the triangle described. The plaintiff in error defended the action upon the ground that, although the public easement in the defendant's land in Golden street may have terminated, she, nevertheless, as abutting landowner, had a private right of way thereover. At the circuit it was ruled that this insistence, if well founded, did not constitute a sufficient defense or bar to the action; and, accordingly, judgment was entered for the plaintiff there.

P. H. Gilhooly, for plaintiff in error. Frank Bergen, for defendant in error.

MCGILL, Ch., (after stating the facts.) The existence of the easement claimed by the plaintiff in error will not justify the exclusive possession which she has taken of the land. Such possession is not necessary to or authorized by a mere right of way, and is inconsistent with the right of the defendant in error which the present action is brought to vindicate. A clear and generally accepted exposition of the law, here applicable, is found in the language of Mr. Justice Bigelow in *Morgan v. Moore*, 3 Gray, 319, 322: "It is no answer to this action [action by writ of entry] that the tenant is the owner of an easement in the demanded premises, and has, therefore, the right, as against the demandants, to use it forever as a passageway. The right to a fee, and the right to an easement in the same estate, are rights independent of each other, and may well subsist together when vested in different persons. Each can maintain an action to vindicate and establish his right,—the former to protect and enforce his seisin of the fee; the latter to prevent a disturbance of his easement. The demandants can, therefore, well maintain their writ of entry, because, as the tenant is in, occupying the entire premises, and denying the demandant's seisin, this is the appropriate remedy by which to assert their title to the fee. And their recovery in this action will in no way affect or impair the rights of the tenant in the easement in the premises." The correctness of this statement was recognized by Mr. Justice Depue, who, in writing the opinion of the supreme court of this state in *Hoboken Land & Imp. Co. v. Mayor, etc.*, of Hoboken, 36 N. J. Law, 545, said, that although it had been decided by the supreme court of the United States that a municipal corporation may defend ejectment, at the suit of the owner of the fee, by setting up the right of possession in a street or common under the rights acquired by the public in a dedication to a public use, the rule was otherwise in case the servitude was a mere private easement. In *Wright v. Carter*, 27 N. J. Law, 76, ejectment was brought by the owner of a fee in a highway, among other things, because of the erection of a tollhouse in the highway on his land. The supreme court held that the tollhouse was not a servitude additional to the public easement of

way, but upon that point the court of errors and appeals, without opinion, reversed the decision; the effect of the reversal being to establish the right of the plaintiff in ejectment to recover, subject to the easement of way, against the appropriation of the land to a purpose not within the limits of the easement. *State v. Laverack*, 84 N. J. Law, 207; *Wuesthoff v. Seymour*, 22 N. J. Eq. 70; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 277. The rule stated is not only well founded in principle, but is also sustained by authority. *Goodtitle v. Alker*, 1 Burrows, 133; *Hancock v. Wentworth*, 5 Metc. (Mass.) 448; *Aqueduct Co. v. Chandler*, 9 Allen, 159; *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 9; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Strong v. City of Brooklyn*, 68 N. Y. 11; *Cooper v. Smith*, 9 Serg. & R. 26, 31; *Warwick v. Mayo*, 15 Grat. 523, 543; *Bolling v. Mayor*, etc., 3 Rand. (Va.) 563; *Sedg. & W. Tr. Title Land*, § 132, and note.

The judgment below will be affirmed.

(56 N. J. L. 251.)

WALLIS IRON WORKS v. COSTER et al.
(Supreme Court of New Jersey. March 2, 1894.)

CONTRACT—ACTION FOR BREACH—PLEADINGS.

A contract between two corporations for building a portion of an elevated railway provided that the work should be completed by a specified time, that final payment was to be made only on the certificate of the chief engineer of another corporation, and that, if the work was not completed at the time fixed, \$100 per day might be retained as damages, unless the delay resulted from causes not within the control of the contractor, of which the engineer was to be the judge. In an action on the contract one count in the declaration admitted the noncompletion of the work at the time specified, but excused the delay by averring that it resulted from causes beyond plaintiff's control. It also admitted that plaintiff had not procured the required certificate of the chief engineer, but excused the failure by averring that before the completion of the work the chief engineer had resigned his office, and no successor was thereafter appointed. *Held*, that an allegation in a plea that, upon the resignation of said chief engineer, the chief engineer of still another corporation became and continued to be the chief engineer of the corporation named in the contract, is a substantial, though argumentative, denial of the allegation of the count on which plaintiff's excuses for nonperformance depend, and that the plea, though irregular, is good on general demurrer.

(Syllabus by the Court.)

Action on a contract by the Wallis Iron Works against Charles H. Coster and others. Heard on demurrer to plea. Demurrer overruled.

Argued at November term, 1893, before the CHIEF JUSTICE, and GARRISON, LIPPINCOTT, and MAGIE, JJ.

Gilbert Collins, for plaintiff. Mr. Meyer, for defendants.

MAGIE, J. The plaintiff is the Wallis Iron Works, a corporation of this state, and the

defendants are former directors of the New Jersey Railway Construction Company, who are sued as trustees thereof; that company having been a corporation of the state, and having been dissolved. The first count of the declaration is based upon a contract, made August 15, 1890, between the two corporations above named, which contract is annexed to and made part of the declaration. By that contract plaintiff agreed to do certain work in the erection of a portion of an elevated railway in New York city. The contract contained the following provisions: "The parties hereto agree that the chief engineer of the Suburban Rapid Transit Company shall decide as to the quality and quantity of the work to be done under this agreement, and that payment for the same shall be made only on the written certificate of the engineer that the terms of this agreement and specifications have been fully complied with. * * * The party of the second part [the Wallis Iron Works] agrees that he will begin work immediately, * * * will begin the delivery of materials * * * by Nov. 15, 1890, and the erection of the structure by December 1, 1890, and will prosecute such delivery and erection continuously, so as to complete the construction * * * by February 15, 1891. The party of the second part agrees that the party of the first part shall be, and hereby is, authorized to deduct and retain, out of any moneys that may be or become due to the party of the second part under this agreement, the sum of \$100 per day as liquidated damages for each and every day that the completion of the whole work, or any portion thereof, which is agreed to be completed by a specified day, shall be delayed beyond such specified day, provided that such delay shall not have resulted from causes beyond the control of the party of the second part, of which the engineer shall be the judge. * * *" In the count it is averred that plaintiff completed the work contracted to be done by it, but it is also admitted that it was not completed until after the lapse of 184 days beyond the time fixed by the contract. It is further admitted that the whole contract price has been paid, excepting \$16,400, which the construction company claimed the right to retain as liquidated damages for the delay in completion. To make out a cause of action, the pleader has averred performance of all conditions precedent contained in the contract, except two; as to them, he admits that plaintiff did not procure or produce to the construction company any written certificate that the terms of the agreement and specifications had been fully complied with, and that it did not complete the work at the time named. The failure to procure the certificate is excused by the averment that the person who was chief engineer of the Suburban Rapid Transit Company when the contract was made resigned his office June 5, 1891, and no successor was afterwards appointed. The excuse, there-

fore, is that at the completion of the work there was no one capable of making the required certificate. The delay in completion of the work is excused by the averment that it resulted from causes (which are set out) beyond plaintiff's control. But, as the contract expressly stipulates that the engineer was to be the judge whether the delay resulted from such causes, it is obvious that this excuse is only effective by its connection with the averment that, before the completion of the work, the office of engineer became vacant, and there was then no one to make the required adjudication. These are the only averments of the count which tend to exhibit plaintiff's right to recover on the contract. The assertion that the construction company was not building the railway for its own use, but under a contract with the Suburban Rapid Transit Company, which contract did not require the completion of the work at any specified time, is quite immaterial. For, if it is to be thence inferred that the construction company was not liable to respond in damages to the suburban company for the delay, it by no means follows that the delay would not cause damage to the construction company. The fact that the delay would subject the construction company to nominal or very small damage may have an important bearing on the construction of the contract, and the determination whether the sum to be daily retained was intended as a penalty or as liquidated damages. That question is not now presented. Plaintiff's right to recover on the contract is, therefore, placed by the count upon the performance of some, and upon excuses for the nonperformance of others, of its conditions precedent. The excuses depend upon the averment that, at the completion of the work, there was no engineer of the Suburban Rapid Transit Company. The second plea interposed by defendants has been demurred to. This plea is plainly irregular. It is directed to the whole declaration, (which contains counts not upon the contract,) and it is really applicable only to the first count. *Conover v. Tindall*, 20 N. J. Law, 513. If sustainable, it is only as containing a denial of a material allegation of that count, and it should conclude to the country, and not with a verification. But neither of these objections is included in the specification of causes, and the latter, at least, is not ground for general demurrer. *Dime Sav. Inst. v. Mayor*, etc., of Hoboken, 42 N. J. Law, 283. The plea can only be sustained as containing a substantial denial of the material allegation of the first count that, after June 5, 1891, there was no chief engineer of the Suburban Rapid Transit Company. Reading the whole plea, and rejecting its many superfluous and immaterial allegations, we find it asserting that, after the date last mentioned, "the chief engineer of the Manhattan Railway Company became and continued to be the chief engineer of the Suburban Rapid Transit Com-

v.28A.no.11—38

pany." This we deem to be a substantial denial of the allegation of the count that the former chief engineer, who resigned on that date, had no successor in office at the time of the completion of the work. That it is an argumentative denial of the fact alleged is not objectionable, on general demurrer. *Dime Sav. Inst. v. Mayor*, etc., of Hoboken, *ubi supra*. This denial is not open to the objection that the contract did not provide for certificates or adjudications by the chief engineer of any other company than the suburban company, for the averment is that some person became and continued to be the chief engineer of the suburban company, and, if that be so, that person came within the terms of the contract, and was qualified to act, although he might also be an officer of another company. Proof of this averment of the plea would meet and avoid the excuse set up in the first count for nonperformance of certain conditions precedent of the contract. The demurrer must be overruled.

(56 N. J. L. 396)

VUNK v. RARITAN RIVER R. CO.

(Supreme Court of New Jersey. March 6, 1894.)

HUSBAND AND WIFE—COMMUNITY PROPERTY—TRESPASS—PARTIES.

1. At common law a conveyance of land to husband and wife created a peculiar estate. During their joint lives each was seised of the entirety, and on the death of either the survivor became entitled to the whole estate. For an injury to the premises by a stranger, the husband might sue alone, or husband and wife might join.

2. The effect of the married woman's act of 1852 upon the estate conveyed to husband and wife after that act took effect was to endow the wife with the capacity, during their joint lives, to hold in her possession, as a single female, one-half the estate in common with her husband, the right of survivorship subsisting as at common law. For an injury to premises so held, by the destruction of trees and grass and fences by fire, the husband and wife should be joined in the suit.

3. In a suit for such injuries brought by the husband alone, and issue joined without notice of the nonjoinder of the wife, the cause was submitted to arbitration pursuant to the statute. *Revision*, p. 34. The arbitrators found that (1) the defendant caused the injury complained of; (2) the owners of the property sustained damages to the amount of \$462.50; and (3) the plaintiff and his wife were owners of the said property as tenants by the entirety. On an application to enter judgment on the award, and a counter application to set aside the award, an amendment was allowed, and judgment ordered entered on the award in favor of the husband and wife, although the wife's right of action became barred by the statute of limitations pending the hearing before the arbitrators.

(Syllabus by the Court.)

Action in trespass by Ezekiel Vunk against the Raritan River Railroad Company. Heard on motion to enter judgment on an award of arbitrators. Conditional order.

Argued February term, 1894, before DEPUE, LIPPINCOTT, and ARBETT, JJ.

John S. Voorhees, for plaintiff. Wm. D. Edwards, for defendants.

DEPUE, J. The plaintiff brought suit against the defendants in tort to recover damages for the destruction of grass, trees, timber, and fences upon a tract of land situate in the township of East Brunswick, in the county of Middlesex, by means of fire communicated by sparks from a locomotive engine of the defendants, through the negligence of the defendants' servants and agents. The declaration alleged that the plaintiff was seised and possessed of the said tract, and that the said grass, trees, timber, and fences were his property. To this declaration the defendants pleaded the general issue. After issue joined, the cause was, by an agreement of the parties under seal, dated April 10, 1893, submitted to the arbitration and award of three arbitrators agreed upon and chosen for the final determination of the issue in the above cause pro ut the pleadings. By this agreement it also stipulated that the submission might, upon the application of either party, be made a rule of this court, pursuant to the first section of the act concerning arbitration, (Revision, p. 34.) The arbitrators, having taken the oath prescribed by the statute, after hearing the parties, by an award dated May 18, 1893, determined and certified as follows: "(1) That the said the Raritan River Railroad Company caused the injury complained of; and (2) that the owners of the property therein have sustained damages to the amount of \$462.50; and (3) that Ezekiel Vunk and Catharine, his wife, are owners of said property as tenants by the entirety." The arbitrators, by their award, further certify as follows: "That the adjudication has been made upon the stipulation, entered into before us by the counsel of the respective parties, that judgment shall be entered thereon upon application to the supreme court at the coming June term thereof, without further notice." Application was made at June term, by the plaintiff's counsel, to have the submission to arbitration made a rule of court, and for judgment and execution thereon. This application was resisted by the counsel of the defendants on the ground that the arbitrators, by their award, exceeded their powers in awarding the damages sustained by the husband and wife as the owners of the property. The plaintiff's counsel then applied to amend by making the wife a party to the suit. This application was resisted on the ground that the wife was, at the time the said award was signed, barred of her suit in virtue of the limitation contained in the second section of the act of March 25, 1881, (Supp. Revision, p. 824, § 10.) These applications were heard upon the papers exclusively, except that it was admitted on the argument that the premises were conveyed to the plaintiff and his wife as tenants by the entirety; but when the deed of conveyance was executed, whether

before or after the married woman's act of 1852, nowhere appears in the papers.

By the common law the husband, by the marriage, acquired a freehold estate in the lands of which his wife was seised in fee. This estate conferred upon the husband a right to possession and the receipt of the rents, issues, and profits. For an injury to the premises by a stranger, arising from the cutting or spoiling of grass, which is a temporary profit, the husband was required to sue alone; for the cutting or destruction of trees, which was an injury as well to the inheritance as to the possession, the husband might sue alone, or husband and wife might join. *Norton v. Norton*, 47 Edw. III. p. 9, pl. 5; 1 Com. Dig. p. 577, "Baron & Feme," X 4; Vin. Abr. pp. 83, 84, pls. 15, 20, 21; *Jeremy v. Lowgar*, Cro. Eliz. 461. The rule stated in Vin. Abr., supra, is that, where nothing is to be recovered but damages, the baron alone shall have action, or baron and feme may be joined; and among the illustrations given is an action for cutting trees and writ of trespass by the baron alone, where the tenure was of him and of his feme. In *Van Note v. Downey*, 28 N. J. Law, 219, this court held that the husband, by marriage, acquired a freehold estate in lands of which his wife had a life estate, and was entitled to the profits thereof during coverture, and that for a trespass committed upon the premises he might maintain an action in his own name. By the common law, a conveyance to husband and wife in fee created a peculiar estate. Under such a conveyance the husband and wife did not take separate estates. Each was seised in entirety. At the death of either the entire estate devolved upon the survivor by right of survivorship. But during the coverture the interest of the wife was under the husband's control, and he was entitled exclusively to the possession and to the rents and profits. *Den. v. Hardenbergh*, 10 N. J. Law, 42; *Den. v. Gardner*, 20 N. J. Law, 556, 558, 560, 562; *Washburn v. Burns*, 34 N. J. Law, 18-20; *Bolles v. Trust Co.*, 27 N. J. Eq. 308. These common-law rules were in force in this state until July 4, 1852, when the married woman's act of that year went into effect. Revision, 636. If the conveyance of the premises in the question was made to the plaintiff and his wife before that date, the plaintiff's estate as husband, with all the rights incident thereto at common law, remained in him, unaffected by that statute. *Van Note v. Downey*, 28 N. J. Law, 219; *Prall v. Smith*, 31 N. J. Law, 244. In that event the suit was properly brought in the name of the husband alone, and he was entitled to recover the whole amount of damages. The effect of the act of 1852 upon estates conveyed to husband and wife after that act went into operation was to endow the wife with the capacity, during the joint lives, to hold in her possession, as a single female, one-half the estate in common

with her husband, the right of survivorship subsisting as at common law. *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, 9 Atl. 695. In that event, for damages sustained, as the arbitrators report, by the owners of property held by husband and wife as tenants by the entirety, the wife should have been joined with her husband as a coplaintiff. The question then becomes one of parties only.

The statute confers upon the courts ample powers of amendment in order to prevent the failure of justice, and the court will exercise this power with liberality whenever justice requires it, and at any stage in the proceedings, even after the case has reached the court of errors. *Insurance Co. v. Day*, 39 N. J. Law, 89; *McLaughlin v. Van Kueran*, 21 N. J. Eq. 379. Under this power a plaintiff may be added, (*Hasbrouck v. Winkler*, 48 N. J. Law, 431, 6 Atl. 22,) or the name of the plaintiff on the record be struck out, and the name of another person be inserted as plaintiff, (*Farrler v. Schroeder*, 40 N. J. Law, 601.) The course of practice in the courts of this state, under the statutes permitting amendments, has been that, wherever the real question in controversy has been fairly tried and correctly settled upon the merits, the court will not set aside the result for an objection that might have been avoided by amendment, but will, in such case, exercise the power of amendment. *Ware v. Insurance Co.*, 45 N. J. Law, 177; *Finegan v. Moore*, 46 N. J. Law, 602-604. By the agreement of the parties the trial of this case was submitted to a tribunal of their own choosing, and the case appears to have been determined fairly upon the merits. Where a controversy is submitted to arbitration, every reasonable intendment will be made to uphold the award. The cases to this effect in our own courts are numerous, and will be found cited in 1 Stew. Dig. tit. "Arbitration." As early as 1789, and long before the statutes which conferred the most extensive power of amendment were passed, this court allowed an amendment of the record after rule nisi for judgment on an award and reasons filed against the award, which were made nugatory by the amendment. *Smith v. Minor*, 1 N. J. Law, 416. If the case had been tried before a jury it would have been competent for the trial judge to have added the plaintiff's wife as a coplaintiff, and, if the result certified by the arbitrators had been contained in the verdict of the jury, this court, following the settled practice, would have directed the amendment, and ordered judgment accordingly on the postea.

Nor will the court refuse to exercise its power of amendment, in the interest of justice, because of the fact that the suit of the wife has become barred by the statute of limitations. The statute of limitations is a defense that is not always received with indulgence. Courts will sometimes refuse an amendment which will permit such a plea.

West Hoboken v. Syms, 49 N. J. Law, 546, 9 Atl. 780. The statute will be no obstacle to prevent an amendment which will merely complete a cause of action which is substantially disclosed upon the pleadings. *Guild v. Parker*, 43 N. J. Law, 430. In the present case a defense of the statute of limitations would present considerations that would deprive it of all right to indulgence by the court. The injury sued for occurred May 8, 1892. Suit was commenced in December, 1892. The case was at issue, and referred to arbitrators by an agreement dated April 10, 1893. These proceedings all were taken before the expiration of the limitation of one year prescribed by the statute. The award of the arbitrators was made May 18, 1893,—only ten days after the expiration of the limitation of one year. No notice of the nonjoinder of the plaintiff's wife was given, pursuant to section 37 of the practice act, (Revision, 853.) If such notice had been given, the amendment would have been made within the year prescribed by the statute. Judgment may be entered on the award of the arbitrators in favor of the husband and wife, on condition that a stipulation be filed by them to release the defendants on payment of the sum awarded.

(51 N. J. B. 606)

CENTRAL TRUST CO. v. CONTINENTAL IRON WORKS et al.

(Court of Errors and Appeals of New Jersey.
Feb. 26, 1894.)

MORTGAGES—PRIORITY TO MECHANICS' LIENS.

A mortgage dated July 19, 1889, delivered the same day, and recorded July 22, 1889, was given by a gas company to the Central Trust Company, as trustee, to secure bonds to the amount of \$350,000. No bonds were issued or sold until September 20, 1889. The gas company commenced the erection of a building upon the mortgaged premises July 29, 1889, before the issue of any bonds. *Held*, that the holders of the mortgage bonds have a lien relating to the time when the mortgage was recorded, and that the mortgage is an incumbrance upon the mortgaged premises prior to the claims for mechanics' liens.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by the Central Trust Company, trustee, against the Continental Iron Works and others, to foreclose a mortgage. From the decree entered, complainant appeals. Reversed.

E. A. & W. T. Day and John P. Stockton, Atty. Gen., for appellants. Frank Bergen and W. D. Edwards, for respondents.

VAN SYCKEL, J. This suit is prosecuted for the foreclosure of a trust mortgage made by the Metropolitan Gaslight Company of Elizabeth, N. J., to the Central Trust Company of New York, trustee, to secure 700 bonds of \$500 each. The mortgage is dated July 19, 1889, delivered the same day, and recorded July 22, 1889. The mortgage is in

the usual form of mortgages by corporations to secure the issue of bonds. It recites the resolution of the board of directors of the company authorizing the issuing of the bonds and the execution of the mortgage to secure the same. The total amount of bonds authorized to be issued were sold and delivered to purchasers between September 20, 1889, and January 31, 1890. Lien claimants claim priority over this mortgage. The excavation for the building erected upon the mortgaged premises was commenced July 29, 1889, being a date prior to the sale of any of the mortgage bonds. By the decree below, priority was given to these lien claims for work done and materials furnished for said building. In this state, mortgages for future advances operate from the time of recording, although the advances may not be made until a subsequent date, and they have priority for all advances made before actual notice of subsequent incumbrances. *Bell v. Fleming*, 12 N. J. Eq. 490; *Ward v. Cooke*, 17 N. J. Eq. 93; *Platt v. Griffith*, 27 N. J. Eq. 207; *Jacobus v. Insurance Co.*, Id. 604. In *Platt v. Griffith* there was a verbal agreement between the parties to the mortgage that it should secure future advances. The lien claims accrued before the advances under the mortgage were made, but the court held that the mortgage was entitled to priority for the full amount advanced. In the *Jacobus Case*, *supra*, the mechanics' liens attached May 28, 1870. The mortgage was dated May 2, 1870, recorded, but not delivered until July 7, 1870. This court held that, although there was no delivery of the mortgage, or advances made under it, until after the lien claims had arisen, the incumbrance of the mortgage would relate to the date when it was recorded, and thus give it priority over the liens. In that case an agreement had been made to loan the money secured by the mortgage prior to its delivery, but I do not perceive how this fact could place the mortgagee in that case in a position of superior equity to that occupied by these bondholders, who are secured by a mortgage to trustees for the money they should thereafter advance upon it. It was made for the expressed purpose of securing money to be advanced, and differs only in the fact that, the future bondholders being unknown, the agreement to advance could not be made with them in person. It was, in substance and effect, made with the trustees named in the mortgage for the benefit of such bondholders, and equity should so regard it. They hold a stronger position than that in the *Jacobus Case*, in this respect: The mortgage to their trustees was made, recorded, and delivered prior to the commencement of the building, while in the *Jacobus Case* there was no delivery until after the liens had attached. Mr. Justice Depue, who delivered the opinion of a majority of the court in the *Jacobus Case*, said that the object of the equitable doctrine adopted by the courts was to give effect to the intention of the parties, and that where

several acts are necessary to make a complete conveyance as between the parties to it, if justice requires it, the conveyance will be regarded as having been made at the first act, to which all subsequent acts will have relation. The mere agreement to advance money in that case gave, of itself, no equity to the mortgagee, because he could have receded from his agreement when another lien was permitted by the mortgagor to intervene before he actually made the advance. The ground of equity was that the parties had entered into a legal contract, which was partly executed, and that parties having notice of such contract must be subordinated to it, as if it had been entirely completed. That is the same principle which applies in enforcing contracts for the sale of land specifically. With the reason which underlies the rule in the *Jacobus Case* in view, the case before us cannot be distinguished from it in principle. The maxim in equity is that what has been agreed to be done shall, for the advancement of justice, be regarded as done. This case is within that rule. The mortgage was given to secure money to be advanced for the purposes of the mortgagor by the purchasers of the mortgage bonds, and the intention of the parties, announced substantially by the execution, recording, and delivery of the mortgage, can be effectuated only by treating the transaction, as a whole, by relation as of the date of the mortgage. This gives it priority over the mechanics' liens for the full issue of the bonds, because neither the complainants nor the bondholders had actual notice of the subsequent incumbrances. The commencement of the building was constructive notice only, and not actual notice, of the lien claims. This court, in the *Jacobus Case*, expressly decided that such constructive notice would not postpone the mortgage debt.

Aside from these adjudications, the bonds of corporations, secured as are these bonds, are dealt with in commercial transactions, and are treated, almost without exception, by the courts, as a class by themselves, not subject, in all respects, to the stricter rules which pertain between natural persons. In *Clafin v. Railroad Co.*, 4 Hughes, 12, 8 Fed. 118, the question was whether bonds which were part of an issue secured by a first mortgage, but which remained unissued in the hands of the mortgagor, could be issued, after the making of a second mortgage and issue of bonds thereunder, so as to preserve a lien superior to the issue of bonds under the second mortgage. Chief Justice Waite, in maintaining the priority of the first mortgage bonds, said: "Here the bonds put out, while not for circulation as money, were intended as articles of commerce, to be bought and sold in the market, and passed from hand to hand as current negotiable securities. They were to be used in trade. When in the hands of the company, their lien under the mortgage was suspended, but, the moment

they were out in the usual course of business, it again took effect as of the time when the mortgage was given. Any other rule than this would materially impair the marketable value of this class of instruments, and tend to defeat the very object of their execution. The whole issue of such bonds must be treated as of the date of the mortgage, without regard to the time they were actually put out, unless the contrary is clearly expressed." The like view was taken by the supreme court of Iowa in *Nelson v. Railroad Co.*, 8 Am. Ry. R. 82. There, between the execution and recording of the mortgage and the issue of the bonds, a mechanic's lien attached to the mortgaged premises. The court of Iowa denied priority to the mechanic's lien, saying that: "If the purchaser of a bond in New York, in Amsterdam, or London is bound to inquire whether the bond in fact was executed by the company contemporaneously with the execution of the mortgage, or whether, before the signing or the negotiating of the bonds, liens of laborers or material men may not have attached to the road, it is apparent that the value of these securities would be much depreciated, and all industries which depend upon the raising of means through negotiation would be paralyzed. The plaintiffs are affected with knowledge of the existence of the mortgage, and, seeing that the road had mortgaged all its future acquisitions, they could and should have protected themselves by refusing to sell the ties without payment or security." In *Reed's Appeal*, 122 Pa. St. 565, 16 Atl. 100, where the lien of the mortgage was held to be dominant, a distinction is clearly drawn between mortgages to secure bonds to be put upon the market and dealt with in commercial circles and a mortgage given by one man to another. The following is the language used by the court at page 573 of that case in 122 Pa. St., and page 100, 22 Atl.: "Where a mortgage is given to cover future advances by one man to another, it is not a matter of much inconvenience for the mortgagee to ascertain from time to time, as he is called on for advances, whether there be intervening liens. But a different case is presented where a public improvement is undertaken, requiring the expenditure of large sums of money and the floating of a debt of great magnitude. The debt is necessarily divided into small parts, and carried into different and distant markets. It would be out of the question to ascertain the state of the record, or of the company's affairs, each time a bond was about to be sold. If this were made the duty of purchasers, it would prevent the sale of such securities altogether, or at least confine their purchase to such large concerns as could buy in bulk after due and careful inquiry. Even then the facts would be open to doubt at every subsequent sale. Thus, their value would be entirely reduced." The cases are referred to in *Jones, Corp. Bonds*, § 205. If this well-established

doctrine is shaken, it will destroy the value of millions of securities of railroad and other corporations, which have been negotiated on the faith of the priority of the mortgage which secures their issue. In the case before us the lien claimants show no superior equity. They had full notice of the existence of the mortgage, and the purpose of the company to put the mortgage bonds upon the market for sale to bona fide purchasers without notice of the mechanics' liens. Charged with such knowledge, they took no active measures to restrain the issue of the bonds. The act of March 4, 1879, (Supp. Revision, p. 456, § 4,) has no application to this case, as clearly appears from the preamble to that act, and also by the provisions of the act. In my opinion, the decree of the court below should be reversed, and the priority of the mortgage bonds established.

(51 N. J. E. 630)

BARLOW et al. v. BARNARD.

(Court of Errors and Appeals of New Jersey.
March 6, 1894.)

CONSTRUCTION OF WILL—IMPLIED DEVISE.

1. The testator, Thomas Barnard, held to have died intestate as to the remainder of his estate left after the expiration of the life estate of his daughters therein.

2. That there was no devise or bequest of such remainder by the will, and no gift thereof could be implied, in this case.

3. That the correct rule as to what is necessary to warrant the implication of such a gift was correctly stated by the vice chancellor in 24 Atl. 912, 50 N. J. Eq. 135, but held that this case is not within that rule.

4. All the conclusions of the vice chancellor are held correct, except those relating to the remainder of the estate after the daughters' life estates have terminated.

5. Decree reversed, so that it may be modified to meet the views of this court as to such remainder.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Charlotte E. Barnard against Emily Barlow and others for construction of the will of Thomas Barnard, deceased. From the decree rendered, (24 Atl. 912,) defendants appeal. Reversed.

John Linn, for appellants. Riker & Riker, for respondent.

ABBETT, J. This is an appeal from a decree of the chancellor on a bill filed for the construction of the will of Thomas Barnard, deceased, and for directions as to the execution of its provisions. The will is dated January 17, 1860. The testator died October 7, 1877. When the will was made, he had a wife, four daughters, and two sons: Emily, aged 26, and then married; Charlotte Ellen, aged 22, then and still unmarried; Mary Letitia, aged 20 years, then married; Alice Isabel, aged 10 years, married in 1876, and who died before her mother, leaving two children, (Lucy and Nellie Haring;) Alfred Thomas, aged 18; and Arthur Clay, aged 14.

Charlotte, the widow of deceased, and his sole executrix, died January 5, 1890. The following members of the family were then living, viz.: The two sons; the grandchildren Lucy and Nellie Haring; Emily Barlow, widow of John S. Barlow, who has one child, (Ida G. Cockshaw;) Mary L. Treadwell, wife of William A. Treadwell, who has one child, (Grace, wife of George A. Treadwell;) and Charlotte E. Barnard, still unmarried. When Thomas Barnard died, all his children were of full age, the youngest being over 27. When he made his will, two of his children (both daughters) were over age. One was married, and the other unmarried. His third child (a daughter) was nearly of age, and married; and the other three children (two sons and a daughter) were minors.

The will, after giving to his wife, for her life, all the real and personal estate of which he should die possessed, proceeds: "I wish and will, at my death, that all property, of whatever kind, of which I may die possessed, may, as soon as practicable, be realized and settled securely on her, in some safe investment, the interest of which, I trust in God, will comfortably support her; the principal to be untouched, unless the interest of that left be too small for her support. At her death, I will it to be kept in the same shape or form for the support of the children not of age or married. On the marriage of my four daughters, I will it to be equally divided between the said four girls, and the share settled on each of them for their lifetime, all and except one dollar each to my two sons, trusting that they will follow my example of industry to gain what they may require."

The learned vice chancellor, in construing this will, held that, after the life provision for the widow, the provision for support was intended to embrace both minor daughters and sons, and likewise unmarried adult daughters, but not unmarried adult sons, and that under this construction the unmarried daughter is entitled to the benefit of the provision for support; that she has a right to be supported, so long as she remains single, out of the income of the testator's estate, but not to its whole income, unless it is only sufficient to give her a proper support according to her rank and condition in life. He held that there was no gift of the income, either directly or by implication, and holds that there is not the least indication that the testator meant, as the class (his children) diminished in number, the survivors should take the whole. He further says: "My conclusion, therefore, is that the unmarried daughter has a right to be supported out of the testator's estate until she marries; and, to that end, she has a right to have so much of his estate kept invested as will produce an annual income sufficient for that purpose. The residue of his estate must be divided into four equal shares, and one share settled on

each daughter for her life." He then says: "The more difficult and perplexing question is, who takes the remainder? In other words, what provision shall be made in the settlements as to who shall take the remainders on the death of the life tenants. The will gives no direct answer to this question." He also says: "No gift of the remainder is made, unless it is made by implication." We agree with the learned vice chancellor in the conclusions reached by him, up to this point. He then says: "But at this point we enter the region of doubt. One of two constructions must, however, be adopted, namely, either that the testator died intestate as to the remainder, or that there is a gift of it, by implication, to the issue of his daughters." He adopts the latter construction. It is a case where there must be much hesitation in adopting any construction as to the remainder of the estate. The rule is correctly laid down by the vice chancellor, that, to justify a gift by implication, the gift must rest on a probability of an intention, so strong that an intention contrary to that which is thus imputed to the testator cannot be supposed to have existed in his mind. Applying this test, we cannot come to the conclusion reached by him.

What was the intention of the testator as to this remainder? It can be reached by adopting the view that he did not attempt to make any disposition of his estate, beyond the lives of his wife and daughters. It is a fair inference from his will, and the circumstances surrounding its execution, that his first care was for his wife, for her life; next, to take care of all his children during their minority, unless they were provided for by marriage; then, to care for his daughters during their lives, providing first for ample support for his unmarried daughter, out of the income of his estate. He took better care of his daughters than of his sons during their lives, because he thought it to be wise to make provision so that his sons should follow his example of industry to gain what they might require; but this did not necessarily involve an intention to disinherit them entirely, after the primary purposes in his mind had been fully accomplished. That part of the will which gives the sons one dollar each was where he was dealing with the income of the estate to be divided in four parts among his four daughters for their lifetime. In disposing of this income, he first gives one dollar to each of his sons, which is to be all that they are to receive of said income during the life of his daughters. He does not seem to have cared or provided for anything after his daughters had been taken care of during their lives. As between his daughters, he evidently thought that the married ones would have husbands to provide for them primarily, and that, if any of them were unmarried, such would have no other source to maintain them, except from the income of his estate.

So he provided that all of his income necessary for the support of the unmarried daughter should be used for that purpose, and, if any was left, that it should be equally divided among his daughters during their lives. There was no reason why he should totally disinherit his sons. Such intention is not shown either in the will or the evidence in the case. He thought his sons were primarily able to take care of themselves, and that they should do so as long as any of his daughters lived. When they were all dead, he no longer had any will as to what was left. He was content to leave that undisposed of, to be distributed under the intestate laws of the state. This view would not require the court to raise a gift by implication, and it would not require us to find that the father intended to disinherit his sons for the benefit, not of his daughters, but for his daughters' children, who might be equally able to gain what they might require by their own industry as his sons, in their old age, or their children. The construction of the vice chancellor would not only disinherit the sons, but also disinherit their children. We therefore reach the conclusion that the views of the vice chancellor are correct, except as to the remainder of the estate after the death of the four daughters, and as to that we find that the testator died intestate. The decree of the chancellor should be reversed, so that it can be modified to conform to the views herein expressed.

(56 N. J. L. 364)

STATE ex rel. GOLDBERG v. DORLAND.

(Supreme Court of New Jersey. March 7, 1894.)

CONSTITUTIONAL LAW—SPECIAL ACTS—TOWNSHIP OFFICERS.

The act of the legislature entitled "An act to amend an act entitled, 'An act respecting the election and terms of office of the clerk and collector or receiver of taxes in certain towns, boroughs and townships,' approved April fourth, one thousand eight hundred and ninety-one," which amendatory act was approved March 24, 1892, (P. L. 1892, p. 258,) and which provides "that in all towns and boroughs, and in all townships, governed by or under a special charter, the terms of office of the clerk, and of the collector and receiver of taxes hereafter elected or appointed therein, shall be the period of two years," is, so far as it applies to townships, unconstitutional under article 4, § 7, par. 11, subd. 3, of the amended constitution of this state. The classification of townships into those "governed by or under a special charter" and those not so governed is not of such a nature as to require or sustain exclusive legislation for each class.

(Syllabus by the Court.)

Action in quo warranto, at the relation of Eugene Goldberg, against Irving H. Dorland, to try defendant's title to the office of treasurer of the township of Kearney. Heard on the demurrer to the information. Judgment of ouster.

Argued November term, 1893, before BEAS-

LEY, C. J., and MAGIE, GARRISON, and LIPPINCOTT, JJ.

Edward Kenny, for relator. Collins & Corbin, for respondent.

LIPPINCOTT, J. This case is on a demurrer to an information in the nature of quo warranto. The question is whether the respondent is an intruder into the office of treasurer of the township of Kearney, in the county of Hudson. This township was originally created and organized under the general laws of this state relating to townships. The township of Kearney is now governed by a special charter. The act is entitled "An act for the improvement of the township of Kearney in the county of Hudson, and to increase the powers of the township committee in said township," approved April 6, 1871, (P. L. 1871, p. 1371.) By the first section of this act it was provided that thereafter the township committee should consist of five members, to be elected as now provided by law for the election of township committees in the townships of this state, and that they should be denominated the "Board of Township Committee of the Township of Kearney," and by that title they should have all the powers of a municipal corporation, necessary for executing the objects and purposes of the special act of incorporation or special charter. The act confers upon the township committee a considerable diversity of powers, and imposes duties quite extensive in their character, quite up to the standard usually required for an ordinary city government. The power to make appointments to certain offices, to enact ordinances, to make appropriations of money for the purposes of the act, to levy, collect, and disburse taxes, lay out and improve streets, impose special assessments, and many other kindred powers, are fully conferred. By the twelfth section the board of township committee of the township are authorized to appoint a township treasurer, to hold office for one year, and until another be appointed in his stead. By other sections of the charter the treasurer was empowered to perform many duties, among which were the duties of the collection of all state, county, and township taxes, to pay the county collector all state and county taxes so collected, to collect all arrearages of taxes and all special assessments for benefits on account of the opening or improvement of streets in the township, and to receive, safely keep, and disburse all moneys of the township under the direction of said board of township committee, and to do and perform and execute all other powers and duties usually performed by the collectors of townships. This act does not provide for the election or appointment of any collector or receiver of taxes. Under the provisions of this act the relator, on May 2, 1893, was appointed, by the board of township committee of that year, treasurer of the township for

the term of one year, and until another should be chosen in his stead. Under this appointment he duly qualified in accordance with the provisions of the charter. The respondent is in the exercise of the duties of the office of treasurer of the township under this charter, which is still unrepealed and in force, and rests his claim to the office upon an appointment made on May 2, 1892, by the board of township committee of that year, in accordance with the provisions of an act entitled "An act respecting the election and term of office of the clerk and collector or receiver of taxes in certain towns, boroughs and townships," approved April 4, 1891, (P. L. 1891, p. 417,) as amended by an act approved March 24, 1892, (P. L. 1892, p. 258,) which amendment, in the first and only section, provides "that in all towns and boroughs, and in all townships, governed by or under a special charter, the terms of office of the clerk, and of the collector and receiver of taxes hereafter elected or appointed therein, shall be for the period of two years, and all persons who shall be hereafter elected and appointed, to said offices or any of them, shall hold for two years and until their successors in office shall have been duly qualified."

Now, it is to be observed that there are townships in this state upon which, by legislative enactment, special charters have been conferred, but they are no less townships than they were before they were either governed wholly or partially by special laws. They are neither "towns" nor "boroughs," as those appellations are commonly understood in legislative enactments or judicial determinations. This questioned statute recognizes these distinctions, and it is neither to be assumed nor determined that specially chartered townships are either towns, villages, or boroughs. The question of the constitutionality of this statute is raised here, and, while that question will not turn upon a mere question of correct nomenclature, yet the distinctions which the statute itself makes between these different local municipal divisions of the state will be regarded in the consideration of the question. Under this act the terms "towns" and "boroughs" are not inclusive of "townships governed by or under a special charter." The township of Kearney, although originally organized under the general law of the state, came in 1871, before the adoption of the recent amendments to the constitution, to be governed under and by a special charter. In the consideration of this matter a serious question arises,—whether this amendatory statute of 1892, to which reference has been made, has any application to the township of Kearney, the charter of which fails to create or designate any such official as collector or receiver of taxes, while it does specifically designate a treasurer and define his duties. The statute of 1892 has but one section, and that provides for the appointment and term of office of a collector and receiver of taxes,

without at all defining the duties of such an office; and the special charter of the township in question neither designates the existence of any such official nor defines his powers and duties; and therefore, it would appear, neither by reference nor in any other manner can the act of 1892 in question here have any relation whatever to this township. But, assuming this act to have such relation, it needs but a statement of its provisions, so far as they apply to townships, (and it is only in reference to townships that the act is at all considered,) to clearly demonstrate that they are in contravention of article 4, § 7, par. 11, subd. 3, of the amended constitution of this state, which provides that the legislature shall not pass private, special, or local laws regulating the internal affairs of towns and counties. Special laws relating to townships have been held by this court to be within the terms of this inhibition of the constitution. Viewed, therefore, in the light of this fundamental provision, this statute is within this prohibition. It will be perceived that this act does not apply to all municipalities of the same class,—that is, to all townships,—but only to the designated few of the class, namely, those "governed under and by a special charter." I think it would be a vain inquiry to ascertain a rational ground of discrimination between townships governed under and by a special charter and other townships in this state, connected with the objects of this statute. There is no distinguishing feature in this act showing a fair relation between the class legislated for and the purpose of the legislation, and which, in this respect, segregates this class from other municipalities of the same character. In re Sewer Assessment for City of Passaic, 54 N. J. Law, 156-159, 23 Atl. 517. Townships are a class by themselves, and have no very important differences, unless it be the difference in population; otherwise, they are as generally alike as possible; and yet the only characteristic pointed out to justify the objects of this statute is the fact that this township is governed by a special charter, while other townships—the same class of municipalities; alike in all respects—are governed and regulated by general laws.

The rules thoroughly settled in this state for distinguishing between general and special laws under our constitution are that, in order to be general, the law must embrace an entire class of objects; that, if it deals with municipalities, they must either comprise what, by common consent, is regarded as a class, such as all cities and townships, or they must differ from other municipalities of the same class in some peculiar characteristic to which the law relates, and which is important enough to afford reasonable ground for the legislation intended. If the statute exclude from its purview a single member of a class thus defined, it becomes special. *State v. City of Orange*, 55 N. J. Law, 99, 25 Atl. 263. The mere fact that certain townships in this

state have at some time or other obtained special enactments conferring upon the township committee greater powers than the township committees in other townships are possessed of is not the acquisition of such a substantial difference or characteristic as will serve as a basis of classification of such municipalities, or such local governmental divisions of the state, as to require or sustain exclusive legislation. What can be the distinction, in this aspect, between such a township, alike in all other respects, and any other township, so far as its reasonable and substantial needs are concerned. There must be something more than a designation of such a characteristic. There must be such a rational basis of classification as to mark the objects so designated as peculiarly requiring exclusive legislation. *Van Riper v. Parsons*, 40 N. J. Law, 9; *Rutgers v. New Brunswick*, 42 N. J. Law, 51; *State v. Hammer*, Id. 440; *Van Giesen v. Bloomfield*, 47 N. J. Law, 446, 2 Atl. 249; *Dobbins v. Northampton Tp.*, 50 N. J. Law, 499, 14 Atl. 587; *State v. Borough of Clayton*, 53 N. J. Law, 278, 31 Atl. 1026; *Helfer v. Simon*, 53 N. J. Law, 551, 22 Atl. 120; *Stahl v. Inhabitants of City of Trenton*, 54 N. J. Law, 444, 24 Atl. 478; *Tyler v. City of Plainfield*, 54 N. J. Law, 526, 529, 24 Atl. 493, 494. The classification attempted in this statute in relation to townships is nothing more than a legislative pretense; and is without any reason for bringing under it only townships governed by or under a special charter; and it is too clear to need further discussion that such a classification is illegal, and the act unconstitutional, and that, therefore, the respondent was entitled to no office, or term of office, by virtue of its provisions. There must be judgment of ouster against the respondent. The relator claims title to the office which the respondent holds, and of which he is exercising the duties, and, as his title is fully set out in the information, judgment may pass in his favor in this respect, that the relator be admitted to the office which he claims.

(51 N. J. E. 615)

BONNET et al. v. HOPE MANUF'G CO.
et al.

(Court of Errors and Appeals of New Jersey.
Feb. 26, 1894.)

CHATTEL MORTGAGE—VALIDITY—AFFIDAVIT—POSSESSION BY MORTGAGOR.

1. If a chattel mortgage be made and delivered to a trustee for creditors, he, as holder, is competent to make the affidavit required by statute to give the mortgage full effect.

2. If the affidavit annexed to a chattel mortgage expressly refers to matters stated in the mortgage, those matters must be regarded as part of the affidavit.

3. If a chattel mortgage, reciting the debts which it was given to secure, be recorded, in pursuance of the provisions of the statute, its recitals become evidence of the existence of the debts, against subsequent creditors of the mort-

gagor, notwithstanding the mortgagor has retained possession of the chattels.

(Syllabus by the Court.)

Appeal from court of chancery.

Bill by Charles E. Bonnet and others against the Hope Manufacturing Company, Leonard R. Fletcher, and others, to establish a right to payment of wages from defendant corporation's property prior to claims of other creditors. There was a decree for complainants, (26 Atl. 685,) and defendants Fletcher and others appeal. Reversed.

The other facts fully appear in the following statement by DIXON, J.:

In this case the bill of complaint was filed on behalf of the operatives of the Hope Manufacturing Company, an insolvent corporation, to secure their wages for labor performed during 30 days prior to January 30, 1892. The appellants, Leonard R. Fletcher, George G. Green, and Hulbert H. Warner, were made defendants because of their interest in a mortgage of real and personal property made under seal by the corporation, and recorded April 15, 1891, of which the material parts are as follows:

"This indenture, made the fourteenth day of April, in the year one thousand eight hundred and ninety-one, between Hope Manufacturing Company, a corporation organized and existing under the laws of the state of New Jersey, party of the first part, and Leonard R. Fletcher, of the city of Philadelphia, in the commonwealth of Pennsylvania, party of the second part, witnesseth: Whereas, the party of the first part, on the day of the date hereof, is indebted unto George G. Green in the sum of six thousand dollars, Hulbert H. Warner in the sum of thirty-two thousand seven hundred and thirty-nine dollars and eighty-nine cents, James F. Hope in the sum of twenty-five thousand dollars, Jeremiah G. Donoghue in the sum of eight thousand dollars, M. E. Bonnet in the sum of four thousand four hundred and twenty-one dollars and seventy-nine cents, Bernard Carr in the sum of four thousand dollars, Leonard R. Fletcher in the sum of two thousand dollars, John F. Hope in the sum of seventy thousand eight hundred and ten dollars and eight cents, and is desirous of securing the payment of said indebtedness; and whereas, at a meeting of the board of directors of said party of the first part held on the thirteenth day of April, eighteen hundred and ninety-one, the president and secretary were duly authorized to execute and deliver to Leonard R. Fletcher, said party of the second part, in trust, a mortgage to secure notes for the payment of said indebtedness; and whereas, the said party of the first part has made its notes for the payment of said indebtedness, all bearing even date herewith and drawing interest from the date hereof, as follows: One to George G. Green, for fifteen hundred dollars, at one year; another to said George G. Green, for fifteen hundred dollars, at two years; a third to said George G. Green, for

fifteen hundred dollars, at three years; and a fourth to said George G. Green, for fifteen hundred dollars, at four years; four to said Hulbert H. Warner, each for eight thousand one hundred and eighty-four dollars and ninety-one cents, one at one year, another at two years, a third at three years, and a fourth at four years; four to James F. Hope, each for the sum of six thousand two hundred and fifty dollars, one at one year, another at two years, a third at three years, and a fourth at four years; four to said Jeremiah G. Donoghue, each for two thousand dollars, one at one year, another at two years, a third at three years, and a fourth at four years; four to said M. E. Bonnet, each for the sum of eleven hundred and five dollars and forty-four cents, one at one year, one at two years, a third at three years, and a fourth at four years; four to Bernard Carr, each for the sum of one thousand dollars, one at one year, another at two years, a third at three years, and a fourth at four years; four to Leonard R. Fletcher, the party of the second part, each for five hundred dollars, one at one year, another at two years, a third at three years, and a fourth at four years; four to John F. Hope, in the sum of seventeen thousand seven hundred and two dollars and fifty-two cents each, one at one year, another at two years, a third at three years, and a fourth at four years: Now, this indenture witnesseth that the party of the first part, as well for and in consideration of the premises, and for better securing to the said George G. Green, Hulbert H. Warner, James F. Hope, Jeremiah G. Donoghue, M. E. Bonnet, Bernard Carr, Leonard R. Fletcher, and John F. Hope, their, and each of their, heirs, executors, administrators, assigns, the payment of said notes and the interest thereon, as in consideration of the sum of one dollar unto the party of the first part by the said party of the second part at and before the enrolling and delivery hereof well and truly paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, conveyed, assigned, transferred, and set over, and by these presents doth grant," etc.

"State of New Jersey, Camden County—ss.: Be it remembered that on this fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-one, before me, the subscriber, a master in chancery of New Jersey, personally appeared William O. Blelock, of full age, to me personally known, who, being by me duly sworn according to law, on his oath saith that he is the secretary of Hope Manufacturing Company; that John F. Hope is the president of the same, and that the seal affixed to the foregoing instrument is the corporate seal of said company, and that the said John F. Hope, as such president, signed said instrument and affixed said seal thereto, and delivered the same as the voluntary act and deed of the said corporation, and by authority of the board of directors of the said company, for

the uses and purposes therein expressed; and that he, the said William O. Blelock, did, at the execution thereof, attest the same, and subscribe the same as witness thereto. Richard T. Miller, M. C. C."

"State of New Jersey, Camden County—ss.: Leonard R. Fletcher, the mortgagee in the foregoing mortgage named, being duly sworn, on his oath says that the true consideration of said mortgage is as follows, viz.: That the said mortgage is made to deponent as trustee to secure the payment of certain indebtedness of the Hope Manufacturing Company, as follows: An indebtedness to George G. Green, of six thousand dollars, for money loaned and advanced to said company, with interest to this date; an indebtedness to Hulbert H. Warner, of thirty-two thousand seven hundred and thirty-nine dollars and eighty-nine cents, for money loaned and advanced to said company, with interest to this date; an indebtedness to James F. Hope, of twenty-five thousand dollars, for money loaned and advanced to said company, with interest to this date; an indebtedness to Jeremiah G. Donoghue, of eight thousand dollars, for money loaned and advanced to said company, with interest to this date; an indebtedness to M. E. Bonnet, of four thousand four hundred and twenty-one dollars and seventy-nine cents, for money loaned and advanced to said company, with interest to this date; an indebtedness to Leonard R. Fletcher, of two thousand dollars, for money loaned and advanced to said company, with interest to this date; an indebtedness to John F. Hope, of seventy thousand eight hundred and ten dollars and eight cents, for money loaned and advanced to said company, with interest to this date; an indebtedness to Bernard Carr, of four thousand dollars, for money loaned and advanced to said company, with interest to this date,—which said several indebtednesses are represented by the promissory notes in the foregoing mortgage particularly mentioned and set forth, and for the payment of which said several notes the said mortgage is security, and that there is due on said mortgage the sum of one hundred and fifty-two thousand nine hundred and seventy-one dollars and seventy-six cents, besides lawful interest thereon from the fourteenth day of April, in the year of our Lord one thousand eight hundred and ninety-one. Leonard R. Fletcher.

"Sworn and subscribed before me this 14th day of April, 1891. Richard T. Miller, M. C. C."

The only questions raised upon this appeal relate to the validity of this mortgage as a lien upon chattels, and the proof of debts secured thereby. The pertinent provisions of the statute are sections 4 and 9 of the chattel mortgage act, (Supp. Revision, p. 491.) viz.: "Sec. 4. That every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery,

and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder or holders of said mortgage, his, her or their agent or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded," etc. "Sec. 9. That every chattel mortgage hereafter recorded pursuant to the provisions of this act shall be valid against the creditors of the mortgagor, and against subsequent purchasers and mortgagees from the time of the recording thereof until the same be cancelled of record," etc.

Thomas E. French and M. P. Grey, for appellants. J. J. Crandall, for respondents.

DIXON, J., (after stating the facts.) The first ground for attacking this mortgage is that the affidavit annexed to it was not made by the proper person, and the vice chancellor so decided. This decision was erroneous. The affiant was the legal mortgagee, to whom the mortgage was delivered, and who held it, and had the lawful right to hold it. Consequently, he was "the holder;" and as such was, by the plain language of the statute, authorized to make the requisite affidavit. That he may not have had personal knowledge of the truth of the matters stated in his affidavit is not reason enough for distorting this explicit provision. The law requires that the statement shall be true, not that the affiant shall know it to be true. Had the statute not indicated the person who was to make the affidavit, then it might well have been assumed that it was to be made by one cognizant of the facts; but here the person or class of persons is designated, without reference to their knowledge. It may often happen that no person within the class is directly cognizant of "the consideration of the mortgage, and the amount due and to grow due thereon," as in the case of an assignee of a pre-existing debt, or an executor or administrator taking security for a debt due the decedent, yet certainly such a person may become "the holder" of a chattel mortgage, and must be competent to make the statutory affidavit. His conscience is charged to the extent of his information. The validity of the instrument depends on the correctness of that information.

The second objection to the mortgage is that the affidavit does not state, "as nearly as possible, the amount due and to grow due" on the mortgage. The affidavit expressly refers to matters stated in the mortgage, and therefore these matters must be regarded as part of the affidavit. *Gardiner v. Parmelee*, 31 Ohio St. 551; *Gilbert v. Vail*, 60 Vt. 261, 14 Atl. 542; *Tompkins v. Crosby*, (N. J.

Ch.) 19 Atl. 720. So read, the affidavit distinctly indicates the times when designated sums will grow due, and that nothing was due at the date of the mortgage.

It is further objected to the claims of the appellants that no proof was made in the cause that the mortgage really represented actual indebtedness. The bill of complaint alleged that there was no such indebtedness, and called on the defendants, the trustee and cestuils que trustent in the mortgage, to answer without oath. The appellants answered that the notes mentioned in the mortgage as theirs did represent so much money actually loaned by them, respectively, to the corporation. No testimony on the point was offered by either side, except that the defendants put the mortgage in evidence, and it was received without objection. Assuming that the burden of proof with regard to the nonexistence of the debts did not rest upon the complainants, still we think the debts were proved. The recitals in the mortgage were evidence against the corporation and its subsequent creditors. *Webb v. Mann*, 3 Mich. 139; *Bank v. Chetwood*, 8 N. J. Law, 1; *Brown v. Kahnweiler*, 28 N. J. Eq. 311; *Revision*, p. 387, pl. 52. But the force of such evidence against creditors would, at common law, have been overcome by the fact that possession of the chattels remained with the mortgagor; that circumstance being, at common law, and in favor of creditors, *prima facie* evidence of fraud, (*Miller v. Pancoast*, 29 N. J. Law, 250,) which could not be rebutted without further proof than the mortgage itself afforded of a valuable consideration. But now, under the statute above quoted, chattel mortgages, when recorded pursuant to the provisions of the act, become valid against the creditors of the mortgagor, notwithstanding his retention of possession. In the validity thus established is included the evidential efficacy of all recitals in the instrument with regard to facts that go to constitute the mortgage; among them, the indebtedness to be secured. The mortgage now in question, having been duly executed, attested, and recorded, sufficiently proved the debts due to the appellants. The decree below, postponing the lien for these debts to the claims of the complainants, should be reversed.

(51 N. J. E. 611)

IN RE DE HART.

(Court of Errors and Appeals of New Jersey.
Feb. 26, 1894.)

CONSTITUTIONAL LAW—INQUISITION OF LUNACY—PRACTICE.

1. A statute directing that a commission de lunatico inquirendo shall be executed before a jury of 12 men is constitutional.

2. The fact that only part of the jurors visited the alleged lunatic for personal examination of him is not sufficient ground for setting aside the inquisition.

3. If the jury find in favor of the incapacity of the alleged lunatic, and upon examina-

tion of the proceedings there appears to be a reasonable doubt as to the propriety of their finding, he should be allowed to traverse the inquisition.

(Syllabus by the Court.)

Appeal from court of chancery.

In the matter of the alleged lunacy of Charles A. De Hart, respondent petitioned for an order setting aside the inquisition, or that he be allowed to traverse the same. The petition was denied, and respondent appeals. Reversed.

Coult & Howell, for appellant. W. S. Whitehead, for appellee.

DIXON, J. Upon a petition presented to the chancellor in June, 1892, a commission in the nature of a writ de lunatico inquirendo was issued to ascertain whether Charles A. De Hart was a lunatic or of unsound mind, and in the following month an inquisition was returned into chancery, finding that Mr. De Hart was then, and for the space of about five years preceding had been, of unsound mind, so as to be incapable of governing himself, his lands, tenements, goods, and chattels. Within a few days Mr. De Hart presented to the chancellor a petition asking that the inquisition be set aside, or, in case that should be refused, that he be permitted to traverse the inquisition. In December, 1892, the chancellor made an order denying these requests, and affirming the proceedings taken upon the commission. From that order, Mr. De Hart appeals to this court. The grounds upon which counsel for the appellant contends in this court that the inquisition should be set aside are (1) that the jury consisted of but 12 men, and (2) that of these only 11 attended at a personal inspection of the alleged lunatic, although all the 12 concurred in the finding. An act concerning idiots, lunatics, etc., approved March 23, 1887, (P. L. 1887, p. 48,) directs the sheriff to summon only 12 jurors, instead of 24, to inquire into and find the truth of the matters involved in a commission relating to the competency of such persons. But it is insisted that this act violates the right of trial by jury, as guaranteed by the constitution. If we assume that the constitutional provision applies to proceedings of this nature, still this statute does not infringe upon it, for the reason that, prior to the adoption of the constitution, the party had no right to trial by more than 12 jurors. "By the old common law," says Blackstone, (1 Comm. 303,) "there is a writ de idiota inquirendo, to inquire whether a man be an idiot or not, which must be tried by a jury of 12 men;" and (page 305) "the method of proving a man non compos is very similar to that of proving him an idiot." In speaking of inquisitions or inquests of office generally, the same author says (3 Bl. Comm. 258) that the inquiry is made "by a jury of no determinate number, being either 12, or less, or more." The sufficiency of 12 men to constitute a jury in such cases is asserted by

other writers on the subject, (Coll. Lun. 153; Shel. Lun. 117; Busw. Insan. § 68;) and was adjudged by the chancellor in Lindsley's Case, 46 N. J. Eq. 358, 19 Atl. 726. In practice, any number not less than 12 nor over 23 has been considered adequate. In Ferne's Case, 5 Ves. 450, 17 jurors; in Dey's Case, 9 N. J. Eq. 181, 23 jurors; and in Vanauken's Case, 10 N. J. Eq. 186, 21 jurors,—were sworn. The inquisition should not be disturbed on this ground.

Nor should the fact that only 11 jurors visited Mr. De Hart for personal examination defeat the finding. The presence of all the jurors at such an examination is not necessary. Smith's Case, 1 Swanst. 4, 6; Child's Case, 16 N. J. Eq. 498, 499.

The question whether the alleged lunatic should be allowed to traverse the inquisition must next be considered. As pointed out by the chancellor in Lindsley's Case, 46 N. J. Eq. 358, 19 Atl. 726, the traverse of such an inquisition was, in England, deemed a matter of right, under the statute 2 & 3 Edw. VI. c. 8; and on an application of the alleged lunatic to traverse, the duty of the court consisted merely in ascertaining that the application was an act of the free will of a person capable of forming and expressing such a volition. In re Cumming, 1 De Gex, M. & G. 537. But, that statute not having been adopted in the United States, the right was here denied at an early day. In Wendell's Case, 1 Johns. Ch. 600, Chancellor Kent said: "The care and custody of idiots and lunatics being confided to this court, the whole control of the inquisition, and the manner in which that control should be exercised, would seem to depend entirely on the discretion of the court." In New Jersey, by a statute passed November 21, 1794, (Pat. Laws 125,) it was enacted that the chancellor should have the care and provide for the safe-keeping of all idiots and lunatics, and of their lands and tenements, goods and chattels; and it is probable that upon this statute was founded the practice in this state of regarding the application to traverse, just as Chancellor Kent regarded it on similar grounds in New York, as addressed to judicial discretion. Covenhoven's Case, 1 N. J. Eq. 19; Vanauken's Case, 10 N. J. Eq. 186; James' Case, 38 N. J. Eq. 547. According to this practice, if there be a reasonable doubt as to the petitioner's unsoundness of mind, the traverse should be allowed. Russell's Case, 1 Barb. Ch. 38, and New Jersey cases last cited. It appears that, at the time of the inquisition, in July, 1892, Mr. De Hart was in his eighty-second year; that in the year 1887 he had had a slight stroke of apoplexy, after which he exhibited a marked lack of memory, especially with regard to recent occurrences; that up to April, 1892, he had been a member of a firm engaged in the business of manufacturing edged tools, which, however, for four or five years preceding, had been chiefly carried on by his partners; that,

nevertheless, he had been generally consulted about the partnership affairs as long as the firm continued, and in March, 1892, had taken an active and decisive part in negotiating the sale of his interest in the business; that at no time had it been suggested among his friends that his personal liberty should be restrained; and that he had always, in his household and neighborhood, been treated as an intelligent person, quite capable of forming and expressing rational opinions on matters discussed in his presence. Under these circumstances, we think there is reasonable doubt whether the infirmity of his memory is such as to indicate that unsoundness of mind which renders one unfit for the government of himself as well as of his property, and without which the courts are not justified in placing a man and his estate under guardianship. *Lindsley's Case*, 44 N. J. Eq. 564, 15 Atl. 1. In old age, inability to attend to the details of business, arising from defective memory and similar causes, is to be expected; but it is protected from serious loss more humanely by the ministrations of friends than by legal proceedings which virtually take away the rights of property and of self-government. The order of the chancellor should be reversed, and the case remitted, with directions that the appellant be permitted to traverse the inquisition.

(18 R. I. 432)

HANAFORD v. HAWKINS.

(Supreme Court of Rhode Island. Dec. 21, 1893.)

GARNISHMENT—DISCHARGE OF GARNISHEE—CALLING IN CLAIMANT—CHECKS.

1. A garnishee should not be discharged merely because he has received notice of an assignment of the fund, the fact of good faith being questioned.

2. Where a garnishee states that he has received notice that the fund has been assigned, and the claimant does not make himself a party under Pub. Laws 1884, c. 433, § 1, he may be made a party under Pub. St. c. 204, § 34, authorizing the court to order any person to be made a party to any action.

3. A person to whom a check has been given for defendant cannot be charged as garnishee, unless it be held and treated as cash.

Exception from court of common pleas, Kent county.

Garnishee proceedings in an action by William A. Hanaford against Christopher A. Hawkins. The garnishees were discharged, and plaintiff excepts. Exceptions sustained.

Samuel W. K. Allen, for plaintiff. Stephen A. Cooke and Louis L. Angell, for defendant.

STINESS, J. The garnishees made an affidavit setting forth that, at the time of the service of the writ upon them for the purpose of attaching the personal estate of the defendant in their hands, they had such personal estate to the amount of \$233, the net proceeds of a judgment collected by them in favor of said defendant, provided no legal

effect should be given to the fact that they had received a letter from John A. Hawkins, prior to this garnishment, stating that he had purchased said judgment; but if the fact stated in said letter was true, and the right to the fund, in consequence thereof, was transferred to said John A. Hawkins, then they had no funds of the defendant in their hands at the time of the attachment. They further stated that they knew nothing of the truth of the alleged fact of an assignment of the judgment. The court of common pleas discharged the garnishees, and exceptions were taken.

In a case of conflicting claims, a garnishee is a stakeholder, who, after a full disclosure, should be protected from a double liability; but, upon the other hand, if he has a fund which may belong to the defendant, the plaintiff should not be deprived of the benefit of the attachment until it appears that it is not the defendant's property. The rule in this state is that, if the garnishee has notice of an assignment of a fund before he is charged, so that he may make the fact known to the court, he is not chargeable. The converse of this rule is that, if he has no such notice, he may be charged. See *Noble v. Smith*, 6 R. I. 446; *Northam v. Cartright*, 10 R. I. 19; *Tracy v. McGarty*, 12 R. I. 168; *Tierney v. McGarity*, 14 R. I. 231; *Lee v. Robinson*, 15 R. I. 369, 5 Atl. 290. In these cases, it is to be noticed, no question was made of the fact of an assignment. If this fact be admitted, there is no occasion for the assignee to appear to protect his interest; but, where the fact or good faith of the assignment of the fund is questioned, it is evidently necessary for the claimant to be made a party to the suit, in order to protect the garnishee. The mere fact of a notice ought not to discharge him, for, by the device of false notices, dishonest debtors might evade valid garnishments of their funds. The claimant under an honest assignment is the one who is chiefly interested to prove it. Hence, it was provided in Pub. Laws, 1884, c. 433, § 1, (printed in 16 R. I. 724,) that any person claiming property attached on trustee process may, of his own motion, become a party to the action, so far as respects the title to such property. The case before us, however, is one where the claimant does not choose to become a party, but stands simply on the notice given. While this is a circumstance which may well arouse suspicion as to the good faith of the transaction, it would not be safe in all cases, after notice of the assignment, to charge the garnishee upon the claimant's default, for the claimant may not know of the attachment. If he should be notified by the garnishee to prove his claim, and should fail to do so, whereupon the garnishee should be charged, doubtless he would be estopped to prosecute his claim against the garnishee thereafter. But, even in this case, the notice would not be in the form of the process of the court, and pos-

sibly not a part of the record. The ownership of the fund is a question to be determined, as much as in a bill of interpleader; and the court cannot be left in a position where it is unable to deal with it according to the fact, or else it must deal with it at the peril of doing injustice to one of the parties before it. Accordingly, it was held in *Railroad Co. v. Paine*, 29 Grat. 502, that the court should require the claimant to appear to state and maintain his claim.

Without resorting to this power of the court, which we see no reason to question, we think Pub. St. R. I. c. 204, § 34, (printed in 16 R. I. 582,) is sufficiently broad to enable our courts to deal properly with a case of this kind. That section provides that the court may order any person to be made a party to any action, and to be summoned in to answer thereto. The provision is comprehensive. Evidently, it is not to be restricted simply to parties defendant to the cause of action, for in section 32 (printed in 17 R. I. 450) of the same chapter the court is empowered, in definite terms, to "order other parties to the contract or specialty to be made defendants and to be summoned in to answer such action or suit." The phrase used in Pub. Laws 1884, c. 433, relating to claimants, is the same that is used in this section 34, viz. "party to the action." This use of terms points to the conclusion that the statute was not intended to include only parties to the cause of action, but to include, as well, those who may be interested in the judgment of the court upon incidental or collateral "matters in controversy," an example of which is found in the case before us. In this view the question of the garnishees could be "properly dealt with" by making the claimant a party to the action, and could not be "properly dealt with" without him. We are therefore of opinion that the question of the garnishees' liability in this case was not ripe for judgment, and that the discharge was premature. Possibly, the plaintiff was in fault in not asking to have the claimant summoned in; but as the legality of this mode of procedure has not before been raised, and there will be no injustice to the parties, we do not think he should be deprived of his remedy.

A second garnishment was made at the same time that the garnishees received a check in settlement of an execution in favor of this defendant, and before they had presented it for payment. The general rule is that, where one holds a promissory note, bank check, or chose in action belonging to a defendant, he cannot be charged for the same on trustee process, because these are not money, and may never be paid; but if a check or note be held and treated as cash, so that a debt is absolutely due from a trustee to a defendant on account thereof, whether the note or check be good or not, the garnishee should be charged. *Hancock v. Colyer*, 99 Mass. 187. This is a question of

fact, and, so far as the facts are disclosed in the record, the refusal of the court to charge the garnishees upon this check was correct. For the reasons stated upon the first exception, a new trial is granted.

(18 R. I. 450)

FULLER v. MOWRY.

(Supreme Court of Rhode Island. Dec. 11, 1893.)

CLAIM AGAINST ESTATE—SERVICES RENDERED.

1. Plaintiff's insane sister being brought by her guardian to live with plaintiff, the latter gave up her former occupation, and was constant in attendance on her sister until the latter's death, seven years later, the guardian furnishing support for both from the sister's estate. Plaintiff put in a claim against her sister's estate for her services. *Held*, that she need not prove an express promise to pay.

2. The court, having charged that a promise made by the administrator that plaintiff should be paid could not create a claim against the estate; that, if in writing, it might bind the administrator, but not the estate,—was not obliged to instruct, on request, that the admissions or promises of the administrator were not to be considered.

3. Letters of defendant's predecessor, as administrator, were competent to corroborate other evidence that plaintiff had rendered the services alleged, had made her claim, and had not been paid.

Assumpsit by Fannie J. Fuller against Raymond G. Mowry, administrator d. b. n. c. t. a. of Emily M. Hill, deceased, for services rendered. Verdict for plaintiff. On petition by defendant for new trial. Petition dismissed.

Charles J. Arms, for plaintiff. Charles E. Gorman, for defendant.

MATTESON, C. J. This is assumpsit to recover for the services of the plaintiff in the care of, nursing, and attendance on Mrs. Emily M. Hill, deceased, on whose estate the defendant is administrator de bonis non with the will annexed. The trial below resulted in a verdict for the plaintiff. The defendant now petitions for a new trial on the grounds that the verdict is against the evidence, and that the court erred in its rulings. The testimony shows that the deceased, who was of unsound mind, was taken by her guardian, in the latter part of 1883, from the insane hospital in Worcester, Mass., to the rooms occupied by her sister, the plaintiff, in that city; that from that time to her death, in May, 1890, Mrs. Hill continued to reside with the plaintiff, and that during the whole of this period her condition, both physical and mental, required the constant care and attendance of the plaintiff; that the income of the property owned by Mrs. Hill was applied by her guardians to the support of the ward and of the plaintiff during the period that the ward resided with the plaintiff. The brother of Mrs. Hill, who was her guardian at the time of her removal from the hospital to the plaintiff's apartments, died in 1887. By reason of his death, the plaintiff, by Pub. St. R. I. c. 214, § 33, in force at the time of the

trial below, was disqualified from testifying as a witness, on her own offer, as to the contract or understanding between herself and the guardian, and she was not called as a witness for that purpose by the defendant. What were the terms of such contract or understanding, if any there was, therefore, does not appear.

The defendant requested the court to instruct the jury that unless they found an express promise by the deceased, or by either of her guardians in her lifetime, the plaintiff could not recover. The court denied the request, and the defendant excepted. This exception and the ground that the verdict is against the evidence are so closely related that they may conveniently be considered together. As Mrs. Hill was of unsound mind, she was, of course, incompetent to make an express promise; and an express promise by her guardian would not have been binding on her or her estate, but only on the guardian himself personally. Schouler, Dom. Rel. § 344. The suit is against the administrator of the ward, and is based, not on an express contract, but on a contract implied by law for necessities furnished to the ward. The defendant argues that, though the law implies a promise to pay for services rendered and voluntarily accepted, yet, when the services are rendered by members of a family living together in one household to each other, no such implication arises, for the reason that, where the household family relation exists, reciprocal acts of kindness which tend to promote the comfort and convenience of the members of the household are presumed to have been rendered disinterestedly, from mere affection or good will, and hence that a plaintiff who sues for such services, to recover, must show affirmatively an express promise of remuneration. Doubtless, this argument is sound, so far as it goes; but the principle contended for is subject to the further qualification that, if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, the plaintiff will be entitled to recover. *Disbrow v. Durand*, 54 N. J. Law, 343, 24 Atl. 545; *Carpenter v. Weller*, 15 Hun, 134; *Bundy v. Hyde*, 50 N. H. 116; *Guild v. Guild*, 15 Pick. 129; *Keener*, Quasi Cont. 315-341. The testimony shows, as already stated, that Mrs. Hill's condition required the constant care and attendance of the plaintiff, and that the latter, in consequence, gave up her previous occupation in order to render to her sister the care and attendance which were necessary. While it is doubtful if the plaintiff, unless prompted by her sisterly affection, would have been willing to give up her prior occupation, and take on herself the burden of caring for, nursing, and attending the deceased, suffering, as the latter was, from the infirmities of mind and body with which she was afflicted, and which rendered her incapable of reciprocating, or perhaps appreciating, the

acts of kindness bestowed on her, we think that the jury were fully warranted in finding, on the testimony, a reasonable and proper expectation on the part of the plaintiff that she was to be compensated for her services beyond the mere support which she received from the income of her sister's estate. The only fact appearing which can be urged as inconsistent with such expectation is that the plaintiff made no claim for compensation during the lifetime of her sister. Why she made no claim does not appear; but it is to be borne in mind in this connection that, if the fact was susceptible of explanation, the plaintiff was precluded by the statute from making it. It may be conjectured that the income of the estate of Mrs. Hill was barely sufficient for the comfortable support of the household, and that the plaintiff was therefore willing to forego, while her sister was living, payment of compensation which could only be made out of the principal of the estate, and which would thereby lessen the income needed for their support. But, whether this be so or not, the testimony shows that immediately on the death of Mrs. Hill, and before the existence of a will was known, the plaintiff made her claim for compensation. This prompt presentation of her claim on the death of her sister tends to negative the idea that her claim was an afterthought, and to support the view that she expected to receive compensation. We think that the instruction was properly denied, and that the verdict was not against the evidence.

Another instruction to the jury requested by the defendant, and denied by the court, to the denial of which the defendant excepted, was as follows: "In ascertaining evidence of indebtedness, the admissions or promises upon the part of Dr. Eldredge or Mr. Mowry, the defendant, are not to be considered by the jury." The court had already instructed the jury that "the promise, if one was made by the administrator, that the plaintiff should be paid, could not create a valid claim against the estate. It might possibly, if made in writing, bind the administrator to pay. If given in writing to avoid the statute of frauds,—if given in writing for that purpose,—it might bind him, but would not bind the estate, and would not create a lien upon the estate." We think that this instruction was sufficiently favorable to the defendant. It was practically equivalent to that requested. The rule is too well settled to need the citation of authority that a court is not bound to give instructions in the words requested by counsel.

The court permitted certain letters written by Dr. Eldredge after the death of Mrs. Hill, and therefore after he had ceased to be her guardian, but while he was administrator on her estate, to be read in evidence. To the admission of these letters the defendant also excepted, on the ground that they could not be evidence of any claim against the estate. These letters were not admitted for the pur-

pose of creating a claim against the estate. They were offered and admitted merely in corroboration of other testimony on the part of the plaintiff, showing, or tending to show, that the services claimed to have been rendered were rendered, and that the plaintiff had made her claim for compensation, and to rebut any inference that the plaintiff had been paid. We think that these letters were admissible for these purposes, as admissions of the former administrator, binding on the defendant by reason of the privity of estate between him and Dr. Eldredge, his predecessor in the office of administrator. *Emerson v. Thompson*, 16 Mass. 429; *Stacy v. Thrasher*, 6 How. 44, 59, 60; *Newhouse v. Redwood*, 7 Ala. 598; *Lashlee v. Jacobs*, 9 Humph. 718; *Duncan v. Watson*, 28 Miss. 187, 207; *Taylor v. Barron*, 35 N. H. 484, 493; 2 *Williams, Ex'rs*, 917, and note; 2 *Woerner, Adm'n*, § 353. Defendant's petition for new trial denied and dismissed, with costs.

(18 R. I. 417)

In re COUNCIL OF TOWN OF CRANSTON
et al.

(Supreme Court of Rhode Island. Dec. 9,
1893.)

SCHOOL DISTRICTS—MERGER IN TOWN—TAXATION.

1. Pub. Laws 1884, c. 447, permitting the abolition of school districts in favor of the town, and requiring the school property taken to be appraised and, at the next annual assessment, a tax to be levied on the whole town therefor, the taxpayers of each district to have remitted to them their proportional share of the appraised value of the property in that district, is not an unfair distribution of the burdens of the state among its citizens, within Const. art. 1, § 2.

2. The fact that the remission is made in the assessment, and so none of the money comes into the town treasury, does not destroy the public purpose of the tax.

3. Pub. Laws 1884, c. 447, providing that when school districts, by vote of town meeting, are merged in the town, their property shall be appraised and, at the next annual assessment of taxes thereafter, a tax shall be levied on the whole town equal to the amount of the appraisal, and there shall be remitted to the taxpayers of each district their proportional share of the appraised value of the school property in such district, less any debts of the district assumed by the town,—requires the assessors to assess the tax and remissions without a vote of the town to levy the tax.

4. Since Pub. St. c. 43, § 6, requires the assessors, before beginning their assessment, to give three weeks' notice to all taxables to bring in to their meeting their accounts of ratable estate, the special levy to be made "at the next annual assessment" is to be made at the beginning of such assessment.

5. The amounts remitted are remitted to the individual taxpayers, not paid to the treasurer of the district.

Case stated on petition of the town council, the assessor of taxes, school district No. 6, and certain taxpayers of the town of Cranston, to construe Pub. Laws 1884, c. 447.

George B. Barrows, for assessors of taxes.
Stephen A. Cooke, Louis L. Angell, and John Palmer, for other petitioners.

STINESS, J. In April, 1892, the town of Cranston voted to abolish the school-district system and to adopt the town system. Thereupon, pursuant to Pub. Laws 1884, c. 447,¹ the title to all the school property vested in the town, subject to an appraisal to be made by a commission to be appointed by this court. The act provides for the payment of such property, as follows: "At the next annual assessment of taxes thereafter, a tax shall be levied upon the whole town equal to the amount of said appraisal; and there shall be remitted to the tax payers of each district their proportional share of the appraised value of the school property in such district; provided that if any district be in debt, and said debt be assumed by the town, the amount of such debt shall be deducted from the whole amount to be remitted to the tax payers of said district." A commission was appointed and a report made, which was confirmed September 12, 1893. Upon these facts the following questions are presented to the court for an opinion:

1. "Is so much of section 1 of said chapter 447 of the Public Laws as requires that, 'at the next annual assessment of taxes thereafter, a tax shall be levied upon the whole town equal to the amount of the said appraisal; and there shall be remitted to the taxpayers of each district their proportional share of the appraised value of the school property in such district,' constitutional?"

It is suggested that the statute violates the provision, in article 1, § 2, of the constitution,

¹ As follows: "Section 1. Any town may at any town meeting, the subject having been duly inserted in the warrant for said meeting, abolish all of the school districts therein; and forthwith all title and interest in all of the school houses, land, furniture, apparatus and other property which was vested in the several districts shall be vested in the town. The property so taken by the town shall be appraised by a commission of three disinterested persons to be appointed by the supreme court, and at the next annual assessment of taxes thereafter, a tax shall be levied upon the whole town equal to the amount of said appraisal; and there shall be remitted to the tax payers of each district their proportional share of the appraised value of the school property in such district; provided that if any district be in debt, and said debt be assumed by the town, the amount of said debt shall be deducted from the whole amount to be remitted to the tax payers of said district. If, however, the parties in interest prefer, the differences in the value of the property of the several districts may be adjusted in such manner as they may agree upon. Sec. 2. Upon the abolition or discontinuance of any district, its corporate powers and liabilities shall continue and remain so far as may be necessary for the enforcement of its rights and duties. Sec. 3. When a town shall abolish the school districts therein, the entire control, management and care of all the public school interests of the town shall be vested in the school committee of that town, and the number of the school committee in any town abolishing the district system may be, by vote of the town, increased to a number not exceeding seven. Sec. 4. All acts and parts of acts inconsistent with this act are hereby repealed, and this act shall take effect on and after its passage."

that "the burdens of the state ought to be fairly distributed among its citizens." The argument is that taxation is a public burden, that the statute provides for a tax for other than a public purpose, and that it is oppressive and unequal in that it does not apply to the district taxed; or, in other words, that the citizens of one district, having a small school property, are taxed for the benefit of other districts having more school property. We do not think the statute is open to the objection of unconstitutionality. School districts have been recognized by this court as quasi corporations. *Bull v. School Committee*, 11 R. I. 244. As such corporations they are, respectively, the owners of their schoolhouses. Under the act, these were to become the property of the town, and to be paid for by the town by way of a proportionate remission of tax. It is true that the taxpayers in a particular district may not, at the present time, be the same persons who paid the tax from which a schoolhouse was built; and yet it is fair to presume that purchasers of property have indirectly paid for the same in an enhanced value of land and property by reason of the erection of a schoolhouse within the district, and they are the present corporators of the district. The apportionment may not be absolutely just, but it is evidently as nearly so as practicable. The remission provided for is not a tax raised for the benefit of individuals, but in payment of property which is virtually purchased by the town. Neither is it a tax for the benefit of one part of the town at the expense of another part, for schoolhouses are for the benefit of all, and not for a part. Some sections may have required and built larger and more expensive buildings than others, but this may be so under direct taxes to build schoolhouses, and surely no one can question the right of a town to do the same thing. The increased expense in such cases is usually offset by the increased number and amount of contributing taxes. The compensation for the more costly buildings under this act is, therefore, as nearly equitable as it can be made. The tax and remission is virtually a tax paid into the town for the schoolhouses purchased, and paid back again to the members of the respective school districts in proportion to their interest in the same. But here comes the objection that, because none of the money goes into the town treasury, it is a tax for the benefit of individuals and not a tax for a public purpose. This objection was disposed of in *Re Dorrance St.*, 4 R. I. 230, 243, where the court says: "Certainly it approaches very near an absurdity, if he [an owner of land] is constitutionally liable, on the one hand, to pay a sum of money to the public for the benefits he has received from the improvement, and the public is constitutionally liable, on the other hand, to pay him in money for the damages which he has sustained by the improvement,—to say that he is constitutionally wronged because, in such a case, the public,

instead of clumsily collecting the money due from him, and putting it into the treasury with one of its numerous hands, and then taking it out again, and paying him for his damages with another of its numerous hands, pays him the balance due him, if his damages exceed his benefits, or exacts from him the balance due to them, if his benefits exceed his damages. It is a mere mistaking of words for things to say, in such case, that he is compensated, contrary to one clause of the constitution, by benefits instead of money, if, under the general power of the government, and in accordance with the spirit of another clause of the same constitution, he is liable to pay money for those benefits." There is no difference in principle between that case and the case at bar. Here all the taxpayers would be liable to pay for schoolhouses built or purchased by the town, and, as members of the school district, the act recognizes that some payment should be made by the town for the property taken from the districts. This much certainly is equitable, and within the general principles of taxation. It is not compensation in the strict sense of the term, as when private property is taken, although it resembles that. It is, rather, an attempted equalization, as between the taxpayers of the town as members of one corporation, and the taxpayers of the districts as members of other corporations; and we fail to see that the adjustment of debit and credit is not fair and reasonable. A similar statute has been sustained in Massachusetts. *Whitney v. Stow*, 111 Mass. 368; *Rawson v. Spencer*, 113 Mass. 40. The case of *Freeland v. Hastings*, 10 Allen, 570, is similar in principle. The cases cited by counsel opposed to this view stand upon very different grounds. In *Hanson v. Vernon*, 27 Iowa, 28, it was held that an act to enable towns and cities to aid in the construction of railroads was not a legitimate exercise of the taxing power. *Hooper v. Emery*, 14 Me. 375, related to money received from the United States government, which it was proposed to divide among inhabitants of a town according to families. *Allen v. Jay*, 60 Me. 124, denied the power of a town to loan its credit to individuals for manufacturing purposes. In *Lowell v. Boston*, 111 Mass. 454, the city of Boston proposed to issue bonds to loan the proceeds on mortgages to sufferers by the fire of 1872. In *Bright v. McCullough*, 27 Ind. 223, a tax for road purposes assessed on real estate only was held to be repugnant to the constitution, which required taxation of all property both real and personal. In *re Lands in Flatbush*, 60 N. Y. 398, held that the city of Brooklyn could not tax land in Flatbush for the extension of Prospect park in Brooklyn. The remarks of judges in these cases are quite appropriate to the case decided, but we fail to see any principles pointed out which would show that the act before us is contrary to the provisions of the constitution.

2. "Does chapter 447 give the collector of taxes power, under the appraisal made, to compute, collect, and remit without any act on the part of the assessors?"

We think the act clearly implies that the assessment, deduction for debts, and remission are to be made by the assessors at the same time as the annual assessment.

3. "Is it the duty of the assessors to assess the amount of the appraised value of the district school property until the voters of the town in town meeting have levied, ordered, or voted such amount as a tax?"

We think it is. The act of the general assembly is superior to the vote of a town, and commands the assessment when the town has taken action under it. Of course, the more orderly way would be for the town to vote the tax, but an omission to do so would not defeat the operation of the law which imposes it.

4. "If a vote of the electors of the town in town meeting is necessary before the amount of such appraised value can be assessed by the assessors, can such tax be levied, ordered, or voted at a special town meeting called for the purpose at any time, or must it be levied, ordered, or voted at the annual town meeting to be holden next after the commissioners' report has been confirmed by the court?"

5. "Can the amount of such appraised value be assessed by the assessors prior to the levy and assessment of the next annual tax, whether levied, ordered, or voted by the electors of the town or not, without such proceedings being had as are prescribed by sections 6, 7, and 8 of chapter 43 of the Public Statutes?"

These two questions may be answered together. Strictly, the assessment is not fully made until the list is completed and delivered by the assessors. But Pub. St. c. 43, § 6,^a provides that the assessment is not to begin until after the time given to the taxpayers for bringing in their accounts. We think the statute contemplates that the assessment of this special tax is to be made along with the general tax, and hence that the intention was to fix the time of making it at the beginning of the assessment. It would be unreasonable to suppose, if, as in this case, a report should be made after the assessment list had been practically completed, but before it had been delivered, that the assessors must do the work all over again, and thus delay the col-

lection of the tax. We think the "next annual assessment" means, and is equivalent to saying, "when the assessors begin to make their next annual assessment." There might, therefore, be an interval after the annual town meeting, within which a special meeting could be held, but it should be at a time to allow for the bringing in of lists by taxpayers, as provided in said section 6.

6. "Are these amounts remitted to be deducted from the taxes of the individual taxpayers, or are they payable to the treasurer of each school district as a fund from which to pay and cancel debts and obligations of the respective districts?"

The act clearly provides for a remission to taxpayers, which means, we think, the individual taxpayers. There is no provision for the proportionate amount of any district to go to its treasurer for any purpose. The liability of a district for debts continues, notwithstanding such remission, although the act presupposes an assumption of district debts by the town, and the retention of an amount sufficient to cancel them, thus saving the trouble of proceedings against the district or of an assessment and collection of a special district tax to pay its debts.

(18 R. I. 429)

JEPHERSON v. TUCKER et al
(Supreme Court of Rhode Island. Dec. 18, 1893.)

MECHANIC'S LIEN—RELEASE.

When the owner required of the contractor releases of liens from those who had furnished material or done work, a release of "all right of lien, title, and interest, for materials furnished" applies only to materials furnished prior to that time.

Petition of George Jepherson against Charles H. Tucker and others for a mechanic's lien. Judgment for petitioner.

George A. Jepherson, in pro. per. Warren R. Perce, for respondents.

MATTESON, C. J. This is a petition for a lien. The petitioner furnished to El. J. Damon & Co. lumber to be used in the repair and alteration of a house belonging to the respondents, situated at 198 Pine street, in Providence. By the provisions of the contract between Damon & Co. and the respondents for repairing and altering the house, Damon & Co. were to be paid in installments at different stages of the work. Before the delivery of the lumber for which the lien is claimed, the petitioner had furnished other lumber for the repairs and alterations to the amount of from three to four hundred dollars. On or about February 10, 1893, the contractors called on the respondents for a payment, which the latter declined to make unless the contractors would obtain from the different mechanics employed in the work, and from the material men who had furnished materials, a release of their rights to

^a As follows: "Sec. 6. Before assessing any tax, the assessors shall post up printed notices of the time and place of their meeting, in three public places in the town, for three weeks next preceding the time of such meeting, and advertise in some newspaper published in the town, if any there be, for the same space of time. Such notices shall require every person and body corporate liable to taxation to bring in to the assessors a true and exact account of all his ratable estate, describing and specifying the value of every parcel of his real and personal estate, at such time as they may prescribe."

liens. For the purpose of enabling Damon & Co. to obtain this payment, the petitioner signed a paper, of which the following is a copy: "Providence, R. I. February 10, '93. To whom it may concern: For value received we hereby release all our right of lien, title, and interest in and to the estate situated at No. 198 Pine street, in the city of Providence, in the state of Rhode Island, for material furnished and labor performed on said house for E. J. Damon & Company, contractors." The respondents, on the receipt of this paper, made a payment to the contractors, who paid the petitioner for the lumber furnished prior to February 10, 1893. Subsequently, the petitioner furnished other lumber, amounting to \$178.17, for which he has not received payment and for which he claims a lien. This lien he seeks to enforce by the present proceeding. At the hearing the respondents introduced the paper purporting to be a release, referred to above as having been signed by the petitioner. They contended that the petitioner was not entitled to a lien because he had thereby released or waived his right to a lien. The petitioner, in reply, insisted that the release or waiver applied only to the lumber furnished prior to its date.

The question thus presented is, whether the operation of the waiver is to be limited to materials furnished prior to its date, or whether it was prospective in its operation and applied to materials subsequently furnished. We are of the opinion that the paper is to be construed as a waiver, merely, of the petitioner's right to claim a lien for materials furnished prior to its date. It contains no language which is prospective. It releases "all our right of lien, title, and interest;" that is, all right of lien, title, and interest which the signer then had,—not any which he might thereafter acquire. Again, it is all our right of lien, etc., "for material furnished,"—not for material to be furnished. In this respect the case is very different from *Brown v. Williams*, 120 Pa. St. 24, 13 Atl. 519, relied on by the respondents, in which the defendants in error had filed a claim for a lien for a balance due them for laying bricks in the construction of several dwelling houses. These houses were built to sell, and, in order to enable the owner to make sale of them as opportunity offered, the mechanics and material men, during the progress of the work, executed to him a release of "all and all manner of liens, claims, and demands whatsoever which we, or any or either of us, now have, or might have, or could have, in or against said buildings and premises for work done or for materials furnished for the erecting and constructing the said buildings," "so that he, the said Samuel H. Brown, [the owner,] his heirs and assigns, shall and may have, hold, and enjoy the said buildings and premises freed and discharged from all liens, claims, and demands," etc. In view of the prospective

language of this release, and of the fact that the purpose of the release was to enable the owner to sell the houses as opportunity offered, the court properly found and held that such a release was an unconditional agreement to look to the personal responsibility of the owner, and not to the structures; and that, though made during the progress of the work, it was operative to discharge the buildings from mechanics' liens as effectively as though made after completion, and for labor done and materials furnished after its execution as well as before. A moment's consideration suffices to show that this is a much stronger case against the material man than the case at bar. We think, too, that the construction which limits the waiver in the present instance to materials furnished prior to its date is strengthened by the fact that Damon & Co. were to receive payments from time to time as the work progressed, and by the fact that the waiver was signed, at a time when one of the installments had been earned, in order to enable the owners to pay it without incurring the risk of loss from liens for materials theretofore furnished or labor theretofore performed. Before making subsequent payments, the respondents had it in their power to require the execution of other releases or waivers, if they had deemed them necessary for their protection.

(63 Conn. 420)

SHANNAHAN v. CITY OF WATERBURY.
(Supreme Court of Errors of Connecticut. Dec. 13, 1893.)

EMINENT DOMAIN — CONDEMNATION PROCEEDINGS — APPEAL — MEASURE OF DAMAGES — ABANDONING IMPROVEMENT.

1. Waterbury City Charter, § 37, provides that property condemned by the city for public use shall be deemed to be "taken" when the proceedings are duly recorded, and compensation is made or secured to the owners; and the amending act of 1878 (section 1) provides that on appeal from an assessment of damages by the board of compensation, and no appeal from the layout, nothing in the charter shall prevent the city from opening and occupying the land pending the appeal. *Held*, that an appeal from an assessment of damages, after the layout was completed and the assessments were payable, postponed the payment of appellant's damages till on determination of the appeal, but did not postpone the time when the improvement should be deemed to have been made.

2. The damages should be assessed when the improvement was made, and not when the city took actual possession, nor when appellant's damages were determined on the appeal.

3. A city cannot abandon an improvement to the injury of a person who had appealed from an assessment, where it has paid damages, collected benefits, and made the improvements, wholly or in part.

Appeal from superior court, New Haven county; R. Wheeler, Judge.

Proceedings by the city of Waterbury to condemn land for the alteration and widening of a public street. John Shannahan appealed from an assessment of damages.

From a judgment for Shannahan, the city appeals. Reversed.

Lucien F. Burpee, for appellant. Webster & O'Neill, for appellee.

CARPENTER, J. In 1889 the city of Waterbury accepted the layout of an alteration and widening of one of its public streets known as "South Riverside Street." The improvement took the whole of a small wedge-shaped piece of land containing about 1,200 square feet, with a building thereon standing. The damages assessed for such taking were \$2,275. From that assessment an appeal was taken to the superior court. The case was referred to a committee. On the trial a question arose whether the damages should be assessed as of the time when the assessment was made by the common council, or as of the time of hearing before the committee. Damages were assessed in the alternative,—\$3,000 if the earlier day was adopted, and \$3,500 if the later. The superior court accepted the report, and rendered judgment for the higher sum. The defendant appealed to this court.

There is, in effect, but one error assigned, and that is the first: "The court erred in not assessing the damages of the plaintiff according to the value of his land at the time when such land was taken for the public use." The other two assignments are but a repetition of the first in another form. Another statement of the question before us is, when was the land taken for the public use? The city insists that it was taken when the assessments made by the common council became due,—September 7, 1889. The plaintiff insists that it was taken when the judgment was rendered on the appeal by the superior court,—May 31, 1893. The superior court sustained the plaintiff's claim. In this we think the court erred. The provisions of the charter bearing on this question are as follows: Section 27 makes the city a highway district, and vests in it exclusive authority over the streets and highways therein, "and exclusive power to lay out, make, or order new highways and streets within the limits of said city, and to alter, repair and discontinue all highways," etc. The court of common council is authorized to appoint a board of road commissioners, with power "to lay out, construct or alter public squares, parks, highways, bridges or walks in said city, whenever ordered to do so by said court of common council." Before proceeding to lay out or alter any street, etc., the thirty-sixth section requires said board to cause reasonable notice to be given to the owners of the land to appear before the board and show cause why the layout, etc., should not be made. Section 37 is as follows: "Whenever said board shall have decided to lay out any such square, park, street, highway, bridge or walk, or alteration thereof, they shall make a report in writing of their

doings to said court of common council, which report shall embody a survey containing a particular description of such square, park, street, highway, walk, or alteration thereof; and whenever said report shall have been accepted by said court of common council, and recorded in the records of said city, and just compensation shall have been made to the persons whose property is to be taken for such public improvements, or shall have been deposited in the treasury of said city, to be paid to them when they shall apply for the same, in the manner hereinafter prescribed, then such square, park, street, highway, bridge or walk, or alteration thereof and the land embraced thereby, shall be and remain taken and devoted to the public use for which it shall have been so laid out." Section 38 provides for the assessment of damages and benefits to be made by the court of common council, or by a board of compensation by it appointed. It is then provided as follows: "Upon the completion of all their assessments (either for damages, or damages and benefits, as the case may be) for any such square, park, street, or other public improvements, by said board of compensation, said board shall make a report of all their doings to said court of common council, and when such report shall have been accepted and recorded in the records of the proceedings of said court of common council, each and all of said assessments shall be legally deemed to have been made and done, and not before. Upon the completion by said court of common council of all their assessments for benefits in reference to any such square, park, street, or other public improvements, the doings of said court of common council shall be recorded; and when so recorded, each and all of said assessments by said court of common council shall be legally deemed to have been made and done, and not before." Thus it appears (when no appeal is taken) that the charter, in the thirty-seventh section, expressly provides that the time when the property condemned for public use shall be deemed to be taken is when the proceedings are duly recorded, and compensation is made or secured to the owners, which, in the present case, was September 7, 1889, assuming that the payments had then been made or secured; that is, had not this appeal been taken, the time of taking the land for public use would clearly have been on the day last named. That seems to be clear from an inspection of the charter, and requires no further argument.

The question now arises, how does the appeal affect this question? The charter answers the question. Section 41 provides that two classes of persons may appeal: First, any one aggrieved by any act of the city "in reference to the laying out, constructing, altering or improving any square," etc.; second, any one aggrieved by any act "in making any of the assessments of damages and

benefits authorized in this act." There is a provision, however, that the appeal shall be taken within 60 days after the doing of the act of which he complains. The section concludes as follows: "No public square, park, street, highway, bridge or walk, or alteration thereof, laid out under the provisions of this act, shall be opened or occupied by said city until the expiration of the time limited for the giving of notice to said city of such an application for relief; nor until all applications duly made as aforesaid for relief against acts done in reference to the laying out of such public improvements, shall be finally disposed of by said superior court." Prohibiting the opening and occupying the improvement during the pendency of an appeal of one class implies a permission to open and occupy if the appeal is from the other class only; but the implication is unnecessary, for in an amendment to the charter, passed in 1878, (section 1,) it is expressly provided, "that in case of any appeal being made from the doings of the board of compensation * * * in making any assessment of damages or benefits, * * * and no appeal is taken from the layout, nothing in said charter shall be construed to prevent said city from opening, occupying and working the same during the pendency of the appeal from the doings of said board." The question is not as to the taking of the plaintiff's land alone, as the argument seems to assume, but is rather when was it determined to make the improvement, and to take all the land necessary for that purpose? The plaintiff's case cannot be separated from others whose lands were taken, but must be considered in connection with the others as one transaction; so that the question is, when was the improvement, as a whole, determined upon? Was it at one time as to all, or at different times with the several landowners? The charter evidently contemplates each improvement as one transaction, and not several transactions with the several landowners. Therefore, we are not to suppose that the improvement was adopted at one time as to the nonappealing proprietors, and at another as to the plaintiff, who appealed. Thus, when the layout was completed, and the assessments made, notice was given that the damages assessed were payable September 7, 1889. On that day it seems damages assessed to others were paid, and would have been paid to the plaintiff but for his appeal. The appeal simply postponed the payment of his damages until the final determination of the appeal, and does not postpone the time when the improvement shall be deemed to have been made. When the improvement was made, then, in contemplation of law, the land was taken, and the damages should be assessed as of that time, and not as of the time when the city took actual possession, or as of the time when the plaintiff's damages were determined on the appeal. It follows that the city had no option to abandon the

improvement after the assessment of damages on the appeal. Perhaps there would have been if the course indicated by the ninth section of the city ordinances had been taken, and the payment of the damages and the collection of the benefits had been suspended until all appeals had been determined, and the city had also refrained from working the improvement; but after paying damages, collecting benefits, and working the improvements, wholly or in part, it was too late to abandon the improvement. The charter clearly gives the right to the city to proceed with the improvement, notwithstanding the appeal, and notwithstanding the uncertainty as to the amount of damages that may ultimately be recovered. No damage was thereby done the plaintiff. He assumed no risk. The land was being taken by a portion of the public under the right of eminent domain, and a public municipality was liable for the damages, so that the payment was reasonably secure. The city not only proceeded with the improvement as to the land taken from others, but actually entered upon the land taken from the plaintiff, and removed therefrom a building, pending the appeal. Other questions are incidentally discussed in the plaintiff's brief, but we do not regard them as having any particular bearing upon the main point, and therefore we refrain from considering them more at length. There is error, and the judgment is reversed, and the case remanded, with instructions to render judgment for \$3,000, with interest. The other judges concurred.

(63 Conn. 429)

HOLLEY v. TOWN AND BOROUGH OF TORRINGTON.

(Supreme Court of Errors of Connecticut.
Dec. 13, 1893.)

MUNICIPAL CORPORATIONS — CHANGE OF GRADE — ACTION FOR DAMAGES — PLEADING — EVIDENCE.

1. Where the selectmen of a town and officers of the borough change the grade of a street without notice to an abutting owner, and without giving her an opportunity to be heard as to such change, or as to the damages which would be occasioned thereby to her property, and without attempting to come to an agreement with her as to such damages, she is entitled to sue the city and borough for the damages to which she has been subjected.

2. The failure of the complaint in such action to aver that defendants have not given plaintiff notice or paid her damages, or to state any sum as damages, is cured by verdict.

3. The destruction of a sidewalk constructed by plaintiff, and of shade trees set out between the sidewalk and the wrought part of the highway, may properly be considered in determining the decrease in value of the property.

4. The defendant borough and town are liable either jointly or severally for the tort, they having both authorized and directed it.

5. The action is properly brought in the superior court of the county wherein defendant corporations are located, and plaintiff resides.

Appeal from superior court, Litchfield county; R. Wheeler, Judge.

Action by Nellie W. Holley against the town

and borough of Torrington for injury to land caused by a change of street grade. From a judgment for plaintiff, defendants appeal. Affirmed.

George E. Terry and Gideon H. Welch, for appellants. James Huntington and Arthur D. Warner, for appellee.

ANDREWS, C. J. The plaintiff, Nellie W. Holley, is the owner of a parcel of land, with buildings thereon, situated in the town and borough of Torrington, bounded on the south by Water street, so called, and on the east by Prospect street. At a town meeting of the town of Torrington holden on the 5th day of January, 1891, it was voted: "That the selectmen of this town are hereby authorized and directed to grade and lower Water street as follows: Commencing in a line of the west side of Prospect street, at a point five feet below the present grade of said street, and grade and level to a true grade to Main street, and from starting point to grade and level said street to a true grade to John street or Naugatuck Railroad, as they shall find it necessary to protect contiguous streets." At a meeting of the warden and burgesses of the borough of Torrington, held on the 15th day of April, 1891, it was voted: "That the town authorities, when they shall cut down Water street and the southern terminus of Prospect street, also shall cut down the sidewalks on each side to the same grade as the streets, and charge the expense of cutting down said sidewalks to the borough." The borough of Torrington lies wholly within the town, and the control of all the sidewalks within its limits is, by its charter, given to the borough. The said streets—Water street and Prospect street—are ancient highways in the town of Torrington, laid out more than 60 years ago, and have been constantly used ever since. Such use had established a grade for the street to which the plaintiff had conformed in erecting the buildings on her said piece of land, namely, a dwelling house, a barn, a store with tenements, and a building used for a photographic gallery. She had also constructed a sidewalk, and either herself or her predecessors had set out shade trees, which were at that time of 50 or more years' growth, between the sidewalk and the wrought part of the highway. Subsequent to the passing of said votes, and prior to the commencement of this action, the defendants, by their proper authorities, claiming to act by virtue of said votes, changed the grade of said street substantially as provided for in the same, thereby lowering the grade of Water street in front of the plaintiff's premises seven feet or more, and cut down and removed the shade trees and destroyed the sidewalk. The change in the grade of the streets so made by the defendants seriously damaged the plaintiff's said property. Before proceeding to make such change in the grade of the streets, neither the selectmen of the town

nor the officers of the borough gave any notice to the plaintiff, in writing or otherwise, that they intended so to do, nor did they, or either of them, afford her any opportunity to be present and to be heard as to such change of grade, or as to the damages that would thereby be done to her property, nor did they, or either of them, ever attempt to agree with the plaintiff as to such damages. In this condition of things the plaintiff brought the present complaint to the superior court in Litchfield county, setting forth a statement of the facts constituting her cause of action, and demanding that a committee be appointed to ascertain her damages, and that she have judgment therefor against the defendants. The complaint was duly served upon the defendants, and returned to the superior court at its October term, 1891. The parties appeared at the court, and the defendants filed an answer, to which the plaintiff made a reply, and a committee was duly appointed. The parties appeared before the committee, and were fully heard, and they then agreed that the damage, if any should be found, should be assessed jointly against the town and the borough. On the 6th day of September, 1892, the committee made its report, finding the special damages done to the plaintiff's land by reason of change in the grade of the street to be the sum of \$2,948.14. On the 6th day of October following, the defendants filed their motion to have the cause dismissed for want of jurisdiction. This motion the court denied. Thereupon the defendants remonstrated against the acceptance of the report. The court overruled the remonstrance, accepted the report, and rendered judgment for the plaintiff to recover said damages of the defendants, with costs. From that judgment the defendants appealed to this court, and have assigned various reasons of appeal. These all come within one or the other of three propositions. Has the plaintiff any remedy at all? And, if so, may the remedy be obtained in this action? And may she recover to the extent the committee has found?

We are of the opinion that the plaintiff is entitled to recover the damages to which she has been subjected. *Healey v. City of New Haven*, 49 Conn. 394. But can her damages be recovered in this action? As we have already seen, the complaint contains a statement of the facts which constitute the plaintiff's cause of action, together with a demand for the relief to which she supposed herself entitled. This is a good complaint, according to the practice act. Very likely, it would not have sustained the test of a demurrer. It did not contain any averment that the defendants had not given her notice, or that they had not paid her the damages. Nor did it state any sum as damages. But these omissions, if defects at all, have not been noticed during the progress of the case, and after a judgment or a verdict we think these defects are aided. They cannot

now be said to have done the defendants any harm. The case of *Healey v. City of New Haven*, (cited above,) at page 401, contains so full and complete an answer to the question just asked that we can do no better than to apply the language there used to the facts of this case. That case was brought to recover damages caused by the change in the grade of a city street, and was decided under the act of 1874, which is re-enacted in section 2703 of the present statutes. It says: "A question is made whether the defendants are liable in the present form of action. The statute, in terms, makes the defendants liable for the damages, 'to be ascertained in the manner provided for ascertaining damages done by laying out or altering highways therein.' The defendants contend that, when a statute creates a right and gives a remedy, that remedy alone must be resorted to. The principle invoked is more especially applicable to cases where the statute makes an act, lawful in itself, unlawful; but it is not applicable to this case, for the reason that the statute gives the plaintiff no remedy. It simply points out a method by which the defendants may ascertain the amount of damages. * * * In this the defendants must clearly take the initiative; it is their duty to move in the matter. Now, suppose they do move, and, having ascertained the damages, refuse to pay, what remedy has the plaintiff? The statutes being silent, the law supplies the remedy. There is certainly no occasion to resort to a mandamus, for nothing remains to be done but to pay the money. But suppose the defendants refuse to have the damages assessed, as in this case. What, then, is the remedy? The defendants answer, 'A mandamus.' Not necessarily. That writ lies only when there is no other remedy. We think an action for the damages is a more direct, more complete, and less expensive remedy. The proceeding by assessment is not a remedy for the plaintiff. She cannot institute it nor control it; and, if instituted by the defendants, she could not compel its continuance. It was in no sense designed for her benefit, but is rather in the nature of a proceeding against her or against her property in rem. The constitution prohibits the taking of private property for public use without compensation. It being necessary to take private lands for highways, this proceeding was designed as an expeditious and inexpensive method of ascertaining the damages to be paid. The theory is that the damages shall be ascertained and paid before the land is taken. But the defendants cannot escape responsibility by omitting this proceeding, and taking the land in the first instance. Should they attempt to do so, it would be no answer to a suit that the statute makes provision for ascertaining the damages. In such a case the plaintiff would hardly be required to resort to a mandamus. The statute provides the same remedy for both cases,—the origi-

nal taking of the land, and the subsequent damage to the adjoining land by changing the grade. * * * The cases are so nearly alike that the same principle should apply to both. The defendants might, and should, have resorted to the statutory mode of assessing damages. They should do so in all instances, and their failure to do so can be no defense. If they take land or make improvements, thereby causing damage where damages are provided for, without complying with the statute, their proceedings are unlawful. They cannot, with good grace, turn the plaintiff out of court, and say to her: 'You ought to have resorted to a mandamus to compel us to do our duty.' " *Lund v. New Bedford*, 121 Mass. 286; *Power Co. v. Allen*, 120 Mass. 352; *Bohman v. Railway Co.*, 30 Wis. 105; *Moore v. Railroad Co.*, 34 Wis. 173; *Cooley*, Const. Lim. (5th Ed.) 654. We think the plaintiff is entitled to recover in this action.

The special damages to the plaintiff's land could be determined only by considering everything by which its value would be affected. The shade trees and the sidewalks were such things. *Hoyt v. Telephone Co.*, 60 Conn. 385, 22 Atl. 957; *Shelton Co. v. Borough of Birmingham*, 61 Conn. 518, 24 Atl. 978; *Id.*, 62 Conn. 456, 28 Atl. 348.

This action being one sounding in tort, the defendants are liable jointly, as they would be severally, for the whole amount of damages; and, being between parties living in Litchfield county, the superior court in that county had jurisdiction to hear and determine it. The motion to dismiss was properly overruled. There is no error in the judgment appealed from. The other judges concurred.

(78 Md. 394)

CENTRAL RY. CO. v. BREWER.

(Court of Appeals of Maryland. Jan. 12, 1894.)

MALICIOUS PROSECUTION—FALSE ARREST—PROBABLE CAUSE—LIABILITY OF CORPORATION—UNAUTHORIZED ACTS OF AGENTS.

1. A street-railway company is not liable for a malicious prosecution and false arrest of an individual by its president and superintendent on a charge of having passed counterfeit money, by dropping a "lead nickel" in the fare box, unless such officers have express authority for such action or it is ratified by the company.

2. Plaintiff, on boarding a street car, dropped into the car a coin resembling a five-cent piece, which the driver immediately discovered was a counterfeit. Plaintiff's attention was called to it, and he was asked to redeem the coin, which he said he would do if it was returned to him. The driver told plaintiff that he could not open the box, but that the coin could be obtained by calling at the company's office. Plaintiff continued in the car, which passed the company's office, without redeeming the bad coin, and soon after the superintendent and other employees had him arrested for passing counterfeit money. He was brought before the United States commissioner, who discharged him. *Held*, that there was probable cause for the arrest and prosecution.

Appeal from Baltimore city court.

Action by Elias Brewer against the Central Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, MCSHERRY, BRISCOE, and ROBERTS, JJ.

T. Wallis Blakistone and Geo. Blakistone, for appellant. A. S. Niles and Oscar Wolff, for appellee.

ROBERTS, J. This is an action for malicious prosecution and for false arrest, whereby the plaintiff seeks the recovery of damages of the defendant company, a body corporate of the state of Maryland. The declaration alleges that the defendant, falsely, maliciously, and without probable cause whatsoever, caused the plaintiff to be arrested upon a writ issued by a commissioner of the circuit court of the United States for the district of Maryland, upon the charge of passing counterfeit money, knowing the same to be false and counterfeit, and with intent to defraud, whereupon the commissioner required the plaintiff to give bail for his appearance before him the day following for a hearing, when said charge was dismissed and the appellee discharged. In the second count it is alleged that the defendant assaulted the plaintiff, and gave him into custody of a police officer, upon a false charge, and required him to go before the said commissioner and give bail for his appearance, etc. To this declaration the defendant pleaded that it did not commit the wrongs alleged. The facts are that the defendant was engaged in running cars upon certain streets of the city of Baltimore for the conveyance of passengers. The plaintiff boarded one of the cars of the defendant at the corner of Druid Hill avenue and Biddle street, and, before taking his seat, dropped into the fare box, which was of the Slawson patent, a coin resembling a five-cent piece or nickel. When the car had proceeded nearly the distance of a short block, the driver of the car called the plaintiff to him, and told him that he had dropped a lead nickel in the box, and requested him to redeem it. The driver pointed out to the plaintiff the particular coin which was lying on the glass shelf of the box, which is an inclined glass plate held in such position that the coins which are dropped into the box fall upon the upper surface of the inclined plane of the glass shelf. This glass shelf is intended to give to the driver a careful scrutiny of the coins deposited for fares, before the same are dropped into the lower part of the box. The testimony conclusively shows that the nickel in question was deposited in the box by the plaintiff. It is equally clear that the coin so deposited was a leaden nickel or counterfeit coin of the United States. And notwithstanding the driver told the plaintiff that he must redeem the counterfeit coin, and that he could not deliver the same to him, as a driver had no right to open the box, but that he

could obtain the same at any time by calling at the office of the company, the plaintiff continued in the car, and passed the office of the company, without paying further attention to the matter. Immediately thereafter, three of the employees of the defendant—the driver of the car in question, the treasurer, and also the superintendent—followed the car in which the plaintiff was, a short distance, and after the plaintiff had left it the superintendent approached him, and said, "You put a piece of counterfeit money in the box, and I would like you to make it good." But the plaintiff declined doing so, and said there was nothing the matter with the nickel,—only a piece out of the corner of it. The plaintiff was then taken before the United States commissioner, where the charge of passing a counterfeit coin was made, the superintendent making the affidavit. The commissioner held the plaintiff under bail for his appearance on the day following, and detained him for about two hours, until bail was furnished. On the day following the making of the charge, the case was heard by the commissioner, and the plaintiff discharged.

At the trial below there were two exceptions taken,—one relating to the court's action on the prayers, and the other to the admissibility of certain testimony. The liability of corporations aggregate for torts committed by them through their agents has, in recent years, received a good deal of attention from the courts. It may indeed be said that the question of corporate liability for torts has been in a progressive stage; but step by step have the limits of such liability been enlarged and extended, until now there is but little difference between corporate liability and individual liability, with respect to torts. In consequence, however, of the fact that a corporation must, of necessity, act through its agents, courts have almost invariably held that, to hold a corporation liable for a tortious act committed by its agent, the act must be done by its express precedent authority, or ratified and adopted by the corporation. Nor is a corporation responsible for unauthorized and unlawful acts, even of its officers, though done *colore officii*. To fix the liability, it must either appear that the officers were expressly authorized to do the act, or that it was done *bona fide*, in pursuance of a general authority in relation to the subject of it, or that the act was adopted or ratified by the corporation. *Ang. & A. Corp.* (10th Ed.) § 311; *Carter v. Machine Co.*, 51 Md. 296.

When the plaintiff was arrested and held to bail, in the manner already stated, the affidavit was made by the superintendent of the defendant. It is asserted in the brief of the appellee that the president of the defendant was also present at that time. We fail, however, to discover the fact in the record. But, in our view of the case, it is immaterial whether he was or was not. The president was but the agent of the defendant, as were the other officers and employees. There is

nothing in the record which directly or indirectly tends to show that the superintendent was acting in pursuance of express precedent authority from the defendant, (Carter v. Machine Co., 51 Md. 298,) in causing the arrest of the plaintiff, nor had he any implied authority for so doing, arising out of the scope of his employment, so far, at least, as the testimony in the record discloses. The fact that he had general authority to look after and manage the affairs of the defendant, in running its cars on the streets of Baltimore city for the carriage of passengers, in no manner suggests that he had, unless expressly authorized so to do by his principal, any authority to arrest a passenger for placing in the fare box a leaden nickel in payment of his fare. He may have a general authority to look after and protect the property of the defendant, and he may possess all the powers properly pertaining to such employment; and yet he would not be empowered to invoke the aid of the criminal law on behalf of his company, unless he had express precedent authority. And, if this be true of the superintendent, it is equally true of the other agents and employees of the defendant. As to the subsequent ratification or adoption by the defendant, the testimony is very meager and inconclusive. At the hearing of the charge, the president, the superintendent, and the driver testified, and the impression made upon the mind of the commissioner is described by him in his testimony, when he says there was nothing in the conduct or manner of the officers or employees of the railway company before him to indicate that they wanted to do anything more than tell the facts which were within their knowledge, and which appertained to their examination. The fact that the president, superintendent, and driver testified before the commissioner affords no legally sufficient evidence of ratification or adoption, for, if they were without authority in causing the arrest, the subsequent testimony given for the government by them, or the manner in which they demeaned themselves in delivering their testimony, in no way supports the theory of adoption or ratification. *Improvement Co. v. Steinmeier*, 72 Md. 320, 20 Atl. 188. There was not, we think, any legally sufficient evidence given at the trial below, from which the jury could have properly inferred either express precedent authority to justify the agents of the defendant in causing the arrest of the plaintiff, nor was there any legal evidence which establishes the adoption or ratification by the defendant of the acts of its agents. It was certainly not within any of the usual objects or powers of the defendant company to prosecute offenders against the criminal laws of the United States, and it has not been contended that any such powers ever were specially conferred upon the defendant. While courts of some of the states have held corporations to strict liability in actions of like character

with the one now under consideration, we are following the doctrine which we think this court has correctly announced in the case of *Carter v. Machine Co.*, 51 Md. 290. To hold differently would, we think, be opening wide the door to a class of cases which courts do not look upon with favor. Public justice has its claims, as well as the individual citizen, and it is no part of the privileges of the latter that he can with impunity ignore the reasonable demands of the former.

We do not, however, sanction the idea that the rights and liberties of the citizen can be trifled with, and unfounded charges preferred, without holding the accuser to a just responsibility. And when corporations authorize their agents to maliciously commit wrongs against the citizen, or ratify or adopt such acts when done, they should be held responsible therefor. The right and the duty of the citizen are reciprocal. He should conduct himself in such manner as not to excite a well-founded suspicion that he is a wrongdoer. If he does not, he has no just cause to complain of the consequences. *Carl v. Ayers*, 53 N. Y. 14. This case now under consideration illustrates our meaning. If the plaintiff, when charged with passing a counterfeit coin with intent to defraud, had exercised a reasonable degree of prudence, which he could have done by dropping a good coin into the box for the bad one, or by going a few steps to the office of defendant, which he was then nearing and about to pass, and redeemed this bad coin, there could have been no possible cause for trouble, but he declined to do either. Having paid no fare for the ride which he took, he quietly walks off, ignoring the obligation he was under to the defendant to pay his fare, and paying no attention to the complaint of the driver that he had dropped a leaden nickel in the fare box. We take it to be very clear from the testimony, as already stated in this opinion, that the plaintiff did deposit the leaden nickel in the box, and that it was a counterfeit coin. The plaintiff himself has not sought to disprove either fact. Under these circumstances, he should have pursued a different course, if he desired to relieve himself from the consequences which reasonably followed. He had ample time to consider and determine upon the course which he thought proper to pursue, and we think he acted in such manner to at least justify the agents of the defendant in believing that, even though he may have unintentionally deposited a bad coin in the box, he was afterwards willing to avail himself of his position, and apply the counterfeit nickel to the payment of his fare. He failed to better his position when he subsequently, at the instance of the commissioner, gave a good nickel to the president of the defendant. The agents of the defendant were unskilled in the refinements of the law, and we think, in what they did, they acted bona fide, and with reasonable and probable cause

for their conduct. The plaintiff, by his course, excited suspicion, and invited the charge, and thus brought upon himself the unpleasant consequences that followed, which we think could have been averted by a reasonable regard for the duty incumbent upon him under the circumstances. *Wilmarth v. Mountford*, 4 Wash. O. C. 79, Fed. Cas. No. 17,774.

In this case we have failed to discover, by implication or otherwise, the slightest degree of malice. None could be inferred from the want of probable cause, because its absence has not been shown. The plaintiff, in his testimony, speaking of the agents of the defendant, said that he knew of no reason why they should have had any feeling against him, and he really had no right to think that they had. The question of the presence or absence of probable cause for a criminal prosecution does not depend upon the guilt or innocence of the accused, or upon the fact whether or not a crime has been committed. *Baldwin v. Weed*, 17 Wend. 224; *Bacon v. Towne*, 4 Cush. 218. And if a person act upon appearances in making a criminal charge, and the apparent facts are such as to lead a discreet and prudent person to believe that a crime has been committed by the party charged, although it turns out that he was deceived and the party accused was innocent, yet he will be justified. *Carl v. Ayers*, *supra*.

The well-settled doctrine is that an agent has implied authority to do only such acts as relate to his own particular duties. This theoretical principle is easily enough expressed and comprehended, but it is just here that the greatest difficulties arise in defining the extent of the principal's liability. The decided cases which illustrate this view are numerous, and we will refer to some of them as explanatory of the doctrines maintained in this opinion, and which we think correctly state the law. In the case of *Roe v. Railway Co.*, 7 Exch. 36, it appears "that a passenger, being desirous of going by an excursion train from Monk's Ferry (the defendant's station) to Bangor and back, inquired of the clerk at the former station by what train he could return. The clerk informed him that his ticket would be available by the evening train from Bangor. The plaintiff accordingly obtained an excursion ticket, and returned by the train mentioned by the clerk. On arriving at the platform near the Chester station, a railway servant, who had charge of the train, upon receiving the plaintiff's ticket, told him that he had come by the wrong train, and that he must pay 2s. 6d. more. This the plaintiff refused to pay, and he was thereupon taken into custody by a railway servant, under the direction of a superintendent; but, after having been a short time in custody, he paid the money under protest, and was released. It appeared that the Chester station was occupied by the defendant's company and by

several other railway companies, but one of the witnesses stated that he believed that the person who took the plaintiff into custody was one of the servants of the defendant's company. The plaintiff's attorney, having written to the secretary of the defendant's company for compensation, received a written answer from him, requesting that he might be furnished with the date of the transaction, and promising to make the necessary inquiries. The secretary also stated that it was an awkward business, and that the blame would fall upon the clerk at the station who had given the false information; and he also offered to repay to the plaintiff the sum of 2s. 6d. he had been compelled to pay. Held, in an action against the defendant for the arrest, that the circumstances of the case did not afford any evidence that the arrest had been made by the authority, either express or implied, given by the company, or that they had ratified the act. In the case of *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314, it appeared that the plaintiff, a passenger on the cars of the company, when demanded to deliver up his ticket to the collector, refused so to do. He was requested to quit the carriage, which he also refused to do, whereupon he was, with necessary force only, removed. A servant of the company then took the plaintiff before a magistrate for an alleged breach of one of the company's by-laws. The attorney for the company attended before the magistrate to conduct the charge, which the court held was no evidence that the company ratified the act of their servant. In the case of *Mall v. Lord*, 39 N. Y. 381, the question was whether a merchant, by employing a clerk to sell goods for him in his absence, or a superintendent to take general charge and management of his business at a particular store, thereby confers authority upon such clerk or superintendent to arrest, detain, and search any one suspected of having stolen and secreted about his person any of the goods kept in such store. The court says: "In examining this question, it must be assumed that by the employment the master confers upon the servant the right to do all necessary and proper acts for the protection and preservation of his property, to protect it against thieves and marauders, and that the servant owes the duty so to protect it to his employer. But this does not include the power in question. It cannot be presumed that a master, by intrusting his servant with his property, and conferring power upon him to transact his business, thereby authorizes him to do any act for its protection that he could not lawfully do himself, if present. The master would not, if present, be justified in arresting, detaining, and searching a person upon suspicion, however strong, of having stolen his goods and secreted them upon his person." The authority of the defendants to the superintendent could not, therefore, be implied from his employment. The

act was not done in the business of the defendants, and they were not, as masters, responsible therefor. We do not think it necessary to pursue the inquiry further. There are many other cases closely analogous to those quoted, among which are *Pressley v. Railroad Co.*, 15 Fed. 199; *Bank v. Owston*, 48 Law J. P. C. 25; *Danby v. Beardsley*, 43 Law T. (N. S.) 603; *Edwards v. Railway Co.*, L. R. 5 C. P. 445; *Allen v. Railway Co.*, L. R. 6 Q. B. 65; *Brokaw v. Transportation Co.*, 32 N. J. Law, 328; *Vanderbilt v. Turnpike Co.*, 2 N. Y. 479.

It follows from the views expressed that we are of opinion that there was no legally sufficient evidence in this cause to justify submitting the same to the jury. When all the facts which the plaintiff's evidence conduces to prove do not show a want of probable cause, it becomes a mere question of law, which the court must decide, and it will be useless and improper to take the opinion of the jury upon it. The defendant's first and second prayers announced the law of the case, and should have been granted. The plaintiff's first, second, and third prayers ought to have been rejected. There is no objection to the law of the fourth prayer, in a proper case. We think the court below was in error in allowing the question to be asked which is contained in the first exception, for the reason that, if the agents of the defendant had no authority to make the arrest, they could not, by their demurrer at the hearing, make the company liable, when there had been no precedent authority or subsequent ratification. The judgment below must be reversed, without a new trial. Judgment reversed, without a new trial.

(78 Md. 308)

SHAW v. DAVIS et al.

(Court of Appeals of Maryland. Jan. 11, 1894.)

CORPORATIONS—MINORITY STOCKHOLDER—ACTION TO ENJOIN MAJORITY STOCKHOLDERS—WHEN MAINTAINED.

1. Equity will not interfere with the action of either the stockholders or directors of a corporation, in relation to its internal management, at the instance of a minority stockholder, where the acts complained of are neither fraudulent nor illegal.

2. The facts that the acts complained of relate to the dealings of such corporation with another corporation, and that the same persons are the officers and majority stockholders of both corporations, while plaintiff has no interest in the latter corporation, do not give the court jurisdiction.

3. A bill by a minority stockholder, against the majority stockholders and officers of one railroad company, for an accounting of the dealings of such company with another railroad company, of which defendants are also the officers and majority stockholders, and to enjoin defendants from executing a permanent lease of the road of the latter company to the former, on the ground that such dealings will be to the great financial interest of the latter company, in which plaintiff has no interest, and to the disadvantage of the former company, is properly dismissed where no fraud is shown.

Appeal from circuit court of Baltimore city.

Bill by Alexander Shaw against Henry G. Davis and others for an accounting and an injunction. From a decree dissolving the temporary injunction and dismissing the bill, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, PAGE, FOWLER, and McSHERRY, JJ.

Charles Marshall, John L. Thomas, and W. Irvine Cross, for appellant. W. Pinkney Whyte, Bernard Carter, and Frank Wood, for appellees.

McSHERRY, J. We have given most patient and laborious study to the voluminous record now before us, as well as to the full and exhaustive briefs filed by the distinguished counsel who so ably argued the cause; and, after mature deliberation, we now proceed to state as concisely as possible the reasons upon which the conclusions we have reached are founded. The West Virginia Central & Pittsburg Railway Company was incorporated by the legislature of West Virginia with an authorized capital stock of 60,000 shares of the par value of \$100 per share. Of these shares, when the pending bill of complaint was filed, 5,000 were held in trust for the company's treasury; 7,200 were owned by the appellant, Alexander Shaw; 2,600 by other members of his family; 30,194 by Henry G. Davis, Thomas R. Davis, and Stephen B. Elkins, and their families; and the residue by Thomas F. Bayard, James G. Blaine, William Windom, William Keyser, and quite a number of other persons. The road extends from West Virginia Junction, near Piedmont, on the line of the Baltimore & Ohio Railroad, in a southerly direction to Davis, in West Virginia, a distance of some 58 miles. The company owns large tracts of coal and timber land, and is chiefly a coal and lumber carrying road. Its sole outlet was, originally, the Baltimore & Ohio Railroad at West Virginia Junction. Not long after it began operations, it encountered serious difficulties with the Baltimore & Ohio, and, as described by Mr. William Keyser, it soon became apparent that the business of the West Virginia Central was largely diminished, and that it was greatly embarrassed by the lack of harmonious relations. In fact, the West Virginia Central property became almost sidetracked by the lack of facilities, the want of a cordial understanding, and its consequent inability to make contracts which it would be able to fulfill; and at last the necessity was forced upon this road to get another outlet, or accept the situation of being entirely bottled up. As a result of this condition, the Piedmont & Cumberland Railway Company was organized and incorporated, with a capital stock of 13,000 shares, for the construction of a road, parallel to the Baltimore & Ohio, from Piedmont to Cumberland. Of the capital stock Henry G. Davis, H. G.

Davis & Bro., and Stephen B. Elkins hold 7,295 shares, the Pennsylvania Railroad Company holds 4,000 shares, and the residue is held in smaller lots by other persons.—Mr. Shaw owning none of it. On May 21, 1886, a tripartite agreement was entered into between the West Virginia Central, the Piedmont & Cumberland, and the Pennsylvania Railroad Companies, whereby the latter agreed to set apart 5 per cent. of its receipts from traffic coming to its road from the West Virginia Central and going from its road to the latter, as a fund to guaranty the payment of the interest on the bonds of the Piedmont & Cumberland road, which were to be issued to the extent of \$650,000, that the money might be thereby raised for the construction of the new road. The West Virginia Central agreed to deliver to the Piedmont & Cumberland all traffic it could control, and the Piedmont & Cumberland agreed to deliver to the Pennsylvania Railroad one-half of all traffic hauled by it to Cumberland; and this agreement was ratified by the stockholders of the West Virginia Central, at a meeting in January, 1887, by a vote of 37,395 shares. With the money raised by the negotiations of these bonds, and by a call of a small installment of the stock subscribed, the Piedmont & Cumberland Railroad was built. When finished, in August, 1887, it was operated by the West Virginia Central under a verbal agreement for 60 per cent. of the gross earnings. Subsequently, and as will be stated more at large later on, the stockholders of the West Virginia Central appointed a committee to consider, and report at an adjourned meeting to be held on March 15, 1890, a permanent lease of the Piedmont & Cumberland road. On the 14th of March the appellant, Alexander Shaw, as a minority stockholder of the West Virginia Central, in behalf of himself and of other stockholders who might come in and be made parties, filed the bill of complaint which inaugurated the pending litigation. The averments of the bill relate to two distinct and disconnected subjects. From paragraph 1 to and including paragraph 7 the bill is confined to a statement of transactions between the West Virginia Central, on the one side, and Henry G. Davis, Thomas B. Davis, and Stephen B. Elkins, on the other, and these are introduced, apparently, for the purpose of showing the mode in which these majority stockholders dealt with the company in matters pertaining, not to this proceeding, but to something totally different. The remaining paragraphs of the bill have reference to transactions between the West Virginia Central and the Piedmont & Cumberland, and to the dealings of Henry G. Davis, Thomas B. Davis, and Stephen B. Elkins, as officers and directors of these corporations, with the corporations themselves, and they may be briefly stated as follows: That Messrs. Davis and Elkins, having subscribed for a majority of the stock of the Piedmont &

Cumberland road, gave value to their shares by the following process: (1) With a view of constructing a road that could be cheaply built, they selected a location so low in the valley as to expose the road to heavy and destructive damages in times of floods in the Potomac; that the road was in other respects defectively constructed, and that it is ruinously expensive to operate; that it was designedly so constructed, with a view of having it operated by the West Virginia Central, and of throwing upon the latter company the heavy cost of operating it. (2) Before the Piedmont & Cumberland road was in a condition for the transportation of freight or passengers, the Messrs. Davis and Elkins used their official power in the West Virginia Central to make the latter company complete the construction of the Piedmont & Cumberland road, and, without authority from the stockholders of the West Virginia Central, they,—the Messrs. Davis and Elkins,—as officials of the two companies, made an arrangement by which the West Virginia Central Company began the operation of the Piedmont & Cumberland road in its incomplete condition, whereby the West Virginia Central was made to pay, not only the ordinary cost of operation, but to complete the Piedmont & Cumberland road, and to put upon it betterments and improvements for the benefit of themselves as the principal stockholders therein. (3) While the Piedmont & Cumberland road was still a most precarious property, and sure to entail immense expense in its operation, the Messrs. Davis and Elkins determined, at the annual meeting in January, 1890, to risk the attempt to make the stockholders of the West Virginia Central ratify a permanent lease of the Piedmont & Cumberland road, which had been prepared and presented to the meeting; and that the lease was most disadvantageous to the West Virginia Central, and most advantageous to the Piedmont & Cumberland Company; and that the rate of earnings proposed in said lease as a compensation to the West Virginia Central was inadequate, and would be a fraud on the stockholders of that company. (4) When the lease was proposed to the stockholders, the plaintiff made a violent protest against any lease being executed until the accounts between the two companies should be first adjusted, without which adjustment the earning capacity of the Piedmont & Cumberland road, the expense incident to maintaining it, or a fair rate of rental could not be ascertained; that the confused state of the accounts kept by the West Virginia Central renders any accurate statement impossible, and it would be a fraud on the stockholders of the West Virginia Central to have any lease made before a full settlement of these accounts between the two companies; that Messrs. Davis and Elkins consented to adjourn the stockholders' meeting until March 15, 1890, and that it is their design at that meeting to use the

power which they have as the holders of the majority of the stock of the West Virginia Central to compel the ratification and acceptance of the lease, which they, as officers of the West Virginia Central, have agreed upon with themselves, as officers of the Piedmont & Cumberland Railway Company. The prayers for relief are—First, for a discovery of the ownership of the stock of the Piedmont & Cumberland Railway; second, for a discovery of the holdings of the stock of the Piedmont & Cumberland Company by the West Virginia Central Company, and the moneys spent by the latter company on the road of the first-named company; third, for an account as to how much money is due to the West Virginia Central by the Piedmont & Cumberland Company for advances made by the West Virginia Central on any account, and, particularly, on account of the completion of the Piedmont & Cumberland, which was paid by the West Virginia Central out of the 60 per cent. operating expenses received under the verbal lease, and which ought to have been charged to the Piedmont & Cumberland and paid out of the 40 per cent. of the gross earnings received by it; and, fourth, for an injunction to restrain the execution of the proposed lease, or any other lease, until the court can ascertain what would be a proper apportionment of the earnings between the leased road and the operating road, and what, in a word, ought to be the terms, conditions, and covenants of such a lease. An injunction as prayed was granted on March 14, 1890, and on April 24th the defendants answered, denying the material allegations of the bill, and moved for a dissolution of the injunction. A general replication was filed, and a large mass of evidence, covering nearly a thousand printed pages, was taken. At the hearing the circuit court of Baltimore city on March 23, 1893, dissolved the injunction and dismissed the bill. From that decree this appeal was taken.

It will be observed at the threshold that the relief prayed for has no relation whatever to the first seven paragraphs of the bill, and whether the averments contained therein be true or be false is purely a speculative question under the present structure of the bill of complaint. If those averments had been conceded by the answer to be true, relating as they do exclusively to alleged transactions between Messrs. Davis and Elkins and the West Virginia Central Company, it is not perceived how they could influence or affect, one way or the other, totally different transactions, in no way connected with or dependent on them. No relief is sought as to anything averred in these seven paragraphs. The case, then, before us is that of a minority stockholder filing a bill in his own behalf, and in behalf of others who may subsequently join him, to restrain by injunction the majority stockholders of one railroad company from leasing, except with the

leave of a court of equity, and upon the terms which it may prescribe, the road of another railway company, in which latter company the majority stockholders are the same persons who are the majority stockholders in the proposed lessee company; and also praying for an account between the two companies of antecedent financial transactions. Naturally, the inquiries which such a case suggests at the very outset are—First, what jurisdiction has a court of equity to control the internal management of a corporation at the instance of a minority stockholder? and, secondly, in what manner does the circumstance that the majority of the stock is held by the same persons in both the companies, affect the question of jurisdiction? And, first, it may be stated, as the result of all the authorities, that whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither *ultra vires*, fraudulent, nor illegal, the court will refuse its intervention because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interests may dictate, and their action will be binding on all, whether approved of by the minority or not. "In this country," said the late Mr. Justice Miller, in speaking for the supreme court of the United States in *Hawes v. Oakland*, 104 U. S. 450, "the cases outside the federal courts are not numerous, and, while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud, or a breach of trust, or are proceeding *ultra vires*." And so, in *MacDougall v. Gardiner*, 1 Ch. Div. 14, James, L. J., said: "I think it is of the utmost importance in all these companies that the rule, which is well known in this court as the rule in *Mozley v. Alston*, 1 Phil. Ch. 790, and *Lord v. Miners Co.*, 2 Phil. Ch. 740, and *Foss v. Harbottle*, 2 Hare, 461, should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder in behalf of himself, and others, unless there be something illegal, oppressive, or fraudulent,—unless there is something *ultra vires* on the part of the company, qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a great variety of things which a company may be well entitled to complain of, but which, as a matter of good sense, they

do not think it right to make a subject of litigation; and it is the company as a company which will make anything that is wrong to the company the subject of litigation, or whether it will take steps to prevent the wrong being done. * * * Everything in this bill, so far as I can see, if it is a wrong, is a wrong to the company. Whether it ought to have been done, or ought not to have been done, depends on whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the things should be done, or should not be done, or left unnoticed." In the same case *Mellish, L. J.*, after observing that very often, in companies, things are done which ought not to be done, proceeds: "Now, if that gives a right to every member of the company to file a bill to have the question decided, then, if there happens to be a cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, it will not go on. In my opinion, if the thing complained of is a thing which, in substance, the majority are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority has the right to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then, ultimately, the majority gets its wishes. Is it not better that the rule shall be adhered to that, if it is a thing which the majority are the masters of, the majority, in substance, shall be entitled to have their will followed? If it is a thing of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and this is what, as I understand, was decided by the cases of *Mozley v. Alston* and *Foss v. Harbottle*. In my opinion this is the rule to be maintained." See, also, *Gray v. Lewis*, 8 Ch. App. 1050.

Secondly. The fact that the same persons hold the majority of the stock in both companies does not, of itself, enlarge the court's jurisdiction. The act complained of furnishes the test of jurisdiction, and it must be ultra vires, fraudulent, or illegal. Nothing short of this will suffice. This is true even in a case where directors, and not stockholders, do the act complained of. *Booth v. Robinson*, 55 Md. 441. And for stronger and more obvious reasons is it also true in a case where stockholders themselves act directly. They are not trustees or quasi trustees for each other. Even a director is not, strictly speaking, a trustee. *Spering's Appeal*, 71 Pa. St.

11; *Smith v. Anderson*, 15 Ch. Div. 247. In *Pender v. Lushington*, 6 Ch. Div. 70, *Jessel, M. R.*, in speaking of the rights of a stockholder, said: "I cannot deprive him of his property, though he may not make use of the property in the way I approve. This is really the question, because, if these stockholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it, are entirely beside the question." Then, after referring to a decision by *Mellish*, the master of the rolls proceeded: "In other words, he [*Mellish, J.*] admits a man may be actuated, in giving his vote as stockholder, by interests adverse to the interests of the company as a whole. He may think it was for his particular interest that a certain course may be taken which may be, in the opinion of others, adverse to the interests of the company as a whole; but he cannot be restrained from giving his vote in what way he pleases, because he is influenced by that motive. There is, if I may so say, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interests. This being so, the arguments which have been addressed to me, as to whether or not the votes which were given would bring about the ruin of the company, or whether or not the motive was an improper one, which induced these gentlemen to give their votes, or whether or not their conduct shows a want of appreciation of the principles on which this company was founded, appear to me to be wholly immaterial." And, in *Manhattan E. R. Co.'s Case*, 11 Daly, 516, the court says: "It is argued that, if common directors are disqualified from acting, so are common stockholders incapable to ratify agreements between their companies, and that the holder of one share of stock in each company could prevent any action at a stockholders' meeting relating to the two companies, no matter how advisable that action might seem to the holder of every other share. I do not say that the disqualification extends to a shareholder. I see no reason why it should. The disqualification rests entirely on the fiduciary relation. A shareholder is trustee for nobody. He has only his own interests to look after as such stockholder. Closely connected, undoubtedly, he is in practice with every other stockholder, but he holds no such fiduciary relation to the corporation as stockholder as he holds as director." *Beach, Corp. c. 13, § 247.*

Accepting these propositions as the fixed and settled law, it remains now to inquire whether the proof sustains the allegations of the bill, and brings the case within the legal principles to which reference has just been made. If the Messrs. Davis and Mr.

Elkins selected, as alleged, an improper location for the Piedmont & Cumberland road, and improperly constructed that road, so that it would be ruinous to operate it, and if they did this with a view of throwing the heavy cost of operating it on the West Virginia Central, it is difficult to assign a reason for such singular conduct. On its face the allegation is, to say the least, improbable. Those gentlemen owned over 30,000 shares of the 55,000 issued shares of the West Virginia Central Company, while they owned but 7,295 shares of the Piedmont & Cumberland road; and that they would purposely and designedly wreck their larger and more valuable holdings in the West Virginia Central merely for the purpose of realizing an income from a smaller and dependent road, in which their aggregate shares were not one-fourth of the amount owned by them in the main enterprise, is quite incomprehensible. Certainly, no motive for such a strange course has been shown. But, apart from the improbable character of the allegation, it is not supported by the evidence. The Piedmont & Cumberland road was located by an experienced and competent engineer, who was the chief assistant of the late J. N. Du Barry, at that time second vice president of the Pennsylvania Railroad Company. He made a careful examination of the route of the proposed road, and selected, according to his testimony, the most suitable location that was available. He submitted his surveys and profiles to the engineering department of the Pennsylvania Railroad Company, and even laid them before Mr. George B. Roberts, the president of that company, and an engineer of high reputation, and they were fully approved by both. He testified that the grades were arranged as high as was deemed necessary to keep beyond the reach of extreme high water, and that, taking into consideration its location, alignments, its grades, and the mode in which it was built, the road, for economical operation, was equal to that of the Baltimore & Ohio. Besides this, it was proved by Mr. Charles H. Latrobe, an accomplished engineer in no way connected with or interested in this litigation, that he had made an examination of the Piedmont & Cumberland road, that its general alignment was good, that it had a very considerable proportion of long tangents, and not more than the usual amount of curvature, which might be reduced at very moderate expense, and that it was superior in this respect to the West Virginia Central, because rectifications of the line could be more readily made. As opposed to this, the record contains the testimony of Mr. Wrenshaw, also an engineer, criticising the location and construction of the road. Though there is this difference of opinion between these engineers, and though, too, a freshet did some small amount of injury to the road in 1888, and an unprecedented flood in 1889 caused considerable damage to it,

that might not have happened had the road been built higher above the Potomac river, still, we are not authorized to decide whether, in point of fact, the best location was selected that might have been selected, but only to determine from the evidence whether the location, as made, was made in good faith, or, on the contrary, with the fraudulent design imputed in the bill. We not only see nothing in the record to support this allegation of fraud, but, on the other hand, we are quite fully satisfied, after carefully considering the evidence, that the Piedmont & Cumberland Railway was projected, located, and constructed in entire good faith, with a view of furnishing a necessary outlet for the traffic of the West Virginia Central road, whereby the property of the latter company would be made valuable to its owners.

Now, as to the charge that, before the Piedmont & Cumberland road was in a fit condition for the transportation of freight and passengers, Messrs. Davis and Elkins used their powers as officers of the West Virginia Central to make that company complete the Piedmont & Cumberland, and that, without authority from the stockholders, but by virtue of their control over the West Virginia Central as majority stockholders, and in their capacity as officers of the two companies, they made an agreement under which the West Virginia Central undertook to operate the Piedmont & Cumberland upon such terms as would benefit themselves as stockholders of the Piedmont & Cumberland, and would permanently better and improve the latter road, to the detriment of the stockholders of the former road. There is no foundation in the evidence to support this accusation. The West Virginia Central began to operate the Piedmont & Cumberland in August, 1887; and while the road was then, as is necessarily the case, to a greater or less extent, with all newly-built railroads, less complete than it was made afterwards, yet, so far from its being unfit for the transportation of freight, it is in testimony by the superintendent that from that day up to the time he was examined as a witness there never had been a car derailed, or, as he states it, there never had been a wheel off the track. He further testified that the road was well ballasted with stone, except in a few bottoms, where sand ballast was used, and that, when turned over to the West Virginia Central to be operated, it was superior to the condition of the Parkersburg Branch of the Baltimore & Ohio when it was turned over to the latter company. Going no farther back than January, 1887, we find that Mr. Davis and the directors, among whom was the plaintiff, Mr. Shaw, stated, in the annual report to the stockholders of the West Virginia Central Company, that it would probably be found to the interest of the West Virginia Central to operate the Piedmont & Cumberland road, which was not then completed; and accordingly, at the meeting of the new board of directors, con-

vened the next month, a resolution was adopted conferring upon the president, Mr. Henry G. Davis, full authority, with the advice and assistance of the company's counsel, the Honorable William Pinkney Whyte, to make such an agreement for the operation of the Piedmont & Cumberland road by the West Virginia Central, as he might deem best, in the interest of the West Virginia Central, and directing him to report the result to the next stockholders' meeting. In January, 1888, Mr. Davis reported to the stockholders of the West Virginia Central, at their annual meeting, that no permanent arrangement had been made for the lease of the Piedmont & Cumberland road, but that the latter road was then being operated by the West Virginia Central for 60 per cent. of the gross earnings of the new road. And this statement was repeated in the annual report made to the stockholders of the West Virginia Central in January, 1889. These reports of 1887, 1888, and 1889 were all unanimously adopted and approved by the stockholders of the West Virginia Central. This temporary arrangement, under which the West Virginia Central operated the Piedmont & Cumberland road up to the time of the filing of the bill, was therefore not made merely by the officers of the two companies, but its terms were known to, and fully and explicitly ratified and approved by, all the stockholders of the West Virginia Central who were present or represented at the annual meetings of 1887, 1888, and 1889, without dissent. At the annual meeting of the stockholders of the same company in 1890, where 54,268 shares out of the 55,000 issued shares were represented in person or by proxy, a resolution was offered by one of the stockholders proposing to lease the Piedmont & Cumberland road, the lessee to pay all the costs and expenses of operating the road and to receive 60 per cent. of the gross revenues, and accompanying the resolution was a draft of the proposed lease. A substitute was moved to the effect that the proposed lease be referred to the board of directors for examination, with a view that it might be determined whether its provisions would "promote and protect the interests of the company." Thereupon Governor Whyte proposed the following amendment, which was adopted without any dissenting vote, so far as the minutes disclose, though Mr. Shaw was present in person, viz.: "Resolved, that the lease proposed be referred to a committee of three stockholders, to report as to the propriety of its acceptance, to an adjourned meeting of the stockholders, and when this meeting adjourns, it shall be adjourned to the 15th day of March, 1890, at 12 m., at this place, when this subject shall be considered." On the 15th of March, when the meeting of stockholders reconvened, the committee appointed under Governor Whyte's resolution reported the form of a lease which they had prepared, varying somewhat the

terms of the one proposed at the meeting in January, and recommended that the percentage of gross earnings to be paid to the West Virginia Central by the Piedmont & Cumberland should be 63 per cent. instead of 60 per cent.; but no action was taken by the stockholders, because the injunction applied for and issued the day previous was served before the meeting assembled. These facts demonstrably show the errors of the averment which charged that the Messrs. Davis and Elkins designed to use the power which they held as owners of a majority of the West Virginia Central's stock to compel the ratification and acceptance of a lease which they, as officers of the West Virginia Central, had agreed on with themselves, as officers of the Piedmont & Cumberland road.

We come now to the averment that large sums of money, expended on account of construction of the Piedmont & Cumberland road after August 1, 1887, were improperly charged to the West Virginia Central, and improperly paid by it out of the 60 per cent. of gross earnings received by it for operating the Piedmont & Cumberland road, while they should have been charged to the Piedmont & Cumberland, and should have been paid out of its 40 per cent. of those earnings. The total aggregate of these alleged erroneous charges, as calculated by Maj. Buckley, an expert accountant produced by the plaintiff, is the sum of \$32,248, and, without pausing to examine the lengthy statement item by item, we will assume that the aggregate amount was improvidently charged to the West Virginia Central, and that upon a strictly technical system of accounting the whole of this should have been paid by the Piedmont & Cumberland company; but still the material question recurs, was the charge of this sum to the West Virginia Central, as made, made merely in error, or in bad faith, or fraudulently? If made in good faith, though inaccurately made, a court of equity has no jurisdiction, at the suit of a stockholder, to readjust the account. Under such conditions, the company injuriously affected must itself seek the appropriate redress. Courts cannot intervene, in the absence of fraud or illegality, or where the act is not ultra vires, to control, manage, or regulate corporate business. The question of ultra vires has nothing to do with this branch of the case. The leasing of the one road by the other was perfectly lawful, and a mere dispute as to the method of keeping certain of the accounts between them could not raise an issue of ultra vires, especially when there is no unvarying, fixed, or unbending system controlling the classification of items in such an account as this. But the evidence signally fails to show any fraud whatever in this transaction. It is often a debatable matter whether particular items ought to be charged to operating expenses or to construction account. Different accountants may honestly disagree as to which of the two ac-

counts a given item should be charged. Necessarily, then, some officer of the lessee company must, in the first instance, decide the question. If he decides wrongly, it does not follow that he has decided wrongfully or fraudulently. This is made perfectly clear by Mr. Keyser in his intelligent testimony, from which we now quote briefly: "Taking the two accounts together and looking at them from all the light that I can get, I should say the president of the West Virginia Central & Pittsburg Railway Company had dealt liberally by the Piedmont & Cumberland road in his method of charging these accounts. If the system of an accountant was to be adopted, and every item charged upon the strict basis of a construction account, I think the carrying out of that principle would eliminate a large amount of these charges against the Piedmont & Cumberland road growing out of the flood. In other words, I cannot see how the president could be tied down to any strictly-defined method of accounting that would enable him to accept, on the one side, Mr. Bulkley's accounts, and, on the other side, justify him in his method of charging the Piedmont & Cumberland road with these large items of practical repairs,—because that is what they were,—growing out of an unusual and disastrous flood. * * * I think the discretion in a case of this kind should be placed in the hands of the president, in the absence of anything which binds it down by any definite rule, as adopted by the two companies. * * * I think, in this case, and I speak now as a stockholder in the West Virginia Central road, that, looking at these accounts, and looking at the lease as I did when I was on the committee, and in the absence of any thing in the way of a definite, clear provision for this business between the two companies, that the matter of stating the accounts has been a fair one on the part of the president, and if I were to criticise it at all, I should say he leaned against the interests of the Piedmont & Cumberland Railroad in charging rather too much." But there is still another view of the subject. While President Davis charged up this sum of \$32,248 to the West Virginia Central, he charged to the Piedmont & Cumberland a much larger sum for other and different expenses, which ought to have been paid by the West Virginia Central; and, therefore, whatever error he made in the first instance was more than counterbalanced by the subsequent error against the Piedmont & Cumberland road. There is one other account alluded to, which may be disposed of in a very few words. There is an allegation that there is money due by the Piedmont & Cumberland for advances made to it by the West Virginia Central for original construction, and growing out of other dealings since. The evidence, however, shows that it is the West Virginia Central which is indebted to the Piedmont & Cumberland.

What we have said in considering the subjects just discussed applies equally to so much of the prayer of the bill as relates to the relief sought by way of account; and, without repetition, we need only add that the plaintiff has failed to support by evidence the averments upon which the jurisdiction to grant that particular relief depends. There is no pretense that the two companies had not the necessary powers, under their charters and under the laws, to enter into the business relations out of which these questions of account arose. The transactions themselves were not illegal, and, however erroneous the accounts may be conceded to be, when considered from the standpoint of a professional accountant, there has been literally nothing adduced to show that the alleged errors were fraudulently or designedly committed, with a view of benefiting the stockholders of the Piedmont & Cumberland Company at the expense of the stockholders of the West Virginia Central Company. Nor does the making of a lease by the Piedmont & Cumberland road to the West Virginia Central Company necessarily depend upon the state of antecedent accounts between the two companies. Whatever unadjusted or erroneously adjusted accounts there may be can as readily be balanced and settled after, as before, a lease has been executed. And if the proposed lease be not ultra vires or unlawful or fraudulent, no court, at the instance of a minority stockholder, or at the instance of any one else, has the power or the right to restrain the majority from dealing with the property as they may deem most advantageous to their own interests. Any other doctrine would put it in the power of a single stockholder, owning but one share out of many hundreds, to transfer the entire management of a corporation to a court of equity, and would effectually destroy the right of the owners of the property to lawfully control it themselves. It would make a court of equity practically the guardian, so to speak, of such a corporation, and would substitute the chancellor's belief as to what contracts a corporation ought, as a matter of expediency, or policy, or business venture, to make, instead of allowing such questions to be settled by the persons beneficially interested in the property. No such arbitrary or dangerous power has ever been claimed by any court, and, if laid claim to, it would never be tolerated in a free government. The injunction granted on March 14, 1890, prohibited the making of a lease upon the terms of 60 per cent. of the gross earnings, or any other lease, until the further order of the court. Apart from all questions of ultra vires, illegality, and fraud, this power, thus assumed, undertook to reserve to the court the authority to prescribe the terms of any lease, because it prohibited the making of any lease without the court's leave. When the terms are not agreed to, the conditions not named, and the covenants not formu-

lated, what authority exists in the chancellor to assume in advance that an act *ultra vires*, or that fraud or illegality, will be attempted? In the case at bar the lease which was actually prepared under the circumstances we have already stated at large—which are a flat negation of any fraud or secrecy—made no provision for a 60 per cent., but for a 63 per cent., proportion of the gross earnings, and there is nothing to show, even if we had the right to go into an examination of the subject, that such a proportion of the gross earnings would be an unfair or inadequate rental. As the court had no power to decree a lease, so it had no power to prescribe the terms of one. It could prohibit the doing of an act *ultra vires*, illegal, or fraudulent. Beyond that it could not go. As no such act was before it, it did right in dissolving the injunction, and in dismissing the bill. For the reasons we have given we will affirm the decree appealed from. Decree affirmed, with costs above and below.

(73 Md. 294)

GREEN v. CITY & SUBURBAN RY. CO.
et al.

(Court of Appeals of Maryland. Jan. 11, 1894.)

EMINENT DOMAIN—TURNPIKES—CHANGE OF GRADE
—OCCUPATION BY ELECTRIC RAILWAY—ABUTTING
PROPERTY OWNERS—WHEN ENTITLED TO COMPENSATION.

1. The charter of a turnpike company, (Acts 1804, c. 51, § 17,) required it to so construct its road as to secure, as nearly as the materials would permit, an even surface "so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees with an horizontal line." The act also provided for compensation to property owners for damages caused by the road passing through their lands. Acts 1809, c. 2, and 1811, c. 202, relieved the company from this requirement, which had not been complied with. *Held*, that the company could change the grade of its road, as it had existed for 60 years, so as to make it conform to the charter requirements, without compensating an abutting property owner who was deprived thereby of ingress to and egress from his property. *Peddicord v. Railway Co.*, 34 Md. 463, followed.

2. Act 1860, c. 259, authorized the turnpike company to lay a railway track on its road. Act 1872, c. 337, authorized it to grant to another company its railway privileges, franchises, etc. Act 1890, c. 225, authorized it to use for propulsion of cars "any motive power or system of traction whatever," and to lay an additional railway track on the bed where only one existed, etc. *Held*, that a railroad to which the turnpike company had granted its railway privileges could use and occupy part of such turnpike road for an electric railway.

3. The use of electricity as a motive power for propelling cars on the railway does not constitute an additional servitude, entitling an abutting property owner who has no interest in the land occupied by the turnpike to compensation or to an injunction, though neither the legislature authorizing the construction of the turnpike, nor the property owners from whom the land on which it is built was obtained, contemplated the building and operation thereon of an electric railroad.

Appeal from circuit court, Baltimore county, in equity.

Bill by James E. Green against the City & Suburban Railway Company and the Baltimore & Yorktown Turnpike Road, for an injunction and damages. From a decree for defendants, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, PAGE, and BOYD, JJ.

Wm. Pinkney Whyte, William H. Keech, and Z. H. Isaac, for appellant. John K. Cowen and E. J. D. Cross, for appellees.

BOYD, J. The bill was filed in this case by the appellant against the appellees, and prays for an injunction to restrain the defendants, and each of them, from making or causing to be made any embankment or fill on the Baltimore & Yorktown Turnpike Road in front of appellant's property; also for pecuniary damages and for general relief. It alleges, in substance, that appellant is the owner of a lot which fronts and abuts 50 feet on the turnpike road, and is improved by a dwelling house occupied by appellant; that the only access to said house and lot is from the said turnpike road; that, although the grade of the road had been established for 60 or more years, the appellees had been for some months past engaged in constructing a new roadway on the easterly side of the turnpike road, which was to be used as a railway upon which cars are to be propelled by electricity; that, in thus constructing the said roadway or railway, cuts of 10 feet and upwards had been made in some places, and in other places embankments or fills of 10 feet and upwards had been made; that one of the said fills had been made on the easterly side of said turnpike road, in front of appellant's lot, of about 6 feet above the bed of the turnpike; that the appellees were about to extend said fill to the westerly side of the turnpike along and up to appellant's premises, by means of which he will be deprived of or seriously hindered in his right of access to his property from the turnpike and the value of his property greatly diminished and almost entirely destroyed, etc. It further alleges that improvements were made by persons owning property abutting on the turnpike road on the belief that the grades, which had been established for 60 years or longer, could not be rightfully changed to the injury of such persons, thus depriving them of access to and egress from their property. It is also alleged that a judgment at law against the railroad company would be of no avail by reason of a mortgage against its property, and that no action has been taken by the appellees to make compensation to appellant for the injury done and about to be done, if permitted, to his property. The charge is then made that it will be in violation of section 40 of the third article of the constitution of Maryland to permit the appellees to proceed without first making just compensation, as it will be such a taking of the private property of appellant as is forbidden by the

constitution, except upon payment of just compensation first being made. The defendant companies filed separate answers, each of which denies that the railway company was grading the road, but admits that the turnpike company was, and claims that it was authorized to do so by its charter and the amendments thereto. They claim that the turnpike company has the right to change the grades in the road as may be necessary, and that the estate of the plaintiff in his property abutting upon said road is always subject to the right of the said turnpike company to alter its grades as public convenience should require from time to time. Various acts of the general assembly are cited in the answers, and the decision of this court in *Peddicord's Case*, 34 Md. 463, is relied on as establishing the right of the turnpike company, under its charter, to make the changes complained of. They admit that the railway company proposes to use electricity as a motive power on its road. They deny that appellant has any interest or property in the premises which should be acquired by process of eminent domain. The evidence differs somewhat as to the height of the proposed fill in front of appellant's lot; that of plaintiff showing that it will be from about six feet at the highest point to a little over four feet at the lowest above the former level of the road, while that of defendants shows that it will be over four feet at the highest point and less than three feet at the lowest point. There is the usual contrariety of opinion of witnesses as to the effect of the contemplated changes on the value of the property. The court below dissolved the temporary injunction previously granted, being of opinion that *Peddicord's Case* was conclusive of this one.

The damage specially complained of by appellant is the alleged interference with the ingress and egress to and from his property by the proposed change of the grade of the turnpike road, which had been established for 60 or more years. This, he claims, constitutes a taking of private property, within the meaning of article 3, § 40, of the constitution, which forbids private property from being taken for public uses without compensation being first made or tendered. So far as there will be any interference with appellant's access to the road, it will be caused by the change of the grade, and not by the electric railway, and, although it may be true that there would have been no change in the grade of the turnpike if an electric road was not contemplated, the first point that suggests itself for our consideration is whether the change in the grade can lawfully be made for any purpose, under the circumstances of this case. If we answer this question in the affirmative, we must then determine whether the fact that the defendants, or either of them, propose, as they admit, to build or construct an electric railway on this changed grade will justify a court of

equity in giving the relief sought in this case. The act of 1804, c. 51, which incorporated the defendant turnpike company, also incorporated the Baltimore & Frederick Turnpike Road and the Baltimore & Reisterstown Turnpike Road; imposing the same duties and vesting the same powers in each. The court, in *Peddicord's Case*, which involved the rights and powers of the Baltimore & Frederick Turnpike Road, referred at length to the various acts of assembly which affected those three companies, and hence it will not be necessary to quote as fully from them as we might otherwise do; but we will briefly refer to such portions of them as may be applicable. The act of 1787, c. 23, was the earliest legislation in this state in regard to turnpikes. That act provided that the roads should be cleared 52 feet in width, grubbed and stoned 40 feet, and also provided for ditches, when necessary, of 6 feet in breadth. The act of 1801, c. 77, provided that the road should be cleared for the width of 66 feet, and that 21 feet thereof should be turnpike roads. Under those acts, the roads were in charge of public officers, and, as they had failed to meet the demand for good roads, the act of 1804, c. 51, was passed, and the companies thus organized were authorized to make their turnpikes on the roads already existing, which they did. The seventeenth section of that act required the companies to keep the roads open to the same width as they were originally laid out and confirmed by the commissioners of review and acts of assembly previously passed, and to make artificial roads at least 20 feet in width of some hard substance, so as to secure a firm and, as near as the materials would reasonably admit, an even surface, and "so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees with an horizontal line," etc. The acts of 1787 and 1804 provided for compensation to the property owners for such damages as they sustained by reason of the roads passing through their lands. The lands occupied by this company were presumably paid for, as provided for by the said acts; and by the acts of 1804, the company was required to pay Baltimore county for the money expended by it. The deed of the plaintiff does not attempt to convey to him any interest in the land occupied by the road, but, on the contrary, limits his lines to the westerly boundary of the road. It is not pretended that the turnpike company had ever complied with the requirement of its charter to build the road "so nearly level in its progress as that it shall in no place rise or fall more than will form an angle of four degrees with an horizontal line," etc., but it is claimed for the appellant that the turnpike company cannot now change the grade, especially after the acceptance of the acts of 1809, c. 2, and 1811, c. 202, which virtually admitted that the company had complied

with its charter. The intent and effect of those acts, however, as was said in Peddicord's Case, were to relieve the companies from the liability of having their property revert to the counties, and they did not operate as an agreement between the legislature, the land owners, and the company that the then existing status of the road, in respect to grading, was to be its determinate condition, and that from thenceforth abutting property holders could not be interfered with by any new or changed grade. No act of the general assembly has been passed which took away the right of the company to conform to the grade contemplated by its charter, even if those above cited have relieved it from the requirement of doing so. It can hardly be contended that, because the legislature relieves a company from a penalty or forfeiture of certain rights, incurred by reason of its failure to comply with the requirements of its charter, it can never thereafter comply with them. Nor is it sound reasoning to say that, inasmuch as this company had been violating its charter for 60 or 80 years, it should be forever thereafter required to violate it. We cannot adopt appellant's position that, because the grade in front of his property had been established (as it existed before the work referred to in these proceedings was commenced) for 60 or more years, therefore it cannot now be changed, and that the turnpike company is estopped from asserting its rights to change it, notwithstanding the requirements in its charter. In *Goszler v. Corporation*, 6 Wheat. 593, an ordinance had been passed by which it was ordained "that the said level and graduation when signed by the said commissioners or a majority of them and returned to the clerk of this corporation shall be forever thereafter considered as the true graduation of the streets so graduated and be binding upon this corporation and all other persons whatever and be forever thereafter regarded in making improvements upon said street." The plaintiff made his improvements according to the graduation made and returned to the clerk. Subsequently, the corporation proceeded to change the grade, and to cut down the street by the plaintiff's house. The plaintiff was refused relief by the court below, and the supreme court of the United States, through Chief Justice Marshall, affirmed the decision on the ground that the power to grade the streets of the city was a continuing power, and that the corporation could alter the grade from time to time. The court said, "It cannot be disguised that a promise is held forth to all who should build on the graduated streets that the graduation should be unalterable;" but it held that the corporation could not abridge its power of changing the grades of its streets, which the legislature had given it the power to do.

In this case, the appellant, by an examination of the charter of the turnpike company

and the amendments thereto, could have ascertained, not only that there was nothing in them to prevent a change of the grade, but that the charter required a different grade from the one in use when he purchased his property. Circumstances might, as, in fact, they did, arise which would make it desirable for the company and the public to have their road as nearly level as possible, and no valid reason has been assigned why it should not be permitted to improve the grade of its road. But we think the case of *Peddicord v. Railway Co.*, 34 Md. 463, already cited, is conclusive of this question. That case determined the rights of the Baltimore & Frederick Turnpike Road, which, as stated above, was chartered by the same act as the Baltimore & Yorktown Turnpike Road. In that case the roadbed was cut down at the point complained of, while in this it was filled; but of course there could be no difference, so far as the rights of the abutting land owners are concerned. This court said, on page 474, that "the commissioners under the act of 1787, and the other authorities provided by the act of 1801, had the right, we think, and it was their duty, to cut down the bed of the road from time to time to any extent that was useful and beneficial to the road, and promoted the convenience of the public in using it, and this right and duty were transferred to the president, managers, and company of the Baltimore & Frederick Turnpike Road by the act of 1804." Again, it is said, on page 477: "Our conclusion is that the turnpike company acquired by its charter the right to grade, pave, and use, in any manner that would promote the benefit and convenience of the public, for the purpose of a public highway, the whole 66 feet of roadway, or any part thereof, not less than 20 feet wide, and to grade the same to any angle less than four degrees, and that it retained that right up to the contract entered into between it and the appellee, and that the holding of the appellant was subject to that right by the company." Being of the opinion that the turnpike company has the right to change the grade of its road in front of appellant's property, it follows from what we have said that he is not entitled to compensation for any injuries to his property caused by such change in the grade. As was said by Justice Grier, in *Smith v. Washington Corp.*, 20 How. 135: "The plaintiff may have suffered inconvenience and been put to expense in consequence of such action; yet, as the act of defendants is not unlawful or wrongful, they are not bound to make any recompense. It is what the law styles 'damnum absque injuria.' Private interests must yield to public accommodation," etc.

It is contended, however, that the appellees cannot build an electric railway on the road without compensating the property owners for this "additional servitude," as it is alleged to be. The proof in the case is that the turnpike company was doing the grading,

which is the act specifically complained of in the bill, and which we have determined it had the right to do. The tracks of the railway company occupy about one-third of the right of way of the road. They are to be laid on the easterly side of the turnpike road. There will be considerably more space outside of the railway tracks than the charter requires to be macadamized. The grade will be more desirable for the traveling public, and the property owners on the road will have the benefit of rapid transit. By the act of 1860, c. 250, the turnpike company was authorized to lay a railway track on the road between Towson and Baltimore, and by the act of 1872, c. 337, it was authorized to grant unto another company the railway privileges, franchises, etc., which it held. By the act of 1890, c. 225, it was authorized to use for the propulsion of cars on its railway tracks "any motive power or system of traction whatever," and to lay down an additional railway track upon the bed of the turnpike road where only a single track existed, "provided that no motive power or system of traction other than horses shall be made use of by the said corporation within the limits of the city of Baltimore without the consent of the mayor and council of Baltimore." On June 1, 1892, the turnpike company granted its railway privileges to the Baltimore Union Passenger Railway Company, and the City & Suburban Railway Company became the successor to those rights. We find, then, that the defendant railway company has obtained the rights and privileges of the turnpike company, which had received express authority from the legislature to build railway tracks on its road, and to use "any motive power or system of traction" for the propulsion of cars. That authority certainly included the use of electricity, especially as it was granted in 1890, at a time when that motive power for cars was very generally used. It would seem to be perfectly clear, then, that this legislative grant so far legalized the use and occupation of part of this road for an electric railway as to protect the company from punishment for the maintenance of what might otherwise be a public nuisance.

It only remains to determine whether the rights of the appellant will be so specially affected as to entitle him to the restraining power of a court of equity to prevent the electric railway from being built or used, under the circumstances of this case. As we have already seen, the appellant has no interest in the land occupied by the turnpike company, and hence is not entitled to compensation as an owner of the reversionary interest therein. If he is entitled to the interference of a court of equity at all, it must be by reason of some special injury he, as an owner of abutting property, has sustained or will sustain, which will amount to a taking of his property, within the meaning of the constitutional provision above referred to.

He is not entitled to protection against mere consequential damages, which he suffers in common with others; and we have already said he is not entitled to compensation for the interference of the ingress and egress to and from his lot on account of the changes of the grade, as we have determined that the turnpike company had the right to make such changes. It is doubtless true that neither the legislature of 1787, nor the property owners from whom the lands on which the road is built were obtained, contemplated the building of a railway on this road,—especially one on which cars were to be moved by the use of electricity; but it is equally true that the law would not require this to be continued as "a dirt road," simply because it was originally constructed in that way. This road will illustrate the progress that has been made within the past century. At first, it was a poorly-constructed dirt road. Then it became a turnpike. Then part of its right of way was occupied by a horse-car railway, which, in its turn, must now give way to an improved method of travel on public highways. To quote from *Peddicord's Case*, on page 481: "It may be said to have been within the legal contemplation of all that it was to be used for all purposes by which the object of its creation as a public highway could be promoted." In that case it was expressly decided that the building of a horse-car railway on the Baltimore & Frederick Turnpike was not a new servitude. This court has also determined, in *Hodges v. Railway Co.*, 58 Md. 603, that the use of the streets of a city or town for the purposes of a horse railway is not an additional servitude, for which adjoining lot owners are entitled to compensation; and in *Hiss v. Railway Co.*, 52 Md. 242, the same doctrine was applied to a road or street just outside of the corporate limits of the city of Baltimore. In fact, this may be accepted as the established law of this country, with very few exceptions. Many of the cases on the subject are collected in the note to section 82, in *Booth on Law of Street Railways*. Some of those authorities have distinguished between horse-car railways in the streets of cities and towns, and those on the country roads; but if we were inclined to adopt the distinction at all, we would not under the circumstances of this case, especially as the question is settled in a case so similar to this as that of *Peddicord*, supra. As the use of electricity as a motive power is comparatively new, there have not been as many decisions concerning electric railways as horse-car railways; but we are not without authorities on the question whether they constitute new servitudes which entitle abutting owners to compensation. Those from other states might be cited, but the recent case of *Koch v. Railway Co.*, 75 Md. 222, 23 Atl. 463, decided that a street is a way set apart for public travel, and the use of electricity for propelling street cars is but a new and improved motive power,

in no manner inconsistent with the uses and purposes for which streets were opened and dedicated as ways for public travel; that the mayor and city council of Baltimore had the power to authorize this use of electricity, and that the use does not impose a new servitude upon the streets, so as to entitle abutting lot owners to additional compensation. Of course, the railway company may make itself liable to the appellant by a negligent construction or maintenance of the road. Those using electricity as a motive power on public highways, such as the turnpike referred to in this case, must remember that they have not the exclusive right to the highway, and must respect the rights of others equally entitled to use it. If they do not, of course the law will require them to do so. It will be incumbent on the turnpike company to keep the road in proper condition for vehicles other than street cars, and of the width required by its charter. The railway company must so construct its tracks and run its cars as not to unnecessarily or improperly interfere with the rights of others in the use of this public highway. If either company fails to discharge its duties to the public, the proper tribunal will give relief to those injured; but we cannot anticipate defaults or acts of negligence on the part of the defendant companies, or either of them, and must dispose of this case as it is now presented to us. We think it clear that, under the evidence and the authorities,—especially *Peddycord's Case*, which we have no desire to disturb or modify,—the appellant is not entitled to the relief asked for in this case, and the decree of the court below must be affirmed. Decree affirmed, with costs to the appellees.

(66 Vt. 60)

DEERING et al. v. SMITH.

(Supreme Court of Vermont. General Term. Jan. 18, 1894.)

REPLEVIN—WRONGFUL DETAINER.

The mere fact that one, in possession of an article belonging to another through no wrongful act of his own, failed to reply to a letter from the owner demanding it, does not show such an unlawful detainer as to authorize a replevin suit by the owner, under R. L. § 1230.

Exceptions from Windsor county court; Thompson, Judge.

Replevin by William Deering & Co. against Andy Smith. Heard on the report of a referee. Judgment on report for the defendant for one dollar damages and costs, and return of property. The plaintiffs except. Affirmed.

C. P. Tarbell, for plaintiff. D. C. Denison & Son, for defendant.

START, J. The mowing machine in question was sold and delivered by the plaintiffs' agent to Ira Button. Button was to give a lien in writing when the plaintiffs' agent

should call for the purchase money. The agent never called for the lien. Button died, and the probate court assigned the machine to Mrs. Button, widow of Ira Button. The defendant worked for Mrs. Button, and was using the machine when it was replevied. The plaintiffs' attorney wrote a letter to the defendant, demanding the machine. The defendant received the letter, but made no reply. R. L. § 1230, provides that, when goods of the value of more than \$20 are unlawfully taken, or unlawfully detained, from the owner or the person entitled to the possession thereof, or when goods or chattels of such value, which are attached on mesne process or taken in execution, are claimed by a person other than the defendant in the suit or debtor in the execution, such owner or other person may cause them to be replevied. It is claimed by the plaintiffs that their action is properly brought against the defendant under this section. It is not claimed that the defendant unlawfully took the machine, but that he unlawfully detained it from the plaintiffs. The claim is based upon the fact that the plaintiffs' attorney wrote the defendant a letter, demanding the machine, to which the defendant made no reply. The omission of the defendant to reply to the letter cannot be regarded as an unlawful detaining of the machine. The letter did not call upon him to deliver it at any particular place, and he was under no obligation to take it to the plaintiffs or their attorney. He might well understand that the plaintiffs would come for it when they wanted it. They did not call on him personally for it, and he has neither refused to deliver it to them, nor asserted any claim to it, nor exercised any control in respect to it, that is inconsistent with the plaintiffs' claimed title and right of possession. Under these circumstances, it cannot be said that he has unlawfully detained the machine. A party cannot be subjected to the expense of a replevin suit unless he has unlawfully taken, or unlawfully detained, property from the owner or the person entitled to the possession thereof. *Bent v. Bent*, 44 Vt. 633. This view of the case renders it unnecessary to consider the other questions argued by counsel. Judgment affirmed.

(66 Vt. 56)

MANNING v. LEIGHTON.

(Supreme Court of Vermont. General Term. Dec. 10, 1893.)

REFERENCE—REVIEW ON EXCEPTIONS—SPECIAL ADMINISTRATORS.

1. An exception to the referee's admission of evidence, unless brought before the trial court by exception to, or motion to recommit, the report, saves no question for review.

2. Irregularities in the appointment, procedure, and report of the referee cannot be first raised in the supreme court.

3. One who, as special administrator, has received payment of Alabama claims, and distributed the funds under decree of the orphans' court, is not liable, as on implied promise, to pay the claim of an attorney not presented to

said court for services in prosecuting the claims; he knowing of such services, but not the nature of the contracts therefor.

On motion to bring forward and rehear. Motion dismissed.

For former report, see 26 Atl. 258.

Jerome F. Manning, A. P. Tupper, and W. H. Button, for plaintiff. Stewart & Wilds, for defendant.

TYLER, J. The plaintiff moves that this case, which is reported in 65 Vt. 84, 26 Atl. 258, may be brought forward upon the docket and reargued. The two motions have been heard together. The plaintiff insists that the court committed two errors in its decision, which, if corrected, should reverse the judgment.

1. On the trial by the referee the defendant offered in evidence a paper which purported to be an order made by the court of commissioners of Alabama claims, July 29, 1885, prohibiting the plaintiff from further appearing before these commissioners as an attorney. To the admission of this order the plaintiff objected, but it was admitted by the referee, subject to the plaintiff's exception. The referee did not submit to the county court the question of the admissibility of the order, and the plaintiff filed no exception to the report on the ground of the alleged error of the referee. The question, therefore, was not passed upon by the county court, and was not before it. Questions not specified and shown by the record to have been raised and decided in the court below will not be revised or noticed here. *Sargeant v. Butts*, 21 Vt. 99; *Dana v. Lull*, Id. 383; *Brigham v. Hutchins*, 27 Vt. 569; *State v. Preston*, 48 Vt. 12; *Miles v. Albany*, 59 Vt. 79, 7 Atl. 601. In *Walton v. Walton's Estate*, 63 Vt. 513, 22 Atl. 617, it was expressly held that this court will not review the rulings of a referee unless some question is submitted by him for the consideration of the county court; that when no questions of law are referred to that court by the referee, and it is claimed that he, intending to follow the law, has mistaken it, or has allowed improper testimony to be introduced before him, the attention of the court should be called to the claimed error by exceptions to the report, or by a motion to recommit. See cases cited by Start, J., in the opinion; also, *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436.

2. The motion in which irregularities are alleged in the appointment, procedure, and report of the referee was not considered by or filed in the court below, and therefore cannot be entertained here.

3. The referee has found that there was no express promise made by the defendant to pay the plaintiff for his services in prosecuting these claims. But the plaintiff contends that the law implied a promise by the defendant to pay him from the fact that the defendant received the funds, and that, by the equitable nature of the action of indebi-

tatus assumpsit, he is entitled to a judgment. It was the obvious legal duty of the defendant, as special or ancillary administrator, to account to the orphans' court for the funds, and to distribute them pursuant to the decree of that court. The plaintiff did not obtain an order from the court that the defendant should pay him for his services, and the defendant had no authority to pay him. It appears that, though the defendant knew that the plaintiff had performed services in the prosecution of these claims, he had no knowledge of the contracts upon which they had been performed, and paid over the funds supposing that the plaintiff's demand for services was against the parties who employed him. In these circumstances, the law raised no promise by the special administrator to pay the plaintiff out of the funds of the estate. There was no indebtedness from the defendant to the plaintiff, and therefore no implied promise. It is unnecessary to decide whether the defendant could have bound himself by an express promise without an order of court, inasmuch as an express promise is not found. Upon a review of the case we find no considerations urged upon us that were not urged at the former argument. It is a well-settled rule that this court will not reverse or revise its decisions upon substantially the same facts upon which they were first rendered. *Herrick v. Belknap*, 27 Vt. 673; *Stacy v. Railroad Co.*, 32 Vt. 551; *Barker v. Belknap*, 39 Vt. 168; *Childs v. Insurance Co.*, 56 Vt. 609; *Railroad Co. v. Hunt*, 59 Vt. 294, 7 Atl. 277. The court will not favor motions to bring cases forward unless the alleged errors are specifically pointed out in the motion. The motions must be dismissed, with costs.

(66 Vt. 65)

COOK v. TOWN OF BARTON.

(Supreme Court of Vermont. General Term. Jan. 11, 1894.)

HIGHWAYS—INSUFFICIENT CULVERT—NOTICE—EVIDENCE—VARIANCE.

1. Plaintiff's notice to the selectmen of defendant town alleged that the opening through a culvert in a highway was insufficient; that consequently water was thrown across the highway adjacent to, and on the sides of, the culvert, and formed holes which caused plaintiff to be thrown from her carriage; and it pointed out the location of the holes in respect to the culvert. *Held*, that the notice pointed out "in what respect the culvert was insufficient and out of repair," as required by statute.

2. In an action for personal injuries caused by a defective highway, evidence was admissible to show how long it had been in substantially the same condition before the accident, and what changes it had gradually undergone.

3. There was no material variance between a notice that there were two holes on one side of a culvert and one hole on the other, and proof that there were two holes on each side.

Exceptions from Orleans county court; Rowell, Judge.

Action on the case by Julia M. Cook against the town of Barton for personal injuries

caused by the insufficiency of a sluice which defendant was bound to maintain. Defendant pleaded the general issue. Verdict and judgment for plaintiff. Defendant excepts. Judgment affirmed.

The evidence of the plaintiff tended to show that the opening through the sluice had become stopped up so that only a part of the water naturally flowing there could pass through; the balance being thrown across the highway next adjacent to the sluice, and having gullied out holes on either side of the sluice proper, by reason of which the plaintiff was thrown from her carriage and injured. The plaintiff offered in evidence the notice delivered to the selectmen of the defendant after the accident. To the admission of this, the defendant objected, for that it did not point out the holes which occasioned the injury as an insufficiency in the sluice or its approaches. The court admitted the notice, subject to the exception of the defendant. The material part was as follows: "Said small bridge, otherwise called a 'culvert,' otherwise called a 'sluice,' was insufficient, in that the opening or passage through the same for the water to flow through was not of sufficient size to permit the water to flow through the same; and, in consequence thereof, such part of the water as could not flow through said opening or passage was thrown over and across said highway next adjacent to said bridge, otherwise called a 'culvert,' otherwise called a 'sluice,' on each side thereof; and holes and depressions in the traveled part of said highway were washed out in the part of said highway over which said water flowed, to a great depth and breadth, to wit, on the northerly side of said bridge, sluice, or culvert, a hole about twelve inches deep and five feet wide, and about four or five feet long, and a hole about two and one-fourth inches deep and about eight feet wide, and about six feet long, and on the southerly side of said bridge, culvert, or sluice, to wit, a hole or depression extending nearly across the traveled part of said highway, and from five to nine inches deep and eight or nine feet wide. Said holes or depressions in said highway formed and made by the aforesaid insufficiency of said bridge, sluice, or culvert caused said Julia M. Cook, without her fault, on the day and year last aforesaid, to be thrown from a carriage in which she was then riding over said road, and thereby the said Julia M. Cook received," etc.

F. W. Baldwin and Dickerman & Young, for plaintiff. W. W. Miles and C. A. Prouty, for defendant.

TYLER, J. The notice alleged that the plaintiff was injured by reason of the insufficiency of a culvert or sluice in a highway in defendant town; that the insufficiency was that the opening through the culvert was too small to permit all the water to flow through; that consequently a part of it was

thrown across the highway adjacent to the culvert, and on each side of it, and forming holes which caused the plaintiff to be thrown from her carriage and injured. It, in effect, alleged that the holes were within the approaches to the culvert. It was not necessary that the notice should call the holes "defects" or "insufficiencies." It pointed them out, described them, and alleged that they caused the accident. It described the culvert in respect to the opening through it, and in respect to the holes which the jury have found, under the instruction of the court, were within the approaches to it. The notice is in compliance with the statute, which requires that notices shall point out "in what respect the bridge, culvert or sluice is insufficient and out of repair."

The plaintiff was permitted to introduce evidence tending to show that this condition of the culvert and its approaches had existed continuously from the spring of 1887 until the time of the plaintiff's injury, but had slowly grown worse. As the evidence related to this particular place, and to these alleged defects in the highway, it was proper to show the condition at other times, by way of comparison and description. *Whitney v. Londonderry*, 54 Vt. 41. Evidence was admissible to show how long it had been in substantially the same condition it was in at the time of the accident, and what changes it had gradually undergone, as it might aid the jury in determining its exact condition at the time in question. *Coates v. Canaan*, 51 Vt. 131.

The notice states that there were two holes on the northerly side and one on the southerly side of the culvert, while the plaintiff's evidence tended to show that there were two holes on each side. Some of the plaintiff's evidence tended to show that there was a depression on each side of the culvert, next to the poles which covered it, extending clear across the traveled track of the highway, but deepest in the wheel tracks. There seems to be no real conflict or variance between the notice and the evidence. To some witnesses it evidently seemed that there was but one depression or hole on each side, extending across the highway, while others might reasonably have said there were two, as the depression was lowest in the wheel tracks. Judgment affirmed.

(66 Vt. 62)

SLAYTON v. WELLS.

(Supreme Court of Vermont. Lamolle. Dec. 25, 1893.)

INSOLVENCY—DISCHARGE—EXCEPTED DEBTS.

R. L. § 1858, excepting from the discharge a debt created by the debtor's defalcation as a public officer or trustee, or for malfeasance while sustaining fiduciary relations, does not so except a liability for the proceeds of goods consigned for sale on commission.

Exceptions from Lamolle county court; Taft, Judge.

Assumpsit by E. A. Slayton against J. T. Wells. Judgment for defendant. Plaintiff excepts. Exceptions overruled.

P. K. Gleed, for plaintiff. Hendee & Fisk, for defendant.

START, J. The plaintiff consigned goods to the defendant to sell on commission. The defendant was to have all that he could obtain for them above the price charged. The defendant was adjudged an insolvent debtor, and the plaintiff proved his claim against the insolvent's estate, and received a dividend of 40 cents on the dollar. The plaintiff seeks in this action to recover the balance of his claim. The defendant pleads his discharge in insolvency. The plaintiff claims that the defendant was acting in a fiduciary capacity, and that for this reason the discharge is not a bar to this action. R. L. § 1858, provides that a debt not founded upon contract, but created by the debtor's defalcation as a public officer, executor, administrator, guardian, receiver, trustee, or assignee of an insolvent debtor's estate, or for malfeasance while in office or sustaining fiduciary or trust relations, shall not be discharged under the provisions of the statute relating to insolvency. The plaintiff's debt is founded upon a contract, and is not within any of the exceptions provided for in this section. The statute excepts from its operation only debts arising from certain enumerated trust relations, not founded on contract; and the phrase, "fiduciary or trust relation," has reference to the same class of trusts enumerated in the preceding clauses of the same section. This statute, so far as it relates to fiduciary debts, is similar to the bankrupt act of 1841, which excepts from discharge debts of the bankrupt created in consequence of a defalcation as a public officer, executor, administrator, guardian, trustee, or while acting in any fiduciary capacity. The effect to be given to the phrase, "while acting in any fiduciary capacity," was considered by the United States supreme court in *Chapman v. Forsyth*, 2 How. 202, and it was held that the exceptions enumerated in the act had reference to special trusts, not implied; that the phrase, "in any fiduciary capacity," did not extend to those trusts which the law implies from the contract, and form an element of every agency, but had reference only to the same class of trusts enumerated in the section mentioned; and that a factor who had sold the property of his principal, and had failed to pay over to him the proceeds, did not owe to him a debt created in a fiduciary capacity, within the meaning of the act. The bankrupt act of 1867, which excepts from the operation of bankruptcy proceedings debts of the bankrupt created in consequence of fraud, embezzlement, defalcation as a public officer, or while acting in any fiduciary character, was considered and construed by the same court in *Hennequin v. Clews*, 111 U. S.

676, 4 Sup. Ct. 578, and it was held that a discharge in bankruptcy under this act operated to discharge the bankrupt from a debt or obligation which arose from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and which he failed or refused to return after the money had been paid or the duty performed. In *Noble v. Hammond*, 129 U. S. 85, 9 Sup. Ct. 235, it was held that where a produce dealer was requested by parties to collect money for them as an accommodation, and without compensation, and to keep it until they called for it, and he proceeded to make such collection, and, without actual fraud or fraudulent intent, deposited the proceeds to his own credit with his own funds, and, before he paid it over, was forced into bankruptcy, the debt thus incurred by him was not within the exception that no debt created by fraud of the bankrupt, or by his defalcation while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy. In *Hayman v. Pond*, 7 Metc. (Mass.) 328, it was held that a factor who had sold goods of his principal, and received the money therefor, did not owe him a debt created while acting in a fiduciary capacity, within the meaning of the bankrupt act of 1841. In *Hammond v. Noble*, 57 Vt. 193, this court gave the phrase, "while acting in any fiduciary capacity," the same construction given it by the United States supreme court. Judgment affirmed.

(65 Vt. 64)

BALDWIN v. TOWN OF WORCESTER.

(Supreme Court of Vermont. General Term.
Jan. 11, 1894.)

PRESUMPTION OF EMANCIPATION.

When an infant becomes of full age, no other fact being shown, its emancipation is presumed.

Exceptions from Chittenden county court; Rowell, Judge.

General assumpsit by L. B. Baldwin, as administrator, against the town of Worcester. Defendant pleaded the general issue. To a verdict directed for defendant, plaintiff excepts. Exceptions sustained.

The intestate brought suit for the support of his adult pauper son. The court directed a verdict, upon the ground that there was no consideration for the promise relied upon. In so doing it acted upon the supposition that the son was unemancipated, and so distinctly announced at the time; and counsel made no suggestion that such was not the fact, but allowed the case to be disposed of with that understanding upon the part of the court.

D. J. Foster and Seneca Haselton, for plaintiff. S. C. Shurtleff, for defendant.

TAFT, J. The court below, understanding that the pauper was an unemancipated son of the plaintiff's intestate, held that there was no consideration for the contract upon which the plaintiff claimed to recover, and directed a verdict for the defendant. If the fact of unemancipation was as understood and stated by the court, the ruling was correct. There was testimony tending to show that the pauper was emancipated. His becoming of full age, which appeared in evidence, afforded a presumption of it, unless the contrary was shown. If the pauper was emancipated, the ruling of the court was erroneous. The testimony tending to show it, the question should have been submitted to the jury. In not so doing, there was error. Judgment reversed, and cause remanded.

(160 Pa. St. 36)

COMMONWEALTH v. COYLE.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

DIRECTORS OF THE POOR—APPRENTICING INFANTS—MALTREATMENT—PROSECUTION.

1. A director of the poor, who knowingly apprentices a child pauper to service with a cruel and parsimonious master, or who, having reason to know that the child's health is impaired by his master's treatment of him, takes no steps to rescue him, is guilty of a misdemeanor at common law.

2. On prosecution for such an offense, evidence of the results of the treatment is admissible, though defendant director had not notice of each specific act of cruelty.

3. A director of the poor, who is guilty of a misdemeanor in office, may be prosecuted and punished after the end of his term.

Appeal from court of quarter sessions, Cumberland county; W. F. Sadler, Judge.

James Coyle was convicted of neglect of duty as director of the poor, and appeals. Affirmed.

W. A. Kramer, J. W. Wetzel, M. C. Herman, and John Hays, for appellant. J. E. Barnitz, Dist. Atty., Fillmore Maust, and W. J. Shearer, for the Commonwealth.

MCCOLLUM, J. James Coyle, appellant, Michael Seavers, and John H. Rhoads were jointly indicted and tried for neglect of their duty as directors of the poor and of the house of employment for Cumberland county. A verdict of guilty was rendered by the jury. Sentence was suspended, as to Seavers and Rhoads, on their payment of one-fourth of the costs, and Coyle was sentenced to pay a fine of \$100 and three-fourths of the costs. The pith of the complaint against them was that they neglected to discharge a duty which, in their official capacity, they owed to Joseph N. Diller, a poor and infirm child, aged seven years, who was a legal charge upon the county of Cumberland, and that in consequence of their neglect he died. In the first count of the indictment, they were charged with having knowingly permitted him to be grossly maltreated by the person

to whom he was apprenticed by them, and in the second count thereof with having, while he was in their charge and under their care, willfully neglected to provide him with reasonable and necessary food and clothing, and otherwise abused and ill-treated him. The evidence produced on the trial was clearly sufficient to warrant the conclusion that the death of the child was hastened by, if it was not solely attributable to, the treatment he received while in the custody of Lafferty, to whom he was bound by them on the 4th of June, 1891, for a term of 14 years. It was also sufficient to sustain a finding that, before they committed the child to the care of Lafferty, they knew, or ought to have known, that the latter was not a proper person to have control of the former. Boyer, who was their representative in the arrangement under which the child was left at Lafferty's six weeks before he was indentured, was advised by persons in the neighborhood that it was an unsafe place for a boy of his years. The testimony of Underwood and Fink on this point showed that they gave him information in respect to the character of Lafferty and his family, and their harsh treatment of a child in their care, which would have prevented any prudent person from committing a boy of tender years to their custody. A parent so informed would not have surrendered his or her child to their possession and control without an investigation which demonstrated that the charges against them were groundless. The care which a parent ought to exercise under such circumstances devolved upon the directors, when young Diller became a charge on their district; and there is reason to believe that, if they had faithfully performed the duty thus cast upon them, he would not have been subjected to the cruel treatment which appears to have been responsible, in some degree at least, for his untimely death. But it is manifest from the testimony that they did not exercise the care enjoined by the law, and that they were negligent in binding him to Lafferty, and in their failure to institute proceedings to cancel the indenture. We need not repeat or discuss the testimony descriptive of the neglect and cruelty to which the child was subjected. It is sufficient to say of it that in our opinion it fully sustained the charges made in the first and second counts of the indictment.

It is contended that the indictment does not charge an offense known to the criminal law; that the directors are not indictable under section 42 of the act of June 13, 1836, because the office of overseer of the poor is abolished in Cumberland county; and that they cannot be prosecuted under section 90 of the act of March 31, 1860, because it appears from the indictment and the testimony that the maltreatment complained of was after they left the child with Lafferty, and was inflicted by him and his family. The counsel for the commonwealth agree with the counsel for the defendants that this case is not gov-

erned by the statutes referred to; but the former maintain, and the latter deny, that the matters charged in the indictment constitute a common-law misdemeanor. We think the contention of the defendants that the common law does not hold them criminally liable for a willful neglect or refusal to discharge their duties as directors is unsound. In 19 Am. & Eng. Enc. Law, p. 504, the rule on this subject is stated thus: "The neglect or failure of a public officer to perform any duty which by law he is required to perform is an indictable offense, even though no damage was caused by the default, and a mistake as to his powers, or with relation to the facts of the case, is no protection." In Russell on Crimes, (volume 1, p. 80,) it is said that: "It is an indictable offense, in the nature of a misdemeanor, to refuse or neglect to provide sufficient food or other necessities for any infant of tender years, unable to provide for and take care of itself, (whether such infant be child, apprentice, or servant,) whom the party is obliged, by duty or contract, to provide for, so as thereby to injure its health." In Archbold's Criminal Pleading & Practice, (volume 2, p. 1365,) it is said that: "An overseer of the poor is indictable for misfeasance in office, as if he relieves the poor where there is no necessity for it, (Tawney's Case, 16 Vin. Abr. 415,) or if he misuse the poor, as by keeping and lodging several poor persons in a filthy and unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather, (Rex v. Wetherill, Cald. 432,) or by exacting labor from them when they are not able to work, (Rex v. Winship, Id. 76.) And if overseers conspire to marry a poor woman, big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted. Rex v. Compton, Id. 246. And, for most breaches of their duty, overseers may be punished by indictment or information." In Pennsylvania, overseers of the poor have been indicted, convicted, and sentenced for a misdemeanor in office, in selling the keeping of paupers, by public vendue or outcry, to the lowest bidder. Overseers of Milton v. Overseers of Williamsport, 9 Pa. St. 48, 49. It is a wise policy which exacts from a public officer intrusted with the care of the poor persons in his district faithful and humane administration of the laws enacted for their relief. In the proper enforcement of such laws, they have considerate and kind treatment, and a comfortable maintenance. Their inability to provide for themselves is not a crime, nor any excuse for neglecting or maltreating them. As charges upon the district, they are entitled to have from it wholesome food and comfortable clothing, and a sufficiency of both. If they are of tender years, or, from any cause, unable to work, it is an act of cruelty to exact from them the performance of tasks which are be-

yond their strength, and injurious to their health. It is culpable negligence in an officer representing the district charged with their support to bind an infant pauper to service with a person whose parsimony and cruelty in the treatment of poor children committed to his care were well known in the neighborhood in which he lived. Inquiry in respect to the character of the master is a duty, and where he resides in a county outside of the district in which the pauper is settled, and is personally a stranger to the officer, the nonobservance of it is a misdemeanor. It seems to us, also, that it is his duty, after the child is bound to service, to see that the covenants of the master are substantially complied with, and if these are willfully and persistently violated, to the injury of the child's health, to institute necessary proceedings to set aside the indenture. In the present case the directors, with knowledge of Lafferty's character, bound young Diller to him, and, with knowledge of the abuse the child was receiving from his master, refused to take any measures to rescue him from the cruelty to which he was subjected by their own negligent act. If, as they contend, their conduct is not condemned, in terms, by any of our statutes in relation to the care of the poor, it is gratifying to know, as we have seen, that the common law holds them responsible for it, as a misdemeanor in office.

The several specifications of error which complain of the admission of evidence of deprivation and cruelty after the 5th of September, 1891, and of the denial by the court of the defendants' motion to strike out such evidence, are not sustained. The evidence referred to showed a continuance of the ill usage they approved by their refusal to take any measures to prevent the master's persistence in it, and was descriptive of the consequences of their negligence. With their knowledge of his character, and of his maltreatment of the helpless boy they committed to his care, they should have anticipated what followed. Having declined, when requested, to intervene in behalf of the suffering child, and thus impliedly sanctioned the master's abuse of him, they had no reason to expect that he would receive better treatment thereafter. In plain violation of their duty to the child and the district they represented, they knowingly bound him to service with a cruel master, and continued him in it when they knew, or ought to have known, that his health was seriously impaired, and his life endangered, by it. It was this breach of duty which constituted their offense, and it was competent for the commonwealth to introduce evidence descriptive of its results, without proving personal notice to them of each specific act of cruelty which contributed to the distress of their victim.

We are not able to discover in the remaining specifications anything which calls for the reversal of the judgment. The conten-

tion that the appellant cannot be prosecuted and punished for misdemeanor in office, because his term has expired, is not supported by reason or authority; and certainly he ought not to complain that, while he was liable for all the costs, he was required to pay only three-fourths of them. The specifications of error are overruled, and the judgment is affirmed.

(160 Pa. St. 79)

**In re BOROUGH OF SHARON HILL.
Appeal of DARBY BOROUGH SCHOOL
DIST.**

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

**SCHOOL DISTRICTS—DIVISION—ADJUSTMENT OF
PROPERTY.**

Since no appeal lies from the court's decree on report of an auditor appointed under Act June 1, 1887, to adjust the assets and liabilities of school districts on change of their limits, the supreme court will only review, as on certiorari, the jurisdiction and regularity of the proceedings, and not the merits of the adjustment as decreed.

Appeal from court of quarter sessions, Delaware county; Thomas J. Clayton, Judge.

Appeal by the school district of the borough of Darby, in the county of Delaware, from the decree of the court of quarter sessions of the said county, adjusting the liabilities and property of said school district, between said school district and the school district of the borough of Sharon Hill, which borough was created out of a part of the borough of Darby. Affirmed.

A. Lewis Smith, for appellant. Edward P. Bliss, for appellee.

PER CURIAM. This certiorari involves inquiry into the jurisdiction of the court below, and the regularity of its proceedings, without more. The act of June 1, 1887, (P. L. 285,) under which the proceedings were had, provides that "upon making the decree," as therein specified, "the same shall be conclusive upon all parties interested." It also provides for the appointment of an auditor, and makes it his duty to "ascertain the existing liabilities of the several boroughs, townships and school districts" affected by the change of limits, "the amount and value of the property owned by each, and the amount and value of the property passing to or from each borough, township or school district, and the assessed valuation of all the property liable to taxation for borough, township or school purposes, as shown by the last annual assessment of each, * * * and within the limits of the part annexed to or detached from said borough, and report the same to the court, with the form of a decree adjusting the liabilities, for all indebtedness and the value of the property

held or acquired by each justly and equitably upon said borough, township and school district, respectively." The act thus appears to provide for the ascertainment of certain data, upon the basis of which the just and equitable adjustment contemplated by it shall be made. There cannot be any doubt as to the jurisdiction of the court, and the proceedings appear to be regular, and in harmony with the law applicable to the subject. We find no error in the decree, or in the proceedings leading up thereto. Decree affirmed, with costs to be paid by appellant.

(160 Pa. St. 100)

**KEISER v. D. L. ESTERLY SONS et al.
(Supreme Court of Pennsylvania. Feb. 26,
1894.)**

APPEAL—VERDICT—WHEN DISTURBED.

Where the evidence is conflicting, and the questions are fairly submitted, the verdict will not be disturbed.

Appeal from court of common pleas, Schuylkill county; Green, Judge.

Feligned issue under the sheriff's interpleader act, in which A. S. Keiser is plaintiff and D. L. Esterly Sons and others are defendants, to determine the ownership of certain personal property claimed by plaintiff, and which was levied on by the sheriff, as the property of H. R. Knerr, under executions against him in favor of defendants. From a judgment for plaintiff for part, only, of such property, plaintiff appeals. Affirmed.

S. B. Edwards, for appellant. John F. Whalen, for appellees.

PER CURIAM. This is a feligned issue, under the sheriff's interpleader act, in which the claimant of the goods levied on is plaintiff, and the execution creditors of H. R. Knerr—as whose property they were seized—are the defendants. The burden was on plaintiff to prove that said goods were his when the lien of the executions is alleged to have attached. For that purpose, considerable evidence was presented to the jury. On the other hand, rebutting testimony was introduced by the defendants. And thus the case depended entirely on questions of fact, which were for the exclusive determination of the jury, and could not be withdrawn from their consideration. As to the title to some of the property in controversy, they found in favor of the plaintiff, and as to the residue, now under consideration, they found for the defendants. An examination of the record has satisfied us that the questions of fact referred to were fairly submitted, with full and adequate instructions as to the law applicable thereto. We find nothing in any of the learned trial judge's rulings that would justify us in sustaining either of the specifications of error. Judgment affirmed.

(100 Pa. St. 107)

SHILLITO v. SHILLITO.

(Supreme Court of Pennsylvania. March 12, 1894.)

LIABILITY OF DEVISEES—CONTRIBUTION—JURISDICTION.

1. Where sons accept land devised to them by a will laying on them the duty of supporting their sisters and mother, they become jointly and severally liable for such support.

2. One of such devisees, being obliged to bear the whole burden imposed on them by the will, is entitled to contribution from the other.

3. Where it is not clear that matters relative to a question of contribution can be conveniently and adequately settled in an action at law, objection cannot for the first time be made to the jurisdiction of a court of equity after most of the testimony has been taken and most of the expense of the litigation incurred.

Appeal from court of common pleas, Beaver county; John J. Wickham, Judge.

Suit by G. Milton Shillito against W. Washington Shillito for contribution. From a decree for complainant, respondent appeals. Affirmed.

Buchanan, Reed & McConnell, for appellant. E. B. Daugherty, J. L. Holmes, and A. P. Marshall, for appellee.

MCCOLLUM, J. The parties to this litigation are sons of James Shillito, deceased, and executors of his will. To them he devised all his real estate, and on them he laid the duty of providing for his daughters so long as the latter should live unmarried with his widow. He also directed that, in addition to her rights under the intestate and exemption laws, his widow should have one cow and a comfortable maintenance from his estate during her life, with a house to live in. In the acceptance by the sons of the lands devised to them, there was an undertaking on their part to discharge, in conformity with the intention of the testator, the duty imposed on them by his will. Thenceforth they were bound for the faithful performance of this duty, and jointly and severally accountable for any breach of it to the parties for whose benefit it was imposed. If one of them was compelled to bear the whole burden in consequence of the inability or refusal of the other to bear his share of it, the former became entitled to contribution from the latter. The right to contribution in such case is founded upon equitable principles, and was originally enforceable only in a court of equity. Now, however, it may be enforced in a court of law, if a contract to make contribution can be implied from the circumstances which create the common liability, as where one of two sureties is compelled to discharge their mutual undertaking to answer for the default of their principal. But a court of equity still has jurisdiction to enforce contribution, and in many cases it is the only court afford-

ing a convenient and complete remedy therefor. We cannot sustain the appellant's contention respecting jurisdiction in this case. It is not clear that the matters put in issue by the bill and answer can be conveniently and adequately settled in a common-law action. The bill charges that, since 1865, the respondent has failed to contribute anything to the support of their unmarried, sick, and feeble-minded sister, or to the maintenance of their mother, and that the complainant from that time has borne the whole burden of providing for them. The prayer of the bill is that the court will determine and decree what shall be paid by the former to the latter for past maintenance of their mother and sister, and what shall be so paid for their support in the future. The answer denies the allegations in relation to the maintenance of their mother and sister, and avers that the complainant has been paid for what he has contributed to their support, and that the respondent's contributions thereto have exceeded his liability therefor. It also avers that, in 1871, the respondent was released by his mother from liability for her future support, and that only one-third of the burden of providing for his sister rests on him. It will readily be seen, from this summary of the issues, that an adjustment of the dispute between the parties involved the ascertainment of their respective liabilities under the will, and of their respective contributions in discharge of the duty imposed by it. In view of the issues formed by the pleadings, and of the nature of the accounts to be examined and passed upon in the decision of the case, we cannot say that any mistake was made in resorting to a court of equity for the relief sought. Moreover, the jurisdiction of the court was not denied or questioned by demurrer, plea, or answer. The first intimation of a want of jurisdiction came after the most of the testimony had been taken by a master appointed on the agreement of the parties, and after the most of the expense of the litigation had been incurred. We have, therefore, a case to which the language of this court in *Adam's Appeal*, 113 Pa. St. 449, 6 Atl. 100, is applicable, even if it be conceded that there is room for doubt respecting jurisdiction. In delivering the opinion of the court in the case cited, the present chief justice said: "While it is true that manifest want of jurisdiction may be taken advantage of at any stage of the cause, the court will not permit an objection to its jurisdiction to prevail in doubtful causes after the parties have voluntarily proceeded to a hearing on the merits, but will administer suitable relief." To the same effect is the language of this court in *Evans v. Goodwin*, 132 Pa. St. 136, 19 Atl. 49. The specifications of error are overruled. Decree affirmed and appeal dismissed, at the costs of the appellant.

(100 Pa. St. 103)

GERBER v. MEREDITH.

(Supreme Court of Pennsylvania. Feb. 28, 1894.)

SET-OFF—WHEN ALLOWABLE.

Defendant in assumpsit cannot set off a claim due from plaintiff to an unsettled estate in which she has an interest as one of several legatees.

Appeal from court of common pleas, Schuylkill county; O. P. Bechtel, Judge.

Assumpsit by M. A. Gerber against Leonora Meredith. There was judgment for plaintiff, and defendant appeals. Affirmed.

The following is the complaint: "The plaintiff, Mahlon A. Gerber, claims of the defendant, Leonora Meredith, the sum of three hundred and thirty dollars, (\$330.00,) which is the amount of defaulted payment on principal sum, and the sum of \$79.49, the amount of defaulted interest, due on a note and agreement, of which the following are copies: Copy of note: 'Johnstown, Pa., March 18th, 1890. I, Margaretta Houtz, hereby acknowledge myself indebted to Mahlon A. Gerber, in the sum of eight hundred and fifty dollars, for the purchase money due him for his interest in the partnership of Gerber & Houtz, by me purchased this day. Said sum is to be paid as follows, viz.: Twenty-five dollars or more each month, on the first day of the month, and legal interest on said sum of eight hundred and fifty dollars, or such parts thereof as from time to time remain unpaid; said payment of twenty-five dollars per month to continue until said amount, together with the interest, is fully paid and discharged. Witness my hand and seal this 18th day of March, A. D. one thousand eight hundred and ninety ——. M. C. Houtz. Witness: E. P. Gerber.' The agreement on which the said Leonora Meredith is liable to pay the said defaulted payments on said note is as follows: Copy of agreement: 'Whereas, Margaretta Houtz, wife of A. W. Houtz, owes Mahlon A. Gerber the sum of eight hundred and fifty dollars on notes or an agreement, with the stipulation that the said sum shall be paid at the rate of twenty-five dollars a month, together with legal interest on the same, or such parts of the same as from time to time remain unpaid: Now, this agreement witnesseth, that, in consideration of said indebtedness, which is accepted by said Mahlon A. Gerber in consideration of this agreement, which is as follows, viz.: That I, Leonora Meredith, hereby bind myself, my heirs, executors, and administrators, and every of them, for the performance of said agreement for the payment of said sum of eight hundred and fifty dollars, with interest, or any installment or installments thereof regularly, as the same from time to time become due, until the entire sum of eight hundred and fifty dollars is paid, with interest; and in default of said payments by said Margaretta Houtz in accordance with her

said contract, I hereby agree to pay any and all of such defaulted installments. In witness whereof, I have hereunto set my hand and seal this fourteenth day of March, A. D. one thousand eight hundred and ninety. Leonora Meredith. [Seal.] Signed, sealed and delivered in presence of G. H. Gerber.' The said agreement and note were duly delivered to the said Mahlon A. Gerber, and default has been made by the said Margaretta Houtz upon said note in the sum of three hundred and thirty dollars, up to the 1st day of October, 1892, and on interest due on the same, default has been made to the sum of seventy-nine dollars and forty-nine cents. Demand has been made on the said Margaretta Houtz and Leonora Meredith for payment of the said installments in arrears, and the said interest thereon, but the said parties have failed to pay the same. Wherefore the plaintiff, Mahlon A. Gerber, claims from the said Leonora Meredith the sum, principal and interest, as stated above to be in arrears."

Affidavit of defense: "Leonora Meredith, the defendant above named, being sworn according to law, doth depose and say that she has a legal defense to the whole of the plaintiff's demand in this action, the nature and character of which are as follows, viz.: That this deponent is the only daughter of the late Daniel Frack, who, by his last will and testament, dated the 13th day of June, A. D. 1885, and probated November 20, A. D. 1890, and of record in the office of the register of wills at Pottsville, in and for the county of Schuylkill, in Will Book No. 7, page 652, etc., devised and bequeathed, share and share alike, to his three children, to wit, Leonora Meredith, the above defendant, Samuel Frack, and Daniel B. Frack, all of his property, real, personal, and mixed. This deponent further avers that, prior to his death, her father, the said Daniel Frack, deceased, on or about the 29th day of July, A. D. 1889, sold and delivered to the firm of Gerber & Houtz, of which firm Mahlon A. Gerber, the above-named plaintiff, was the senior partner, goods, wares, and merchandise, which were valued and worth, at the time of the said sale and delivery to said firm, the sum of fourteen hundred and fifty 36-100 (\$1,450.36) dollars, which sum of money is now due and payable by the said firm of Gerber & Houtz to the estate of the said Daniel Frack, deceased; that neither the said Mahlon A. Gerber and Margaretta C. Houtz, his late partner, nor either of them, nor any one for them, has ever paid the whole or any part of this large sum of money, and that the whole of it, to wit, fourteen hundred and fifty 36-100 dollars, (\$1,450.36,) together with interest on the same from January 29, 1890, to November 28, A. D. 1892, is now due and payable to the estate of the said Daniel Frack, deceased. This affiant also avers that the estate of her father, the late Daniel Frack, deceased, is solvent, and that she and her said

brothers will each receive more than five thousand (\$5,000) dollars from the said estate, and that the plaintiff is in manner and form as above set forth indebted to her father's estate in the sum of fourteen hundred and fifty 36-100 (\$1,450.36) dollars, with interest from January 29, 1890; that one-third of this large sum of money, to wit, five hundred and twenty-six 96-100 (\$523.96) dollars, is her property, and belongs to her by reason of her father's last will and testament heretofore referred to, and that this sum of money, now due and payable to her by the said firm of Gerber & Houtz, is a larger amount than the plaintiff claims of her in this action; that the executors of her father's estate, one of whom is herself, have instituted an action to No. 255, November term, 1892, against Mahlon A. Gerber, the above plaintiff, and Margaretta C. Houtz, the members of the late firm of Gerber & Houtz, for the recovery of this large sum of money, to wit, fourteen hundred and fifty 36-100 (\$1,450.36) dollars, with interest from January 29, A. D. 1892, and that she has made arrangements to purchase the entire claim of the estate of her father, the late Daniel Frack, deceased, against the members of the late firm of Gerber & Houtz from her brothers, Samuel Frack and Daniel B. Frack, aforesaid; that this defendant is advised and believes, and so avers, that one-third of the claim, to wit, the sum of five hundred and twenty-six 96-100 (\$526.96) dollars, being one-third of the sum in which the members of the late firm of Gerber & Houtz are indebted to her father's estate, belongs of right to this deponent, and is in fact her property, and is a set-off against the claim of the plaintiff in this suit; and further alleges that the statement and copy of claim filed and served on defendant in this case do not entitle the plaintiff to judgment in default of an affidavit of defense,—all of which this defendant will prove on the trial of this case. Leonora Meredith. Sworn and subscribed December 17, 1892, before John Gray, J. P."

J. F. Minogue and Geo. J. Wadlinger, for appellant. G. H. Gerber, for appellee.

PER CURIAM. There was no error in entering judgment against defendant for want of a sufficient defense. We find nothing in the record that would warrant us in reversing the same. Further discussion of the questions intended to be raised by the specifications of error is unnecessary. Judgment affirmed.

(160 Pa. St. 76)

TREGO v. BOROUGH OF HONEYBROOK.
(Supreme Court of Pennsylvania. Feb. 26, 1894.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—WORK BY PROPERTY OWNERS—INDEPENDENT CONTRACTORS.

Property owners engaged by direction of borough authorities and in obedience to an

ordinance, in paving and curbing the sidewalk in front of their properties, are not contractors exercising an independent employment, over which such authorities have no control, so as to relieve the borough from liability for the dangerous condition of the street, caused by such property owners rolling a stump taken from the sidewalk into the street.

Appeal from court of common pleas, Chester county; Hemphill, Judge.

Action by Horace Trego against the borough of Honeybrook for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Monaghan & Hause, for appellant. C. Wesley Talbot, for appellee.

PER CURIAM. It is a mistake to assume, as appears to have been done by defendant in this case, that property owners, who, by direction of the borough authorities, and in obedience to the requirements of an ordinance for that purpose, are engaged in paving and curbing the sidewalk in front of their respective properties, are, in any proper sense, contractors exercising an independent employment, over which said authorities have no control. The well-recognized principle of *Painter v. Pittsburgh*, 46 Pa. St. 213, and *Reed v. Allegheny City*, 79 Pa. St. 300, and that line of authorities, has no application to such cases. Defendant's points for charge recited in the specifications of error might, therefore, have been refused. The qualified affirmances of said points, now complained of, were more favorable to the defendant than it was entitled to. Where such improvements are being made, pursuant to ordinance, and by direction of the borough authorities, the latter are not thereby relieved from the duty of seeing that the street or streets on which the work is being done are kept in a condition that is reasonably safe for public travel. The testimony in this case was quite sufficient to justify the jury in finding, as they did, that the defendant corporation was negligent in that regard, and therefore liable to the plaintiff for the injury he sustained in consequence thereof. The large stump taken out of the sidewalk, and rolled into the street several feet, outside of the curb, was permitted to lie there ten days or two weeks, without a light, or anything to warn travelers at night of its position. This was surely gross neglect of duty on the part of the borough authorities, and it is no excuse to say that, in the circumstances, they had no power to abate the nuisance. Judgment affirmed.

(160 Pa. St. 109)

MADARA v. POTTSVILLE IRON & STEEL CO.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

MASTER AND SERVANT—INJURY TO MINOR SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Findings that plaintiff's minor son was killed by the negligence of defendant without

contributory negligence were warranted by evidence that the son was employed on a high platform which was considered dangerous by many, that plaintiff complained of the danger to his son's boss, who promised to get a man for the place, and that the son remained temporarily at his employment, and was killed within 20 minutes by falling from the platform.

Appeal from court of common pleas, Schuylkill county; Weldman, Judge.

Action by Nicholas C. Madara against the Pottsville Iron & Steel Company for negligently causing the death of plaintiff's minor son. From a judgment for plaintiff, defendant appeals. Affirmed.

The following are the portions of the charge of the trial court which relate to the negligence of the parties:

"The Pottsville Iron & Steel Company has been summoned to appear in this court to answer for the death of Jacob Madara, son of Nicholas Madara. The charge which the plaintiff has made is stated in writing, and that is the basis of this lawsuit. The plaintiff has filed this, and upon this alone, and the evidence in support of it, you must determine whether the defendants are guilty of negligence or not. They say that 'the buckets, platform, and machinery connected therewith were so improperly erected and constructed, and so carelessly and negligently managed and maintained and taken care of, that by reason thereof, to wit, at the county aforesaid, on or about the 7th day of January, 1891, the said Jacob H. Madara, while engaged in his labor aforesaid, was thrown and precipitated from the said platform to the ground, a distance of about forty feet, and killed.' There is no doubt in this case that Jacob H. Madara was working on that platform, and that he met his death while in his employment thereon, the 7th day of January, 1891, and that he was found on the ground, with the gearing which was suspended from the iron rod, and which held the bucket, lying on top of him. It is a principle of law, and there is no other claim in this case, that the burden rests upon the plaintiff to prove, not only that Jacob H. Madara was killed, but that he was killed by reason of the negligence of the Pottsville Iron & Steel Company. * * * Even if the company was negligent in some particular respect, that would not justify you in finding a verdict for the plaintiff in this case, unless that very negligence was the cause of death. You can see the reason for that. If this negligence had been, for instance, in some other part of the works, the fact that they were negligent at some other place would not justify this jury in finding a verdict against the Pottsville Iron & Steel Company, if that negligence had not occasioned this death. We want to make that plain. You must determine from these facts if there was any negligence, say, about the platform,—that that platform was too narrow, if narrow, and that that narrowness occasioned the death of this plaintiff's son; if that is

not so, then Nicholas Madara has no cause of complaint against the Pottsville Iron & Steel Company. * * * First. Was the platform too narrow for ordinary safety? Second. Was the fact that it was too narrow the proximate cause of the death of Jacob Madara? On the subject as to whether it was too narrow, you have the evidence that the father complained that it was dangerous. You have the descriptions of a number of witnesses, and their opinions that it was dangerous. You have the testimony that it has been widened since that, and that a man has worked on that platform for a year since. All these facts, without our repeating them, are for your consideration on the question as to whether it was dangerous or whether it was not. We do not say that it was dangerous. That is a question for the jury to determine under the facts in this case. Besides, it is not enough for you to determine that that was dangerous, and then say that the Pottsville Iron & Steel Company are liable, but you must be convinced by the evidence that the fact that that platform was too narrow was the reason why Jacob Madara met his death; because, by your verdict finding damages against the Pottsville Iron & Steel Company, you would be saying that the platform was too narrow, and that caused the death of Jacob Madara. That is what you must find in order to find a verdict in this case. Ordinarily, Jacob Madara, being a man eighteen or nineteen years of age, was old enough to form his own opinions about his safety. The supreme court have gone very far in holding a man of that kind responsible for his own acts, where he judges for himself, when he knows of the danger and still continues in the employment. * * * There is very little or no evidence in this case that the employer promised to remedy this defect, but, if you will remember, Nicholas Madara testified on cross-examination, on the subject of the conversation of the 7th of January: 'I was standing by then, when I heard him [Skidmore] tell the Polander to go over there, but the Polander would not do it. He said, "I won't do it. I won't work there." I said, "George, [that meant Skidmore,] take the boy down." He said, "I will get a man and take him down right away," and twenty minutes after he was killed.' Whether this conversation took place exactly as stated there is for you to determine, because Skidmore does not testify to what took place, exactly, on the 7th. He testifies more particularly as to what took place on the 5th of January. On the 5th of January, as we understand his testimony, and on all other occasions, his version of his conversation with Nicholas Madara was that he would take him off when he got a chance to put him in the mill,—give him a betterment there. If the conversation took place at the time as related by Nicholas Madara; that is, if George Skidmore said, 'I will get a man and take him down right

away,' and then within twenty minutes he was killed, it seems to us the case would come within the rulings that we have read to you, where the danger is not so immediate that he might be justified in working there until the employer took him down and put another man in his place. But, as we say, Skidmore's testimony does not agree with the testimony of Nicholas Madara, and it is for you to say which you believe. If, however, you can infer from the testimony of Nicholas Madara, or Nicholas Madara and Skidmore together, that the young man was afraid, and his father was afraid, if the young man took no part in it, that if he left there he would not have employment, and he simply took the risks to wait until he could get a job in the other mill, then he would not be entitled to recover. If this young man, or the father, in point of fact, was waiting there until he could get a better job, and there was no promise to remedy this defect, if any, and he took the risks, then that would exonerate the Pottsville Iron & Steel Company from liability in this case. If you conclude, in the first place, that it is true that Skidmore induced the young man to stay there until he would get another man,—and in considering that, you must not only consider the testimony of these witnesses, their opinions and descriptions of the place, but you must consider also the fact that the place has been in operation for a number of years, and what has occurred as a result of the narrowness of that platform,—and if you should conclude that the platform was too narrow, that making it too narrow was a negligent act on the part of the Pottsville Iron & Steel Company, then if you should conclude that this death was occasioned by the narrowness of the platform, and the negligence, then it would be your duty to find for the plaintiff. * * *

Defendant's counsel asked the court to charge as follows: "First. It is the duty of the plaintiff to prove that the death of the plaintiff's son was occasioned by the negligence of the defendant company." Answer: "Affirmed." "Second. If there be any negligence on the part of the defendant, its liability arises from the alleged dangerous condition of the platform, by reason of a part of it being too narrow. But, even if it were dangerous, its danger was apparent, not hid; open, not latent; was visible to the eye and sense of the plaintiff's son; and, having continued to work thereon for over two months with full knowledge of its dangerous character, and he is killed from unknown causes, plaintiff cannot recover." Answer: "If the death of the plaintiff's son was brought about by unknown causes, there can be no recovery, for the reason that the right of recovery in this case rests upon the negligence of the defendant, which must be proved. Otherwise, the rule of law is correctly stated in this point, except that if the jury believe that the platform where the de-

ceased worked was dangerous, and the father of the deceased had complained to George Skidmore, his boss, who was in charge of the work and machinery, of the danger, and was induced then to remain temporarily at his employment by the promise of said Skidmore that he would get a man, and take him [the deceased] right down, and was then killed within twenty minutes, then if the jury believe that, though there was no visible defect in the machinery or structure, other than that the platform was too narrow to be safe, and that this defect caused the death of the plaintiff's son, then the plaintiff would be entitled to recover." "Third. That the condition of the platform was known to plaintiff's son, when he contracted to work for defendant, and the apparent risks and dangers were a part of his contract." Answer: "Affirmed." "Fourth. The master is not responsible for the dangerous state of the premises, if those dangers are known to the servant, and the latter has accepted the employment, knowing of the attendant risks." Answer: "Affirmed." "Fifth. There is no evidence that the plaintiff's son ever complained that the place where he worked, or that the machinery, was dangerous." Answer: "Affirmed."

Geo. M. Roads, for appellant. W. J. Whitehouse, for appellee.

PER CURIAM. This case involved questions of fact which were necessarily for the consideration of the jury, and they were fairly submitted to them by the learned trial judge in a clear and able charge, which appears to be free from any error of which the defendant had any reason to complain. The jury must have found that the deceased sustained the fatal injury in consequence of the negligence of defendant company, and that neither he nor his father was guilty of any negligence that contributed thereto. The testimony was quite sufficient to warrant them in so finding. There is nothing in either of the specifications of error that requires special notice. Judgment affirmed.

(180 Pa. St. 117)

SMITH v. PHILADELPHIA & R. R. CO.
(Supreme Court of Pennsylvania. March 5, 1894.)

RAILROAD COMPANIES — ACCIDENT AT CROSSING — CONTRIBUTORY NEGLIGENCE.

In an action for injuries received while crossing a track, where plaintiff's testimony did not show that she either stopped, looked, or listened before crossing, though there was an unobstructed view in the direction from which the engine which struck her came, and the only witness of the accident testified without contradiction that the engine was visible a square away, it was proper to enter a nonsuit.

Appeal from court of common pleas, Philadelphia county.

Action by Alice Smith against the Philadelphia & Reading Railroad Company for in-

juries received at a railroad crossing. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Joseph L. Tull, for appellant. Gavin W. Hart, for appellee.

MITCHELL, J. There were but two witnesses who testified as to the circumstances of the accident,—the plaintiff and Haines. The plaintiff does not state that she either stopped, looked, or listened before entering on the railroad crossing, though there was ample room, being space enough for four tracks, an unobstructed view at least in the direction from which the engine came, and it was light enough for the other witness, Haines, to see distinctly. What the plaintiff does say is very indefinite: "I had crossed a couple of tracks, or three. * * * Will you tell us what track it was you stopped on? I could not tell." The other witness, Haines, says he saw the engine "just this side of Lehigh avenue," which was the next street below Somerset, where the accident took place. For nearly, if not quite, a square, therefore, the engine was in sight of plaintiff if she had looked. It was negligence, in the first place, to enter on the crossing without looking, and, even after having started to cross, there is no room for any other deduction from the evidence than that the plaintiff did not look when she could have seen, or, looking, took the chances of getting across in front of an engine in plain view. Judgment affirmed.

(100 Pa. St. 156)

In re FRITZ'S ESTATE.

(Supreme Court of Pennsylvania. March 5, 1894.)

EXPECTANT INTERESTS—ASSIGNMENT—VALIDITY—CONSIDERATION—EVIDENCE.

1. An assignment of an expectant interest in an ancestor's estate is valid if founded on a sufficient consideration.

2. On an issue whether a son actually paid his father a consideration for the father's expectant interest in an estate, the father testified that he received a specified sum, and that he did not return any of it. The son testified that no part thereof was ever returned, and it was shown that he was a man of integrity, and industrious. The only evidence that the son received back any of the money was that of his employer, who testified that he lent him money, which was returned in a few days; but on cross-examination he said he was mistaken, and that he did not know when the money was repaid. *Held*, that the evidence supported a finding that the son paid a consideration, which was not returned.

Appeal from orphans' court, Lehigh county; Edwin Albright, Judge.

Claim by Alfred Fritz against the estate of Charles Fritz, deceased. From a judgment of the orphans' court reversing findings by the auditor allowing said claim, Alfred Fritz appeals. Reversed.

Jas. S. Biery, for appellant. John Rupp, E. H. Stine, and C. J. Erdman, for appellees.

GREEN, J. There is nothing practically in controversy in this case except the sufficiency of the consideration for the assignment of Benjamin Fritz of his expectancy in his father's estate to his son, Alfred Fritz, the appellant. It has been many times decided, and is not at all controverted, that such an assignment is valid if founded upon a sufficient consideration. The auditor in the court below decided, as a matter of fact, that the appellant did furnish the money, to the amount of \$625, to his father, in consideration for the assignment. If the money was furnished, it was sufficient in amount to constitute a good and valuable consideration for the assignment. The auditor had the witnesses before him, he heard their testimony, he could observe their manner of testifying, and was therefore able to judge of their credibility. He accredited them as witnesses by accepting their testimony as true, and basing his conclusions of fact upon it. In point of fact, no attack was made upon the character of any of them as truthful witnesses. Not one of them was contradicted by any witness as to any statement made. On the contrary, the only witness examined for the appellees, F. H. Hersh, corroborates Alfred Fritz in every particular, and, when he said the \$300 which he loaned Fritz was repaid in a few days, he corrected himself on his cross-examination, and said he did not receive the money, and did not know when it was paid back, and in fact knew nothing at all about it except that his firm did not lose the money. Upon the supposed fact that this money was paid back in a few days, the learned court below, principally, inferred that the money was never really used by Benjamin Fritz, but was handed back to his son, Alfred, in a few days, and by the latter was paid to Hersh, and therefore the transaction was collusive, and done with intent to defraud the creditors of Benjamin Fritz. If the testimony justified this inference, the conclusion would be warranted. But Benjamin Fritz testified positively that he used the money to pay a doctor's bill, some debts he owed, and rent and necessities for his family. He also testified positively that he never returned any of the money to his son. Alfred Fritz also testified that his father did not return any part, either of the \$325, or of any of the other sums he had loaned him, and that he had not paid him anything on account of any of the loans. He also admitted that he had repaid the \$300 to Hersh not long after he borrowed it, but did not say how soon after. He did say, however, that he had earned the money he paid to Hersh, not only in working over time, but in painting and in other work. In order to justify the inference that the moneys claimed by Alfred Fritz to have been paid to his father were not paid, it is necessary to find that both of them were guilty of perjury and of fraud. Alfred Fritz had worked for 11 years for the same employers, and was still work-

ing for them. They had confidence enough in his integrity and his honesty to lend him \$300 upon his own request, and without any security. One of his employes testified that Alfred had earned money by doing overwork, though he could not name the amount. Without any contradictions of Alfred's testimony, without any impeachment of his character as a truthful witness, with affirmative proof from the testimony of the appellees' witness corroborating his testimony as to all material details, and in face of the clearest proof of his industrious habits and of his personal honesty, and of the manifestly good opinion of him which must have been entertained by his employers, we think an inference of either fraud or perjury against him is entirely too harsh, and cannot be justified. The auditor has found in favor of his claim, with, of course, a better opportunity of judging of his truthfulness than either the court below or we can have, and such finding of facts we must regard as the verdict of a jury, not to be disturbed except upon the clearest proof of mistake. We fail to find any such proof in the case. Fraud is not to be presumed, but proved. We do not think it has been proved in this case, and we do not feel at liberty to presume it. We are unable to find any testimony which will authorize such a presumption. Without further discussing the subject, although it is capable of much greater elaboration in the same direction, we think that the findings of the auditor should be sustained, and that it was error to reverse them. The assignments of error are all sustained. The decree of the court below is reversed, at the cost of the appellees, and the record is remitted with instructions to distribute the fund in accordance with the first report of the auditor, but allowing the sum of \$106 to Josiah Fritz.

(160 Pa. St. 164)

SCHUYLKILL COUNTY v. MINOGUE.

(Supreme Court of Pennsylvania. March 5, 1894.)

COUNTY AUDITORS—JURISDICTION—ADJUSTMENT OF ACCOUNTS.

1. The county auditors have no jurisdiction to settle and adjust the accounts of an attorney employed by the county commissioners to conduct the litigated business of the county.

2. By appealing from a judgment of the county auditors, one does not so recognize its force and effect as to be debarred from attacking it for want of jurisdiction in the auditors.

Appeal from court of common pleas, Schuylkill county; O. P. Bechtel, Judge.

Report of auditors of Schuylkill county, showing James F. Minogue, as solicitor for the county commissioners, indebted to said county for money overdrawn as solicitor's fees. Judgment was entered on the report. From a decree discharging rule to strike off judgment, said Minogue appeals. Reversed.

J. F. Minogue and P. M. Dunn, for appellant. J. O. Ulrich, for appellee.

STERRETT, C. J. Acting on the belief that they had authority to do so, the auditors of Schuylkill county audited the account of the defendant, James F. Minogue, attorney for the county commissioners, and reported him indebted to said county \$425, moneys overdrawn for solicitor's fees, and thereupon judgment was entered against him for that sum. It is conceded that the commissioners were also surcharged with a like sum for unauthorized payment of said fees, which amount is included in judgment entered against them at the same time; but that does not appear in the record now before us, nor is it material to this contention. In February, 1893, appellant obtained a rule to show cause why the judgment against himself should not be stricken from the record, on the ground that the auditors had no jurisdiction in the premises, etc. From the decree discharging that rule, this appeal was taken.

Plaintiff relies mainly on its motion to quash on the ground that defendant, by appealing from the judgment on the day his rule to show cause was discharged, recognized its force and effect as a judgment, and cannot now say that it is void for want of jurisdiction in the county auditors. We cannot assent to that proposition. Want of jurisdiction may be taken advantage of at any stage of the case. An appeal from the judgment, taken out of abundance of caution, cannot have the effect of making a void judgment either a voidable or a valid one. If void in its inception, for want of jurisdiction in the county auditors, it is still void, and the contention should be terminated by striking it from the record. The motion to quash is therefore denied.

With commendable frankness the learned counsel for plaintiff, in the course of his argument, conceded that, if his motion to quash failed, he had no case; that, when entered, the judgment was void for want of jurisdiction in the county auditors as to the defendant. The reason for that will be quite apparent when we consider that county auditors have no common-law jurisdiction, and their statutory authority does not embrace the defendant. It appears that an elective, salaried office, the incumbent of which was called the "Solicitor of Schuylkill County," was created by the act of March 15, 1871, (P. L. 357,) the term of which was three years; but that act was repealed by the act of May 3, 1878, (P. L. 44,) "to take effect from and after January first, one thousand eight hundred and eighty-one." Thereafter no such "office," properly so called, existed in that county. The commissioners, however, have been in the habit of annually appointing a member of the bar to take charge of the county's legal business, and his compensation, it is alleged, has been the subject

of agreement between him and the commissioners, depending somewhat on the amount of extra services required in court or outside the county, but not exceeding \$925 in any one year. Under such arrangement as that, defendant was retained by the county commissioners in January, 1888, and has continued in their employ. We have not been referred to any statute that gives the county auditors any jurisdiction to call such an employe to account. Section 48 of the act of 1834 (P. L. 545) requires the county auditors to settle and adjust the accounts of the commissioners, treasurer, sheriff, and coroner of the county, and to make report thereof to the court of common pleas, showing the balance due from or to each of such officers; but we know of no act that either requires or authorizes them to settle and adjust, in like manner, the accounts of an attorney employed by the county commissioners to conduct the litigated business of the county. It follows from what has been said that the report of the auditors, and the judgment thereon, in so far as they relate to him, were unauthorized, and the rule to strike off said judgment should have been made absolute at plaintiff's costs. *Allen v. Krips*, 119 Pa. St. 4, 12 Atl. 759; *Pantall v. Dickey*, 123 Pa. St. 438, 16 Atl. 789; *McKinney v. Brown*, 130 Pa. St. 368, 18 Atl. 642. The decree discharging the rule to show cause is reversed, and rule reinstated; and it is now ordered and decreed that the rule be made absolute, and that the costs in the court below and here be paid by the plaintiff.

(160 Pa. St. 133)

**CITY OF PHILADELPHIA v. BARBER
et al.**

(Supreme Court of Pennsylvania. March 5 1894.)

**TAXATION—EXEMPTIONS—CHURCH PROPERTY—
CONSTRUCTION OF STATUTE.**

1. A church purchasing a church building is not entitled to an exemption from taxes for the current year for more than the portion thereof during which it holds title to the property.

2. Act May 14, 1874, exempting churches and regular places of worship from taxation, and providing that all property other than that "in actual use and occupation for the purposes aforesaid, and from which any income or revenue is derived, shall be" taxed, does not exempt part of a building which is rented by the church owning it, though on certain days in the week such rented part is used by the church for church purposes.

3. The above proviso of said act is valid in so far as it limits the exempting effect of the body of the act, though unconstitutional in so far as it might impose a tax on property before the passage of the act,—a purpose not indicated by the title.

Appeal from court of common pleas, Philadelphia county; Henry Reed, Judge.

Claim by the city of Philadelphia against Frank Barber and Luther E. Albert for taxes for 1889 on a certain lot and building

thereon. Judgment for defendants, and said city brings certiorari. Reversed.

The property assessed by the board of revision of taxes of Philadelphia for the purpose of taxation is a lot or piece of ground with a brick and stone church building thereon erected. The title to said property is held by the appellees as trustees for a religious society, which came into possession and occupied the premises on November 28, 1888, as a church, under an agreement with the then owner which was consummated at that time, and subsequently put in the form of a deed of conveyance, dated March 1, 1889. From November 28, 1888, the church received rent from the board of education for a portion of the building partially occupied by them five days in the week for public school purposes. The rent thus received was appropriated by the church for the maintenance of their church worship, the amount received not being sufficient to meet all the expenses. The part of the building used for public school purposes was also used by the church in common with the school, and forms an integral portion of the building.

Chas. F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellant. Frank A. Hartranft, for appellees.

MITCHELL, J. The title of the church did not accrue until March, 1889, for, whatever its equitable rights in the building may have been prior to that date, the deed was not made until then, and it does not appear in the evidence that the former owner did not receive for his own use the rent paid up to that time by the city for the rooms occupied by the public school. The most, therefore, that the church could claim in the way of exemption, would be for the proportion of the tax due for the last 10 months of the year. Whether the tax could be thus apportioned we do not decide. In general, taxes are assessed and payable early in the year for the entire year. In *Moore v. Taylor*, 147 Pa. St. 481, 23 Atl. 768, no tax had been assessed for the year, because at the time of the general assessment the property was used as a church, and therefore exempt; but during the year such use had ceased, and it was held that the exemption immediately ceased, and the property became at once assessable in the hands of the purchaser for the remainder of the year. Whether the rule would work the other way, and exempt the property in the hands of the church from any part of the tax already assessed and due upon it, was not discussed in the argument, and we do not, therefore, pass upon it. All that we now decide is that in no view of this case could the church be entitled to exemption for more than the portion of the year during which it held the title to the property.

The other question involved is equally clear. The claimant of exemption from tax-

ation must show affirmative legislation in support of his claim, and his case must be clearly within it. The constitution exempts nothing; it merely permits the legislature to exempt, within the lines laid down for its guidance. *Wagner Free Institute v. City of Philadelphia*, 132 Pa. St. 612, 19 Atl. 207. The claim in the present case is under the act of May 14, 1874, (P. L. 158),¹ providing for the exemption, inter alia, of churches and regular places of stated worship. But the proviso of that act, in express terms, limits the exemption to property "in actual use and occupation for the purposes aforesaid," and provides that all other property, even of churches, etc., from which any income or revenue shall be derived, shall be subject to taxation. If, therefore, the property is rented out, and thus produces income or revenue, it is subject to taxation, and the fact that for a part of the time—certain days or hours in the week—the church also uses the rented portion for its own purposes does not relieve it, or take the case out of the express language of the act. "In actual use" means "in exclusive use," and a mere concurrent or alternate occupation by the church does not come within the requirements for exemption. It is true that in *Sewickley Borough v. Sholes*, 118 Pa. St. 165, 12 Atl. 302, the proviso of the act of 1874 was held to be unconstitutional because it sought to impose taxation on property not before taxable, and such purpose was not indicated in the title of the act, which referred to exemption only. There is no repugnancy between that decision and the present. For the purpose, and to the extent, that the proviso of the act of 1874 attempted to make property taxable which was not previously so, it may be conceded to have transgressed the rule of the constitution as to the titles of legislative acts, and therefore to be inoperative; but it still remains for all other purposes, and certainly as a part of the language used to express the legislative intent in regard to the exemptions expressed in the previous part of the act. Churches, etc., are exempted, and the extent of such exemption is illustrated and defined in the proviso as the property which is "in actual use and occupation for

the purposes aforesaid," and from which no revenue is derived. Neither the facts nor the reasoning of the court in *Sewickley Borough v. Sholes* require us to ignore the proviso in interpreting the legislative intent of the whole act. Such use was expressly made of it in General Assembly v. Gratz, 139 Pa. St. 497, 20 Atl. 1041, by Thayer, P. J., whose opinion was adopted without qualification or addition by this court. "Notwithstanding the fact," he says, "that we must now regard the proviso in the act of 1874 as unconstitutional, it is lawful, perhaps, to look at it, and to read it, to see if it sheds any light upon the intention of the legislature in using the language contained in the residue of the act."

Before leaving the case of *Sewickley Borough v. Sholes*, it may be well to call attention to the entire omission in it of any reference to the act of April 8, 1873, (P. L. 64,) making all real estate liable to taxation, except certain specified exemptions. When, therefore, it is said in that case that "prior to the act of 1874 the rule was that nothing was subject to taxation except that which was expressly taxed by some law," and that "under this law [act of 1874] everything is taxable except that which is exempt," the reference should have been to the act of 1873 instead of the act of 1874; and the case of *Erie Co. v. Commissioners of Waterworks*, 113 Pa. St. 368, 6 Atl. 138, which appears to be practically overruled by *Sewickley Borough v. Sholes*, may still be sustained under the act of 1873, while *Erie Co. v. City of Erie*, 113 Pa. St. 360, 6 Atl. 136, may require reconsideration, unless, notwithstanding the act of 1873, it may be sustained on the ground that property owned by municipal bodies, and used for public purposes, is never subject to tax laws unless the legislative intent to include it is clear. The exemption of church property under the act of 1874 being limited, therefore, to that in actual use and occupation, and the necessary construction being that such use and occupation must be exclusive as well as actual, and not the source of income or revenue, the exemption in the present case must be limited to such parts of the building as meet those requirements. If the church lot was large, and the church should erect a row of stores around its edge, and rent them out, there could be no question that that part of its property would be taxable, though the income should all be applied to the support of the church. It would not come within the intent and description of the statute. What was done in the present case amounts to the same thing. Part of the building is used solely by the church, and part is rented out for school purposes. The rooms being all under the same roof makes no difference in principle. The parts rented and producing income are liable to taxation. There is, in fact, no express warrant in the act for dividing the building for purposes of taxation,

¹Act May 14, 1874, entitled "An act to exempt from taxation public property used for public purposes, and places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity," provides: "That all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy and enjoyment of the same; all burial ground, etc., * * * be and the same are hereby exempted from all and every county, city, borough, bounty, road, school and poor tax. Provided, that all property, real and personal, other than that which is in actual use and occupation for the purposes aforesaid, and from which any income or revenue is derived, shall be subject to taxation, except where exempted by law for state purposes, and nothing herein contained shall exempt same therefrom."

and exempting any part of it when other parts produce income; but such division was sustained by Judge Allison in *Association v. Donohugh*, 7 Wkly. Notes Cas. 208, upon grounds of equity and the broad intent of the statute, and has been received with general acquiescence. Judgment reversed, and venire de novo awarded.

(160 Pa. St. 119)

HILL v. EGAN.

(Supreme Court of Pennsylvania. March 5, 1894.)

BILL OF EXCEPTIONS NUNC PRO TUNC—WHEN ALLOWED.

1. Where a vital error is committed by the trial court, but the appellant fails to file a bill of exceptions, and have the record put in proper shape for review, owing to erroneous ideas of practice, which were corrected by decisions of the supreme court announced after the appeal was taken, the trial court should allow a bill of exceptions nunc pro tunc, or in such other form as in its discretion it may deem best.

2. A magistrate cannot, without notice to the prosecutor, after holding the accused to bail, render a judgment discharging him.

Appeal from court of common pleas, Philadelphia county.

Action by Leopoldina Hill against John J. Egan to recover damages for malicious prosecution. From a judgment for plaintiff, defendant appeals. Appeal quashed.

De Forrest Ballou, for appellant. J. Campbell Lancaster, for appellee.

MITCHELL, J. According to the facts as they appear in the paper books, the plaintiff was arrested upon a warrant issued at the instance of defendant, and on hearing before the magistrate was held to bail. After the hearing was thus ended and defendant had gone away, the plaintiff was discharged without the entry of the required bail. Whether this was done by the magistrate, or by the police officers, appears to have been left in doubt by the evidence; and the learned judge charged the jury that, if it was an escape by the compassion of the police, it was not a legal discharge, but that if it was the act of the magistrate, then it was an end of the prosecution, and plaintiff could recover. This view, however, entirely overlooked the facts, apparently undisputed, that the hearing had terminated in a holding to bail, and that the magistrate had no right, without notice to the prosecutor, to open the case and render a different judgment. No such illegal action on his part could make the defendant liable for malicious prosecution. On such a state of facts, the view taken by the learned court below at the first trial, which resulted in a nonsuit, was correct. But, unfortunately for the appellant, we have nothing before us on which to base a judgment. We have none of the evidence, for there is no bill of exceptions. Even as to the charge, therefore, we could not pass

upon it for want of the facts to which it related. But the charge itself, though printed in the paper book of appellant, is not of record. It nowhere appears to have been filed by the judge, or approved by him and filed by his order. The case, therefore, is not in position for us to afford appellant any relief.

This case, was tried and the appeal taken before the announcement of the decisions of this court in *Rosenthal v. Ehrlicher*, 154 Pa. St. 396, 26 Atl. 435, *Connell v. O'Neil*, 154 Pa. St. 582, 26 Atl. 607, and *Com. v. Arnold*, (not yet officially reported,) 29 Atl. 270; and, in view of the fact that the failure of counsel to have the record put in proper shape for review was owing to erroneous ideas of practice, which were corrected in those decisions, we think this is a very proper case for relief by the court below by the allowance of a bill of exceptions nunc pro tunc, or in such other form as it may, in its discretion, deem best. For the present we have nothing before us. Appeal quashed.

(160 Pa. St. 140)

In re COLGAN'S ESTATE.

Appeal of BROWN.

(Supreme Court of Pennsylvania. March 5, 1894.)

EXECUTORS AND ADMINISTRATORS—WHAT CONSTITUTE ASSETS.

Where a balance of the consideration for a farm is to be paid by the grantee if the grantor ever needs it, and the grantor dies without demanding it, but without doing anything to extinguish the debt, it is an asset of her estate, and should be set off against a claim by such grantee against the estate for board of deceased.

Appeal from orphans' court, Chester county; Waddell, Judge.

Exceptions by Grace Ann Brown and Sarah Jane Harry to the report of an auditor appointed to make distribution of the balance of the estate of Sarah Colgan, deceased, in the hands of David Colgan, executor. From an order overruling the exceptions and confirming the report, executors appeal. Reversed.

W. S. Harris, for appellants. J. Carroll Hayes and Wm. M. Hayes, for appellee.

GREEN, J. When the deed for the farm was executed and delivered by Sarah Colgan to Jesse Jackson for the consideration of \$2,800, of which \$2,000 was secured, the remaining \$800 was a debt due and owing by Jackson to his grantor. It was admitted before the auditor that this sum was to be paid if Sarah Colgan ever needed it. She therefore had the legal right to demand it, and that right continued until the time of her death. She did not demand the money in point of fact, but she never surrendered her right to do so, and did nothing to extinguish the debt. The grantee, Jackson, now claims that Sarah

Colgan was indebted to him, at the time of her death, for 80 weeks' boarding and nursing furnished by him, and which he claims was worth \$10 per week, amounting, in all, to \$800. He never demanded payment of this claim during Sarah Colgan's life, and it can well be understood that she omitted to demand payment of the \$800 due her on account of the fact that she was receiving boarding and nursing from him. But it will require some effort to believe that, if he had presented his bill during her life, she would not thereupon have expressed her need of the \$800 which he owed her on the land. However that may be, it cannot be questioned that any one who is in debt has need for the use of money for the extinguishment of the debt. Literally, the debt due by Jackson to the decedent was never surrendered or extinguished up to the moment of her death, and we do not understand how the mere fact of the death could produce such extinguishment. At the very moment of her death, other persons became vested with her rights, and, as to them, nothing but the absolute discharge of the debt by her in her lifetime, or its disposition by will, could relinquish Jackson from the obligation to pay it. It is not enough to say she did not demand it. She had the right to demand it up to the instant of her death, and that right she never surrendered. It was therefore an asset of her estate. The claim of \$800 for boarding and nursing was allowed by the auditor and learned court below, but they refused the set-off of the \$800 owing by Jackson to the decedent, because she never demanded its payment. We cannot assent to that conclusion, and therefore hold that the one debt should have been applied to the payment of the other, for which it was certainly needed. The decree of the court below is reversed, and the record is remitted, with direction to make distribution in accordance with this opinion, at the cost of the appellee.

(180 Pa. St. 144)

J. C. McNAUGHTON CO. v. HALDEMAN.
(Supreme Court of Pennsylvania. March 5, 1894.)

NEGOTIABLE NOTES—VALIDITY—PRESUMPTIONS.

In an action on a note by an indorsee, whose title is not impeached, against an indorser, who had nothing to do with the transactions out of which it arose, every legal presumption in favor of the validity of the note must be indulged in.

Appeal from court of common pleas, Delaware county; Thomas J. Clayton, Judge.

Action by the J. C. McNaughton Company against T. J. Haldeman on a note. There was judgment for plaintiff, and defendant appeals. Affirmed.

George E. Darlington and E. H. Hall, for appellant. W. C. Wilson, for appellee.

GREEN, J. It is impossible to tell, from the deposition of I. L. Haldeman, what the exact consideration of the note in suit was. He says: "It was to settle a balance in a stock transaction between J. C. McNaughton and myself. That balance was made up of profit and losses in those transactions." He further said that he never bought any stock for McNaughton, and, of course, he never sold any. He, however, received money from McNaughton by way of margins, and he had a number of settlements with him during their transactions. Of course, there was money due from I. L. Haldeman to McNaughton, and for that money the note in suit was given. It was made payable to J. C. McNaughton, and was indorsed by T. J. Haldeman, the defendant, at the time of its delivery. McNaughton indorsed it over the name of T. J. Haldeman, as he had a perfect right to do, and then passed it to the plaintiff company. This action is by the indorsee against the indorser, and there is no testimony in the case impeaching the title or the good faith of the plaintiff in acquiring the note. Whether the money for which the note was given represented the margins which J. C. McNaughton had deposited with I. L. Haldeman, or whether it represented profits on the transactions, or part margins and part profits, the testimony utterly fails to tell, and of course we do not and cannot know. It certainly does not represent the proceeds of any stocks sold, because none ever were sold. We cannot say that it does not represent the money deposited by way of margins, and we are not at liberty to presume an illegal consideration, in the absence of testimony to establish it. The witness says he paid McNaughton all the money he ever borrowed of him, but he does not say that he ever paid him any of the money he received as margins. We decided in *Peters v. Grim*, 149 Pa. St. 163, 24 Atl. 192, that where the profits of stock transactions were paid over by the broker to his customer, leaving the amount of the original deposit in the hands of the broker, the customer could recover this money in an action against the broker. And so, here, the broker admits that he received margins from his customer, and does not say that he ever repaid them. He does not say that the note was given exclusively for profits, and we cannot assume that it was. The action is on negotiable commercial paper in the hands of an indorsee whose title is not impeached; and it is against an indorser who had nothing to do with the transactions out of which it arose. Upon every principle, the legal presumption is in favor of the validity of the note, and we think the learned court below was entirely right in excluding the deposition of I. L. Haldeman, and in directing a verdict for the plaintiff. The assignments of error are all dismissed. Judgment affirmed.

(160 Pa. St. 172)

MILLER et al. v. BAKER.

(Supreme Court of Pennsylvania. March 12, 1894.)

RESULTING TRUST IN LANDS—ENFORCEMENT—LIMITATION—POSSESSION OF HUSBAND AND WIFE—IMPEACHING WITNESS—LAYING FOUNDATION.

1. Where a husband and wife occupy land bought with her money, title to which was taken in his name through mistake, and he continues to recognize her title, the possession is hers, so that the five years' limitation against the enforcement of resulting trusts (Act April 22, 1856) will not run, it being inapplicable where the cestui que trust is in possession.

2. For the purpose of impeaching a witness, acts and declarations of his, inconsistent with his testimony that land standing in his name was the property of his wife, are admissible, though they were not in the presence of his wife.

3. On an issue as to ownership of realty standing in a husband's name, evidence that it was regularly assessed to him is a fact to be considered in connection with his testimony that it was his wife's property, taken in his name by mistake and inadvertence.

4. It cannot be objected that a proper foundation was not laid for the introduction of acts and declarations inconsistent with witness' testimony, where a proposed cross-examination of him as to acts and declarations inconsistent with his testimony was not allowed.

Appeal from court of common pleas, Washington county; E. H. Stowe, Judge.

Action by James M. Miller and another against William J. Baker for possession of land. Judgment for defendant. Plaintiffs appeal. Reversed.

The following specifications of error are referred to in the opinion:

"(6) The court erred in sustaining the defendant's objection to the following evidence of the plaintiffs: 'Theodore Hawkins on the stand: Before you lent William J. Baker any money, did you have his title examined? Yes, sir. (Objected to as incompetent and irrelevant. Objection sustained, and bill sealed for plaintiffs.)' (7) The court erred in sustaining the defendant's objection [and in striking out] the following evidence of the plaintiffs: 'Did you lend him the money evidenced by these judgments on the faith of advice that you got with reference to the validity of Baker's title? Yes, sir. (Objected to as incompetent. Objection sustained and bill sealed for plaintiffs, and answer stricken out.)' (8) The court erred in refusing to sustain the plaintiff's objection to the following offer of evidence by the defendant: 'Defendant asks leave to read in evidence Exhibit A, being a paper given by Mr. Fordyce, as testified to by Mrs. Baker; and also the notice which is admitted to have been given at the sheriff's sale. (The reading of the Fordyce paper is objected to because it contains no evidence with regard to this matter one way or the other, has no date, and is in no respect evidence. Objection overruled. Bill sealed for plaintiffs. Read in evidence.)'"

Copy of Exhibit A: "No. 2, cont'd. Beginning at a stone; thence, by land of Ma-

nasa Wildman, south, 87½ east, 33 ps., to hickory; thence, by the same, south, 66½ east, 116 ps., to stone; thence, by land of Edward Bussey, north, 18.20 east, 154 ps., to stone; thence, by same, south, 62 degrees west, 75 ps., to post by maple; thence, by lot No. 1, south, 29 degrees east, 19 ps., to W. O. bush; thence, south, 28.20 west, 67 ps., to stone fence; thence, by the same, south, 35½ degrees west, 155 ps., to the place of beginning,—containing one hundred and thirty-four acres and seventy perches. And that they value and appraise, and do value and appraise, the same at fifteen dollars and thirty-three cents per acre; the whole amounting to twenty-one hundred and twenty-eight dollars and fourteen cents [illegible] 14-100. Joanna Baker."

McCrackens & McGiffin and H. M. Dongan, for appellants. J. M. Garrison, Jas. I. Brownson, Jr., and Boyd & E. E. Crumrine, for appellee.

McCOLLUM, J. The appellants in this case claim possession of the land in dispute by virtue of their purchase of it at a sheriff's sale upon a judgment against the appellee, and the latter rests his defense to the action on his wife's title. It appears that the legal title to the land was in the appellee prior to 1891, when he conveyed it to his wife. He alleges that the land was purchased by his wife, and that she paid for it from her separate estate, but that, through the inadvertence of the grantors, the deeds for it were made to him, and that neither he nor his wife discovered the mistake until some time after the deeds were recorded. He also alleges that when the mistake came to their knowledge his wife urged him to have it corrected, and that for a long time he failed to do so, principally because he believed, and so assured her, that her right to the land was not affected by it. We are satisfied, from our examination of the testimony submitted by the appellee in relation to these and other matters, that the case was for the jury, and that the learned court below did not err in refusing to affirm the plaintiff's second, third, and fourth points. The evidence, if credited, was sufficient to establish a resulting trust; and it showed a situation which prevented the five years' limitation prescribed by the sixth section of the act of April 22, 1856, from running against the cestui que trust in favor of the trustee. The husband's continued recognition of his wife's title to the land rendered her possession of it as complete and effectual against him as if the deeds had been made directly to her. It is well settled that the limitation referred to does not run against a cestui que trust in possession. *Clark v. Trindle*, 52 Pa. St. 492; *Willard v. Willard*, 56 Pa. St. 119; *Douglass v. Lucas*, 63 Pa. St. 9. The possession by a husband and wife of the wife's land is referable to

her title and the marital relation. His occupancy of it results from and accords with his relation to the owner, and it is not in any sense adverse to hers; nor, as between them, will the mere continuance of such occupancy for any space of time operate, in equity or by force of any statute, as an extinguishment or bar to the assertion of her title. In such case, her possession is the dominating one and, as against him, will protect her, although, through his inattention and the mistakes of her vendors, he is clothed with the bare legal title to the property. In other words, in a situation such as we are considering, her possession is sufficient to prevent the limitation from running in his favor. If, after the deeds were recorded and before the conveyance to her of the title he acquired by them, he had sold the land to a bona fide purchaser, the latter would have taken a title unaffected by the trust. But the appellants are not such purchasers. They bought at a sheriff's sale, upon a judgment against the husband, and with notice of the wife's equity. They have, therefore, his title only, and that, as we have seen, cannot prevail against her. In the affirmance of the defendant's points we discover no error. They were drawn with reference to the evidence in the case, and based upon a finding of facts by the jury in accordance with his contention. If the facts were found to be as claimed by him, the legal conclusions deducible from them were correctly stated in the points. The appellant's criticism of the points is ingenious and plausible, but without substantial merit. In their printed argument they admit that "they had the notice which was read at the sheriff's sale," and, certainly, that was as distinct notice of the wife's claim of equitable ownership as could well be given. It was to this notice that the language of the defendant's first point plainly applied, as there was neither evidence nor claim that the appellants had received any other notice of the wife's equitable title.

We think that the learned court below erred in rejecting the appellant's offer to prove acts and declarations of the appellee inconsistent with his testimony. He was the sole defendant, and an important witness in the cause. His testimony was in support of a title which, if established, would defeat their claim. It seems that the offers were overruled on the ground that they did not propose to show his acts and declarations in the presence of his wife. But it is obvious that the purpose of the offers was to discredit him as a witness, by showing that his previous actions and statements were antagonistic to his testimony. It was clearly competent for the appellants to introduce evidence of this character, and it was material for them to do so, because, by destroying his credibility as a witness, they impaired the strength of his defense. We think, also, that it was error to strike out evidence that

previous to 1891 the property was assessed to him. The assessment was a fact to be considered, in connection with his testimony that his wife owned the property.

The learned counsel for the appellee suggests that a proper foundation was not laid for the introduction of evidence to contradict him; but the record shows that the appellants attempted to cross-examine him in relation to alleged acts and declarations inconsistent with his testimony, and that they were not permitted to do so. This attempt was plainly made with the view of obtaining from him an admission or denial of such acts and declarations. The proposed cross-examination was, therefore, pertinent, and should have been allowed. The offers to prove these matters by other persons were not objected to or rejected on the ground now suggested as a basis for their exclusion. It is plain enough that the appellants sought, and were denied an opportunity, to introduce these matters to discredit the appellee as a witness, and it is equally plain that they were not permitted to do so.

We are not satisfied that any error was committed in the rulings complained of in the 6th, 7th, and 8th specifications. In accordance with the foregoing views, we sustain the 1st, 2d, 3d, 4th, and 5th specifications of error, and overrule the remaining specifications. Judgment reversed, and venire facias de novo awarded.

(100 Pa. St. 104)

IN re VACATION OF PUBLIC ROAD IN PALO ALTO.

Appeal of WRIGHT.

(Supreme Court of Pennsylvania. Feb. 26, 1894.)

VACATING STREETS IN BOROUGHS — JURISDICTION OF COURT OF QUARTER SESSIONS — REPEAL OF STATUTES.

1. Act April 3, 1851, authorizing the corporate officers of a borough to lay out necessary roads, and improve the same, and Act April 22, 1856, providing that, when such officers shall be about to open any street, or improve it, they shall apply to the court of quarter sessions, which shall appoint freeholders to assess damages and benefits, are applicable only when such road or street is wholly within a borough, and do not repeal Act June 13, 1836, authorizing courts of quarter sessions, on petition, to change or vacate any road whenever the same shall have become useless.

2. In proceedings to vacate a portion of a street, in which there was only one party—an adjoining property owner—objecting, where it appeared that such vacation would not prevent its use as a private way, that it would remove a dangerous grade crossing, and relieve the public authorities from the expense of keeping the bridge thereon in repair, and that large sums of money had been expended in erecting a new bridge, a report vacating such portion was properly confirmed.

Appeal from court of quarter sessions, Schuylkill county.

In the matter of the vacation of a street within the borough of Palo Alto. The report of reviewers vacating the street was

confirmed, and Thos. F. Wright, administrator of the estate of Benjamin Haywood, appeals. Affirmed.

Opinion of the court, in the court of quarter sessions of Schuylkill county, in the matter of the exceptions to the report of the reviewers, vacating a portion of a road in Palo Alto:

"The proceedings appear to be regular, and in compliance with the act regulating the vacation of streets in this county. No evidence was submitted to show the contrary, nor was there any irregularity pointed out at the time of the argument. In fact, but two questions were presented for the consideration of the court, to wit: has the court jurisdiction? and, if so, should the report be confirmed?

"Palo Alto was incorporated by virtue of the act of May 29, 1854, and made subject to the general borough act of 1851. It is claimed that, as the portion of the road which is to be vacated under this report is now within the borough, the court has no jurisdiction, but the power is in the borough authorities. The act of February 11, 1854, (P. L. 62,) entitled 'An act to consolidate and amend the road laws in the counties of Beaver, Butler, and Lawrence,' was extended to the county of Schuylkill by the act of March 6, 1860, (P. L. 105.) This act contains no restriction on the power of the court to vacate any street, lane, or highway, such as is found in the twenty-second section of the general road law, or Act June 13, 1836.¹ Since the act which confers the power upon the court is much later than the act incorporating the borough of Palo Alto, and in view of the decision in Union St., Pottsville Borough, 140 Pa. St. 525, 21 Atl. 406, there may be ground for discussion as to whether the jurisdiction is really not conferred by our act of 1860.

"There are, however, facts in this case which, in our judgment, render it unnecessary that we should consider or determine the effect of the act of 1860. The short piece of road which it is proposed to vacate begins at the eastern end of the old Palo Alto bridge, and extends over the four or more tracks of the Reading Company, making one of the most dangerous grade crossings in this county. It forms a portion of the public highway which formerly led from the borough of Pottsville, through the borough of Palo Alto, into the borough of Port Carbon and adjoining townships. It never was wholly within the borough of Palo Alto. It neither began in the borough of Palo Alto, nor did it end there. Until quite recently, both its beginning and ending were entirely outside the borough, and now its termination is far beyond the borough limits. It has always been one of the most frequently traveled public highways, over which the people

of the Schuylkill valley passed in coming to the county seat and other points. Through the borough of Palo Alto, it is known as 'Bacon Street.' For years the grade crossing has been regarded as exceedingly dangerous, and public travel has been much interrupted and annoyed. In consequence of this state of affairs, a new bridge has been erected, of a most substantial character, over 500 feet long, and but a short distance away from the old bridge, but which avoids the grade crossing, as it stretches over the river, canal, and all the railway tracks, and connects the same streets, to wit, Worman street, in Pottsville, with Bacon street, in Palo Alto. Already the old bridge, which was partly in the borough of Pottsville and partly in the borough of Palo Alto, has been vacated, and the new bridge and its approaches opened. These facts appear from the report and the map, and are not, and cannot be, denied. In addition to this, it may be truthfully said that this road was in existence long prior to the incorporation of Palo Alto. It is now claimed by the exceptant that a part of this road, to wit, the bridge, has been recently vacated. It now begins in the borough of Palo Alto, and therefore the court has no jurisdiction. No one ever questioned the jurisdiction of the court when we had before us the report vacating the old bridge, and opening the new bridge and its approaches. If we had jurisdiction then, we feel confident we have now, for, had that report vacated 150 feet more than it did, it would have included the part now in question, and no possible question of jurisdiction could have arisen.

"We think, however, the authorities cited by the exceptants determine this question clearly and fully. The leading case upon this subject is the Somerset and Stoytown Road, 74 Pa. St. 61, in which the proceeding was to widen and straighten a road from a point in Somerset borough to a point in Somerset township. After considering the acts of 1851 and 1856,² and fully discussing the subject of repeal, the court says: 'But by streets and alleys "therein"—that is, within the borough limits—must necessarily be meant such as begin and end therein, and not such public roads as are or may be opened through the borough, of which a part only is within the borough limits. As to such roads, there is nothing in either of these acts to repeal the general law, or repugnant to it. In laying out and opening such a road between distant termini, though it may be laid out through a borough, or in widening or

¹Act June 13, 1836, authorizes courts of quarter sessions, on petition, to change or vacate any road, whenever the same shall have become useless.

²Act April 3, 1851, authorizes the corporate officers of a borough to survey and lay out such roads and streets as they may deem necessary, and to provide for the widening and straightening of the same; and Act April 22, 1856, provides that when such officers shall be about to open any street, or widen and extend it, they shall apply to the court of quarter sessions, which shall appoint freeholders to assess damages and benefits.

straightening one already laid out and opened, to require that, as to the part within the borough, one proceeding shall be followed, and, as to so much as lies without, another and different proceeding, would be to introduce unnecessary complication.' It was decided that, as one of the termini was beyond the borough limits, the jurisdiction was in the court, although the other of the termini was within the borough. Of course, the rule would be the same when the proceeding is to vacate, and therefore the case in hand seems to be the very counterpart of the case above cited. This case is cited and approved in *South Chester Road*, 80 Pa. St. 370. The case of *Osage St.*, 90 Pa. St. 114, so much relied upon, is a proceeding to vacate; and, to distinguish it from the case before us, we need but give a few extracts from the opinion. Justice Woodward says: 'Osage street was dedicated to the use of the public by Charles Hacker by deed executed on the 21st day of November, 1864, and duly recorded, and was adopted as one of the streets of South Bethlehem on the 20th of September, 1875.' The street existed, therefore, by virtue of an express grant, and came directly within the province of the twenty-second section of the act of 1836, which forbids its vacation by court. But, in addition to this, it is one of the streets of the borough of South Bethlehem by adoption, and wholly within the borough, having its beginning and ending within the borough limits. It is therefore directly within the ruling of the *Somerset and Stoystown Road Case*, *supra*. In the *Parkeburg Borough Case*, 124 Pa. St. 525, 17 Atl. 27, the supreme court cite and approve both the foregoing cases, and Justice Clark strongly states the court's conclusion in this language: 'While the exclusive power of the authorities of a borough to enact and ordain streets, alleys, etc., under the act of 1851, is undoubted, by streets, alleys, etc., "therein," is meant such only as begin and end within the limits of the municipality. This exclusive provision does not extend to public roads laid out through, or to a point within, the borough limits. The court of quarter sessions has undoubted authority, in such cases, under the general road law of 1836.' He then proceeds to show that, under the general borough law of 1851, this right is recognized, in the twenty-seventh section. We are therefore led to the conclusion that under these authorities the jurisdiction, in this case, is in the quarter sessions, since the road is not one wholly within the borough limits.

"Should the court approve of the report of the viewers in opposition to the vacation, or the reviewers recommending the vacation? We have but one party objecting to this va-

cation, to wit, the representative of the Haywood estate. The estate is interested in real estate adjoining the street proposed to be vacated, upon both sides. In fact, no other property owners adjoin, except the railway company's tracks or right of way. The vacation of this small piece of street will not prevent its use as a private road from the crossing to Worman street. The general borough act of 1851 does not repeal the general road law of 1836, authorizing the court of quarter sessions to lay out private roads, although such private roads be entirely within the borough limits. See *Private Road in Huntingdon Borough*, 149 Pa. St. 133, 24 Atl. 189. By proper action, the street and old bridge may still be available to this particular property. The vacation will, in such case, but remove the dangerous grade crossing, and relieve the public authorities from the necessity of keeping the road and bridge in repair. The boroughs of Pottsville and Palo Alto, the county officials, and the railway company, all desire and urge its vacation. Large sums of money have been contributed by these boroughs, the company, the county, and the electric railway company, together amounting to many thousands of dollars, for the construction of the new bridge. The object of all this was to be relieved of the serious inconvenience and danger attending public travel at this crossing. Under these circumstances, the assent of the court ought not now to be withheld, when this public improvement has thus been obtained.

"It is proper to say that, in part, the statements herein contained in relation to the incorporation of Palo Alto, the original termini of the road, the record of the vacation of the old bridge, and the opening of the new, are based upon matters which counsel assented to, and which are therefore regarded as facts in the case, it being well known that the truth thereof could readily be established.

"And now, September 14, 1893, the report of the reviewers is hereby confirmed, the exceptions being overruled, for the reasons above given. September 14, 1893. Haywood estate excepts. Bill sealed. By the court: O. P. Bechtel. [Seal.]"

P. M. Dunn, for appellant. F. W. Bechtel and John F. Whalen, for appellee.

PER CURIAM. The facts of this case, and the questions arising thereon, are clearly and accurately stated by the learned judge of the court of quarter sessions. In concluding to dismiss the exceptions, and confirm the report of the viewers, for the reasons stated in his opinion, we think he was clearly right, and the decree is affirmed thereon. Decree affirmed, on the opinion of the court below, with costs to be paid by appellant.

(160 Pa. St. 150)

HINCHMAN v. PHILADELPHIA & W. O. T. R. CO.

(Supreme Court of Pennsylvania. March 5, 1894.)

HORSE AND STREET RAILROADS—FRANCHISE—NONUSER.

1. Act March 15, 1865, empowered the defendant turnpike company to buy the road, property, and franchise of the D. Pass. R. Co. at any future judicial sale, defendant thereupon to become the absolute owner thereof, with the same franchises and restrictions as were the D. Co.'s, and further permitting defendant to remove the track and superstructure of the railroad, and dispose of the materials, on condition that it should, within three months after such removal, put that part of the road in its former good order. *Held*, that the act expressly waived forfeiture of the franchise by nonuser, and defendant, having bought out the D. Co. at judicial sale, removed and sold the material, and restored the highway, could, in 1893, rebuild the railroad under the old franchise.

2. Injunction will not lie, at the suit of a private person, to enforce forfeiture of a charter granted to a corporation for public purposes.

Appeal from court of common pleas, Delaware county.

Bill by Charles S. Hinchman against the Philadelphia & West Chester Turnpike Road Company for an injunction. Demurrer sustained, and bill dismissed. Plaintiff appeals. Affirmed.

Garrett E. Smedley and J. McGregor Gibb, for appellant. A. Lewis Smith, for appellee.

GREEN, J. By the act of March 15, 1865, (P. L. p. 356,) the defendant corporation was expressly authorized and empowered to purchase the road, property, and franchises of the Delaware County Passenger Railroad Company at any judicial sale thereof to be thereafter named. The act declared that the said turnpike road company should thereupon become and be the absolute owners of said road, property, and franchises, and invested with the like powers, privileges, and immunities, and subject to the same restrictions and conditions, as the passenger railroad company was, before such sale, invested with and subject to. The act further provided "that the said turnpike road company may remove the tracks and superstructure of said railroad and dispose of the materials thereof, and of the other property so purchased, upon condition, however, that they shall within three months after the removal of any part of said track and superstructure, restore that part of their road to as good order and condition for public travel as the same was in before said railroad track was laid." It is alleged in the bill in this case that the road, property, and franchises of the passenger railroad company were duly sold under a mortgage thereon, and were purchased by the turnpike company under the authority of the act of 1865, and that subsequently the turnpike company sold the cars, horses, and harness purchased from the passenger railroad company, and also the rails

and other iron lately belonging to the passenger railroad company. No complaint is made that the turnpike company did not place its road in as good condition for use as it was before the passenger railroad was built. In 1893 the turnpike company resolved to rebuild the railroad, and this bill is filed for an injunction to prevent them from so doing, on the ground that the franchise to build a passenger railroad was forfeited by nonuser.

The passenger road was built and run on the turnpike road. It is fair to assume, though unimportant to this contention, that, having proved unremunerative, it was abandoned in 1865, but its franchises were preserved by the legislation above referred to. The act of 1865 imposed no restrictions or limitations upon a re-exercise of those franchises. On the contrary, it expressly authorized those things to be done which, ordinarily, would be regarded as evidence of an intention to abandon. When, therefore, the turnpike company sold the cars, horses, harness, rails, and iron formerly belonging to the railroad company, they did so in pursuance of an express legislative authority, and incurred thereby no implication of abandonment or other disability as to the future exercise of their franchise. It follows that when the turnpike company now desires to re-exercise the franchise of the railroad company, which belongs to it by a lawful and unrestricted purchase, it cannot be held to be subject to an implication of abandonment, and therefore of forfeiture, resulting from a long-continued nonexercise of the franchise. Such nonexercise, being a necessary, and therefore an intended, result of the authorized sale of the cars, horses, harness, rails, and other iron of the railroad company, and the removal of the tracks and superstructure of the railroad, also authorized by the act of 1865, cannot possibly be a cause of forfeiture. Notwithstanding these acts thus legitimated, the franchise of the railroad continued, and was simply suspended, during its period of nonexercise, and may therefore be resumed at pleasure. The right to acquire the franchise, and the concurring right to sell the appliances and move the tracks of the railroad company, being conferred by the same act of legislation, cannot be held to be inconsistent with each other, and therefore may coexist without any hostile implication. In this essential feature the present case differs from all the cases of forfeiture arising from disuse of the corporate franchise. The decisions in those cases are therefore inapplicable to the present. The nineteenth section of the act of 1849 has no application—First, because this company was not incorporated under that act; and, secondly, because it has express legislative authority to do the very things which are set up as the cause of forfeiture. We also fully agree with the learned court below that no charter to a corporation for public purposes can be forfeited ex-

cept by the commonwealth in a proceeding for that direct purpose. *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 183, and many other cases. Judgment affirmed.

(160 Pa. St. 124)

HARRISON et al. v. REEVES et al.

(Supreme Court of Pennsylvania. March 5, 1894.)

CONTRACT TO FURNISH MATERIALS—CONSTRUCTION—REDUCTION OF PRICE.

A building contractor who has arranged with a subcontractor for materials for fireplaces, to be estimated at a certain price for each fireplace, the owner of the building to "have the privilege of selecting all these materials within the above figures," is entitled, in settling with the subcontractor, to a credit for the amount by which such estimated price exceeds the price of fireplace materials selected by the owner, and actually used.

Appeal from court of common pleas, Philadelphia county; Gordon, Judge.

Assumpsit by Charles H. Harrison and C. W. Dorland, trading as W. H. Harrison & Bro., against Stacy, Henry, and Albert A. Reeves, trading as Stacy Reeves & Sons. Judgment for plaintiffs. Defendants appeal. Reversed.

The facts were as follows: Mrs. Sinnickson being about to erect a house in Philadelphia, the building contract, together with the plans and specifications, were prepared therefor by Addison Hutton, architect. The pertinent parts were as follows: "The contractor shall execute the work in accordance with the drawings and the following specifications, prepared by Addison Hutton, architect, to whom all questions as to their true interpretation shall be referred, and whose decision thereupon shall be final and conclusive, and thoroughly binding upon said contractor and his subcontractors. He shall make changes from original design, if so required by the owner, without any claim for violation of the contract. * * * Payments on account will be made upon certificates issued by the architect. * * * Tiles: * * *

The new tiles for fireplace fronts and hearths to be estimated at \$40 each, each fireplace set complete, and the grates or backs and jambs are to be included also in this proposal at \$40 each. The owner is to have the privilege of selecting these articles within the above figures." The contract, plans, and specifications having been submitted by Stacy Reeves & Sons, who were to undertake the whole work, to various persons, bids were received from such persons for doing portions thereof as subcontractors. Among these persons were W. H. Harrison & Bro., the plaintiffs, who, July 11, 1890, made a bid in writing, engaging to supply and set in the said house, according to the said plans and specifications, the tile work in kitchen and bath rooms, the backs and jambs and tile hearths and facings, the range work and boiler, and to remove the fireplace in the parlor, dining

room, and library, with the tile hearths and facings, for \$1,768. July 17, 1890, they agreed to do certain work (in part included in their bid of July 11, 1890) for \$265; the two contracts, taken together, to do the whole work therein specified being \$1,778. During the progress of the work, the Harrisons furnished other work and materials, not included in their first estimates, which (less certain work which was included, but was not performed, valued at \$265) amounted to \$889.50. The total amount, therefore, which would have been due them if all the work had been done precisely as originally estimated for by plaintiffs, and without any selection having been made by Mrs. Sinnickson, (less the \$265,) would have been \$2,667.50; but Mrs. Sinnickson selected fireplaces at lower prices satisfactory to her, and plaintiffs, by their letter of May 6, 1891, estimated for 13 fireplaces at \$597, giving the prices at which they would furnish each. This proposal was accepted by the architect by letter of May 9, 1891. There was a subsequent credit of \$25, reducing this bid from \$597 to \$572. The 13 fireplaces, according to the original estimates, were to cost \$80 each, or \$1,040 in all. The value of the work actually done (according to Mrs. Sinnickson's selections, and plaintiffs' subsequent bids) amounted, not to \$1,040, but to \$572,—a difference of \$468. The verdict, under the direction of the court, was in favor of plaintiffs for \$704.14. Defendants also offered to prove that, the matters in controversy having been submitted to the architect under the provisions of the original contract and specifications, an award was made that nothing is due plaintiffs by defendants. The court rejected this testimony. Plaintiffs admitted that they had examined the contract and specifications before making their bids, though they averred that they had not noticed this particular provision requiring submission to the architect.

Edward F. Pugh and Henry Flanders, for appellants. Wm. Henry Lex, for appellees.

GREEN, J. We think the learned court below was in error in giving a binding instruction to the jury to find for the plaintiffs the designated sum of \$645. The amount, if any, to which the plaintiffs were entitled, was a disputed question of fact, which could only be decided by the jury. There was conflicting testimony on that subject; the defendants claiming that the plaintiffs had been paid in full, and were entitled to nothing. The credibility of the witnesses, the several payments made on account, the question whether the plaintiffs had furnished fireplace fronts and hearths at \$40 each, and grates or backs and jambs at \$40 each, or others in their places at a lower price selected by Mrs. Sinnickson, in conformity with a right of such selection on her part under the original contract, were all matters for the consideration of the jury. The question

whether Mrs. Sinnickson had a right to select fronts and hearths, and grates or backs and jambs, at a lower price than \$40 each, and to have the contract price abated by the difference in price, was a question of the construction of the contract, and therefore for the court. But that question is not presented in the charge, nor in any points submitted on either side. We are very clear, however, that she did have the right to make such selection, and, if she did so select, she was entitled to have credit on the contract price for the difference in the price as against the original contractors; and that they had the right to a similar credit against the plaintiffs, who contracted with them for this part of the work. The privilege of selecting these articles at a lower price than \$40 each would be meaningless if she was to receive no benefit from such selection.

It is somewhat doubtful whether the plaintiffs would be bound by the conclusive arbitration of the architect. We have not the whole contract between the owner and the defendants before us, and do not know whether a knowledge of its entire contents would affect the question or not; but the letter of the plaintiffs to the defendants dated July 11, 1890, distinctly proposed to supply the work and materials in question according to the plans and specifications of the architect, and the subsequent correspondence between the plaintiffs and the architect indicates that all the plaintiffs' work was furnished under and in accordance with the plans and specifications of the architect, and subject to his immediate supervision and control. Moreover, the plaintiffs' letter and proposal to the architect dated May 6, 1891, contain a distinct memorandum of the selection by Mrs. Sinnickson of the articles in question at much reduced prices, recognized and acknowledged by the plaintiffs, and, as we understand, an agreement to place them all in at the prices named, amounting to \$597, instead of \$1,040, which would be the original contract price at \$40 each. We are at a loss to discover upon what principle the plaintiffs can claim to recover \$1,040 for work which they apparently agreed in writing to do for \$597. The idea that the owner, if she selected articles costing less than \$1,040, was nevertheless bound to pay that price because the expression in the contract giving her the right of selection was "within the above figures," is altogether untenable. We cannot sanction it in any point of view. Now, while the determination of such a question as this was probably not within the function of the architect, acting as arbitrator, we incline to think that the defendants' offer to prove the reference to, and action by, the arbitrator should have been received, leaving the consideration of its effect for the subsequent action of the court upon all the testimony. It probably would have but little effect on the cause, because the contention between the parties seems to turn upon the

question whether the plaintiffs are entitled to charge the defendants \$1,040 for the fireplace fronts and grates, or backs and jambs, or \$572; and on that subject we think, as we are at present advised, that they can only charge the lower sum. The plaintiff Charles H. Harrison, being on the witness stand, admitted that he had seen and read the original specifications, and he read from them on the stand the portion relating to this subject. It is as follows: "The new tiles for fireplace fronts and hearths to be estimated at \$40 each, each fireplace set complete, and the grates or backs and jambs are to be included also in this proposal at \$40 each. The owner is to have the privilege of selecting all these articles within the above figures." It will be observed that the figure \$40 each was only an estimated figure, and was subject to the owner's right to select all the articles "within the above figures;" that is, at lower figures. The witnesses also admitted that the owner had the right of selection within the figures, that she had made such selection, and that the fireplaces, backs, and jambs which she so selected he had put in. His own proposition of May 6, 1891, to put these in at a cost of \$597, was followed by a letter from the architect, dated May 9, 1891, directing the plaintiffs to put them in at that price, and to do it as a part of the plaintiffs' contract with Stacy Reeves & Sons, reporting the same to them. As we understand, all this was done, and it certainly would be a matter for the jury to decide whether the work was put in at the price thus proposed, and accepted or not. The assignments of error are all sustained. Judgment reversed, and new venire awarded.

(160 Pa. St. 129)

SOMMER v. GILMORE.

(Supreme Court of Pennsylvania. March 5, 1894.)

GARNISHMENT—LIABILITIES OF GARNISHEE—EVIDENCE OF COLLUSION—TRIAL.

1. In garnishment, it appeared that, after plaintiff had attached a debt due the principal defendant on a judgment entered on a judgment note, the garnishee denied his indebtedness, paid off a previous garnisher, caused the judgment to be opened, and obtained a verdict in his favor; that there were variations between the testimony of the garnishee and his previous affidavits in the suits against him by the principal defendant and the previous attaching garnisher; and that the garnishee had made statements which tended to show an arrangement between the garnishee and the principal defendant by which the verdict for the garnishee at the retrial was obtained. *Held*, that such evidence was competent to show whether the verdict at the retrial was obtained by fraud.

2. Declarations of the garnishee and the principal debtor in reference to the garnishee's debt are competent evidence, where ground has been laid for a claim of fraudulent combination between them to deprive the garnisher of the benefit of his attachment.

3. It is error to neither affirm nor refuse requests to charge.

Appeal from court of common pleas, Philadelphia county.

Garnishment proceedings by Andrew Sommer, to the use of Mary F. Lathrop, as administratrix of John Lathrop, deceased, against William J. Gilmore, as garnishee of Ransom Rogers. From a judgment for the garnishee, plaintiff appeals. Reversed.

William J. Gilmore was lessee of the National Theater, Philadelphia, at a rental of \$170 per week. Gilmore was a young man without means, and his security on the lease, and financial backer, was Ransom Rogers, a lawyer. Gilmore was unsuccessful in the business, and on June 4, 1875, at a settlement between Gilmore and Rogers, it was found that Gilmore was indebted to Rogers in the sum of \$5,381.21, for which Gilmore executed, in favor of Rogers, a judgment note. Judgment was entered on the note by Rogers against Gilmore, to June term, 1875, (No. 194,) common pleas No. 2, of Philadelphia county, and execution issued thereon in September, 1875, by Rogers, which was returned by the sheriff, "Nulla bona." From June, 1875, until 1882, Gilmore was insolvent. Soon after the judgment note was executed, Gilmore left Philadelphia, and went to Baltimore, where he again failed, in 1879, and was then followed by his creditors to Philadelphia. About 1880, Gilmore, having secured a half interest in the lease of the Grand Central Theater, which, on account of his creditors, he held in the name of another, (Mr. Gallagher,) began to make money rapidly. On October 10, 1882, Mary F. Lathrop, the plaintiff herein,—a judgment creditor of Rogers,—attached in the hands of Gilmore the debt due by him to Rogers on the judgment of Rogers v. Gilmore, aforesaid. In 1879 Rogers had become a fugitive from justice, and had never returned to Philadelphia. During his absence the said Rogers made frequent inquiries of his friends in Philadelphia about the financial condition of Gilmore, with a view of collecting his judgment, if possible, and as late as December 5, 1881, he wrote a letter from Chicago, Ill., to D. B. Taylor, Esq., of Philadelphia, in reference to the collection of the said judgment, in which letter Rogers stated that Gilmore was also indebted to him on an open and unsettled account incurred subsequently to the settlement out of which the judgment referred to grew.

Reeve L. Knight, having obtained judgment against Ransom Rogers on December 3, 1881, issued an attachment *sur* judgment, and attached, in the hands of Gilmore, this same debt due on the same judgment of Rogers v. Gilmore. On September 28, 1882, Lydia P. Palmer issued a foreign attachment against Rogers, and attached the debt due by Gilmore to said Rogers, as represented by said judgment. These three claims against Rogers, together, amounted to over \$11,000, with interest, or exceeded in amount the debt due by Gilmore to Rogers in the said judgment. Gilmore, seeing this in the fall of 1882, after the service of the said attachments on him, told his partner, Mr. Gall-

agher, that there was nothing which Rogers could then receive on his judgment note against him, and that he (Gilmore) thought he could find him, (Rogers,) and that he would go and look him up, and see if he could not make an arrangement with him. Gilmore did go. He was gone three or four days. When he returned to Philadelphia, he informed Mr. Gallagher that he had found Rogers in Virginia; that he made arrangements with Rogers, and brought him to Philadelphia; that he (Gilmore) telegraphed his attorney, Mr. Kneass, at Philadelphia, to secure Mr. Hopple to act as attorney for Rogers, and to meet the train at the station at Philadelphia; that the attorney met the train, and as Rogers did not want to get off the cars, fearing that he might be arrested, the attorney got on the train, and rode on to Trenton, N. J., to get instructions from Rogers. In pursuance of Gilmore's understanding with Rogers, and in pursuance of Rogers' instruction to him, the attorney of Rogers united with Mr. Kneass, the attorney of Gilmore, in an application to common pleas No. 2 of Philadelphia to open the said judgment of Rogers v. Gilmore, and let the defendant into a defense. Both the attorney for Rogers, the plaintiff, and the attorney for Gilmore, the defendant, entered their appearances before the commissioners, taking depositions under the rule, on behalf of the rule to open the judgment. The only person permitted by the court of common pleas No. 2 to appear and oppose the joint efforts of the plaintiff and defendant to open and set aside the judgment of Rogers v. Gilmore was Reeve L. Knight, he having obtained judgment against Gilmore, as garnishee. The depositions under the rule to open the judgment were protracted. Finally, in 1888, the said Gilmore paid Reeve L. Knight (the only attaching creditor who was permitted by common pleas No. 2 to defend the judgment) \$850. The amount of Knight's judgment against said Rogers was \$724.36. Reeve L. Knight, the only person who could oppose the rule to open the said judgment, having thus been removed from the case, the rule to open the judgment was made absolute, and on the 12th day of November, 1888, a jury trial was had on the judgment note, which resulted in a verdict for Gilmore.

From the date of the said judgment note of \$5,381.21 up almost to the date of the said attachments against Gilmore, garnishee, Rogers, on numerous occasions, had declared that Gilmore was justly indebted to him in the amount of the said judgment note, and also on a liability subsequently incurred, and issued execution on said judgment; and on December 5, 1881, Rogers wrote from Chicago, Ill., to D. B. Taylor, Esq., to the same effect, and refused to give Mr. Taylor one-half of the said judgment against Gilmore for collection. Notwithstanding these facts, after the attachments were served on Gilmore, and after Gilmore found Rogers in Virginia

and made his arrangements, with him, Rogers, through his counsel, united with Gilmore to open said judgment and procure a verdict in favor of Gilmore; and at the trial in common pleas No. 2, November 12, 1888, the plaintiff, Rogers, through his counsel, stated to the jury that the said note was given without any consideration, and that their verdict ought to be given in favor of Gilmore, the defendant. At no time prior to the service of the said attachments on Gilmore did he ever deny his indebtedness on the said judgment note to Rogers. Nor did Gilmore, at the time when execution was issued on the said judgment note, in September, 1875, or at any time thereafter, either deny his said indebtedness, or make any effort to have the said judgment opened. And, immediately after the attachments were served on him, Gilmore admitted to his partner, Mr. Gallagher, in 1882, that he was indebted to Rogers on his note, and said that Rogers could then get nothing on account of the debt. After the attachments were served on Gilmore, and before he found Rogers in Virginia, Gilmore made two affidavits in reference to the consideration of the said judgment note. At the trial in *Rogers v. Gilmore*, November 12, 1888, after he had found Rogers, and arranged with him, Gilmore told a story as to the consideration of the said judgment note entirely different from his said affidavits.

The court below ruled out all offers by the plaintiff to prove the admissions and declarations, verbal and written, made by Rogers at and from the date of said judgment note up to the time of the service of the said three attachments on Gilmore, and up to the time of the combination made between Rogers and Gilmore to set aside the judgment of *Rogers v. Gilmore*, which offers were for the purpose of showing that the acts done and statements made by Rogers in pursuance of his arrangement with Gilmore, which resulted in a verdict in favor of Gilmore, were false and fraudulent.

Plaintiff requested the following charges, but the trial court neither gave them nor considered them in the charge: "First. If the jury find that the trial in common pleas No. 2, November 12, 1888, in case *Rogers v. Gilmore*, on the judgment note of \$5,381.21 executed by Gilmore in favor of Rogers, was a sham trial, and that the verdict therein was obtained by a combination between said Rogers and Gilmore for the purpose of defrauding the plaintiff and the other creditors who had previously attached the debt due on the said judgment in the said case of *Rogers v. Gilmore*, then the verdict in favor of Gilmore in said case is null and void as to this plaintiff, and she is entitled to recover, notwithstanding said verdict. Second. The entire series of acts and declarations made by either Rogers or Gilmore in reference to the consideration of the said judgment note of \$5,381.21 before and after the plaintiff and the other creditors attached said judgment are to

be considered together, for the purpose of determining whether or not the testimony of Gilmore—the only witness—at the trial in *Rogers v. Gilmore* as to the consideration of said note of \$5,381.21, and the statements made by Rogers, or by his directions, at said trial, as to the consideration of said note, were false, and known to them to be false at the time, and made by them (the said Rogers and Gilmore) to carry out a combination to defraud the plaintiff and the other attaching creditors. Third. If the jury finds that the evidence shows or tends to show that there was a combination between Rogers and Gilmore to open the judgment in the case of *Rogers v. Gilmore*, and obtain a verdict in favor of Gilmore on said judgment note of \$5,381.21, on the ground that said note was given without consideration, for the purpose of defrauding the plaintiff and the other attaching creditors, then all the acts, declarations, letters, and admissions of either Rogers or Gilmore, which show and tend to show that Gilmore was, at the time the attachment was served on him in this case, justly indebted to Rogers, and that said note was given for a just debt, and was justly due, and that the said trial was a sham trial, are evidence to bind the other party to that sham trial, although not made in his presence. Fourth. If the jury find that Gilmore was indebted to Rogers on the said note \$5,381.21 at the time it was attached by plaintiff in the hands of Gilmore, then the plaintiff in this case is entitled to a verdict against Gilmore for the amount of her judgment against Rogers, and interest, the debt due by Gilmore to Rogers being larger in amount than the debt due by Rogers to the plaintiff."

S. Morris Waln, J. S. Freemann, and John F. Keator, for appellant.

MITCHELL, J. This case grows out of the same transactions, and raises the same questions, as *Palmer v. Gilmore*, 148 Pa. St. 48, 23 Atl. 1041; and the evidence offered on the part of plaintiff was admissible, for the reasons there given. The defense—or one of the defenses—of Gilmore to the note given by him to Rogers was that it never represented a real debt. The letter of Rogers to Taylor, and the offer of the testimony of Mrs. Palmer, tended to prove the contrary, and, ground having been laid for the claim of fraudulent combination between Gilmore and Rogers to deprive plaintiff of the benefit of his attachment, the declarations, written or verbal, of either, in reference to the debt, became competent evidence.

The plaintiff presented four points, of which no notice was taken; and we cannot regard the charge as even in substance covering them, even if it were otherwise a fair and judicial presentation of the case. They were entitled to a definite answer, either in affirmance or refusal. Judgment reversed, and venire de novo awarded.

(18 R. I. 519)

MOWRY v. HARRIS.

(Supreme Court of Rhode Island. March 17, 1894.)

ACTION BY ADMINISTRATOR — LIMITATIONS — APPOINTMENT OF ADMINISTRATOR—APPEAL.

The "one year after the granting of letters * * * of administration" allowed an administrator by Pub. St. c. 205, § 7, within which to commence an action on a claim, which otherwise would be barred, commences to run on the appointment and qualification of an administrator, though the decree appointing him is reversed on appeal, Pub. St. c. 181, § 7, declaring that in case of an appeal from a decree of probate its operation shall be suspended till affirmed, provided that if the decree grant letters of administration the administrator on giving bond may collect credits of intestate as though no appeal had been taken.

Action by Marquis D. L. Mowry, administrator, against Wanton M. Harris. Defendant demurs to plaintiff's replication to defendant's pleas of limitation. Demurrer sustained.

Marquis D. L. Mowry, in pro. per. Cooke & Angell, for defendant.

TILLINGHAST, J. This is assumpsit to recover the amount claimed to be due on a promissory note for the sum of \$221, dated April 6, 1885, and payable on demand, with interest. In addition to the plea of the general issue, the defendant has filed two pleas in bar, in the first of which he sets up that at any time within six years he never promised in manner and form as the plaintiff has declared against him, and in the second of which he sets up that the plaintiff's cause of action, if any he has, did not accrue to him at any time within six years next before the commencement of his said action; to which said pleas the plaintiff has filed the following replication, viz.: "And the said plaintiff, for replication to the defendant's second and third pleas above pleaded, says that by anything by the said Wanton M. Harris, defendant, in his second and third pleas above pleaded in bar alleged ought not to be precluded from having and maintaining his action aforesaid against the said Wanton M. Harris, defendant, because he says that the said Van Buren Mowry, to whom the said action accrued, and before the time limited for bringing the said action on the 17th day of January, 1890, at Smithfield, in the county of Providence, and state of Rhode Island, died, and the several causes of action in said declaration mentioned accrued to said Van Buren Mowry within six years next preceding the time of the death of said Van Buren Mowry, and the said several causes of action survived the death of said Van Buren Mowry, and an action thereof and thereon might have been sued and prosecuted by said Van Buren Mowry at the time of his death; and after the death of said Van Buren Mowry, Wanton M. Harris, of the city of Woonsocket, in the county of Providence, and others, made application in writing to the court of probate

of said town of Smithfield, praying that Daniel W. Latham, of said town of Smithfield, might be appointed administrator of the estate of said Van Buren Mowry, deceased, and said court of probate, on the 29th day of March, 1890, made a decree appointing said Daniel W. Latham administrator of the estate of said Van Buren Mowry, deceased, and said Daniel W. Latham qualified under said appointment according to law; and Marquis D. L. Mowry, of the town of North Smithfield, in said county and state, guardian of the person and estate of Edwin H. Mowry, of said North Smithfield, brother and next of kin of said Van Buren Mowry, deceased, appealed from said decree of said court of probate so appointing said Latham administrator to the October term of the supreme court for the county of Providence, to be holden at Providence, within and for the county of Providence, on the first Monday of October, 1890, and duly entered his appeal at said term of said supreme court, and said appeal was continued from term to term of said court until the April term thereof, 1891; and such proceedings were had thereon upon said appeal at said April term that on August 1, 1891, said supreme court ordered that the decree of the probate court of Smithfield appointing Daniel W. Latham administrator be reversed, and that said probate court is directed to appoint the said Marquis D. L. Mowry, if a suitable person; and thereupon such proceedings were had by said court of probate that on the 26th day of September, 1891, said court of probate appointed Marquis D. L. Mowry, the plaintiff, administrator of the estate of Van Buren Mowry, deceased, and said Marquis D. L. Mowry qualified under said appointment according to law, and within one year after granting letters of administration to said plaintiff, to wit, on the 21st day of November, 1891, the plaintiff commenced his present action, and declared in the same for the several causes of action aforementioned; and all this he is ready to verify; wherefore he prays judgment, and his damages," etc., "to be adjudged to him," etc. To this replication the defendant has filed the following demurrer, viz.: "And the said defendant saith that the replication of the plaintiff to the second and third pleas of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that he, the said defendant, is not bound by law to answer the same, and he states and shows to the court here the following cause of demurrer in law to the replication, that is to say: The period of time between the qualification of Daniel W. Latham as administrator upon the estate of Van Buren Mowry, deceased, and the time when the supreme court reversed the decree appointing him such administrator, is included

within the six years provided by law in such cases for the commencement of actions, and the extension of one year to said term referred to in said replication, and therefore said action was not brought within said extended term of one year, and this he is ready to verify; wherefore, by reason of the insufficiency of the said replication in this behalf, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him," etc.

The question as to the sufficiency of the plaintiff's replication to said plea in bar depends mainly upon the construction to be put upon the provisions of Pub. St. c. 181, § 7. Said section is as follows, viz.: "In case any order, decree or determination of any court of probate shall be appealed from, the operation of such order or decree shall be suspended until the same shall be affirmed by the supreme court: provided, that if the decree shall be for granting letters testamentary, of administration or guardianship, the executor, administrator or guardian on giving bond according to law, shall have power to collect, receive and take possession of all the rights, credits and estates of the testator, intestate or ward, which by law he could have collected, received or taken possession of, provided no appeal had been made, and to take proper care of the ward and his family pending such appeal." At the date of the death of said Van Buren Mowry the time limited by law for bringing an action on the note in question had not expired. By virtue of the provision of Pub. St. c. 205, § 7, (now, as amended, being chapter 14, § 8, of the judiciary act,) the operation of the general statute of limitations, which had commenced to run against said note, was suspended until the appointment and qualification of an administrator on the estate of the deceased, after which said administrator was allowed one year in which to commence his action thereon. Failing to commence said action within this time, the note in question would be outlawed. Said replication shows that on the 29th of March, 1890, Daniel W. Latham was appointed administrator of the estate of said Van Buren Mowry, and duly qualified according to law thereunder; that from this appointment an appeal was taken by said Marquis D. L. Mowry, guardian of the person and estate of Edwin H. Mowry, the next of kin of the deceased, which appeal was thereafterwards, on the 26th day of September, 1891, by this court decided in favor of the appellant; (see 17 R. I. 480, 23 Atl. 13;) that on the 26th of September, 1891, said Mowry was duly appointed administrator of the estate of said Van Buren Mowry, and thereafterwards, on the 21st of November, 1891, which was 6 years, 7 months, and 15 days after the date of said note, and 1 year, 7 months, and 22 days after the appointment and qualification of said Latham, commenced the action in question. The plaintiff contends that, as the de-

cree of the said probate court appointing said Latham administrator was reversed by this court, the latter never was administrator of the estate of the deceased, the effect of the reversal being to vacate the decree in toto; and hence that the "one year after the granting of letters of administration" mentioned in the statute did not commence to run until the appointment of said Marquis D. L. Mowry as administrator on said estate. In support of this position he cites *Jones v. Dyer*, 20 Ala. 373; 1 *Williams, Ex'rs*, pp. 657, 658; *Washburn v. Dorsey*, 8 *Smedes & M.* 214; *Thomas v. Butler*, Vent. 217-219; *Packman's Case*, 6 *Coke*, 19a; *Digby v. Wray*, 3 *Bac. Abr.* 51; 2 *Woerner, Adm'n*, p. 1203, § 547, and cases cited; *Tarbox v. Fisher*, 50 *Me.* 237; *Paine v. Cowdin*, 17 *Pick.* 142; *Arnold v. Sabin*, 4 *Cush.* 46; *Calvert v. Williams*, 9 *Gill.* 172; 1 *Williams, Ex'rs*, 405; *Martin v. Fuller*, Comb. 371; *Stone v. Spillman*, 16 *Tex.* 432; *Skinner v. Bland*, 87 *N. C.* 168. These authorities are to the effect that an appeal, when properly perfected, removes a case wholly and absolutely from the trial court, and places it completely within the jurisdiction of the appellate tribunal; that is, it becomes a supersedeas or a stay of proceedings to enforce execution, and hence the jurisdiction and control of the court below entirely ceases. That such is the general rule of law there is no question. See *Elliott*, App. Proc. § 541, and cases in note 1. But that this rule has been materially modified by the provisions of the statute above quoted is clearly evident, and hence said authorities are not in point; for, while said statute declares that in case of an appeal the operation of the order or decree appealed from shall be suspended until affirmed by the supreme court, it also expressly provides that if the decree shall be for granting letters of administration, the administrator, on giving bond, shall have power to collect, receive, and take possession of all the rights, credits, and estates of the testator which by law he could have collected, received, or taken possession of, provided no appeal had been made. The powers of an administrator, then, in so far as they are enumerated in the proviso of said statute, are precisely the same after as before the appeal is taken; in other words, he continues to be the administrator for said purposes the same as though no appeal had been taken. See 2 *Woerner, Adm'n*, § 548. Until the reversal by this court of the decree of the probate court appointing Henry W. Latham administrator, as aforesaid, then, he had full power to collect and receive the debt in question, and, as incidental thereto, the right to commence and prosecute a suit at law for the collection thereof, upon the familiar principle that "whenever a power is given by statute, everything necessary to make it effectual, everything essential to the exercise of it, is given by implication." *End. Interp. St.* § 418, and cases cited in note 12; *Potter's Dwar. St.* 514-517; *Suth. St. Const.* §§ 340, 341. In other words, said Latham

was, until removed as aforesaid, as fully qualified in every respect to enforce the collection of said debt as said Marquis D. L. Mowry would have been had he been appointed and qualified on the 29th of March, 1890. It necessarily follows, therefore, that the "one year after the granting of letters * * * of administration," mentioned in said section 7 of chapter 205, within which an action may be commenced upon a claim which, but for said provision, would be barred by the statute of limitations, commenced to run in this case from the date of the appointment and qualification of said Latham as administrator, and not from the time of the appointment and qualification of said Marquis D. L. Mowry. Demurrer sustained.

(18 R. I. 507)

HANNA v. GRANGER, City Treasurer.

(Supreme Court of Rhode Island. March 14, 1894.)

FELLOW SERVANTS—VICE PRINCIPALS—TESTED BY ACT DONE.

An engineer of a city steam roller, who has a flagman under his orders and dischargeable by him, in carelessly starting the roller without warning is the flagman's fellow-servant, not his vice principal.

Action by Michael Hanna against D. L. D. Granger, city treasurer of Providence, for damages for personal injuries. Demurrer to declaration sustained. Plaintiff petitions for new trial. Denied.

Cassius L. Kneeland, for plaintiff. Francis Colwell, City Sol., and Albert A. Baker, Asst. City Sol., for defendant.

STINESS, J. The declaration in this case states (1) that the plaintiff was in the employ of the city of Providence as flagman to a steam roller used in repairing streets; (2) that he was subject to the orders of the engineer of said roller, also in the employ of the city, and liable to discharge by him; (3) that, while so employed, the engineer carelessly and suddenly started the roller, without warning to the plaintiff, with great noise, frightening a span of horses used by said city so that they ran into and injured the plaintiff.

These allegations, on demurrer, raise very pointedly the application of what is called the fellow-servant rule. The plaintiff concedes that this rule is applicable to municipal corporations, and we can see no reason why it should not be. Indeed, there is stronger reason for including municipal corporations within its protection than there is for including private business corporations. It has been so applied. *Flynn v. Salem*, 134 Mass. 351. In *Turner v. City of Indianapolis*, 96 Ind. 51, there is a dictum to the contrary, but it is evidently based upon the independence of the fire and street departments as public officers, and cannot be regarded as a general statement. In *Coots v.*

City of Detroit, 75 Mich. 628, 43 N. W. 17, the fellow-servant rule was held not to apply, upon the grounds that a fireman has the rights of a traveler in the streets, independently of his employment by the city; and hence an injury caused by a defective street is not one of the risks incident to his employment. The principle of these cases is not inconsistent with an application of the rule to cases like this one. The rule here invoked is that a master, using due care in the selection of servants, and furnishing suitable appliances, is not answerable to one of them for an injury received in his service by the carelessness of a fellow servant. No one will deny that this is established law, outside of statutory provisions, notwithstanding the limitations, exceptions, and refinements to be found in the multitude of cases where sympathy has misguided judgment. The rule is plain and simple. It marks out a clear boundary of duty and liability. It requires of the master care in selecting servants and providing appliances for the work; it leaves to the servant the risk of accident from the negligence of his fellows against which a master could not take precaution. The cases which have sought to ingraft limitations upon the rule have been too numerous for citation, but they fall into classes, which may be more conveniently considered. One class holds that a laborer in one department is not a fellow servant with a laborer in another and separate department. This distinction is recognized in Georgia, Kentucky, Tennessee, and Illinois. 7 Am. & Eng. Enc. Law, 842, and cases cited. It rests upon the fanciful assumption that those engaged in the same department can influence each other to caution and report delinquencies, while those engaged in different departments cannot do so, and hence should not be regarded as within the reason of the rule of fellow servants. This doctrine has been examined and disapproved in this state in *Brodeur v. Falls Co.*, 16 R. I. 448, 17 Atl. 54, and the great weight of authority is against it. Another class of cases holds that employes of different grades, the superior having the right of direction over the inferior, are not fellow servants. Numerous citations of this class may be found in *McKinney on Fellow Servants*, p. 112, § 43, note 2. At the head of the list stands *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, which for the last ten years has been the principal prop for this doctrine. But in the recent case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 814, the whole subject is most ably reviewed by Mr. Justice Brewer, and the *Ross Case* is explained; indeed, we may almost say that it is explained away. He says: "The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability; but did hold that an instruction in such general language was not

erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employes of the company, acting under him on the same train." After calling attention to the fact that the decision in the *Ross Case* was not reached by a unanimous court, four of its members being of the opinion that it was carrying the thought of a distinct department too far, the court, in the *Baugh Case*, Chief Justice Fuller and Mr. Justice Field dissenting, proceeded to decide that an engineer and fireman, running alone on a railroad, without a train attached, are fellow servants, and the fireman is precluded from recovering for injuries caused by the negligence of the engineer. At the close of the section cited above, Mr. McKinney says: "On the other hand, the entire doctrine of the liability of the master for a superior's tort to an inferior is unequivocally repudiated by courts whose number and authority (saving the United States supreme court) outweigh that of those favoring the doctrine." In view of the *Baugh Case*, it would seem that the "saving" clause may now be omitted. In *Mann v. Print Works*, 11 R. I. 152, it is recognized that mere difference of grade is not sufficient to affect the rule relating to fellow servants, if the fact of superiority is not an element in causing the injury. Another limitation, and that which is most strongly pressed in this case, is that of a servant acting as a vice principal and so not a fellow servant with other employes. This is a sound and necessary limitation. It is self-explanatory. When a master commits his duty to another person, whether a servant or not, such person stands in the place of the master; he is a vice principal with reference to that duty, and the master is responsible for his act as such. Simple as this rule is, there has been much confusion in its application. Thus, beginning with *Railroad Co. v. Stevens*, 20 Ohio. 415, it has been held that every superior servant is a vice principal as to those under him. In some cases this is mere dictum; e. g. *Cowles v. Railroad Co.*, 84 N. C. 300, where the jury expressly found that the injury occurred because the company provided defective cars. This is a somewhat amusing case, because it is frequently quoted in support of this "superior servant" notion. The court say that the purpose of counsel was to bring the case within the rule of fellow servants, "so much discussed of late by elementary writers," and hence he should have been more careful to show whether the two servants were fellow servants, or whether one was superior to the other. Nevertheless the court go on to announce the law just the same as though these facts had appeared, and then say they will not rest their decision on that point, but on the correctness of the verdict of the jury. Under such a rule, the liability of a master for negligence would run through every grade of workmen in his employ, down to the very lowest; for the

negligence of this class only would be exempt. It is simply another phase of the "superior servant" idea, which, as we have seen, is neither accepted as law in this state nor in the country at large.

Other cases have held that the power to hire and discharge help makes one a vice principal. For example, it is said in *Patton v. Railroad Co.*, 96 N. C. 455, 1 S. E. 863, that where a laborer, who simply, by the nature of his employment, would have no authority to bind or represent his principal in any respect, has power to employ other like laborers, to direct them when, where, and how to work, to control and superintend them, and discharge them in his discretion, although he should labor with and as one of them, the master is liable for his negligence in the course of his employment. But over against this case should be put that of *Webb v. Railroad Co.*, 97 N. C. 387, 2 S. E. 440, where it was held that authority to discharge a fellow servant does not, of itself, make one a vice principal. Undoubtedly the power to hire and discharge is the test of a vice principal when the question involved is that of selecting or retaining proper servants, for in this respect the servant would clearly represent the master. But in no other sense is it a test. The power to summarily discharge unworthy servants, and to hire new ones, is often a very necessary and beneficial power for the safety of other servants, for it gives a foreman authority to compel attention to duty. But it does not change the character of the foreman's duties from that of a servant to those of the principal, nor does it impose upon him the master's responsibility in other respects. And this brings us to the true statement of the rule, as we understand it, which is that a servant is a vice principal only when he stands in place of the principal with reference to the principal's duty, or in the exercise of the principal's functions. Anything beyond this is inconsistent with the well-settled rule of the master's duty. It adds to and alters it in ways that cannot be foreseen or guarded against, and makes a master liable, however great may have been his care and diligence in selecting his servants. But it may be said that the converse makes the servant suffer. So it may. Accidents are continually happening from somebody's carelessness. The law gives a remedy in damages against the guilty party, but not against an innocent one. As to strangers, upon principles of public policy it treats a master as guilty for the negligence of his servant; but public policy does not demand that he should be so treated as to his own servants, who have the option to examine their surroundings in his service, and to receive pay according to the risk they incur. They may sue a fellow servant for his negligence, but to make the master liable for it, unless that servant is taking the place of the master, is contrary to reason and justice. The doctrine is very pithily stated in *Ell v.*

Railroad Co., 1 N. D. 336, 48 N. W. 222: "Those cases which preserve the fellow-servant rule in its full integrity bring the facts of each case to the test, not of the rank of the negligent servant, but of the character of the negligence from which damage results. Did the master owe to his servant a duty as master? Answer the inquiry in the affirmative, and he cannot escape a careless discharge of that duty by shifting the burden to the shoulders of a servant, however inferior his position may be. It is the negligence of the master himself, because that was carelessly done which he was bound to have carefully performed." See, also, *Crispin v. Babbitt*, 81 N. Y. 516; *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020; *Davis v. Railroad Co.*, 55 Vt. 84; *McDermott v. Boston*, 133 Mass. 349; *Flynn v. Salem*, 134 Mass. 351; *Doughty v. Driving Co.*, 76 Me. 143; *Car Co. v. Parker*, 100 Ind. 191; *Hussey v. Cogger*, 112 N. Y. 614, 20 N. E. 556; *Yates v. Iron Co.*, 69 Md. 370, 16 Atl. 280; 7 Am. & Eng. Enc. Law, 838 et seq. Applying the rule that the character of the act is the criterion of fellow service, the demurrer in this case must be sustained. The act set forth in the declaration is the careless starting of the engine. This is the act of a servant, and not the duty of a principal. The negligence alleged pertains to the duty of a servant, and not to the duty of a principal. This is not a question of fact, because the law defines and limits the duty of a principal, and the declaration does not state a case which shows a breach of that duty. The demurrer was rightly sustained in the court below, and the petition for a new trial is denied.

(18 R. I. 513)

LARICH v. MOIES, Town Treasurer.

(Supreme Court of Rhode Island. March 14, 1894.)

RISKS OF EMPLOYMENT—FELLOW SERVANTS.

1. The danger in shoveling sand under an overhanging bank being as apparent to the laborer as to his foreman, if obvious, is assumed; if not, the foreman is not negligent in ordering it.

2. If a foreman were negligent in ordering his men to go on shoveling sand under a bank, after warning that it was dangerous, such negligence was that of a fellow servant, not of a vice principal.

Action by Oliver Larich against Charles P. Moies, treasurer of the town of Lincoln, for damages for personal injuries. Nonsuit ordered. Plaintiff petitions for new trial. Denied.

Peter J. Quinn, for plaintiff. Benjamin M. Bosworth, for defendant.

STINESS, J. In April, 1892, the plaintiff was in the employ of the town of Lincoln, shoveling sand at a bank, which left an overhanging crust. The plaintiff saw it. One of his fellow laborers went to knock it down, and the foreman was told that it was danger-

ous; but he called back the laborer, saying: "There is no danger. You load up. I don't want the bank at present. I want the sand, and must have it." He also said that, after they had got one load of sand, he would throw down the bank. The commissioner of highways had previously notified the men, including the plaintiff, to be careful about the danger from the bank. Before the load was completed, the bank fell, and the plaintiff was injured. Upon this state of facts, shown at the trial, the plaintiff was nonsuited. We think the nonsuit was rightly ordered. The danger from the overhanging bank was open to the observation of all. If the danger was obvious, then the plaintiff voluntarily assumed an evident risk, and a risk incident to his employment. If it was not obvious, there is nothing to show negligence.

For aught that appears, the foreman simply erred in judgment, and this is all the more probable from the plaintiff's own statement that he had been in places where he would suppose there was ten times more danger than there was there that day. In either case the plaintiff would have no right to recover. This is clearly set forth in *Griffin v. Railway Co.*, 124 Ind. 326, 24 N. E. 888. See, also, *Kenney v. Shaw*, 133 Mass. 501. But if the direction of the foreman to go on digging be assumed to be negligence, under the circumstances, still it was the negligence of a fellow servant, for which the town would not be liable. The plaintiff was familiar with work in such places. The town was not shown to be negligent in its selection of servants or appliances. The manner of proceeding with the work was committed to a foreman or "boss," and this involved the exercise of such discretion and judgment only as belongs to a coworker in a superior grade. No duty of a master was omitted or violated, but the negligence, if there was negligence, was purely that of a fellow servant, for which the plaintiff cannot recover against the principal. *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Flynn v. Salem*, 134 Mass. 351; *McDermott v. Boston*, 133 Mass. 349. The plaintiff's petition for a new trial must be denied.

(18 R. I. 514)

DE MARCHO v. BUILDERS' IRON FOUNDRY.

(Supreme Court of Rhode Island. March 14, 1894.)

MASTER AND SERVANT—FELLOW SERVANTS.

An employee in a foundry cannot recover for an injury resulting from the act of the foreman in throwing a box on a pile of iron posts, in that the foreman was a fellow servant of such employee as to such act.

Action by Carmono De Marcho against the Builders' Iron Foundry on demurrer. Judgment for defendant.

Geo. T. Brown, for plaintiff. Samuel Ames, for defendant.

PER CURIAM. The negligent act set forth in the declaration is that of a foreman in throwing a box upon a pile of iron posts, whereby the plaintiff was injured. This was clearly the act of a fellow servant, and not the negligence of the principal. The foreman was doing nothing which it was the duty of a master to do, nor was any breach of a master's duty the proximate cause of the injury. As held in *Hanna v. Granger*, 28 Atl. 659, and *Larich v. Moles*, Id. 661, a servant stands in the place of a principal only when some duty or power which pertains to a principal, and which is an element in causing the injury complained of, is delegated to him; as to all other matters, he is a coservant. The character of the act is the criterion of the liability, and not the foreman's power of supervision and control, or of hiring and discharging help. See *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Riley v. Railroad Co.*, 27 W. Va. 145; *McKin. Fel. Serv.* § 42, p. 109, and cases cited. The declaration sets out, therefore, a case of negligence of a fellow servant, and not of the defendant. The demurrer to the declaration must be sustained.

(18 R. I. 517)

STONE v. WESTCOTT et al.

(Supreme Court of Rhode Island. March 14, 1894.)

CREDITORS' BILL—WHEN LIES.

A bill to subject a judgment debtor's interest in a trust fund to payment of the debt is demurrable, where it does not allege that execution had been issued on the judgment, and returned unsatisfied.

Bill by Waldo H. Stone against Nathaniel W. Westcott and others. Judgment for defendants.

Littlefield & Struess, for complainant. Joseph C. Ely and Herbert Almy, for respondents.

TILLINGHAST, J. This is a bill in which the plaintiff is endeavoring to subject the equitable interest of the defendant Nathaniel W. Westcott in the fund held by the executors of the will of Penelope N. Westcott to the payment of a judgment debt of said defendant. The bill sets forth, among other things, that the plaintiff recovered judgment against said defendant Westcott on the 25th day of February, 1893, for the sum of \$125, debt, and costs of court, taxed at \$12.85, which judgment is wholly unsatisfied, and that at the time of said recovery, and since then, said Nathaniel W. Westcott has never had any personal property or real estate upon which execution could be levied to satisfy said judgment. The defendants have demurred to the bill because it is not alleged therein that execution on said judgment has

been issued, and returned unsatisfied, and the only question now before us therefore is whether the bill can be maintained. That the bill is demurrable is settled in this state by *Smith v. Millett*, 12 R. I. 60, which is merely an affirmation of the general rule appertaining to the subject, (see cases collected in 2 Beach, Mod. Eq. Jur. p. 980, note 3,) unless the case falls within some exception to the general rule there laid down. The plaintiff's counsel contends that an exception arises where, as in this case, the bill alleges that defendant has no property or estate upon which the execution could be levied, and hence that it would be an idle proceeding to go through with the form of issuing an execution, and having the same returned unsatisfied. We do not think said allegation brings the case within any of the exceptions to the general rule above stated. In *Bank v. Paine*, 13 R. I. 592, the defendant had absconded, leaving no legal assets which could be attached, so that a judgment at law could be obtained against him; and this court held that, as legal process was thereby rendered impossible, the reason for said rule failed, and the plaintiff might, therefore, proceed at once to enforce his claim in equity. In *Gardner v. Gardner*, 17 R. I. 751, 24 Atl. 785, it was held that if the debtor be dead the creditor may proceed in equity, without first pursuing his legal remedy. In the case at bar the defendant had not absconded, he was not dead, nor is it even alleged that he was insolvent, so as to bring the case within the exception made by those authorities which hold that such an allegation dispenses with the necessity for the issue and return of an execution before proceeding in equity. See cases cited in *Ginn v. Brown*, 14 R. I. 527. Nor does the bill allege that the defendant has conveyed his property to another, in fraud of the judgment creditor, so as to excuse him from the service of execution. See *Payne v. Sheldon*, 63 Barb. 169. The plaintiff's remedy at law, then, has not been exhausted; and the case remains in uncertainty, to say the least, as to what would have resulted from the use of an execution if one had been issued. *Bank v. Wetmore*, 124 N. Y. 241-248, 28 N. E. 548; *Durand v. Gray*, 129 Ill. 9, 21 N. E. 610; 2 Beach, Mod. Eq. Jur. § 893. The issuing of the execution, and the return of the officer thereon that no property or estate can be found to satisfy the same, is the best evidence—in fact, is conclusive evidence—that the plaintiff's remedy at law has been exhausted. And until this is done the rule is well settled, subject to the exceptions above mentioned, and one or two others not pertinent to this case, (see 4 Am. & Eng. Enc. Law, p. 575, note 1,) that a court of equity has no jurisdiction. Demurrer sustained.

(86 Vt. 70)

In re HODGES' ESTATE.

(Supreme Court of Vermont, General Term.
Jan. 9, 1894.)

TRUSTEES—ACCOUNTING—COMMINGLING OF FUNDS.

1. A trustee who has made a loan partly of trust money and partly of his own, and taken a note for the whole payable to himself individually, is liable for any loss of interest on the trust money, without regard to his motives in making the loan.

2. Where a trustee has mingled the trust funds with his own, and neglected to keep any separate account of the interest received thereon, he is chargeable with the highest legal rate of interest on the entire fund, and can be allowed nothing for his services.

3. The account is to be adjusted with annual rests, interest being charged on the entire fund, and on any balance of such interest in his hands at the end of each year, after the deduction of the sum allowed for that year.

4. Since the court is required, by R. L. § 2298, to examine a trustee on oath as to the correctness of his account before allowing it, (unless it is unobjected to, and its correctness well proved,) the trustee is a competent witness on exceptions to his account by the estate of his deceased cestui que trust.

Exceptions from Windsor county court; Tyler, Judge.

In the matter of the estate of Edmund Hodges, deceased. Appeal by the estate of Polly Hodges from a decree of the probate court settling the account of Smith Hodges, trustee. There was judgment that nothing was due appellant, and appellant excepts. Reversed.

For former report, see 22 Atl. 725, 63 Vt. 661.

This was an appeal from a decree of the probate court settling the account of Smith Hodges, trustee. Heard at the December term, 1892, Windsor county, upon the report of a commissioner, and exceptions thereto, Tyler, J., presiding. Judgment that the report be accepted, and that nothing is due from the said Smith Hodges, trustee. The estate of Polly Hodges, appellant, excepts. Edmund Hodges died February 22, 1864, leaving a will, of which Smith Hodges was appointed executor by the probate court. March 11, 1867, said executor settled his account in the probate court, and there was found upon such settlement \$3,610.65 remaining in his hands. Thereupon he was ordered by decree of said probate court to account to Polly Hodges, widow of the deceased, for the use and income of said \$3,610.65 during her lifetime, agreeably to the provisions of the will of the testator. The accounting before this commissioner was between the estate of Polly Hodges and the said Smith Hodges, executor and trustee, it being claimed upon the part of the said Polly Hodges' estate that the said Smith Hodges had not in her lifetime paid over to her the income of said trust fund. Polly Hodges died May 20, 1888, and it appeared that during the greater part of the time between the settlement of his account in the probate court, in 1867, and the date of her death, Smith Hodges had mingled the trust funds with his own estate,

and had kept no separate accounts in reference to the same. His claim was that, in supporting Polly Hodges, who was his mother, he had paid over to her a sum in excess of what the income of the fund in his hands would reasonably be. He also claimed several deductions by reason of losses of income, all of which were disallowed by the commissioner, except one. On June 2, 1877, Smith Hodges loaned one Ford \$1,000 of money belonging to the trust fund, and \$483 of his own money, and took Ford's note, payable to himself personally, for the whole sum, \$1,483, and a mortgage of real estate situated in the village of Woodstock to secure said note. At the time Hodges took this mortgage he made reasonable inquiry as to the value of the property mortgaged, and came to the conclusion that it was worth \$2,200, and was good security for the sum loaned. Soon after the execution of this mortgage, Ford became insolvent, and Hodges was ultimately obliged to take a deed of the property in payment of the note. This was in 1882, and he held title to the property from then until March, 1884, when he sold it for \$1,200. Taking into account the amount which he had expended in connection with the property, and the amount which he had received from the property, there was a net loss of principal, besides a loss of interest from June 2, 1877, to the date of the sale, March 27, 1884, which the commissioner held should be deducted from the income of the trust fund. The commissioner found that Hodges acted with reasonable prudence in negotiating the loan and in caring for and disposing of the property, and that the loss was occasioned mainly or wholly by the depreciation of the value of the mortgaged property, and by the insolvency of the mortgagor.

Norman Paul, for plaintiff. W. E. Johnson and French & Southgate, for defendant.

THOMPSON, J. It was held in this case, reported in 63 Vt. 661, 22 Atl. 725, that, after the ascertainment of the amount of the residuum of the estate of Edmund Hodges, and the decree of the probate court leaving it in the hands of Smith Hodges, the executor, to be applied to the use of the widow, Polly Hodges, in accordance with the provisions of the will, the executor was under the obligations of a trustee as completely as if so named in the will and appointed by the court. On this basis he is to account for the income of the trust fund, to which the widow was entitled. The executor contends that he should not be charged with the interest on the fund lost by the loan to Joseph Ford. A trustee is bound to act with good faith. He is not to use the trust property in his own private business, nor is he to make any incidental profits for himself in its management, nor is he to acquire pecuniary gains from his fiduciary position. An important duty of good faith prohibits

the trustee from mixing the trust property and his own property together in one amount, the depositing trust moneys in his own personal account with his own moneys in bank, and all similar modes of combining or failing to distinguish between the two funds. This rule is designed to protect the trustee from temptation, from the hazard of loss, and of being a possible defaulter, as well as to protect the trust fund. Whatever may be the reason or motive that prompts it, if the trustee commingles the trust property with his own, and the mingling is followed by actual loss, accidental or otherwise, the trustee must make good, not only the principal sum lost, but also the interest. 2 Pom. Eq. Jur. (1st Ed.) § 1076; *Farwell v. Steen*, 46 Vt. 678; *McClosky v. Gleason*, 56 Vt. 264. This is the only safe rule for the administration of trusts. It was held otherwise in *Barney v. Parsons*, 54 Vt. 624, but, in so far as that case is in conflict with this rule, we think it ought not to be followed. Smith Hodges, by loaning Ford \$1,000 of the trust fund and \$493 of his own money, and taking Ford's note for the whole amount, payable to himself personally, commingled the trust fund with his own, and he must make good the interest lost by that transaction. The commissioner finds that the executor commingled the entire trust funds with his own during the greater portion of the time covered by the accounting, and neglected to keep any separate account of the same, or of the interest received thereon. He must, therefore, be charged with the highest legal rate of interest on the entire fund, and can be allowed nothing for his services in caring for the same. *McClosky v. Gleason*, 56 Vt. 264.

It is objected that Smith Hodges was not a competent witness upon any matter in this accounting. By the provisions of R. L. §§ 2105, 2490, it is made the duty of the probate court to examine every executor and administrator and guardian upon oath as to the correctness of his account, before the same is allowed by the court, except when no objection is made to its allowance, and its correctness is satisfactorily established by competent testimony. R. L. § 2298, imposes the same duty as to the examination of a trustee as to the correctness of his account, before its allowance by the court. In cases of this kind the county court is an appellate probate court. R. L. § 2268. Under these statutory provisions, Smith Hodges was a competent witness upon all questions and matters touching his management of the trust fund, and the disposal of the same, or the income thereof, by him. All the findings of the commissioner necessary for the final disposition of the case are made either upon testimony of Smith Hodges, admissible under this rule, or upon other competent testimony, having a legal tendency to prove the facts found.

The commissioner has not made a formal statement of the trustee's account, but he

has reported such facts as enable this court to determine what judgment is to be rendered. The account is to be adjusted with annual rests, as indicated by the commissioner. The trustee is to be credited each year with the sum allowed him by the commissioner, and, as no objection is made to allowing him the sums he paid out for the funeral charges of Polly Hodges and for gravestones for her, he is to be allowed for the same in this accounting; but we express no opinion whether these two items are technically allowable in this accounting, if objected to. He is to be charged each year with the interest on the entire fund, and upon any balance of such interest remaining in his hands at the end of each year, after deducting the sum allowed him for each year. On this basis, allowing the funeral charges and cost of gravestones as paid May 20, 1888, the date of the death of Polly Hodges, there was then due from the trustee the sum of \$556.98. The judgment of the county court is reversed, and the balance of the income payable to Polly Hodges, due and unpaid, is adjudged to be \$556.98, and interest thereon from May 20, 1888, to be certified to the probate court, with costs below and in this court to the appellant.

(66 Vt. 32)

WATERMAN, Collector, v. DAVIS.

(Supreme Court of Vermont, General Term.
March 5, 1894.)

TAXATION—INTEREST IN QUARRY—VALUATION—NOTICE.

1. Though the fee of the surface is in another, an undivided interest in a quarry is assessable to the owner as realty.

2. Since listers must, under R. L. §§ 292-294, classify real estate, and, as to stone quarries, etc., specify each parcel, its quantity, valuation, and location, an entry on the grand list of one undivided half of a quarry on the farm of D., "with four acres of land," as assessed to defendant, does not imply an assessment of said four acres to him, as well as the share in the quarry, it appearing of record that his interest is confined to the quarry.

3. In an action for taxes against a nonresident, who is absent from the trial, though neither he nor his attorney have been notified to produce the treasurer's notice sent him, (R. L. § 387,) specifying a time and place for payment of the tax, a manifold copy of such notice is competent evidence.

4. The listers' assessment of an undivided interest in realty, at a valuation based on the annual rental reckoned at 6 per cent., if unappealed from, under R. L. §§ 297, 298, to the board of civil authority, is conclusive.

Exceptions from Windsor county court; Munson, Judge.

Action by R. W. Waterman, collector of Chester, against Thomas P. Davis, for taxes due and unpaid. Judgment for plaintiff. Defendant excepts. Affirmed.

Upon the trial the defendant offered to show that the quarry was operated by the Union Soapstone Company at the rate of \$1.50 per ton for the stone taken out; that the listers ascertained the amount paid for

the use of the quarry under this contract, and assessed the quarry at such a valuation as would amount, at 6 per cent., to this sum, without any reference to its actual value in money. The court excluded the testimony, to which the defendant excepted.

W. W. Stickney, J. G. Sargent, and W. E. Johnson, for plaintiff. Geo. L. Fletcher and L. M. Read, for defendant.

ROSS, C. J. This action is to recover taxes assessed by the town of Chester against the defendant, as the owner of real estate in that town. He owned an undivided half of a soapstone or freestone quarry on the farm of his brother, L. H. Davis. It appeared that L. H. Davis owned the land covering the quarry. The defendant's interest in the quarry was assessable to him as real estate. R. L. §§ 9, 283.

1. On the trial the defendant claimed that the grand list and assessment of the tax were void, because he was assessed in that list for four acres of land, which he neither owned nor occupied. The entry on the grand list against him is: "One undivided half of a soapstone or freestone quarry on the farm of L. H. Davis, with four acres of land, \$11,833." This entry must be construed in the light of the requirements of the statutes. In the appraisal of real estate the listers were required to classify it. R. L. §§ 292-294. In the class in which this falls the listers were required to specify each parcel, the quantity thereof, its valuation, and location, with reference to village, school, and fire district. In this entry the parcel specified is "one undivided half of a soapstone or freestone quarry;" its location, "on the farm of L. H. Davis;" its valuation, "\$11,833;" and the quantity of the farm in which the quarry exists, "with four acres of land." This last is the only expression about which any doubt can be entertained. It may bear the construction that the quarry was intermingled with four acres of the farm belonging to L. H. Davis, which expresses exactly the fact, and defines the quantity and extent of the quarry. It could be given the construction claimed by the defendant,—as four acres of land in addition to the quarry. In such case, however, we should expect the word "with" would be replaced by the word "and." To a man like the defendant, who knew the situation of the quarry, and his title therein, and who is presumed to know the requirements of the statute which the listers were to meet in making the entry, the entry ought not to be misleading. It clearly specifies the parcel assessed to be the quarry. It locates the quarry on the farm of L. H. Davis, or on land owned by him. It defines its extent and quantity as "with four acres" of that land. Other forms of expression might have been used which would have been more clear, and freer from doubt. The law is to be administered by common men; men

of judgment in regard to property and its value; not expert linguists. The space allowed for an entry is contracted, and does not admit of so full expression, as reasonably would be required in a conveyance of the property. It is sufficient if it can reasonably be construed as covering the taxpayer's interest, and no more. Where his interest is on record,—as it was in this case,—it is to be presumed the lister's entry was meant to cover that interest, and no more, if it can reasonably be given that construction. This exception is not sustained.

2. The defendant is a resident of Iowa. The town treasurer seasonably sent him by mail a notice, naming a time and place when and where he would be present to receive the tax assessed against the defendant. On the trial, without previously having called upon him or his attorney to produce the notice sent, the defendant not being present at the trial, the court allowed, against his exception, a manifold copy of the notice sent to be given in evidence. In *Colling v. Treweek*, 6 Barn. & C. 394, Bagley, J., says: "There are three descriptions of cases where notice to produce an instrument is unnecessary: First, where the instrument produced and that to be proved are duplicate originals; secondly, where the instrument to be proved is a notice,—as a notice to quit, or a notice of the dishonor of a bill of exchange; * * * and, third, where, from the nature of the suit, the opposite party must know that he is charged with the possession of the instrument." Where the instrument to be produced is a notice, *Kine v. Beaumont*, 3 Brod. & B. 288, is cited, in which it was held that, the copy of an original letter giving notice of the dishonor of a bill, without notice to produce the original letter, was admissible; *Dallas, C. J.*, saying that he could not see any great difference between a duplicate original and a copy made at the time. To the same effect are 1 Greenl. Ev. § 561; *Bank v. Chapin*, 3 Pick. 180; *Quinley v. Atkins*, 9 Gray, 370; *Steph. Dig. Ev. art. 92*; 1 *Thomp. Trials*, § 775. The last author cites *Eisenhart v. Slaymaker*, 14 Serg. & R. 153, in which *Gibson, C. J.*, said: "Every written notice is, for the best of all reasons, to be proved by a duplicate original; for, if it were otherwise, the notice to produce the original could be proved only in the same way as the original notice itself, and thus a fresh necessity would be constantly arising ad infinitum, to prove notice of the preceding notice." This rule is established on reason and authority. The manifold copy was properly admitted. Parol evidence would also have been admissible to establish the giving of notice if no manifold copy had been taken. *Bentley v. White*, 54 Vt. 564.

3. The testimony offered by the defendant, and excluded against his exception, bore upon the manner in which the listers reached their judgment in regard to the value of the defendant's interest in the quarry. From the

listers' entry on the grand list they assessed the value of that interest as real estate, and not as a debt due him on a redeemable lease. Their assessment was made upon the basis required by the law. That assessment was in the nature of a judicial determination of its value, and, unappealed from to the board of civil authority in the manner provided by law, (R. L. §§ 297, 298,) concluded further hearing in his behalf on that subject in other tribunals, (Taylor v. Moore, 63 Vt. 60, 21 Atl. 919; Fulham v. Howe, 60 Vt. 351, 14 Atl. 652; Bullock v. Guilford, 59 Vt. 516, 9 Atl. 360; Weatherhead v. Town of Guilford, 62 Vt. 327, 19 Atl. 717.) The offered evidence was properly excluded. No other questions are raised by the exceptions. Judgment affirmed.

(66 Vt. 81)

BROWN v. BROWN et al.

(Supreme Court of Vermont. Rutland. March 7, 1894.)

INJUNCTION — RESTRAINING ACTION OF PROBATE COURT—DOWER AND HOMESTEAD.

Chancery will not interfere by injunction, on petition of a creditor of deceased, with the action of the probate court in appointing commissioners to set out homestead and dower to the widow of deceased, on the ground that the appointment was without notice to petitioner, that one of the commissioners is biased against him, and that the severance of homestead and dower will greatly injure the rest of the premises.

Appeal in chancery, Rutland county; Taft, Chancellor.

Petition by George F. Brown to restrain commissioners appointed by the probate court from setting out homestead, and for a sale of the premises. Heard upon bill, answers, and a master's report. Bill dismissed, with costs. The orator appeals. Affirmed.

George W. Brown left a will by which he bequeathed the orator, his son, \$5. The orator presented a claim against the estate of his father, which was disallowed by the commissioners, but upon which he finally recovered judgment in the sum of about \$3,000, which was the principal debt against the estate. The widow, Nancy L. Brown, waived the provisions made for her by the will, and applied to the probate court for the appointment of commissioners to set out homestead and dower. While these commissioners were proceeding to act, this suit was begun, and they were temporarily restrained. The master found that the commissioners were appointed without any notice to the orator, that one of them was so biased against the orator that he ought not to have been appointed, that the homestead and dower could not be severed without great damage to the remaining premises, and that the homestead and one-half acre exceeded \$1,000 in value.

Geo. E. Lawrence and F. S. Platt, for appellant. Henry A. Harman, Butler & Moliney, and J. C. Baker, for appellees.

START, J. The orator is a creditor of the estate of George W. Brown. Defendant Nancy L. Brown, widow of George W. Brown, made application to the probate court for the district of Fair Haven for the appointment of commissioners to set out her homestead and dower, and thereupon the court appointed the defendants Francis A. Barrows, Thomas B. Clark, and Gardner Parker such commissioners. The commissioners entered upon the performance of the duties assigned to them, and, while thus engaged, they were restrained from proceeding further by the injunction order in this case. The probate court has jurisdiction of all matters reported by the special master, and power to grant such relief as the orator is entitled to, and, having taken jurisdiction, we see no occasion for the interference of the court of chancery. R. L. §§ 1898, 1914, and 2220. Decree affirmed, and cause remanded.

(66 Vt. 76)

BROWN v. BROWN.

(Supreme Court of Vermont. Rutland. March 7, 1894.)

APPEAL FROM PROBATE COURT — PROCEDURE IN COUNTY COURT — SETTING OUT HOMESTEAD AND DOWER.

1. An order of the probate court, accepting and ordering recorded a report of commissioners appointed to set out homestead and dower, is appealable.

2. The county court may allow one appealing from the probate court to file a copy of an amendment of the order allowing the appeal, so as to show from what order the appeal is allowed.

3. An appeal to the county court from an order of the probate court accepting a report of commissioners appointed to set out homestead and dower vacates such report and order, and the county court may then set out dower and homestead in the manner provided by statute for setting it out in the probate court.

Exceptions from Rutland county court; Tyler, Judge.

Petition in the probate court by Nancy L. Brown to set out her homestead and dower in her husband's estate. From an order accepting the report of commissioners appointed on such petition, George F. Brown appealed to the county court. The appeal was dismissed, and he excepted. Reversed.

Geo. E. Lawrence and F. S. Platt, for plaintiff. H. A. Harman, for defendant.

START, J. This is an appeal from an order of the probate court for the district of Fair Haven, accepting and ordering recorded a report of commissioners appointed to set out a homestead and dower to the appellee. The appellee moved to dismiss the appeal, and claimed, among other things, that the appellant was not entitled to an appeal from such order, and that it does not appear that the appellant appealed from any order, sentence, decree, or denial of the probate court.

It appears from the application for an appeal filed in the register's office that the appellant prayed for an appeal from the order of the probate court approving of the doings of the commissioners, but the certified copy of the order allowing the appeal does not show from what order or decree the appeal was taken. The appellee's counsel conceded that the probate court has amended its records, so that it now appears from the order allowing the appeal that the appellant appealed from the order of the court approving of the doings of the commissioners. The county court held, as a matter of law, that the appeal papers could not be amended in that court, and dismissed the appeal, to which the appellant excepted. The county court had power to allow the appellant to file a copy of the amended order of the probate court, allowing an appeal. *Maughan v. Burns' Estate*, 64 Vt. 316, 23 Atl. 583; *Whitcomb v. Davenport's Estate*, 63 Vt. 656, 22 Atl. 723; *Wyman v. Wilcox's Estate*, 63 Vt. 487, 21 Atl. 1103; *Carruth v. Tighe*, 32 Vt. 626. If it was necessary to file objections to the doings of the commissioners, or to the order and decree of the probate court, they could be filed or amended in the county court. *Francis v. Lathrope*, 2 Tyler, 872; *Howe v. Pratt*, 11 Vt. 255; *Stevens v. Hewitt*, 30 Vt. 262; *Bucklin v. Ward*, 7 Vt. 195. Proceedings for settling out a homestead and dower fall within the general jurisdiction of the probate court in the settlement of estates of deceased persons. R. L. § 2270, gives to any person interested in an order, sentence, decree, or denial of the probate court the right of appeal to the county court. The case of *Byram v. Byram*, 27 Vt. 295, was an appeal from an order and decree of the probate court accepting and confirming the report of commissioners appointed by the court to set out a homestead to the widow and children of the deceased. The appellees moved to dismiss the appeal, on the ground that the county court had no jurisdiction, and it was held that the appellant was entitled to an appeal under section 28, c. 47, Comp. St., which is, so far as it relates to the right of appeal, the same as R. L. § 2270. In *True v. Morrill*, 28 Vt. 672, the holding of the court is to the same effect. The county court has appellate jurisdiction of matters originally within the jurisdiction of the probate court, and, in appeals from the orders and decrees of the probate court in respect to homestead and dower, it has the same power to appoint commissioners to set out homestead and dower as that given to the probate court. R. L. § 2268. In *Adams v. Adams*, 21 Vt. 162, it is said that the jurisdiction of the county court as an appellate court is measured only by the extent of the jurisdiction of the probate court. It is not limited to any particular questions that arise in the probate court, or confined to a portion of the business transactions there, but is expressly extended over all matters

which are within the jurisdiction of that court. It is an appellate court for the rehearing and re-examination of all matters which have been acted upon in the court below. In *Hilliard v. McDaniels*, 48 Vt. 122, it is said that an appeal from a lower to a higher court carries up the whole case for a retrial upon all matters and features entering into and affecting the final decision and order to be made therein. In *Maughan v. Burns' Estate*, 64 Vt. 316, 23 Atl. 583, it is said that the county court has, by statute, appellate jurisdiction of matters originally within the jurisdiction of the probate court, and in such appeals it sits as a higher court of probate, and its jurisdiction is coextensive with that of the probate court. It is not limited to the particular questions that arise in the probate court in the matter appealed, but is expressly extended to matters originally within the jurisdiction of that court. It is an appellate court for the rehearing and the re-examination of matters, not particular questions merely that have been acted upon in the court below. The report of commissioners appointed to set out homestead and dower does not become operative or of binding force until it is returned to the court making the appointment accepted and recorded by that court, and a certified copy thereof recorded in the town clerk's office where deeds of such lands are by law required to be recorded. R. L. §§ 1907, 2222. If an appeal is taken and entered in the county court, the doings of the commissioners and the order of the probate court are vacated, and do not have the effect to sever the homestead and dower from the other real estate, or to fix and determine the right of the widow to the same; and in determining the right of the widow to homestead and dower, and setting out the same, the appellate court has the power given by statute to the probate court, and may proceed in the manner provided by statute for setting out homestead and dower in the probate court. R. L. § 1907, provides that when, in a case not in chapter 95 otherwise provided for, it is necessary, in a proceeding at law or in equity, to sever or set out a homestead from other real estate, the court in which such proceedings are pending may appoint three commissioners to appraise and set out such homestead. R. L. § 1900, provides that commissioners appointed to set out the homestead shall, where a right of dower also exists, first set out the homestead, and, from the residue of the real estate of the deceased, set out the dower. Under this section the commissioners set out a homestead and dower to the appellee, and made report of their doings to the probate court, and the same was approved by the court, and ordered to be recorded. From this order, the appellant was entitled to an appeal to the county court. Judgment reversed; the appellee's motion to dismiss overruled; cause remanded to the county court for further proceedings.

(56 N. J. L. 454)

STATE (POTTER, Prosecutor) v. BERRY.

(Supreme Court of New Jersey. March 5, 1894.)

ALLOWANCE FOR SUPPORT OF LUNATIC—POWER OF ORPHANS' COURT—CERTIORARI.

1. The orphans' court has no authority to make an order directing in advance how much the guardian of a lunatic shall expend annually, for the support of the lunatic, out of his personal estate and the profits of his real estate.

2. A daughter of the lunatic may prosecute a writ of certiorari for the purpose of testing the validity of such an order.

(Syllabus by the Court.)

Certiorari, at the suit of Anna M. Potter, against Arthur E. Berry, guardian of Samuel Dally, a lunatic, to determine the jurisdiction of the orphans' court as to the care of lunatics. Judgment for prosecutor.

Argued February term, 1894, before MA-GIE and DIXON, JJ.

Alan Strong, for prosecutor. E. Cutter, for defendant.

DIXON, J. The orphans' court of Middlesex county, on the petition of Arthur E. Berry, guardian of Samuel Dally, a lunatic, made an order directing that the guardian should expend the sum of \$2,000 annually, for the support of the lunatic, out of his personal estate and the income of his real estate, and that the guardian should be authorized to pay the taxes on the house and land occupied by the lunatic and his wife, and keep the said house and premises in good order and repair while so occupied. The prosecutrix, who is a daughter of the lunatic, has sued out this writ of certiorari to try whether the subject-matter of this order is within the jurisdiction of the orphans' court. Const. N. J. art. 6, § 4, par. 3. The guardian denies the right of the prosecutrix to institute such a proceeding, urging that she has no legal interest in the question presented.

Our act concerning Idiots and lunatics (Revision, p. 601) provides that, even during the life of the lunatic, his heirs and next of kin may cause the guardian to render accounts before the orphans' court. This, we think, gives the heirs apparent or presumptive and next of kin of the lunatic sufficient legal interest in the administration of the estate by the guardian to warrant them in challenging the jurisdiction of the orphans' court, when it attempts to pass upon questions which involve the accountability of the guardian. We must therefore consider whether the order made was within the jurisdiction of the court.

The jurisdiction of the orphans' court is the creature of statute, and, although such construction will be given to the statutes es-

tablishing and regulating the authority of the court as, consistently with the obvious intentions of the legislature, will advance and extend their remedial provisions, yet the court can exercise only these powers which, on that construction, appear to have been conferred. *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 18 Atl. 1048. Its powers over the guardians and estates of lunatics are derived from the act above cited, (Revision, p. 601.) This statute authorizes the orphans' court to appoint the guardian of a lunatic; to order him, when necessary, to sell the lunatic's timber and lands; to compel the guardian to render true accounts of his administration of the estate of the lunatic; to receive and settle (*Shepherd v. Newkirk*, 20 N. J. Law, 343) his accounts; and, when the guardian has received the proceeds of the sale of the lunatic's lands sold by order of the chancellor, to direct how much of such proceeds (other than the interest thereof) the guardian may appropriate each year to the support of the lunatic. In these provisions, we discover no sign of a legislative purpose to confer upon the court authority to decide, in advance, what amount of the lunatic's personal property or of the profits of his realty shall be expended for his support by his guardian. On the contrary, a negation of such authority seems to be strongly implied in the limited grant of power over the corpus of the fund raised by the sale of lands. Other provisions of the statute clearly indicate that it is the duty of the guardian to determine from time to time, as circumstances may require, what expenditures shall be made, out of the personal property and the profits of the realty, for the support of the lunatic. He is to "have the care and safe keeping of the lunatic, his lands, tenements, goods and chattels, that the said lunatic may live and be competently supported and maintained by and out of his goods and chattels and the profits of his lands and tenements." Although the guardian is to render account of his administration to the orphans' court, and the court is to pass upon the propriety of his conduct, yet this by no means implies that, before the exigencies arise under which the guardian is to act, the court may anticipate the possible conditions, and prescribe his duties or limit his powers. The guardian, not the court, is made the custodian and the administrator of these funds, subject only to the judgment of the court upon the honesty and prudence of his transactions. The power thus delegated to the court is essentially different from that exercised in making the order under review. The former is purely judicial. The latter is mainly administrative. We think the order brought up is beyond the jurisdiction of the orphans' court, and should be set aside.

(56 N. J. L. 318)

VAN HORN v. VAN HORN et al.

(Court of Errors and Appeals of New Jersey.
Feb. 26, 1894.)TORTS—SLANDER OF PLAINTIFF'S BUSINESS—
PLEADINGS—JUDGMENT.

1. In an action on the case against several for a tort, though a conspiracy be charged, one of the defendants may be found guilty and the other not guilty, the foundation of the action being the damage, and not the conspiracy.

2. Where the action is against two or more, alleging a conspiracy to destroy the plaintiff's business by false and malicious statements concerning his character, and no conspiracy is proven, a recovery may be had against one of the defendants, only, for injuries produced by false representations made by him with malice and ill will.

3. In such action it is not necessary to set out in the declaration the slanderous words which caused the injury. It is not regarded in the law as an action for slander, and the two years' limitation does not apply to it.

4. A creditor may lawfully inquire into the circumstances of his debtor, and the person inquired of may answer freely, and unless his communication be of facts which he does not honestly believe, or the communication be such as was made, not for the honest purpose of giving the desired information, but to gratify a malicious purpose, no action will lie.

(Syllabus by the Court.)

Error to circuit court, Essex county; De-pue, Judge.

Action in tort for a conspiracy by Emma Van Horn and James Van Horn against Amos H. Van Horn and Casper Soer. There was judgment for plaintiffs against defendant Van Horn, and he brings error. Affirmed.

For reports of the supreme court, see 20 Atl. 485, 21 Atl. 1069.

Samuel Kallish, for plaintiff in error. Robert H. McCarter, for defendants in error.

VAN SYCKEL, J. This suit was instituted by Emma Van Horn and her husband against Amos H. Van Horn and Casper Soer. The action is in tort, and the declaration, among other things, charges that the defendants conspired to injure Emma in her business of selling fancy goods, which she carried on in her own name, and that, by false and malicious statements concerning the personal and business character of Emma, they induced and persuaded one Snyder to remove the stock of goods he had supplied her with, and to refuse to deliver what he had expected to let her have, leaving her without any stock to sell or customers to sell to. To this declaration both defendants filed a general demurrer, which was certified to the supreme court for its advisory opinion. The opinion of the supreme court, found in 52 N. J. Law, 284, 20 Atl. 485, advised the circuit court to overrule the demurrer, and held: (1) That an action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damages. (2) The gravamen, in a civil action, is not the conspiracy, but the malice; the former is

matter of aggravation or inducement, only, in the pleading and evidence, under which one or all of the defendants may be found guilty. The defendants then filed a plea of the statute of limitations,—that the cause of action did not accrue within two years next before the commencement of the suit. This plea is applicable exclusively to an action for slander. The declaration does not set forth the words spoken, and is not in form an action for words spoken, but a special action on the case to recover damages occasioned by the malicious conduct of the defendants. The supreme court decided that this is not an action for slander, and that the two years' limitation does not apply to it. 53 N. J. Law, 514, 21 Atl. 1069. The cause then went down for trial before the Essex circuit court, and no evidence being there produced to establish a conspiracy, or to justify a verdict against Soer, a verdict was directed in favor of the defendant Soer. The defendant Amos H. Van Horn then by his counsel insisted (1) that the facts set forth in the declaration would not sustain the action against the defendant Van Horn alone; (2) that the communication made by said Amos H. Van Horn to Snyder was privileged; (3) that the action was barred by the two years' limitation.

The evidence shows that Emma Van Horn's husband was engaged in the furniture business. The defendant was engaged in a similar business on the same street near by. The former was compelled to close his business by financial embarrassment, by reason of which he was ejected from the premises he occupied. Emma, his wife, then set up the millinery business in part of the premises which her husband had occupied. She commenced this business with an old stock of millinery goods, valued at about \$200, and entered into an arrangement with one Snyder to receive from him goods to be sold on commission, amounting to about \$1,500, of which about \$400 worth was delivered to her under this arrangement. Evidence was offered to show that Snyder withdrew from this agreement to furnish goods to Emma, influenced by representations made by Amos H. Van Horn to him, which were alleged to be false and malicious, in consequence of which her business was broken up. The jury was instructed that, if the acts done by the defendant were prompted by malice and ill will, with the purpose of injuring and obstructing the business of the plaintiff Emma, and such acts produced the injury complained of, the plaintiffs were entitled to recover. There was evidence upon which the jury had a right to find in favor of the plaintiffs on this issue. That evidence was properly submitted to the jury. In *Parker v. Huntington*, 2 Gray, 124, the action was against two for maliciously conspiring to have the plaintiff indicted. Mr. Justice Bigelow said that, by the ancient form of pleading, all actions for malicious prosecution, where two or

more were made defendants, were laid with a charge of conspiracy, which practice is supposed to have its origin in the phraseology of 21 Edw. I., but that the charge of conspiracy was never deemed essential; it is mere surplusage, and need not be proved, and there may be a recovery against one or both. In *Pollard v. Evans*, 2 Show. 51, a recovery against one in an action on the case for conspiracy was maintained. This conclusion rests upon the rule as stated in *Wellington v. Small*, 3 Cush. 145, that, in an action on the case for conspiracy, the gist of the action is not the conspiracy, but the damage done to the plaintiff. This is in accordance with the declaration of Lord Holt in *Savile v. Roberts*, 1 Ld. Raym. 374, that conspiracy is not the groundwork of the action, but the damages done the party. *Austin v. Barrows*, 41 Conn. 287, charged conspiracy, but the court held that the allegation of conspiracy brought no strength to the declaration, for it shows no additional cause of action; an act which, if done by one alone, is no cause of action, is not rendered actionable by being done in pursuance of a conspiracy. In *Steamship Co. v. McGregor*, 15 Q. B. Div. 476, which alleged a conspiracy to injure plaintiff's trade, Lord Chief Justice Coleridge said that an action would lie for damages done to business by a conspiracy. When this case came again before the Lord Chief Justice, as reported in 21 Q. B. Div. 544, he said that in a civil action it is the damage which results from the unlawful combination itself with which the civil action is concerned. *Garing v. Fraser*, 76 Me. 37, adopts the like view. In *Hutchins v. Hutchins*, 7 Hill, 104, the New York court held that in an action on the case against several for a tort, though a conspiracy be charged in the declaration, one of the defendants may be convicted, and the rest acquitted; the foundation of the action being the damage, and not the conspiracy. To recover against all, a joint wrong must be shown, but, if only one is shown to be concerned, the plaintiff may still recover against the one. The alleged injury in that case was effected by false statements concerning the plaintiff, which were not actionable per se. *Jones v. Baker*, 7 Cow. 445, is of like purport. *Riding v. Smith*, 1 Exch. Div. 91, was an action by a trader, alleging that the defendant falsely and maliciously charged the plaintiff's wife with adultery, whereby the plaintiff was injured in his business. The action was upheld on the ground that the injury to plaintiff's business was the natural consequence of the words spoken. *Kelly, C. B.*, said it was of little consequence whether the wrong was slander, or whether it was a statement of any other nature calculated to prevent persons from resorting to plaintiff's shop. In *Bowen v. Hall*, 6 Q. B. Div. 333, the plaintiff successfully maintained his action against the defendant for maliciously inducing another to break his contract for service with

the plaintiff, by which the plaintiff was injured in his business. *Lumley v. Gye*, 2 El. & Bl. 216, which has been much discussed, was approved in the case last cited. A like injury was declared to be actionable in *Walker v. Cronin*, 107 Mass. 555. *Wells, J.*, said: "The general principle is that, in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages. The intentional causing of such loss to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong." In *Coward v. Wellington*, 7 Car. & P. 531, a husband maintained an action for special damage in consequence of a letter written by the defendant, reflecting on the character of plaintiff's wife.

The rule to be deduced from these cases, and one which has the most ample support, is that while a trader may lawfully engage in the sharpest competition with those in a like business, by holding out extraordinary inducements, by representing his own wares to be better and cheaper than those of others, yet when he oversteps that line, and commits an act with the malicious intent of inflicting injury upon his rival's business, his conduct is illegal, and, if damage results from it, the injured party is entitled to redress. Nor does it matter whether the wrongdoer effects his object by persuasion or by false representation. The courts look through the instrumentality or means used to the wrong perpetrated with the malicious intent, and base the right of action upon that. The principle is that the action is founded on the tort, and can therefore be sustained against one, as well as against several, for the damage chargeable to the wrongful act. In no other view, where conspiracy is alleged in an action against two or more, could recovery be had against one alone, as two at least must participate to constitute conspiracy. The courts almost uniformly disregard the charge of conspiracy as an actionable element, and consider the malicious injury, and the resulting damage, as the foundation and support of the action. *Laverty v. Vanarsdale*, 65 Pa. St. 507. *Pol. Torts*, p. 267, says: "It seems to be the better opinion that the conspiracy is not in any case the gist of the action, but is only matter of inducement or evidence." *Mr. Bigelow*, in a note to the *Leading Cases on the Law of Torts*, (page 214,) says "that the effect of the principal case is that the fact of conspiracy becomes actionable only when the act would be a ground of suit if done by a single person." The Maryland court of appeals, in *Kimball v. Harman*, 34 Md. 407, declared that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several. The rule is firmly established in the cases that, in an action charging conspiracy, a verdict may be rendered against one alone

upon proof that he intentionally inflicted the injury through persuasion, or by false representations, instigated by malice. This cannot, therefore, be regarded as an action for slander, to which the two years' limitation will be a bar, first, because it was not necessary to set out the words of the false representation. In an action for enticing away a servant it is sufficient to declare that the defendant maliciously enticed, persuaded, and procured the servant to leave the master, without specifying what means were resorted to to accomplish the wrongful purpose. Such is the form given in the books of pleading and in the reported cases. *Lumley v. Gye*, supra. Under such a declaration, evidence in support of the action that the defendant effected his object by false representations concerning the character of the master would undoubtedly be competent, although the words are not set out in the pleading. In *Haldeman v. Martin*, 10 Pa. St. 360, which was an action for maliciously conspiring to injure the plaintiff by falsely accusing her of being pregnant with a bastard child, Chief Justice Gibson said "that the falsity of the charge in the first instance implies malice, and, where the uttering of the words in which it is made is not the gist of the action, they need not be set out." The declaration in this case avers that Amos H. Van Horn, maliciously intending to injure Emma, did by means of fraud and deceit persuade Snyder to decline to complete his contract, and did prevail upon him, by means of corrupt, fraudulent, and deceitful representations and statements as to the personal and business character and standing of Emma, to remove the stock of goods he had furnished her with. There is no reason why the means by which the wrong is done should be set out in the declaration in this case with more particularity than is required in the forms for enticing a servant to leave his master. In the latter case, the gravamen is that the servant is wrongfully induced to withdraw his services; in the former, the creditor is influenced and persuaded to withdraw his support from the plaintiff's business. Again, this cannot be treated as an action for slander, requiring the false representation to be set out, and subjecting it to the two years' limitation, because the action for this tort will lie against one, or against two or more. An action for slander will not lie jointly against two; such an action cannot be maintained, because the words of one are not the words of another. A separate action for words spoken must be prosecuted against each. *Townsh. Sland. & L.* §§ 113, 118; *Thomas v. Rumsey*, 6 Johns. 28. Even if husband and wife uttered similar words simultaneously, they were regarded as two separate publications, and an action had to be brought against the husband alone for what he said, and against both husband and wife for her words. *Odgers, Sland. & L.* 371, and cases cited. If this is an ac-

tion for slander, it would not lie against two. The facts that it will lie against two, and that the courts treat the damage resulting from the malicious intent as the gist of the suit, repel the conclusion that it is to be classed with actions of slander. The plea of the statute of limitations was therefore, in my judgment, no bar to this action. As to the question of privilege, the trial court charged the jury that a man has a right to inquire of his neighbor into the circumstances of a person to whom he is giving credit, and that person may on such occasions communicate freely, and unless his communication be of facts which he does not honestly believe, or the communication be such as was made, not for the honest purpose of conveying the information to the inquirer, but such as, in the judgment of the jury, under the evidence, shows that the defendant took advantage of that privilege to gratify a malicious purpose, no action will lie. This is a correct statement of the law; there was evidence of malice, and, therefore, the trial judge properly submitted the question of malice to the jury. Such is the rule adopted in this court in *Andrew v. Deshler*, 45 N. J. Law, 167. In my opinion, the judgment below should be affirmed.

(56 N. J. L. 449)

STATE (WARREN MANUF'G CO., Prosecutor) v. DALRYMPLE, Collector.

SAME v. DONNELLY, Collector.

(Supreme Court of New Jersey. March 5, 1894.)

TAXATION—PROPERTY SUBJECT — CONSTITUTIONAL LAW.

1. Manufacturing Co. v. Warford, 37 N. J. Law, 397, followed.

2. The supplement to the tax act, passed May 11, 1886 (Supp. Revision, p. 981,) re-enacted March 30, 1892, (P. L. 1892, p. 378,) is special, and therefore unconstitutional.

3. Raw material necessary for the manufacture of paper, paper in process of manufacture, and manufactured paper, being "visible personal estate," must, under the act of March 19, 1891, (P. L. 1891, p. 189,) be assessed for taxes in the township, ward, or taxing district where the same is found.

(Syllabus by the Court.)

Separate certioraris at the suit of the Warren Manufacturing Company against Frederick A. Dalrymple, collector of the township of Holland, Hunterdon county, and David O. Donnelly, collector of the township of Pohatcong, Warren county, to review certain assessments for taxation. Heard together on an agreed statement of facts. Judgment for prosecutor.

The other facts fully appear in the following statement by DIXON, J.:

Statement of facts agreed upon between the prosecutor and the respective defendants in above certioraris: "First. That the valuation made by the assessors of the respective townships—Pohatcong and Holland—is not in dispute. Second. That the real estate of the

prosecutors, involved in these proceedings, consisted of two tracts of land,—the one known and designated as the upper or old mill property; the other known and designated as the lower or new mill property. The said tracts of land adjoin. The upper or old mill tract contains five hundred and fifty-two and ninety one-hundredths acres, two hundred and thirteen and seventy-nine one-hundredths acres of which are situate in the township of Pohatcong, (formerly Greenwich,) Warren county, and three hundred and thirty-nine and eleven one-hundredths acres are situate in the township of Holland, (formerly Alexandria,) in the county of Hunterdon. The lower or new mill tract consists of three hundred and fourteen and one-half acres; three hundred and five and one-half acres of which are situate in the township of Holland, in the county of Hunterdon, and 9 acres in the township of Pohatcong aforesaid. The Musconetcong creek is the division line between the said townships and said counties. Third. That all of the personal property of the prosecutors is located in the township of Holland aforesaid, excepting one thousand dollars' worth, which is located in the township of Pohatcong aforesaid on the upper or old mill property; that the total amount of the personal property of the prosecutors was assessed by each township at \$70,000, \$40,000 of which was assessed and taxed by each township as located on the upper or old mill property, and \$30,000 of which was assessed and taxed by each township as located on the lower or new mill property. Fourth. That the prosecutors acquired title to all of the upper or old mill property (real estate) prior to January 1, 1881. Fifth. That the prosecutors acquired title to the lower or new mill real estate on the following dates, viz.: As to three hundred and five and one-half acres situate in the township of Holland, on the 7th day of February, A. D. 1889, and as to the 9 acres situate in the said township of Pohatcong, on May 22d, A. D. 1890. Sixth. That the respective township officers of the respective townships—Holland and Pohatcong—assessed and taxed the whole of the upper or old mill real estate to their respective townships. Seventh. That the township officers of Pohatcong township assessed and taxed the whole of the lower or new mill real estate to the benefit of said township. Eighth. That the township officers of Holland township assessed and taxed all of the lower or new mill real estate in said township of Holland to the benefit of said township, but not the nine acres situate in Pohatcong township. Ninth. That the township officers of Holland township and the township officers of Pohatcong township each assessed and taxed all of the personal property of the prosecutors to the benefit of their respective townships. Tenth. That the personal property of prosecutors, at the time of the assessment, consisted of raw

material necessary for the manufacture of paper, paper in process of manufacture, and manufactured paper. Eleventh. That the portion of the upper or old mill real estate which is situate on Pohatcong township is one-fifth in value of the whole old mill tract; that the portion of the old mill real estate which is situate in Holland township is, in value, four-fifths of the whole of said tract; that the portion of the lower or new mill property which is situate in Holland township represents seventy-nine eightieths in value of the whole of said tract, and the portion thereof that is situate in Pohatcong township represents the one-eightieth of the value thereof. Twelfth. That the prosecutors at the old mill have a superintendent who superintends the works, and a shipping clerk who makes out the invoices and shipping bills, and keeps the time of the employees. The books kept at the old mill are an order book and a shipping book and a book to keep a record of incoming and outgoing freight. There is an office in the old mill for the use of the said superintendent and the said shipping clerk, which said office is in the township of Holland, in the county of Hunterdon. That the prosecutors have an office in Riegelsville, Pohatcong township, in the said county of Warren, about three miles from either mill property. That said office is in a stone building attached to a grist mill. That in that office the secretary and treasurer performs his duties for the company, the prosecutors. That the meetings of the board of directors and stockholders are held there, and that the general manager of prosecutors has his office and performs his duties there. That a statement of the transactions of prosecutors at the said mill are forwarded to and filed at the said Riegelsville office. All records of the company are kept at the said Riegelsville office. The safe of prosecutors is at the said Riegelsville office, there being no safe at the mill office. The checks of the company are issued from the Riegelsville office. The money to pay employees is put up in envelopes at the Riegelsville office, sent to the mills, and the men there paid. That the bill heads and stationery of the company are printed 'Riegelsville, N. J.' Wm. S. Gummere, Atty. of Prosecutors. R. S. Kuhl, Atty. for Holland Township. Irwin W. Schultz, Atty. of Defdt. David C. Donnelly, Coll. Pohatcong Township."

Argued February term, 1894, before AB-BETT and DIXON, JJ.

Wm. S. Gummere, for prosecutor. R. S. Kuhl, for Holland Tp. Irwin W. Schultz, for Pohatcong Tp.

DIXON, J., (after stating the facts.) The provision contained in section 6 of the tax act of April 11, 1886, (Revision, p. 1150.) that, "when the line between two townships or wards divides a farm or a lot owned or possessed by the person taxed, the same shall

be taxed, if occupied, in the township or ward in which the occupant resides," still remains as a feature of our taxing system, (P. L. 1891, p. 189, § 6.) Consequently, upon the facts stated in these causes, the whole of the old mill tract must, according to *Manufacturing Co. v. Warford*, 37 N. J. Law, 397, be assessed in Pohatcong (formerly Greenwich) township. For the same reason, the whole of the new mill tract must also be assessed in the same township, unless the supplement of May 11, 1886, (Supp. Revision, p. 981; re-enacted P. L. 1892, p. 378,) requires the application of a different rule to that property. We think this supplement should not be applied, for two reasons: First, because the new mill property does not, in the words of that supplement, lie adjacent to the lands upon which the owner resides, the residence of this corporation being in its principal office at Riegelsville, three miles distant, (37 N. J. Law, 397;) and, second, because this supplement is special, and therefore void, under article 4, § 7, par. 12, of the constitution, requiring property to be assessed for taxes under general laws only. The supplement makes the place of the assessment of land depend upon the question whether the owner acquired title since the year 1881. We are unable to perceive how the fact that land has been purchased since 1881 can afford any reasonable basis on which to found a class of lands for purposes of taxation; and therefore, according to the entire train of our decisions, a statute attempting to classify real estate on such a fact for those purposes cannot be general. Hence we conclude that all the real property is assessable in Pohatcong only, and the assessment in Holland township must be set aside.

The personal property seems plainly to come within the reach of the first clause of section 6 of the act of March 19, 1891, (P. L. 1891, p. 189,) which enacts "that the tax on visible personal estate shall be assessed in and for the township, ward or taxing district where such property is found." According to the tenth fact stated at the head of this opinion, all of the personal estate assessed was visible; and, according to the third fact there stated, \$69,000 worth of it was found in the township of Holland, and \$1,000 worth in the township of Pohatcong. The assessments on personal property in these townships must be reduced to these figures. The prosecutor is entitled to costs in both causes.

STATE (MERRELL, Collector, Prosecutor) v. INHABITANTS OF TOWNSHIP OF POHATCONG.

(Supreme Court of New Jersey. March 5, 1894.)

Certiorari at the suit of Lewis Merrell, collector of Warren county, against the inhabitants of the township of Pohatcong, in Warren county. 28A.no.12—43

ty, to review an assessment for taxes made by the assessor of Pohatcong county. Judgment for prosecutor.

Argued February term, 1894, before AB-BETT and DIXON, JJ.

Henry S. Harris and George W. Shipman, for prosecutor. Irwin W. Schultz, for defendant.

DIXON, J. It appears in this case that the assessor of Pohatcong township assessed the taxable property in the township for 1893 at the sum of \$1,086,684, which was its true value; that, upon presentation of his duplicate to the county board of assessors for the ascertainment of the township's quota of state and county taxes, that board fixed the quota upon the sum of \$1,098,897, which was the valuation in the duplicate for 1892; that thereupon the township appealed to the state board of taxation, under the eighth section of "A general act concerning taxes," (P. L. 1891, p. 189,) and insisted, not only that the valuation of 1893 should be adopted as the basis for ascertaining the quota, but also that \$70,000 should be deducted from such valuation, because the assessor had assessed, at that figure, the new mill property of the Warren Manufacturing Company, which mainly lies in Holland township, Hunterdon county, and which, therefore, it was claimed, was not assessable in Pohatcong township; and that the state board sustained these claims of Pohatcong township, and fixed the quota upon the basis of \$1,016,684. The present certiorari brings this determination of the state board before us for review. For the reasons stated in our opinion delivered at the present term in the suits of *Manufacturing Co. v. Dalrymple*, and *Same v. Donnelly*, 28 Atl. 671, the new mill property of that company was assessable in Pohatcong township; and therefore the judgment of the state board, deducting its value—\$70,000—from the amount of the duplicate, was erroneous, and must be set aside. The quota chargeable against the township should be reckoned upon the amount of the duplicate of 1893, viz. \$1,086,684. The prosecutor is entitled to costs.

(52 N. J. E. 366)

NATIONAL DOCKS & N. J. JUNCTION CONNECTING RY. CO. v. UNITED NEW JERSEY RAILROAD & CANAL CO. et al.

(Court of Chancery of New Jersey. March 6, 1894.)

EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—GRANTS—CONSTRUCTION.

1. Under Revision, p. 929, § 101, authorizing railroad companies to take possession of land condemned on paying into the circuit court the amount found due as compensation, a payment to the clerk, without the court's knowledge, and without any order being entered on its minutes, or other records being made, confers no right of appropriation on the condemning company.

2. The condemnation by a railroad company of land abutting on a highway does not vest in such company the landowner's title to the highway.

Bill by the National Docks & New Jersey Junction Connecting Railway Company to enjoin the United New Jersey Railroad & Canal Company from interfering with the construction of the complainant's road. Bill dismissed.

Charles L. Corbin and John R. Emery, for complainant. James B. Vredenburg and Joseph D. Bedle, for defendants.

VAN FLEET, V. O. This is an application for a mandatory injunction. The litigants are railroad corporations. The complainant was incorporated under the general railroad law. By its bill it alleges that it has acquired by condemnation a right to construct an underground crossing through the lands of the defendants at a point in Jersey City where, in addition to the tracks constituting a part of the defendants' main line, more than 20 other tracks have been laid for the storage of passenger cars when not in use; that it desires to commence work at once in constructing such crossing, by making a deep excavation under the three storage tracks lying furthest to the south, and called tracks Nos. 1, 2, and 3; and that the defendants, to prevent it from constructing such crossing, have placed cars on these three tracks at the point where the excavation must commence, and have also, after written request, refused to remove them. The bill also alleges that it is the intention of the defendants to keep cars constantly on the tracks at the point of crossing, and by that means prevent any excavation being made there, unless the complainant will take the risk of the cars falling into the excavation and killing or maiming its workmen. To remedy the wrongs the defendants are thus committing, the court is asked to compel them to remove the cars standing over the crossing, in such manner, from time to time, as will enable the complainant to construct its crossing expeditiously and with safety, and also to enjoin them from doing anything which will prevent or obstruct the complainant from the full and fair exercise of its rights. The defendants deny that the complainant's proofs show that it has acquired a right to enter upon and take possession of their land at the point where it claims a right to construct a crossing.

No principle of legal right and duty is better settled in this state than that which declares that when a railroad corporation attempts to acquire land by the exercise of the power of eminent domain, compensation, either actual or constructive, must precede appropriation. The constitution so ordains. As the complainant was organized under the general railroad law, it has only such rights and powers as that law grants. That law expressly declares that no company incorporated under it shall take possession of any land taken by it by condemnation until it shall have first made compensation, but that, after what must be considered as just compensation in the particular case has been finally determined, in either of the modes pointed out, the condemning company shall, on making tender of the amount ascertained by such determination, and in case the same is refused, on paying it into the circuit court of the county wherein the land taken lies, "be empowered to enter upon and take possession of the said lands, and proceed with the work of constructing its road." Revision,

p. 929, § 101. There can be no doubt that the legislative design in incorporating this provision in the general railroad law was to render tender and refusal and payment into court a constructive payment, and to give such a payment the same legal effect as would result from an actual payment. The sum which must be regarded as just compensation for the land taken in this case has already been finally determined, so far, at least, as to invest the complainant with a right, on tender and refusal of the money and its payment into court, to take such possession of the land as may be necessary to enable it to proceed with the construction of its road thereon; and the sum so ascertained has been tendered and refused. So far I regard the complainant's case free from doubt or dispute. But the question in contest is, has the other prerequisite of the statute been performed? Or, stated in another form, had the condemnation money been paid into the circuit court when the complainant filed its bill? On this point the bill, after alleging that both parties appealed from the award of the commissioners, and that a trial by jury had been had, and a verdict rendered, on which judgment had been entered against the complainant for \$95,000, says: "Your orator, on the 1st day of November, 1893, duly tendered payment of said sum, with interest from said 23d day of October, 1893, to the said owners, and, payment having been refused, forthwith duly paid said sum and interest to the clerk of the Hudson circuit court." The manner in which this payment was made is stated with greater particularity in an affidavit made by one of the complainant's engineers. After stating that he was present when the tender was made and refused, he says: "I then went with Mr. Dickinson [Mr. Dickinson is the person who made the tender] to the county clerk's office, and saw him, on the same day, pay to the deputy clerk, in charge of the office, the same sum, receiving his receipt therefor." Now, unless paying money to the clerk is, under this statute, paying it into court, it is manifest that the payment made by the complainant in this case was wholly unauthorized, just as much so as if it had been made to the sheriff, or any other officer of the court. The clerk is not the court. He is simply its scribe, and custodian of its records. He is not the agent of the court, nor has he any authority to act for or represent the court in its absence. In the discharge of its judicial duties a court can have no agent or representative. The clerk of the circuit court does not possess the least shred of judicial power. He has no power to decide what is money, nor in what circulating medium payment in such a case must be made,—whether in coin or currency. For anything that appears to the contrary, this payment was made to the clerk, not in the presence of the court, but in its absence, and without its knowledge, and without any order or rule being entered on its minutes,

or other record being made; and also without notice to the defendants, in their absence, and without their knowledge. The money in such cases represents the land taken. It is the thing which the law substitutes for the land, and the thing which must be put into court is that thing which the law has legalized as money. It would seem, therefore, to be entirely clear that the object of the legislature in directing that the money should be paid into the circuit court was to give that court complete jurisdiction over the whole matter, namely, to see that the proper sum in legal money was paid to a person authorized by the court to receive it; also to make provision that the money should be safely and securely kept until a final disposition of it is to be made; and that when it is ordered to be paid to see to it that the order directs that payment shall be made to the person who was entitled to the land taken. It is the payment of the money into court that confers upon the condemning company the right of appropriation, and, as the money represents the land over which the right of appropriation is acquired, the court must, in making a final disposition of the money, treat it as if it were land, and order it to be paid to the person who was entitled to the land. *Ross v. Adams*, 28 N. J. Law, 160, on error, 30 N. J. Law, 505. This interpretation of the statutory provision under consideration makes it plain, as I think, that a railroad corporation incorporated under the general railroad law can, in no case where payment into court must precede appropriation, acquire a right to take possession of the land condemned until it has paid the condemnation money into court in such manner that the court acquires, the instant that the payment is made, complete control over the money for all purposes. In my judgment, to accomplish the legislative design, the money must be paid in the presence of the court, or under its authority; the indispensable requisite being that, when the money passes from the hands of a condemning company, it shall go into the hands of some person whom the court has authorized to receive it, either by special order or general regulation. The power of the court to designate the person to receive the money, and to prescribe how it shall be safely kept, is, in my judgment, unquestionable and absolute, and may be so exercised as that the clerk shall neither handle nor touch the money.

It has long been settled that when the defendant in a suit at law desires to pay the sum which he admits to be due into court, in discharge of his liability to the plaintiff, he can only do so under an order or a rule of the court in which the suit is pending, and that a payment to the clerk in such a case, in the absence of an order or a rule, is not a payment into court. The usual statement of this doctrine is that the clerk has no authority to receive money for the court without a rule. The supreme court of this state

has recently enforced this doctrine. *Levan v. Sternfeld*, 55 N. J. Law, 41, 25 Atl. 854. Among the cases cited with approval by Mr. Justice Reed in delivering the opinion of the court in the case just mentioned is *Baker v. Hunt*, 1 Wend. 103. In that case it appeared that the defendant had paid to the clerk a sum sufficient to satisfy the plaintiff's demand. The clerk received the money, but refused to give receipt for it, stating that he did not think he had any authority to receive it. He subsequently returned the money to the defendant, and then the plaintiff applied for an order requiring the clerk to pay the money to him. The application was denied, the court, by Chief Justice Savage, declaring: "The clerk had no right to receive the money without a rule of court, and acted correctly in returning the money to the defendant." Money paid to the clerk cannot be considered as having been paid into court, for the very obvious reason that the clerk is not the court, and has no authority, in the absence of a statutory direction, or a special order, or a general regulation, to act for the court in such a case; and also for the further reason that such a payment, especially when made without the authority of the court, in its absence, and without its knowledge, entirely fails to accomplish the fundamental object of the direction to pay the money into court, which is to put the money into the custody of the court for safe-keeping, and its ultimate payment, by order of the court, to the person entitled to it. In the absence of statutory direction, or a special order, or a general regulation, the clerk, in my judgment, has no more authority to receive money in such a case for the court than he has to decide what sum shall be paid, or what shall be received as money, or where the money shall be placed for safe-keeping, or to whom it shall be paid. As a general rule, money cannot be paid into the English court of chancery without an order. Mr. Daniell, in his treatise on Pleading and Practice, says: "No money can be paid into court to the credit of any cause or matter, with few exceptions, without an order." 2 Daniell, Ch. Pr. (5th Ed.) marg. p. 1786, bottom p. 1708. The exceptions referred to will be found on examination to be cases where parliament has selected the person to whom the money must be paid, and has given express direction that it shall be paid to him. For example: The English statute authorizing land to be taken for railroad and other purposes, generally called the "Lands' Clauses Act,"—8 & 9 Vict. c. 18, (17 Brit. St. p. 584,)—declares that when the sum awarded for land taken exceeds £200, and cannot, for any reason, be paid to the owner, the money shall be paid into the bank, in the name and with the privity of the accountant general of the court of chancery, to be placed to the account there of such accountant general. Under such a statute it is obvious that to get the money into court no order is necessary.

nor has the court any authority to make one, for parliament has itself designated the person to whom the money shall be paid, and also where it shall be placed for safe-keeping, and has thus deprived the court of all power either to appoint a person to receive the money, or to select a place for its safe-keeping. The construction of such statutes has been free from doubt or question from the time the first one was passed. In an anonymous case, reported in 1 Ves. Jr. 56, it appeared that parliament, by a private act, had directed the sale of an estate, and that the money arising from the sale should be paid into the bank, in the name and with the privity of the accountant general. After the sale a petition was presented, asking that an order be made directing that the money be paid into court pursuant to the act. Lord Thurlow held that he had no authority to make an order. He said: "Money is frequently to be paid in by authority of the court; frequently the court has a right to look into it. Here it is to be paid to the accountant general, and the court has no authority." And he then added, in substance, that when an act of parliament confers authority on the court, or refers a matter to the court, the court must obey the direction of parliament. But one deduction can be fairly made from this statement of law, and that is that when a statute directs that money shall be paid into a particular court, without designating a person to receive, and where the money shall be placed for safe-keeping, the duty of making such designations is necessarily imposed on the court, and the court must then look into the matter, and decide who shall be authorized to receive the money, and where it shall be placed for safe-keeping. In such a case the money cannot get into court except by the authority of the court, for, until authority is given to some person, either by special order or general regulation, no one has authority to receive the money for the court. When a statute does not order to whom it shall be paid in order to put it into the custody of the court, the court must; and until the court does, either by special order or general regulation, no person, whether an officer of the court or not, has the least authority to receive the money for the court.

There are statutes which direct that money, in condemnation cases, shall be paid into court by paying it to a particular officer, —as, for example, that it shall be paid to the clerk of the circuit court, or that it shall be paid into a specified court, to the clerk thereof; and others, still, which, without ordering the money paid into court, simply direct that it shall be paid to the county clerk. But between such statutes and a statute which directs that the money shall be paid into a particular court, without directing to whom the payment shall be made, there is, it will be observed, a clear and broad distinction. They vary both in their

words and their substance. Statutes expressed in the form first stated point out plainly and distinctly an officer to whom the money shall be paid, and must therefore be understood as a legislative command that the payment must be made to him. The court, under such a statute, has no power whatever to direct or control the payment of the money, because the legislature has given full and final direction on that subject. While a statute expressed in the second form, as it omits the direction given by the first, and fails to say to whom the money shall be paid, and simply says that it shall be paid into court, without more, must be understood, according to an established principle of construction, as evincing a clear legislative purpose, especially when the words of the two are contrasted, to give the court into which the money is directed to be paid full power and authority to decide how it shall be brought into court, who shall be authorized to receive it, and where it shall be placed for safe-keeping. The two provisions, it will be noticed, differ widely in a highly important particular. The one directs to whom the money shall be paid in order to bring it into court, while the other simply directs that the money shall be paid into court, without appointing any person to receive it. The one gives full and specific direction as to whom the money shall be paid, and the other says nothing whatever on that subject. The one omits a material direction that the other contains. They cannot, therefore, mean the same thing. To declare that they do would not be construction, but legislation. A court may expound, but it cannot legislate. The principle which must control the construction of a statute differing as widely as this does from other statutes on the same subject was laid down by Mr. Justice Buller, many years ago, in *Jones v. Smart*, 1 Term R. 44, and recognized and enforced by the court of errors and appeals, speaking by Chief Justice Beasley, in *Palma-ter v. Tilton*, 40 N. J. Eq. 555, 557, 5 Atl. 105. It is this: "We are bound to take the act of parliament as they have made it. A *casus omissus* can in no case be supplied by a court of law, for that would be to make laws."

Without giving any consideration to the question as to whether, where payment of the condemnation money into court must precede appropriation, a right to possession can, in any case, be legally acquired, except the payment is made on notice to the landowner, so that he is afforded an opportunity to be present in court to see that his rights are properly protected, my judgment is that the complainant's application must be denied, for the reason that, on its own showing, it appears that it has not paid the condemnation money in such manner as to give it a right to take possession of the land condemned.

There is another reason why I think the

complainant's application, in its present form, must be denied. The land of the defendants which the complainant seeks to acquire, as described in the condemnation proceedings, consists of a strip 55 feet in width, extending from the northerly boundary of a street in Jersey City known as "Railroad Avenue" northward a little less than 525 feet. The defendants, as abutting owners, hold the fee of one-half of the land occupied by this street. At the point where the complainant's railroad will cross this street the street is about 50 feet wide, so that the complainant's route, at the point of crossing, embraces a lot of land belonging to the defendants, but constituting a part of the street 55 feet in width by 25 feet in length, and containing about 1,375 square feet. This land in the street forms no part of the land which the complainant notified the defendants it intended to take, and of which the statute required the complainant to give "a particular description" in writing. Revision, p. 928, § 100. It lies, in fact, entirely outside of the land described in the condemnation proceedings. Hence, unless the quantity of land acquired by the exercise of the power of eminent domain in this case can be extended, by construction, so as to embrace land lying outside of the boundaries of the land described, it is manifest that the complainant has acquired no right whatever to use or possess the defendants' land in the street. At the time the condemnation proceedings were commenced the defendants' land in the street was burdened with the easement of a public highway. Subsequently, however, and between the date when the commissioners made their award and the date when the appeals from their award were tried, the street, at the point of crossing, within the lines of the complainant's route, was vacated by the proper authority; so that the fact is that, when the sum which must be regarded as just compensation for the land taken was finally determined by the verdict of the jury which tried the appeals, the defendants' land in the street was no longer subject to the easement of a public highway, but had been entirely freed from it. It is not pretended by the complainant that the sum awarded by the jury included the value of the defendants' land in the street, or that on the trial of the question as to what sum would constitute just compensation for the land which the complainant wanted to acquire, either party understood or supposed that the land in the street constituted part of the land for which compensation should be made. No evidence respecting its value, or the damages which would be caused by its appropriation, was offered by either party. They, on the contrary, restricted their evidence, as to value and damages, to the land embraced within the particular description which the complainant had given of the land it intended to take. Notwithstanding these facts, the

complainant contends that it has acquired a right to construct its railroad over the defendants' land in the street. The general principle asserted in support of this contention is that the condemnation of land abutting upon a highway by a railroad corporation operates as a grant of land outside of the land particularly described, and carries the right acquired by the condemning company as far into the public way as the title of the owner whose land is taken extends. The argument is, of course, that such is the legal effect imputed by construction to a grant of land abutting upon a public way, made by deed; and that, as land taken by the exercise of the power of eminent domain is held, in legal theory at least, to have been acquired by grant, the meaning and effect of such a grant should be determined by the same rules which govern the construction of a grant made by deed. But this argument, as is apparent, entirely overlooks the wide difference existing between the two grants, both as to the means by which they are effected and the purposes for which they are made. When land abutting on a public way is conveyed by deed, free from condition or limitation, the grantee acquires a right by the deed to use the land for any and all purposes for which land may lawfully be used. To many of such purposes the land occupied by the highway, whether it remains subject to an easement in favor of the public or not, is a necessary and indispensable adjunct. When a conveyance of land thus situated is presented for construction, the presumption is easy and natural that the parties to the deed both understood and expected that the land in the highway, though not within its descriptive words, would pass by the deed; the land in the street in such a case "being regarded," as Chief Justice Beasley, in the leading case on this subject in this state, said, "as a mere adjunct of the property sold, and worthless for any other use." *Salter v. Jonas*, 39 N. J. Law, 469, 472. And it is upon the ground of the presumed intention of the parties, and upon this ground alone, that the doctrine rests that the delineatory words of a deed may be extended by construction so as to make the deed convey more land than they describe. In the case just cited the chief justice, on page 473, says: "The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed in the nature of the affair and the situation of the parties. When the conditions of the case are altered, as if the vendor should, in a given case, have an apparent interest to reserve to himself the parcel of street in question, a different rule of interpretation might become proper." It would seem, then, to be beyond dispute that the construction which the complainant contends should be given to its grant cannot be adopted, for the reason that the presumption upon which it can alone rest

cannot be made in any case where land is taken in invitum. In such a case the fact is, and no sensible presumption can be made to the contrary, that the landowner means to grant nothing. He simply submits to legal compulsion, and does not intend to give up anything which the law will permit him to keep. That such was not only the purpose, but stubborn determination of the landowners in this case, is made entirely certain by the averments of the complainant's bill. The defendants are charged with having pertinaciously resisted the complainant in its efforts to acquire a right to cross their land by the institution of many distinct legal proceedings in both the state and federal courts, in bad faith, and solely to delay and obstruct the complainant in the pursuit of its rights. Their course, in this respect, as described by the complainant, shows that they did not intend to yield anything which the law would permit them to keep, nor even to submit to legal compulsion if they could help it. The law never indulges in presumptions contrary to what the fact appears to be. Besides, I think it is debatable whether, where land abutting upon a highway is conveyed by deed to a railroad corporation simply as a part of its right of way, and for no other purpose, the land in the highway, belonging to the grantor, would, by force of the rule under consideration, be held to pass. The land conveyed in such case would be acquired, not for all the uses to which land may lawfully be applied, but for a single purpose, namely, for the passage of railroad cars over it. The land in the highway could not be used as an adjunct to such a purpose, nor could it be applied in any other lawful way so as to render it valuable or useful to the grantee as a railroad corporation. None of the reasons which govern the construction of a deed whereby land is conveyed to the grantee for all purposes would exist in such a case, and it would, therefore, seem to be the duty of the court, when such a deed is presented for construction, to declare that, when the reason of any particular law ceases so does the law itself.

But there is another, and, as I think, conclusive, reason why land taken by the exercise of the power of eminent domain under the general railroad law must be held to be unalterably limited to the land particularly described, and that its area can in no case and under no circumstances be extended or enlarged by construction. The legislative purpose, in requiring the condemning company to give a particular description in writing of the land it intends to take, is apparent, and had its origin, unquestionably, in a desire to secure fairness and promote justice. The duty of furnishing a particular description was manifestly imposed so that the landowner might see and know just how much of his land was required, and what was its position and relation to his other land, and thus be placed in a position

where he would have a fair opportunity to contest with his adversary the question of just compensation; and also that all persons who should be charged with the duty of ascertaining and determining what would be just compensation for the land taken, might be furnished with the means of estimating intelligently and judiciously the value of the land to be taken, and the damages which would be caused thereby. That this purpose would be defeated, and the wrong which the legislature meant to prevent would be done, if the complainant's construction of its grant were adopted, appears to me to be so plain that no argument is required to prove it. On general principles of justice I think it is entirely clear that a grant acquired by a railroad corporation by the exercise of the power of eminent domain should not be enlarged or extended by inference or implication. With respect to such grants the rule of construction should be held to be that whatever is not granted by express words must be understood to have been withheld. For these reasons, I think the court is bound to declare that the complainant acquired no right by the condemnation proceedings to the defendants' land in Railroad avenue. This being so, it follows necessarily that, until the complainant may lawfully use that land in passing to and from the point where it intends, according to the plan set forth in its bill, to commence the construction of its crossing, no injunction of the kind asked for should issue. If it were issued, it would inflict serious injury on the defendants, and do the complainant no good. The first and principal measure of relief asked is that the defendants may be compelled to remove the cars standing over the crossing on tracks 1, 2, and 3, and keep those tracks at that point free, in order that the complainant may commence work in constructing its crossing by excavating under these tracks. But the fact is that, in consequence of the situation and surroundings of the land condemned for the crossing, the complainant has no means of access to the point where its excavation, under its present plan of constructing its crossing, must commence, except over and across the defendants' land in the street; and, as the complainant has not, as yet, acquired a right to use that land, it follows that it cannot proceed to excavate under the three tracks, and consequently has no right to have the cars standing over the crossing removed. My conclusions on the whole case are: First, that as the complainant had not paid the condemnation money into court when it filed its bill, and hence had acquired no right to the possession of the land condemned, its bill must be dismissed, but without prejudice to the commencement of a new suit; and, second, that as the defendants' cross bill shows that the complainant has taken possession of the defendants' land in Railroad avenue, and commenced work there-

on, without right, an injunction must issue restraining the complainant from its further use.

(160 Pa. St. 245)

HASSINGER v. AMMON et al.

(Supreme Court of Pennsylvania. March 12, 1894.)

CONTRACT OF SURETYSHIP—ACTION ON BOND—DEFENSES.

1. Under a bond reciting that H. was about to take certificates in a benefit society which, for assessments, etc., would cost him \$2,198.40, and providing that if he paid his dues, and the society failed to pay him his benefits as they matured, the obligors would save him harmless from loss by reason of its failure, and would pay him such part of the \$2,198.40 as the society should fail to pay him, the obligors are sureties, not guarantors.

2. In an action on such bond, the validity of the society's charter and the legality of its business cannot be raised by the obligors.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Action by George W. Hassinger against J. S. Ammon and others on a penal bond. Judgment for plaintiff. Defendants appeal. Affirmed.

The charge of the court below was as follows:

"This is a suit brought by George W. Hassinger against Jacob S. Ammon, Isaac R. Fisher, Henry J. Mays, John N. Leavy, and Mahlon Fogleman. All the parties signing this bond have been sued, but the only ones who have pleaded, and who are now on trial, are Jacob S. Ammon and Henry J. Mays. So far as the charter is concerned, and the alleged illegality of the business done by the association, that cannot be called in question in this case. The association was chartered by the court, and the suit is upon the bond. So far as the points of the defendants in this case are concerned, they are refused. While the first point may be true, it requires no special answer, and we may refuse them generally, inasmuch as the other points raise the legal question in this case. Now, what is this bond? It appears that Jacob S. Ammon, Isaac R. Fisher, Henry J. Mays, John N. Leavy, and Mahlon Fogleman gave their bond to George W. Hassinger on the 14th of January, 1886. The conditions of this bond are set forth in this way: 'The condition of this obligation is that whereas, the said above-named George W. Hassinger is about to take \$27,000 worth of the certificates of the Equitable Beneficial Society of the City of Reading for unmarried persons, the last of which certificates are to mature in the month of July, A. D. 1887, and which certificates will cost the said George W. Hassinger, for entrance fees, assignments, monthly dues, and annuals, until they are all matured, the sum of twenty-one hundred and ninety-eight dollars and forty cents, now, if the said George W. Hassinger shall promptly and regularly pay all the monthly dues and annuals on the said certificates of marriage

insurance until all of them shall have matured, and that the said the Equitable Beneficial Society shall fail to pay the said George W. Hassinger his benefits as they shall mature from time to time, then we, the undersigned, bind ourselves, our heirs, executors, and administrators, and every of them, to save and keep him, the said George W. Hassinger, harmless from loss or damage by the said Equitable Beneficial Society failing to pay him his benefits as they mature; then we bind ourselves, our heirs, executors, and administrators, and every of them, to pay him, the said George W. Hassinger, such share or proportion of said \$2,198.40 which the said Equitable Beneficial Society shall fail to pay him upon his claims for benefits: provided, the monthly dues and annuals are regularly and promptly paid as they are required by the by-laws of the said society: and provided, also, that if the undersigned obligors shall be required to pay to the said George W. Hassinger the above-named amount, to wit, \$2,198.40, all sum or sums of money previously paid by said society upon the certificates that have previously become beneficial (if any) shall be deducted from the above amount of \$2,198.40, and such balance to be paid to him with interest, and upon the condition hereinbefore fully stated and set forth, to be mutually kept and performed by the parties hereto, this obligation shall be void and of none effect, or else to be and remain in full force and virtue.' It is represented in this bond that the certificates which George W. Hassinger is about to take, will cost him, for entrance fees, assignments, monthly dues, and annuals, until they are all matured, the sum of \$2,198.40, and the covenant in the bond is that if he shall promptly and regularly pay all the monthly dues and annuals on the certificates until they have all matured, and if the said the Equitable Beneficial Society shall fail to pay George W. Hassinger his benefits as they shall mature, then the makers of this bond are to save and keep him harmless from loss by reason of the failure of the society to pay him. This bond requires that George W. Hassinger pay these various entrance fees, assignments, monthly dues, and annuals. Having received these certificates from the society, he was required to advance the money to make payment, as herein required. If he kept the covenants on his part, then, in case of the refusal or failure on the part of the society to pay him the matured benefits, these men were to pay to Hassinger such share or proportion of the \$2,198.40 which the Equitable Society should fail to pay him.

"What did Mr. Hassinger do under this bond? What did he get? What did he pay? Mr. Hassinger, when placed upon the stand, said that he paid in cash \$1,087, and gave a duebill for \$511.40, which together makes up the \$2,198.40 mentioned in this bond. Upon being cross-examined, he admits that some

portion of this amount—he is unable to say how much—was paid in what are termed duebills. The duebill is placed in evidence. The date of the bond is the 14th of January, 1886. There was some alteration made in the date of the duebill, which Mr. Reifsnnyder explains by giving the proper date. So far as the alteration is concerned, we do not think that is material in this case. \$1,687 was paid, and the indorsements of the secretary upon this duebill show that subsequently, in four different installments, the balance was paid. It is admitted that duebills entered into some portion of the \$2,198.40. The assessment book being placed in evidence, it would appear from that book, as shown by Mr. Reifsnnyder, that assessments Nos. 60 and 61 on policy 1449, one policy, and on 1472 to 1479, one policy, were unpaid. Subsequently Mr. Hassinger was placed upon the stand, and he said he paid these two payments by duebills, and Mr. Ludwig, who was secretary at the time of the payment, says these two were paid by duebills, and that he accepted the duebills as payment, upon being told to do so by the manager or superintendent of the society, Mr. Hackenberger. If that testimony is believed, then all the assessments were paid, and, the proofs of marriage having been accepted by the society, the different policies had matured. The policies having matured, the Equitable Beneficial Society were required to pay the benefits maturing, and, upon failure to do so, the bondsmen became liable to pay such share or proportion of the \$2,198.40 which the Equitable Beneficial Society had failed to pay upon the claim for benefits. But the defendants say that there is evidence in this case, to be submitted to the jury, as to what took place at the time of the making of this bond, that the payments were not to be made by duebills or orders, but were to be paid in cash. Isaac R. Fisher, being sworn, as to this particular subject, said, 'I do not recollect that there was anything said in reference to duebills;' and, in answer to the question whether anything was said about cash, he said, 'So far as I recollect now, this money was to be paid in cash towards these certificates and the assessments, or the dues upon them.' Henry Mays, in testifying as to what took place, and whether anything was said about the payment of assessments, answered: 'In regard to that, I could not tell you. This was to raise money, and not to pay duebills.' Then, when he was asked the question, 'You are right sure they said it would not be paid in duebills?' he answered, 'I am sure of that, because they wanted money.' Dr. Ammon, being placed upon the stand, says: 'There was further objection found as to the manner in which this was to be paid into the association; that was spoken about, as to the orders which were already due, that there should not be any orders accepted on this money, because it was money that was needed to pay some claims that were due and

overdue; that is what the money was to be used for,—to pay off these claims.' William H. Reifsnnyder, being asked about the conversation had with Hassinger when the orders were offered in payment of \$1,687, said, 'To the best of my knowledge, I told him about the duebills,—that I thought that was not the case; that it was not cash; that cash money was to come for these certificates; that the duebills would not bring money to pay these things.' Mr. Hassinger, being placed upon the stand, says that there was nothing said with reference to the matter of duebills. [The court will say to the jury that if they find from the evidence given that there was a distinct agreement made then and there as to the manner in which these amounts were to be paid, that if it was then and there agreed that nothing but cash should be accepted, and that no duebills should be used, then the use of a duebill was not a performance of this contract, and there could be no recovery in this case. If, however, they believe that there was nothing said at the time of the making of this bond with regard to the subject, then the society, if they accepted any duebills as payment upon the different assessment of dues, that cannot now be called in question, if they were accepted and taken by the society in settlement;] so that on that point the verdict will be as the jury find the facts. [If they find that duebills were not to be used, and that stipulation entered into the bond, there can be no recovery at all in this case. If they find, however, that there was no such stipulation, that the society accepted and took them in settlement, fairly, then there can be a recovery,] provided the jury find, from the evidence, that Hassinger performed what he covenanted to perform in this case. If the latter theory is found, then the amount due by the face of this bond, the amount which the defendants guaranteed to pay upon the failure of the covenants by the obligors, was \$2,198.40. Mahlon Fogleman, who was on this bond, made a settlement, in which he paid \$439.68. That settlement inures to the benefit of these obligors, and must be deducted from that amount. That would leave \$1,758.72.

"The next question, then, that the jury will determine is: Did the society pay any benefits that had matured? What is the evidence on that question? Mr. Reifsnnyder, being placed upon the stand, says that policy 1449, net amount \$68, was paid to Mr. Hassinger. Upon subsequent inquiry as to how it was paid, he stated that the assessment of E. U. Merkle, \$28, was paid on account, but he was unable to account for \$30.50 as having been paid, but he thought, and was of the belief, that the \$68 had been paid in full. If the jury find, as evidenced by the books here, if they find the true state of facts to be that \$68 was paid, that must be allowed as a credit. If they find that the whole of the \$68 was not allowed, and that but \$30.50

was unaccounted for, the \$30.50 only will enter into their calculation. What is the next item? On the books it would appear that on policy 1456 to 1463 \$544 was paid: Reifsnnyder says that amount was paid, and the books of the company, being offered in evidence, show how, when, and where that was paid. The evidence on the books would show that that amount was paid, and if the jury believe the evidence on the books, supplemented by Reifsnnyder's testimony, \$544 will also be allowed as an additional credit. Mr. Hassinger, when upon the stand, says that he got neither of these items. The books of the company show that in the settlement of his dues these different sums were used up, and, if that is so, they would be entitled to a credit for them. The statement made by the plaintiff in this case allows, upon its face, credit simply for what Mahlon Fogleman paid. If the jury believe the evidence of the books, the books of the society of which Mr. Hassinger was a member, they will allow as a credit \$544 additional, and they will allow the \$68 additional unless the payment of the \$30.50 has not been satisfactorily accounted for; and the result, taking the plaintiff's statement as the correct one, would leave, as actually due, the sum of \$1,146.72, to which interest added of \$349.58 would make a total of \$1,496.30; and, if this \$30.50 is not satisfactorily accounted for, the amount would be \$1,526.80, if this calculation is correct. [The statement prepared by the defendants claims to show that the liability would be only a balance of \$321.32. Their statement shows that the actual cash payments to the company were \$1,122, instead of the amount mentioned in the bond. The court has already said to you that, if the agreement entered into at the time of the giving of this bond was that duebills should not be used, then there could be no recovery at all. But if such agreement was not made, then the defendants' statement should not be considered by the jury, except in so far as the credits are mentioned of \$68, payment on maturing policies, and also \$544 on maturing policies, and the amount received from Fogleman, to wit, \$439.68. That is all I need to say to you in this case.]"

Specifications of error: "First. The court erred in refusing defendants' first point, as follows: '(1) The only power authorizing the issuance of policies or certificates by the said association, for any purpose, is given in article fifth, admitted in evidence, as follows: "The object of the society is to issue certificates of membership in certain specified amounts, and to pay the parties for whose benefit the certificates were issued from a fund to be raised, in each case of marriage, by an assessment of its members." Second. The court erred in refusing defendants' second point, as follows: '(2) The object of the society, as appears by the charter, is "to issue certificates of membership in certain specified amounts, and to pay the parties for whose

benefit the certificates were issued from a fund to be raised, in each case of marriage, by an assessment of its members." This language clearly contemplates a personal association, and does not authorize the assignment of certificates, nor contemplate that anyone may acquire an interest, or become a beneficiary, by the purchase of certificates issued for the benefit of others; and, as the certificates on which this action is based were not issued for the benefit of the plaintiff, he did not thereby become a member of the association, and had no interest in the certificates purchased by him, and no valid or lawful contract with the association, and the contract entered into with the defendant and others, guarantying the performance of a contract that could not be enforced at law and was against public policy, was void, and there can be no recovery in this action.' Third. The court erred in refusing defendants' third point, as follows: '(3) It does not appear by competent evidence that any of the beneficiaries whose policies or certificates were purchased by the plaintiff were married, or that any obligation of the said association ever arose to the said parties, or either of them, by reason of the issue of such certificates. The plaintiff, therefore, could not have recovered any sum from the association, and the contract embraced in the bond in suit was a simple guaranty of a wager that within two years certain persons would marry, which wager was against good morals and public policy, and there can be no recovery in this action.' Fourth. The court erred in refusing defendants' fourth point, as follows: '(4) As the bond in suit purports to be a guaranty or indemnity bond, it must first appear that the association was exhausted before an action against the guarantors would lie, and there being no evidence that any assessment was made, or that any effort was made, to compel an assessment on the members of the association, for the payment of these certificates, if they ever became beneficial, this action against the guarantors is premature, and there can be no recovery.' Fifth. The court erred in refusing defendants' fifth point, as follows: '(5) It appears, upon the face of the bond on which this action is based, that George W. Hassinger had become "the purchaser of twenty-seven certificates, of \$1,000.00 each, of the Equitable Beneficial Society of Reading, for unmarried persons, making a total of \$27,000.00," for the sum of \$2,198.40, and that the obligors in said bond agreed to indemnify and save him harmless in said speculative venture to the extent of the purchase money. And it appears, by the certificates referred to and offered in evidence, that they were not issued to the said George W. Hassinger, but, respectively, to Cyrus S. Snyder, \$3,000.00, and to Lillie L. Fix, \$24,000.00, and that these certificates were by these parties, respectively, assigned to the said George W. Hassinger. The purchase of certificates from members

for speculation was not contemplated in the purposes for which the court chartered this mutual benefit association, and such purchases did not constitute George W. Hassinger a member thereof, or entitle him to the benefits accruing to the purchased certificates. It was a speculative venture on the marriage of persons in whom he does not appear to have an insurable interest, and was, therefore, against good morals and public policy, and was a wager with the said members which could not be enforced at law. And his contract with the obligors in said bond to save him harmless in the said unlawful undertaking, or to guaranty the wager, was likewise void, and there can be no recovery.' Sixth. The court erred in refusing defendants' sixth point, as follows: '(6) The contract between George W. Hassinger and the defendants, as set forth in the bond, was a contrivance of said Hassinger to defraud the bona fide members of the association. Hassinger, the plaintiff, was president of the association, and purchased the certificates for speculation, with intent to apply the funds of the association, not as a dowry upon the marriage of himself or any other member of the association, as contemplated in the charter, but as a profit of 23 per cent. upon a two years' investment. The law will not sanction such undertakings, nor lend its aid to enforce such iniquitous contracts.' Seventh. The court erred in refusing defendants' seventh point, as follows: '(7) That George W. Hassinger, the plaintiff, was at the time of his alleged purchase of the said certificates, and ever since then has been, a married man, and, as such, could not become a member of the association, nor by any contrivance have the members thereof assessed for his benefit. His purchase of certificates with that intent was, therefore, an attempt to defraud the members of the association, and the bond to guaranty or indemnify him against loss in that unlawful venture cannot be enforced at law.'"

Defendant also assigned as error the giving of those parts of the charge inclosed in brackets.

E. B. Wiegand and Richmond L. Jones, for appellants. J. H. Jacobs and Charles H. Tyson, for appellee.

PER CURIAM. This suit is on defendants' penal bond, the condition of which is fully recited in the charge, and need not be repeated. On the trial they submitted seven points for charge, the refusal of which constitutes the first seven specifications of error. In their fourth point the court was requested to say: "As the bond in suit purports to be a guaranty or indemnity bond, it must first appear that the association was exhausted before an action against the guarantors will lie, and there being no evidence that any assessment was made, or that any effort was made to compel an assessment on the mem-

bers of the association, for the payment of these certificates, if they ever became beneficial, this action against the guarantors is premature, and there can be no recovery." The vice of this proposition is the assumption that defendants' obligation to plaintiff is that of guarantors, and not sureties. According to the condition of their bond, they are not guarantors, and hence the point was rightly refused. The fifth, sixth, and seventh points are also predicated on assumptions of fact and inferences of law, some of which were unwarranted by the evidence. As presented, it would have been error to have affirmed either of these points; and the same may be said of the first, second, and third points. The validity of the Equitable Beneficial Society's charter, and the alleged illegality of the business that was transacted by it, cannot be determined in this action. If the propriety of chartering such associations, under vague and indefinite articles, were properly before us, we might have a very decided opinion to express as to the care that should be exercised by courts having jurisdiction of the subject. In this case, the right of the plaintiff to recover, and the amount to which he was entitled, under the condition of the bond, if anything, depended on questions of fact which were for the exclusive consideration of the jury. The testimony was submitted to them in a clear and impartial charge, which appears to be free from any error that would warrant a reversal of the judgment. Considered in connection with other portions of the charge, there is no error in the excerpt recited in the last specification. Judgment affirmed.

(160 Pa. St. 133)

JENKINS et al. v. BAXTER et al.

(Supreme Court of Pennsylvania. March 12, 1894.)

CORPORATIONS—STOCKHOLDERS' MEETING—ELECTION OF DIRECTORS—VALIDITY—MANNER OF CONTESTING—WHEN SET ASIDE.

1. Where the stockholders of a corporation meet at the proper place and time, and before the election of directors part of them withdraw because of dissatisfaction to another part of the same building, and elect themselves directors, the latter cannot maintain a bill against the directors elected in a regular manner at the former meeting to set aside defendants' election and declare plaintiffs lawfully elected, for an order for a new election to be held under direction of a master, and for an injunction, on the ground that a quorum was not present at such election.

2. Plaintiffs' remedy for contesting the validity of defendants' election is by quo warranto, as provided by Act June 14, 1836. *Updegraff v. Crans*, 47 Pa. St. 103, followed.

3. Where neither defendants nor plaintiffs were legally elected under the laws of such corporation, and defendants constituted the old board of directors, the latter hold over.

Appeal from court of common pleas, Philadelphia county.

Bill by William H. Jenkins and others against William Baxter and others to set

aside an election of defendants as directors of the Colorado Mining Drill Company, to declare plaintiffs elected as such directors, for an order requiring a new election to be held under direction of a master, and for an injunction. From a decree for plaintiffs, defendants appeal. Reversed.

Edward H. Well, for appellants. Mellick & Potter, for appellees.

FELL, J. William H. Jenkins and four other persons were plaintiffs in a bill in equity filed January 3, 1893, against the directors of the Colorado Mining Drill Company, praying the court to set aside an election of directors that had been held on October 12, 1892, by the stockholders of the company, to declare that the plaintiffs were lawfully elected directors, to order a new election to be held under the direction of a master, and to grant an injunction. It appears from the bill filed that at a meeting of the stockholders, convened for the purpose of electing a board of directors, a chairman was selected by a majority of those present, against the objection that the selection should be made by a stock vote, whereupon Jenkins and others, without waiting until the time for voting, withdrew to an adjoining room, and organized a meeting of their own, and elected themselves directors. Those who remained elected a board of directors, who afterwards elected the defendants officers of the company. The ground of complaint is that after the withdrawal of the plaintiffs from the stockholders' meeting a majority of the stock was not represented, and that there was not a quorum present. The real point of contention is as to the right to vote 7,000 shares of stock held in trust by the Commonwealth Title & Trust Company. To all this the defendants demurred on the ground that the plaintiffs had a full, complete, and adequate remedy at law. This demurrer was overruled, and the defendants filed their answer; and, after hearing on bill and answer, a decree was made, deciding that one of the plaintiffs was entitled to vote the shares of stock held in trust, appointing a master to hold an election, and directing the defendants at once to deliver to the master the property of the corporation.

The first assignment of error is, "The court below erred in overruling the demurrer to the bill of complaint," and it squarely raises the question whether the averments of the bill brought the case within the equitable jurisdiction of the court. The act of June 18, 1836, confers upon the supreme court and the courts of common pleas the jurisdiction and powers of courts of chancery as to all corporations other than those of a municipal character. This power has been used to control and supervise the election of directors, where it has been shown that by reason of fraud, violence, or other unlawful conduct on

the part of the stockholders a fair and honest election could not be held. This was done on the occasions which gave rise to *Gowen's Appeal*, 10 Wkly. Notes Cas. 85, and to *Tunis v. Railroad Co.*, 149 Pa. St. 70, 24 Atl. 88. The power was invoked in advance of an election to prevent fraud or force, and to secure that the right of each stockholder to vote should be passed upon by an impartial and disinterested person, whose decision was subject to immediate review and correction. Those cases differ widely from this. The court here was not asked to supervise an election upon the allegation that by reason of fraud or force a fair election could not be held, nor upon any other allegation. An election had been held at the office of the company on October 10, 1892. This was the proper place and the appointed time, and the meeting was regular, quiet, and orderly. The plaintiffs withdrew from the meeting before the voting commenced, and proceeded, in another room, to hold an election of their own. Nearly three months afterwards—on January 3, 1893—their bill was filed. It was the right of the plaintiffs to contest the validity of this election, if they so desired, but the method was by a writ of quo warranto, as provided by the act of June 14, 1836. *Updegraff v. Grans*, 47 Pa. St. 103. It follows, therefore, that the demurrer should not have been overruled, and this sustains the first assignment of error.

Without entering into the question of the right to vote the stock held in trust, it is clear that the remaining assignments should be sustained. The hearing was on bill and answer. From the answer it appears that fourteen stockholders attended the meeting of October 10th; that no objection was made to the organization of the meeting, or to any of the proceedings; that when the secretary was about to read the reports of the officers of the corporation four of the plaintiffs withdrew from the room, although urgently requested by the other stockholders to remain. These four afterwards organized a meeting in the entry of the building, at which no other person was present, and elected themselves and another directors. The laws of the corporation required the meetings and elections of the company to be held at the regular office of the company, and do not require a stock vote except for the election of directors. If the election held by the stockholders who remained at the meeting was void because a majority of the stock was not represented, that held by those who withdrew was irregular in every respect. If neither election was valid under the laws of the corporation, the old board of directors held over, and they are the same persons who were elected at the first meeting. The decree is reversed and all proceedings under it are set aside, and the bill is dismissed, with costs to be paid by the appellee.

(160 Pa. St. 253)

In re GERHARD'S ESTATE.

Appeal of MOYER.

(Supreme Court of Pennsylvania. March 12, 1894.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Under a will providing that the interest on a legacy, made a charge on testator's land, be paid to the legatee for life, and directing the payment of the principal to the legatee's heirs at her decease, the legatee takes only a life estate.

Appeal from orphans' court, Berks county; H. Willis Bland, Judge.

In the matter of the estate of John Gerhard, deceased. Mary Moyer, a legatee, appeals from a decree giving her a life estate, only, in a certain fund. Affirmed.

The contention arises upon the construction of the will of John Gerhard, probated November 30, 1888.

The opinion of the orphans' court is as follows: "In the matter of the exception filed May 9, 1893, nunc pro tunc, as of the 4th day of January, 1893, by special allowance of the court, to an adjudication filed December 19, 1892. The exception complains that the court erred in distributing to Mary Moyer the sum of \$1,400, made up as follows: (a) Charge on land sold to Adam Gerhard, \$600; (b) charge on land sold to William Gerhard, \$400; (c) charge on land sold to David Reber, \$400. The provision of the will of the decedent, under which the distribution was made, is as follows: 'Item. After the decease of my said wife, I order and direct that all my real estate owned by me at the time of my decease, as well as all the personal property then remaining, shall be sold at public sale by my hereinafter named executors. * * * And the money arising from such sale or sales, together with all the rest, residue, and remainder of my estate, whatsoever the same may be, I give and devise the same unto my eight children, Isaac, Lydia, wife of Jacob Shaffner, Mary, wife of Aaron Moyer, Rebecca, William, Daniel, Sarah, wife of Adam Stoudt, and Adam, share and share alike, and their heirs. * * * Item. My will is, and I order and direct, that of the share hereinbefore given and bequeathed to my daughter Mary, wife of Aaron Moyer, the sum of \$1,400 shall remain charged on my real estate as follows, &c.: Six hundred dollars (\$600) thereof shall remain charged on my farm at present occupied by my son Daniel, four hundred dollars (\$400) thereof shall remain charged on my farm at present occupied by my son Isaac, and four hundred dollars (\$400) thereof shall remain charged on the farm whereon I and my son Adam at present reside, of which several sums the respective owners or occupiers of said farms shall pay the annual interest, at the rate of five per cent. to my said daughter during her natural life, and upon her decease said principal sum shall be paid to

her bodily heirs in equal shares, and in case my said daughter shall die without leaving bodily heirs, then the said sum of fourteen hundred dollars shall revert and fall back to my estate, and shall be paid to my other children and their heirs.' Exceptions to said distribution were filed by the executors, in that character, on the 4th day of January, 1893, which, in an opinion filed April 19, 1893, were overruled, one of the grounds for the action of the court thereon being the want of interest of the executors, as such, in the subject-matter of the exceptions. In order to obviate the objection of want of interest in the original exceptants, a petition was presented to the court on the 9th day of May, 1893, praying that Adam Gerhard and Daniel Gerhard be allowed to file exceptions to the original adjudication as heirs and legatees of the decedent, and an order was made on the same day, granting the prayer of the petition. The exception now before the court was filed in pursuance of the order so made, and properly raises the question as to the interest of Mary Moyer in the said \$1,400.00 charged on the real estate of the decedent, in pursuance of his will, as above set forth. The gift to her, in the first instance, is absolute, i. e. to her and her heirs, and the controversy is upon the effect of the subsequent direction to charge the \$1,400.00 on certain real estate of the decedent; the owners thereof to pay the interest thereon to Mary Moyer during her natural life, and the principal upon her decease to her bodily heirs in equal shares, and, in case she should die without leaving bodily heirs, the principal to revert and fall back to testator's estate, and to be paid to his other children and their heirs. Generally, words which will create an estate tail in a devise of a freehold will confer an absolute interest in a gift of personal property; but where there are any words or expressions in the bequest showing that the testator did not intend 'issue' or 'bodily heirs,' or their equivalents, in their technical sense, but used them in the popular sense of 'children,' such words and expressions are sufficient to displace the operation of the rule, and limit the interest of the first taker to an estate for life; and where the expressions 'leaving issue,' or 'leaving bodily heirs,' have been used by a testator in a bequest, they have universally been held to denote 'children.' It was said by Gibson, C. J., in *Seibert v. Butz*, 9 Watts, 494, that 'there is perhaps no case in which the limitation over of personal estate, after an indefinite dying without issue, whether the first limitation were indefinite or expressly for life, has ever terminated been confined to a dying without issue at the time of the death; but the courts have seized with avidity on any circumstance, however trivial, denoting an intent to fix the contingency at that period.' The law, as stated by Judge Gibson, has been often applied by the courts since his

time; and so recently as *Miller's Estate*, 145 Pa. St. 561, 22 Atl. 1044, and *Wallace v. Denig*, 152 Pa. St. 251, 25 Atl. 534, his statement of the rule has been repeated and applied in terms. It seems to have been the law since the case of *Pinbury v. Elkin*, 1 P. Wms. 563-64, (decided in 1719.) There the testator bequeathed to his wife all his goods and chattels, made her his executrix, and provided that if she should die without issue by him, then, after her decease, 80 pounds should remain to the testator's brother, J. S. The testator died, next his brother died, and subsequently the widow died, without issue. It was held that the will meant issue living at the widow's death, and that the executor of J. S. was entitled to the legacy of 80 pounds. Next came the case of *Forth v. Chapman*, 1 P. Wms. 664, (decided in 1720.) That case, doubtless, is the true authority for the case here, for the reason that the bequest over was given upon the contingency of the first legatees leaving no issue. There *Walter Gore* devised a leasehold to his nephews, *William Gore* and *Walter Gore*, and if either of them should die, and leave no issue of their respective bodies, then he gave the leasehold premises to the daughter of his brother *William*. The nephews having died without issue, the question was whether the limitation over to his niece was too remote. Lord Chancellor *Parker* decided that it was not, and said: "The reason why a devise of a freehold to one for life, and if he die without issue, then to another, is determined to be an estate tail, is in favor of the issue that such may have it, and the intent take place; but that there is the plainest difference betwixt a devise of a freehold and a devise of a term of years, for in the devise of the latter to one, and if he die without issue then to another, the words "if he die without issue" cannot be supposed to have been inserted in favor of such issue, since they cannot by any construction have it." The case of *Forth v. Chapman* has been repeatedly cited and approved by our supreme court. In *Clark v. Baker*, 3 Serg. & R. 477, *Tilghman, C. J.* said of it: "These words, 'without leaving issue,' applied to personal estate, have been held to mean issue living at the death of the person to whom the property is given in the first instance. But not so with regard to land. This is the distinction taken in *Forth v. Chapman*, 1 P. Wms. 667, and it is well founded, because it carries into effect the intention of the testator." In *Smith's Appeal*, 23 Pa. St. 9, the rule established by *Forth and Chapman* was distinctly recognized by *Lowrie, J.*, who at page 10 said: "Now, as to personal property. Let it be noticed that the legacy is in terms absolute, and that it is qualified only by the bequest over on his death without issue. But these are words of entailment, and, therefore, when applied to personal estate, they pass the absolute property. A different construction is usu-

ally put upon the phrase "dying without leaving issue" when applied to personal property. It is a general, though not universal, rule that words which, when applied to land, would create an estate tail, will, when applied to chattels, pass the entire interest. How can it be otherwise? Chattels cannot be inherited. They pass to one set of representatives, and land to another."

"In *Still v. Spear*, 3 Grant, at page 307, *Strong, J.*, said: 'The property which the plaintiff below seeks to reach by his attachment is personalty. Laying aside for the present any notice of the trust, and treating the gift as directly to *Levi*, the first taker, we have a legacy of the interest of a fund to him indefinitely, and, in case he should die "without leaving issue," a gift of the principal to the children of *Charles*. The case is then completely within the rules laid down in *Smith on Executionary Interests*, (pages 599, 600,) which are as follows: "Where personal estate is limited, either directly to, or by way of executed trust for a person indefinitely, or for life, with a limitation over an indefinite failure of his issue, the whole interest vests in the ancestor. But where the limitation over is on failure of children only, or on failure of issue within a given time, the ancestor will have a life estate with a limitation over of a springing interest, or the entire interest with a conditional limitation over." The limitation over to the children of *Charles* is not a limitation after an indefinite failure of issue. Notwithstanding the doubts which have been expressed in some cases, it is now settled that, in gifts of personalty, the phrase "die without leaving issue" means die without leaving issue living at the death of the person; the failure of the whole issue is spoken of.' In *Train v. Fisher*, 15 Serg. & R. 148, *Duncan, J.*, said: 'Personal estate cannot be entailed. It makes no difference, in regard to the rules of construction, whether the use, interest, or profits be given, with a limitation over of the thing itself, or a bequest of the thing itself. This was formerly a finespun distinction, which in process of time, as personal property increased in estimation, and the liberality of courts extended, has been exploded; and it is now perfectly settled that whether it be a bequest or its use makes no difference. The principle is that where there is a limitation of a chattel by words which, if applied to freeholds of inheritance, would create an estate tail, in personal estate the whole interest vests absolutely in the first taker. There is a distinction, however, as to the words "dying without leaving issue" between a devise of real and personal estate; in the former, generally they seem to be construed to mean indefinite failure of issue; in the latter, issue at the time of the death of the first taker.' In *Hopkins v. Jones*, 2 Pa. St., at page 71, *Sergeant, J.*, said: "The words "die without lawful issue" are to be construed, in case of

personal estate, to mean "die without leaving lawful issue," when that corresponds with the testator's intent. *Pinbury v. Elkins*, 1 P. Wms. 563.' In *Miller's Estate*, 145 Pa. St. 565, 566, 22 Atl. 1044, Mr. Justice Sterrett said: 'But the courts have seized with avidity on any circumstance, however trivial, denoting an intention to fix the contingency at the time of the death. *Selbert v. Butz*, 9 Watts, 490. And accordingly, in *Snyder's Appeal*, 95 Pa. St. 174, where the bequest was to H., and if he should "at any time die without issue, I then give and bequeath" over to all testator's children, it was held that the use of the words "at any time" and "then" imported a definite failure. So, when the time at which the devise over is to take effect is expressly or impliedly limited to a particular period within a life or lives in being, and twenty-one years after, or if he die without leaving issue behind him, or leaving issue at the time of his decease, or if the devise over be of a life estate, which implies necessarily that such devisee may outlive the first estate, the testator has been considered as meaning a failure of issue within a fixed period, and not an indefinite failure.' In 2 *Roper on Legacies*, (page 1551), the learned writer says: 'Again, the words "leaving" or "leave" have been held sufficient to restrain the general import of the term "issue" to those living at the death of the first taker, so as to give effect to the bequests over, upon there being no such issue in existence at that period. Thus, where a testator bequeaths a legacy to A. generally, or to A. for life, and in case he should die leaving no lawful issue, then over; or to A., his executors, administrators, and assigns, and if he die before twenty-one, leaving no issue; or to A. generally, or for life, and to the heirs of his body, and, if he dies leaving no heirs of his body, to B.; or to A. and his heirs, and, if he die leaving no lawful heirs, to B.; or to the children of A. living at his death, and, if such children should die without leaving issue, to B.; or to A. for life, and to his heirs male after him, and, if he should not leave any son, then over.'

"The foregoing citations show how little vigor technical words importing, presumptively, the gift of an inheritance have when used in a bequest of personal property, and how easily their presumed meaning, as words of inheritance, is overcome by expressions of the testator tending to show that he did not use them in their legal sense. If, upon a fair construction of the words of the will, it is manifest that the testator intended a failure of issue within the period allowed for the vesting of future interests, by the rule against perpetuities, the failure of issue intended is, in a legal sense, a definite one, and a gift over is good; and, in the ascertainment of the testatorial intent, courts are satisfied with any reasonable indication of such intent. Not only does

Forth v. Chapman furnish an example of the rule of construction for cases of this kind, but also the probable reason for the rule in the words of Lord Chancellor Parker, at page 666, where he says: 'Besides, the testator, who is inops concilii, will, under such circumstances, be supposed to speak in a vulgar, common, and natural, not in a legal, sense.' As shown by the above authorities, the word 'leaving,' in the connection in which it is used by the testator, would seem to fix the decease of Mary Moyer as the point of time, in the mind of the testator, when a failure of bodily heirs of Mary was to vest the \$1,400.00, absolutely in the other children of the testator. But it seems to the court that for other reasons than those arising out of the rule established in *Forth v. Chapman*, as far as the conclusion in that case depended on the use of the word 'leaving,' it is necessary to hold that Mrs. Moyer is entitled only to the income of the said fund. The \$1,400 is distinctly charged upon the several purparts of the testator's real estate, and those who may become the owners are charged with the duty of paying the interest thereon to her, at the rate of five per cent., and the principal to her bodily heirs; and in case she shall die without bodily heirs, 'then' the principal shall revert to his estate, and be paid to his other children and their heirs. In *Scott v. Price*, 2 Serg. & R. 59, the testator gave his daughter certain bequests, and then proceeded: 'As also 550 pounds specie, to be paid to her in yearly payments, viz.: 100 pounds yearly, after she arrives at the age of 18 years, until the said 550 pounds be paid. * * * It is further my will that if it should please God that any of my before-mentioned sons or daughters should die before he, she, or they attain the age of 21 years, unmarried or without lawful issue, that then, or in either case, the bequest or bequests hereinbefore made, to any or either of them, shall devolve to the survivors or survivor, to be divided share and share alike; and in case it should happen that my sons and daughters should also die under age and without lawful issue, that then and in such case my whole estate real, before divided, shall descend to my brother James Scott's son, Alexander.' Sarah was nine years old when testator died; she subsequently married Price, and died without issue. *Tilghman, C. J.*, said, (page 62): 'The question is whether the legacy was vested absolutely in Sarah Price, or went over, on her death, to her surviving brothers and sisters. An executory devise of a chattel, to take effect after an indefinite failure of issue, would be void, the contingency being more remote than the law permits. It is granted, however, by the counsel for the defendant that the contingency mentioned in this will is not too remote, because the dying without issue is not indefinite, but restricted to the time of the death of the

first taker. But a question has been made whether money can be the subject of an executory devise; of this I entertain no doubt. A sum of money devised to one for life, with remainder to another, may be of great use to the first taker; he may put it to interest, or invest it in goods or land, and thus make profit. * * * It was once supposed that a gift of a chattel for an instant was a gift forever, and that any limitation over would be void. But, since the law of executory devises has been established, there has been no difference between money and any specific chattel.' In *Dehl v. King*, 6 Serg. & R. 29, the will was, (page 29:) 'I also give and bequeath unto Henry King, my grandson, * * * and to his heirs and assigns, the sum of one thousand pounds, * * * to be paid to him in 200 pounds yearly payments; the first payment whereof to be made in May, 1808, and from hence 200 pounds successively until the whole shall be fully paid; nevertheless, if the said Henry King should die unmarried and without issue, that then, and in such case, the sum so bequeathed shall be equally divided to and among all my children, share and share alike; but in case he shall marry, and then die without issue from his body, that then, in such case, two-thirds of the said legacy shall only be divided amongst my children as aforesaid, and one-third of the said legacy shall be given to the widow.' The will was dated January 6, 1801; the testator died in 1812; Henry King died in 1816, never having been married, and, at his death, children of the testator survived. At pages 30, 31, *Duncan, J.*, says: 'However rigid the rule may be, in executory devises of real estate, as to the construction of the words "dying without issue," signifying an indefinite failure, yet the most strenuous adherents of this rule consider that, in executory bequests of personal estate, any words in the will will be laid hold of to restrain the generality of the words "dying without issue," and confine them to dying without issue living at the time of the person's decease, in order to support the intention of the testator, for by this construction the devise over becomes valid. *Anderson v. Jackson*, 16 Johns. 409; *Moffat's Ex'rs v. Strong*, 10 Johns. 12.' At page 33 it was declared to be demonstrative of an intention to limit over on a definite failure; that the gift over was given to persons in being at the death of the first taker.

'In *Selbert v. Butz*, 9 Watts, 490, the words of the will were, 'All the above-mentioned, and what will be found in cash, bonds, and notes, and all that what shall accrue out of my personal property after my decease, shall be divided in equal shares unto my four daughters, or their heirs, as afterwards shall be mentioned. * * * Should one of my daughters die without issue or will, in that case her inheritance shall come to my other daughters then liv-

ing, or to their offspring in equal shares, but, to prevent misunderstanding, the share of the sister to her children.' In holding the language of the will to import a failure of issue at the decease of the daughters, *Gibson, C. J.*, (page 494,) said: 'The daughter's will would speak at her death, and the contingency of dying without issue was evidently so closely coupled in the testator's apprehension with the idea of her dying with or without one as to have been inseparable from it; and, though there may be an indefinite dying without issue, there can be no indefinite dying without a will. The legacy was to go to the survivors if the dying sister made no will and had no children; but if she made a will, or perhaps an appointment in the nature of one, it was to go to her appointee; but to either, necessarily, at her death.' In *Myers' Appeal*, 49 Pa. St. 111, the words of the bequest were: 'I give and bequeath unto my friend J. R. Ingersoll, et al., the sum of \$20,000 in trust for the use of my daughter, Emma J. Snyder, during life, and, after her decease, for such issue, if any, as she may have. I direct that the interest on said legacy shall commence from the day of my death, and that the same shall be paid to my daughter in monthly installments of \$100.' *Read, J.*, at pages 112, 113, said: 'The natural construction of the first legacy is to give only a life interest to the appellant, with remainder to such issue as she may leave at her death. The rule is now certainly settled in England that a legacy to A. for life, and after his death to his issue, gives the legatee an interest for life only, and that the issue take as purchasers. This was the rule laid down by Lord Thurlow in *Knight v. Ellis*, 2 Brown Ch. 570, and, after various contradictory decisions, it is now recognized as the established law of the land.' In *Bentley v. Kauffman*, 86 Pa. St., at pages 100, 101, Chief Justice Agnew said: 'Did Leon Kauffman take an estate for life, or absolutely, in the personality bequeathed to him by his mother, Hannah Ann Kauffman? We think it was a bequest of the interest or income for life only. That a bequest of income or profits will carry an absolute estate in the principal or corpus of the estate in some cases is well settled, but the ground of the conclusion in such instances is that no contrary intent of the testator appears, to sever the product from its source; and the fruits, therefore, carry with them that which bears them. In the interpretation of a will, however, in order to gather the testator's intention, the words income and interest as distinguished from the corpus or principal, and the enjoyment for life only, have an important bearing. *Earp's Appeal*, 75 Pa. St. 119; *Ogden's Appeal*, 70 Pa. St. 501. Hence, when the intent clearly appears, to carry the corpus or principal over to others the words of the will must be permitted to have their proper

force. Here the bequest of the interest only for life, connected with the provision immediately following, is inconsistent with an intent to confer the principal absolutely upon him. The provision is: "If my son, Leon Kauffman, should die without issue, it is my desire that the whole amount of my investment be given to the Orphans' Asylum." In *Elchelberger's Estate*, 135 Pa. St. 160, 19 Atl. 1006, 1014, the words of the will, (page 161, 135 Pa. St., and page 1006, 19 Atl.) were: 'I give and bequeath to my son, Martin Elchelberger, a sum of money which shall be of equal value with the share bequeathed to my other sons; the said sum of money to be placed on interest by my executor, and the interest thereof to be paid annually to my said son, Martin Elchelberger, during his natural life. In case the said Martin Elchelberger should die and leave no legitimate heirs of his own body, then the sum bequeathed to him shall revert to my other heirs.' At pages 171, 172, 135 Pa. St., and page 1006, 19 Atl., Mr. Chief Justice Paxson says: 'Where it is the manifest intent of a testator to sever the product from its source, a bequest of an income of an estate will not carry an absolute estate in the principal. *Bentley v. Kauffman*, 86 Pa. St. 99. The trust is an active one, intended to preserve the contingent remainders. *Kay v. Scates*, 37 Pa. St. 31; *Sheets' Estate*, 52 Pa. St. 257; *Eachus' Appeal*, 91 Pa. St. 105. Moreover, a limitation over on the death of the first taker, or a direction that the interest of money shall be paid annually to him for life, is held to be evidence that he has but a life interest. *Myers' Appeal*, 49 Pa. St. 111, *Sheets' Estate*, supra. * * * And in *Reck's Appeal*, 78 Pa. St. 432, it was held that "all mere technical rules of construction must give way to the plainly-expressed intention of a testator, if that intention is lawful."

"I have presented the decisions so fully, and quoted from them so copiously, in order that the distribution under review may be looked at, if possible, from the standpoint of every important and controlling case heretofore decided by the supreme court, and involving the construction of testamentary dispositions similar in character to the one now before me. A consideration of the cases cited, and they are representatives of the only class pertinent to the question before the court, has conclusively satisfied me that my former adjudication was erroneous, and that Mary Moyer has no interest in the corpus of the \$1,400 charged by the testator on his real estate during her life. Under the will, she is entitled only to the interest of the fund during her life; and the principal, upon her death, will pass to her issue, if she shall leave any, as purchasers, and, in the contingency, of her dying without leaving issue, over to the other children of the testator."

Rieser & Schaffer, for appellant. *E. H. Shearer and Rothermel Bros.*, for appellee.

PER CURIAM. We find no error in the conclusions reached by the learned president of the orphans' court, and, for reasons given in his opinion, we think the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(160 Pa. St. 314)

**HEERE et al. v. PENN NAT. BANK OF
READING et al.**

(Supreme Court of Pennsylvania. March 12, 1894.)

SUBMISSION TO JURY—QUESTIONS OF FACT.

Where the right to recover depends on questions of fact, there must be a submission to the jury.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Action in sheriff's interpleader by Julia Heere and Thomas F. Brady, trading as Heere & Co., against the Penn National Bank, the Second National Bank, the Farmers' National Bank, and the Citizens' National Bank. Judgment for plaintiffs. Defendants appeal. Affirmed.

Heere & Co. entered the partnership of Heere, Koch & Co., under an agreement dated April 5, 1893, which stipulated that they should transfer their assets to the new partnership, and that the new partnership should continue carrying on business under the name of Heere, Koch & Co., and should pay the debts of both the old partnerships. Shortly thereafter Heere & Co. moved their tobacco, fixtures, etc., to the factory of Heere, Koch & Co., where the operations of the new partnership began and continued uninterrupted from that time until June 6, 1893, when the defendants' attachments were served. On June 2, 1893, the defendants brought suit against Heere, Koch & Co. on notes given by the old firm of Heere, Koch & Co. There had been no registry of the new partnership in the prothonotary's office, and the only defendants named in the suits were the members of the old firm of Heere, Koch & Co. On June 6, 1893, the banks issued the attachments under the act of 1869 in said suits, and on June 20, 1893, having obtained judgment by default, issued *fi. fas.* The attachments were served, and levies under *fi. fas.* made on all the assets of the new firm in the factory, including certain tobacco which had been moved there by Heere & Co., and had not yet been worked up, cigars which had been made there from tobacco moved there by Heere & Co., and had not yet been sold, and other assets contributed by Heere & Co. to the new partnership. Heere & Co. thereupon made claim to the sheriff for the said tobacco, cigars, and other assets, and on his petition an interpleader was awarded.

The charge of the court below is as follows:

"It appears from the evidence in this cause that George E. Heere, Aaron M. Koch, and I. C. Becker were engaged in the manufacture of cigars in this city under the firm name of Heere, Koch & Co. Several of the banks of this city, defendants here, obtained judgments against Heere, Koch & Co. for moneys owing by that firm, and, having so obtained judgment, issued execution. When the sheriff came to the Eighth and Oley factory of Heere, Koch & Co., he levied upon everything in the factory building, whereupon a claim was made that certain tobacco and fixtures there found belonged, not to Heere, Koch & Co., but to Heere & Co., a firm which it is said is composed of Julia Heere and Thomas F. Brady. The issue, therefore, which is presented to your attention, is one of title to property. If the execution creditors of Heere, Koch & Co. actually levied upon and took the property of Julia Heere and Thomas F. Brady, trading as Heere & Co., they would have no right to do that, unless Heere & Co.'s property had been handed over to the control of the firm of Heere, Koch & Co. There seems to be no dispute in this case with regard to the law. The law is for the court, and the facts are for the jury. Considerable eloquence has been expended in your hearing to illustrate facts in this case, and to convince you which way your verdict should be. I shall answer now the legal points which have been presented to the attention of the court. The defendants ask us to say: '(1) If the jury believe that the plaintiffs moved the goods in controversy to the factory of Heere, Koch & Co. in pursuance of the partnership agreement of April 5, 1893, and thereafter treated them as the goods of the new firm until the defendants' attachments were served, the rights of the parties were thereby fixed, and the plaintiffs could not thereafter disavow the new partnership; and the changing of the books, and marking them null and void, and the reclaiming of the goods, are ineffectual for this purpose.' This point we will affirm, if the jury so find the facts. '(2) If the jury believe that the plaintiffs were in partnership with the old firm of Heere, Koch & Co., and had contributed the goods in controversy thereto at the time the defendants' attachments were served, the verdict must be for the defendants.' This point we also affirm. '(3) Under all the evidence in the case the verdict must be for the defendants.' We decline to so instruct you. The plaintiffs ask us to say to you: 'If the jury find that the alleged copartnership between Heere, Koch & Co. and Heere & Co. was not carried out, and that the goods of Heere & Co. in dispute were taken to the factory at Eighth and Oley streets, and kept separate from the goods of Heere, Koch & Co., and were not mingled with the goods of Heere, Koch & Co., but were kept there as the property of Heere & Co., the verdict must be for the plaintiffs.' We affirm this point, and so instruct you. You will therefore observe, in listening to

v.28A.no.12—44

these points, that there is practically very little difference of opinion as to the law of this case. The case turns upon the fact whether or not, when Heere & Co. moved their goods from the factory at Tenth and Penn to the factory at Eighth and Oley, they did so in pursuance of articles of copartnership carried out, and whether the goods were placed in the care of Heere, Koch & Co. in pursuance of that partnership. If they were not so placed, if the articles of copartnership were not carried out, if these goods were not delivered into the care of Heere, Koch & Co., but, on the other hand, were kept separate from their goods, were not mingled with their goods, and were kept in that factory as the property of Heere & Co., then your verdict will be for the plaintiffs. If they were not so kept, but were mingled with the goods so as to make them a contribution of one firm to the other, then your verdict will be for the defendants. That is the whole case."

Philip S. Zieber and Baer & Snyder, for appellant Penn Nat. Bank. Isaac Hiester, for appellant Second Nat. Bank. Henry A. Muhlenberg, for appellant Farmers' Nat. Bank. G. B. Stevens, for appellant Citizens' Bank. J. Howard Jacobs, Jeremiah K. Grant, and Ermentrout & Ruhl, for appellees.

PER CURIAM. The only specification of error in this case is the refusal of the learned president of the common pleas to charge as requested in defendants' third point: "Under all the evidence in the case the verdict must be for the defendants." We are satisfied from an examination of the record that there was no error in refusing to charge as thus requested. The right of the plaintiffs to recover depended on questions of fact which were for the exclusive consideration of the jury. Those questions were fairly and impartially submitted to them, with instructions that appear to be free from error. As already observed, the only complaint here is that the learned judge did not withdraw the case from the jury by giving them binding instructions to find for the defendants. If he had done that, the plaintiffs would have had just reason to complain. The assignment of error is not sustained. Judgment affirmed.

(100 Pa. St. 316)

In re PALETHORP'S ESTATE. (No. 282.)
(Supreme Court of Pennsylvania. March 12, 1894.)

APPEALABLE ORDERS—REQUIRING EXECUTOR TO
FILE ACCOUNT.

An order of the orphans' court directing an executor to file an account is not appealable.

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

Petition by Harriet Palethorp for an order requiring Robert Palethorp, surviving executor of the estate of John H. Palethorp, de-

ceased, to file an account. From an order granting the petition, the executor appeals. Appeal quashed.

Robert Palethorp, for appellant. W. A. Manderson, for appellee.

PER CURIAM. This is a rule to show cause why the appeal taken in the above-entitled case should not be quashed. It appears that the appeal is from an order of the orphans' court directing appellant, as surviving executor of John H. Palethorp, deceased, to file an account. It cannot be doubted that the court has jurisdiction in the premises; nor can it be doubted that the order complained of is merely interlocutory. It follows that the appeal is premature, and should be quashed. Rule absolute, and appeal quashed.

In re PALETHORP'S ESTATE. (No. 283.)
(Supreme Court of Pennsylvania. March 12, 1894.)

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

Petition by Harriet Palethorp for an order requiring Caroline A. Palethorp and Henry B. Palethorp, as surviving executors of Angelina Palethorp, deceased, to file an account. Granted. The surviving executors appeal. Appeal quashed.

Robert Palethorp, for appellants. W. A. Manderson, for appellee.

PER CURIAM. This appeal is from an order of the court below, directing appellant to file an account, etc., and involves the same question that has been decided in opinion just filed in No. 282 of this term, 28 Atl. 689, in which we held that the order complained of was merely interlocutory, and the appeal premature. For same reason, the appeal in this case should also be quashed. Rule absolute, and appeal quashed.

(160 Pa. St. 229)

HOOK v. MUTUAL FIRE INS. CO. OF BERKS COUNTY.

(Supreme Court of Pennsylvania. March 12, 1894.)

FIRE INSURANCE POLICY—ADDITIONAL INSURANCE—WAIVER OF CONSENT.

Where a policy provides that it shall be void if additional insurance be taken without the written consent of the company indorsed on the policy, knowledge by the treasurer and a director of the company that additional insurance had been taken does not constitute a waiver of the condition, in the absence of any evidence that he had authority to waive the condition, or even attempted to do so.

Appeal from court of common pleas, Berks county; Endlich, Judge.

Action by Michael W. Hook against the Mutual Fire Insurance Company of Berks County. A verdict was directed for defendant, and plaintiff appeals. Affirmed.

Isaac Hlester and Benj. F. Dettra, for appellant. Augustus S. Sassaman and Cyrus G. Derr, for appellee.

PER CURIAM. The fire insurance policy on which this suit is based contains this clause: "Any member insuring in other companies covered in part by this company, his or her policy shall be considered sunk, provided the same is not approved by this company, and indorsed on his, her, or their policy, in which case this company shall be liable only to the payment of a ratable proportion of any loss or damage which may be sustained." During the life of the policy in suit, plaintiff procured additional insurance on same property in another company; but it does not appear that any indorsement of approval thereof was made by the defendant company on its policy. The absence of such approval and indorsement thereof as are required by the clause above quoted was interposed as a bar to plaintiff's recovery. The only answer that could be successfully made to this defense was that the company defendant had waived compliance with the requirements of said clause, or that it had so acted, in relation to the subject-matter thereof, as to estop itself from defending on the ground of noncompliance therewith. Testimony was introduced by plaintiff tending to show that Jacob Herbine, the treasurer of defendant, and also one of its directors, had knowledge of said additional insurance prior to February 9, 1883; but it did not appear that he was a general agent of the company, or was authorized to receive notice of additional insurance, or waive compliance with the provisions of the policy in relation thereto, or that he even undertook to do either. There was also testimony tending to show that plaintiff subsequently paid to George W. Brenneman, a collector of the company, an assessment due under the terms of his policy, etc. Without further reference to the testimony relied on by the plaintiff, it is sufficient to say that it was not such as the court would have been warranted in submitting to the jury on the question of either estoppel or waiver; and hence there was no error in directing a verdict for defendant. Viewing the evidence in its most favorable light, there is nothing in it that would have justified a verdict in favor of plaintiff. In principle, the case is similar to *Bard v. Insurance Co.*, 153 Pa. St. 257, 25 Atl. 1124, and other cases that might be cited. Judgment affirmed.

(180 Pa. St. 300)

BRUNNER v. AMERICAN TELEGRAPH & TELEPHONE CO.

(Supreme Court of Pennsylvania. March 12, 1894.)

NEGLIGENCE OF EMPLOYE—EXPLODING DYNAMITE IN HIGHWAY—LIABILITY OF MASTER.

Where plaintiff, while driving along the highway, was thrown from his buggy by the negligent explosion of dynamite which defendant's servants were testing in the highway, defendant is liable.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Trespass by Francis Brunner against the American Telegraph & Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff was thrown from his buggy and injured because of the sudden fright of his horse, caused by the explosion of a percussion cap of the kind used in blasting with dynamite, near the highway on which plaintiff was driving. The cap was exploded by Delany, who plaintiff contended was an employe of defendant. Defendant denied its liability for Delany's act, alleging that it was not done within the scope of his employment, but for his own amusement, and also that he was the employe of an independent contractor. Defendant proved that there were two gangs of workmen employed in the construction of a telephone line, with different duties. One, known as the "digging gang," dug and prepared the holes into which the poles were to be set. The other, known as the "pole gang," came behind, and planted the poles in the holes that had been dug. With the first of these gangs was a man known as the "dynamite man," who had charge of the dynamite used in blasting such rocks as the digging gang could not dispose of with pick and bar. Delany belonged to the pole gang. On the morning of the 16th of September, 1889, both gangs came on the line to resume work. The digging gang went forward to dig where they left off on Saturday night. Livingston, the dynamite man, went to a barn not far from the highway, where his cartridges and caps had been stored, to get a supply for the day's work. When he came out, the members of the pole gang, or some of them, were standing near, and unemployed. He remarked that some of the caps had water in them, and were worthless. Delany said to him: "Give me some of them caps." He gave him one or more of them and a piece of fuse, and, as he testifies, went forward toward the digging gang some little distance, when he heard a report. Delany and another man named Crofton had exploded a cap, and the fright of the horse and the injury to plaintiff had resulted. Plaintiff contended that Delany's object was to determine whether the caps were valuable or not, and his experiment was in the interest, and for the benefit, of the company, and the information of Livingston, who stood by and tacitly authorized it to be made.

Specifications of error: "First. The court erred in charging the jury as follows: 'But there is some evidence tending to show that Livingston was by when the cap was exploded,—was among those who had the cap and exploded it; and taking this together with the fact that Delany asked for the cap with a view to see whether it would explode, and the testimony that another cap had shortly before been exploded, it is claimed by the plaintiff that it may be inferred that

Delany and Livingston were acting together in this matter, and that Livingston permitted Delany to make the experiments, which, the plaintiff would have you believe, he had just been making, to ascertain whether or not the caps would explode, and that Delany's act was, in fact, that of Livingston.' Second. The court erred in refusing defendant's first point, as follows: '(1) There being no evidence in this case tending to prove that the cap was exploded by any employe of the defendant company within the line of his duty, there can be no recovery, and the verdict must be for the defendant.' Third. The court erred in refusing defendant's second point, as follows: '(2) It appearing from the uncontradicted evidence that John Delany exploded the cap which is alleged to have caused the accident, that the said John Delany belonged to the pole gang, whose duty it was to set up the poles previously dug by another gang, and that it was not within the scope of the authority or employment of the men employed in the pole gang to handle explosives or do blasting for the company, the explosion of a cap by the said John Delany, under the circumstances detailed in the evidence, however negligent on his part, was not the negligence of the company defendant.' Fourth. The court erred in refusing defendant's fourth point, as follows: '(4) The giving of the cap to Delany by Livingston, who was charged with the custody of the company's explosives, was not negligence.' Fifth. The court erred in refusing defendant's fifth point, as follows: '(5) The giving of the cap to Delany by Livingston was too remote to be assigned as the cause of the accident; the rule is that the injury must be the natural and probable consequence of the negligence,—such a consequence as, under the surrounding circumstances, might and ought to have been foreseen by the wrongdoer as likely to follow from his act.' Sixth. The court erred in refusing defendant's sixth point, as follows: '(6) It appearing by the uncontradicted evidence of Crocker, the superintendent of construction, that the work of construction and employment of the men was done by the American Telephone and Telegraph Company, and not by the American Telegraph and Telephone Company, the defendant, there can be no recovery against the defendant company. A corporation is not liable for the negligence of its independent contractor in the construction of its work.' Seventh. The court erred in refusing defendant's seventh point, as follows: '(7) Under all the evidence in this case, the verdict must be for the defendant.' Eighth. The court erred in refusing defendant's eighth point, as follows: '(8) It appearing by the admission of the plaintiff that he has assigned and transferred all his interest in his claim against the defendant company, he is not entitled to a recovery, and the verdict must be for the defendant.' Ninth. The court erred in charging the jury as follows:

'In order to hold this company, gentlemen, you must find, first of all, that the men whose act caused this injury were in the employ of this particular company which is here sued. You will recollect that the name of the company defendant is given as the American Telegraph and Telephone Company. You will also remember that there was testimony to the effect that there was another company, called the American Telephone and Telegraph Company, and that it was that company which constructed this telegraph line. [The credibility of that testimony is for you to ascertain whether or not this particular company which was sued was the employer of these men. If it was not, then there is no liability upon it. If, on the other hand, you find that it was the company which is sued, then you will pass on to the next question.']'

Richmond L. Jones, for appellant. Ermentrout & Ruhl, for appellee.

PER CURIAM. This case depended on questions of fact, which were for the exclusive consideration and determination of the jury. There is no complaint as to the admission or rejection of evidence. The testimony was fairly submitted to the jury in a clear and impartial charge, in which their attention was called to the facts which it was incumbent on the plaintiff to prove in order to entitle him to their verdict. The verdict that was rendered by the jury is necessarily predicated of their having found those facts substantially as claimed by plaintiff. The first specification complains of a part of the charge recited therein. There is nothing in this excerpt that the testimony did not warrant the learned trial judge in saying. There was some evidence tending to prove that Livingston was present when the cap was exploded, etc. The next seven specifications are to the refusal of the court to affirm defendant's points for charge therein recited. We are satisfied, from an examination of the questions involved, that there was no error in refusing to affirm either of said points. There is no error in that part of the charge covered by the ninth and last specification of which the defendant has any just reason to complain. We find nothing in the record that would justify a reversal of the judgment. Judgment affirmed.

(160 Pa. St. 185)

GREENWAY v. CONROY et al.

(Supreme Court of Pennsylvania. March 12, 1894.)

INJURY TO EMPLOYE — VICE PRINCIPAL — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS — EVIDENCE.

1. The affirmance, without qualification or explanation, of plaintiff's points alleging that under certain circumstances a person who directed plaintiff to do certain work, was a vice principal, and that defendant was responsible for injuries caused by his negligence, and plain-

tiff was entitled to recover, without presenting the question of contributory negligence, is error, which is not cured by a statement that plaintiff could recover only for injuries caused by negligence properly chargeable to the employer, and not for those caused by his own negligence, the jury not being told what negligence might be properly chargeable to the employer, or that there could be no recovery for injuries which resulted from concurrent negligence.

2. It cannot be assumed that a boy over 14 years old, with 6 months' experience in a machine shop, is incapable of forming a judgment of the danger of putting a belt on a moving pulley, especially when warned by an older and more experienced person.

3. Plaintiff was employed to prepare and drill fastenings, part of which had first to be marked by M. Defendant told him to go to M., who would direct him what to do. M. told him to drill some fastenings, and, the belt being off the machine which he was to use, told him to put it on. In doing this he was injured. Plaintiff testified that M. was the superintendent and engineer, that he was called the engineer, and took charge of the place when defendant was away; but further said that defendant was around the shop all the time, seeing that everything went right. The evidence showed that defendant was in the shop at the time of the accident, and was seldom away. The testimony for defendant was that M. was employed, not as a foreman or superintendent, but merely to run the engine, put on the belts, and mark fastenings; that he had no general direction of any of the business; and that he differed from his fellow workmen only in that a part of the work first passed through his hands, and that on rare occasions, when defendant was away, he had charge of the shop. *Held*, that there was no evidence that at the time of the accident M. was a vice principal, with general authority over plaintiff.

Appeal from court of common pleas, Philadelphia county; Bregy, Judge.

Action by Ernest R. Greenway, by his next friend, against Patrick J. Conroy and others, trading as P. J. Conroy & Co., for personal injuries. Judgment for plaintiff. Defendants appeal. Reversed.

Plaintiff's first and third points were as follows: First. If the jury find that the defendants had placed John C. McNamara in charge of their business, or that branch of it in which the plaintiff was engaged at the time of the accident, during their absence, exercising no discretion and no oversight themselves, then McNamara was a vice principal, and the defendants are responsible for injuries caused by his negligence. Third. If the jury find that the plaintiff was ordered by John C. McNamara to put the belt on the pulley, and that it was not within the scope of plaintiff's duty and employment, but was within that of McNamara; that the order was not a reasonable one; that its execution was attended with hazard to life and limb, and that a prudent man would not have ordered the boy to execute it,—then the rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury, whether a true rule or not, does not

apply to this case, and the plaintiff is entitled to recover from the defendants in this action.

Ellis Ames Ballard, for appellants. George Robinson and L. R. Fletcher, for appellee.

FELL, J. The plaintiff, a boy over 14 years of age at the time of his injury, had been employed for 6 months in the machine shop of the defendant. The shop was a small one, in which but seven or eight men were employed, and was under the direct management of the defendant, whose time was spent there in superintending the work. On the morning of the accident the plaintiff had been engaged at work outside the shop, and was told by the defendant to go to McNamara, who would tell him what to do. He was directed by McNamara to drill some fastenings. According to the plaintiff's testimony, he found the belt off the machine he was to use, and asked McNamara to put it on, and was told by him to do it himself. He procured a ladder in order to reach the shafting, and, in his attempt to put the belt on the pulley, his hand was caught, and seriously injured.

It was denied by the defendant's witnesses that the plaintiff had been told to put the belt on, and two of them testified that when he was going up the ladder for that purpose he was told of the danger, and cautioned not to attempt it, and that he persisted notwithstanding this warning. It was McNamara's business to put the belts on the pulleys. He was the oldest workman in the shop, and had charge of the belts. He laid out the work for the other employes, and, in the absence of the defendant, was looked to by them for directions. The question of contributory negligence on the part of the plaintiff, and the question whether McNamara was more than a fellow servant, for whose negligence the defendant would not be liable, are fairly raised by the testimony. Neither the first nor the third of plaintiff's points presented the question of contributory negligence, and the effect of their affirmance without qualification or explanation was to withdraw that subject from the consideration of the jury. The learned judge of the common pleas, in the course of a very clear and impartial charge, said: "The plaintiff has a right to recover only for injuries that are caused by negligence that is properly chargeable to the employer. An accident caused by the negligence of the plaintiff himself in a case of this kind gives the plaintiff no right to a verdict." This we think, however, does not correct the error of the affirmance of the points. The jury was not instructed as to what negligence might be properly chargeable to the employer, nor directed that there could be no recovery for injuries, the result of concurrent negligence. There was testimony that the plaintiff, before he went up the ladder, was warned of the danger. We

cannot assume that a boy over 14 years of age, with 6 months' experience in a machine shop, is incapable of forming a judgment of the danger of such an act, especially when he has the aid of the warnings of an older and more experienced person. As was said by Mitchell, J., in *Kehler v. Schwenk*, 144 Pa. St. 359, 22 Atl. 910: "All the cases agree that the measure of a child's responsibility is his capacity to see and appreciate danger, and the rule is that, in the absence of clear evidence of the lack of it, he will be held to such measure of discretion as is usual in those of his age and experience. This measure varies, of course, with each additional year, and the increase of responsibility is gradual. It makes no sudden leap at the age of 14. That is simply the convenient point at which the law, founded upon experience, changes the presumption of capacity, and puts upon the infant the burden of showing his personal want of intelligence, prudence, foresight, or strength usual in those of his age.

The fourth specification of error is to the refusal of the court below to affirm the defendant's point: "Under all the evidence, your verdict should be for the defendant." If there was testimony showing that McNamara was a vice principal, this point was properly refused; if from all the testimony it appeared that he was only a fellow workman, it should have been affirmed. The plaintiff testified that McNamara was the superintendent and engineer, that "he was called the engineer," and took charge of the place when the defendant was away; but, on cross-examination, said that the defendant was around the shop all the time, seeing that everything went right. This is the only light thrown upon the subject by the plaintiff or his witnesses. All of the testimony shows that the defendant was in the building or the adjoining yard at the time of the accident, and was seldom away from the shop. The uncontradicted testimony of the defense is that McNamara was employed to work, not to superintend; that he was not even employed as a foreman, but had his regular work, like every other man in the shop; that it was his duty to run the engine, put on the belts, and mark fastenings that were to be drilled. He neither employed nor discharged workmen; he was clothed with no special authority; he had no general direction of the business, or any part of it; he was not intrusted to perform a duty which the law imposes upon the employer, and which cannot be delegated by him except at his peril. He differed from his fellow workmen only in this, that a part of the work which required marking and laying out first passed through his hands, and that upon occasions of rare occurrence, when the defendant was away, he had charge of the shop. On this occasion the defendant was not absent, and there is no ground for a pretense, even, that McNamara

was in charge of the works. The direction of the defendant to the plaintiff to go to McNamara to be told what work to do must be considered as having relation to the kind of work he was accustomed to do from day to day, which was cleaning, japanning, drilling, and countersinking, a part of which had first to be marked and prepared by McNamara. He was placed under the charge of McNamara only as to the selection of his particular work. This direction was not a delegation by the defendant of his general authority over the plaintiff to another, and there was no more reason to suppose that the plaintiff would be told to put a belt on a moving pulley than that he would be required to run the engine. There was nothing in the testimony to carry this case to the jury but the bare assertion of the plaintiff that McNamara was the superintendent, unaccompanied by any explanation of the nature of his duties, or proof of a single fact to substantiate it. The uncontradicted testimony of the defense, resting not upon mere assertion, but upon proofs that were conclusive, shows that he was not the superintendent. This cannot properly be said to raise an issue of fact for a jury. On the one hand was the assertion of an opinion or conclusion; on the other, the proof of the only facts upon which the conclusion could be based, and which demonstrate its error. Superintendents are not made by calling them such, but by the nature of their employment, their duties, and their work. Aside from this, it seems to be conclusive of the whole case that it is shown by the plaintiff's testimony that the defendant was his own superintendent except at times, of not frequent occurrence, when he was called to the city, and that on this occasion he was present, and in charge of the shop. We are of opinion that the learned judge should have affirmed the defendant's point, and directed a verdict for him. The judgment is reversed

(160 Pa. St. 252)

In re WENTZEL.

(Supreme Court of Pennsylvania. March 12, 1894.)

INSOLVENTS—CRIMINAL PROSECUTION—DISCHARGE.

Act March 31, 1860, § 133, providing that if no bill be presented or found at the next sessions against an insolvent committed for trial, or the indictment be not tried at the second sessions, (unless postponed at the instance of the insolvent,) the common pleas shall "discharge him from imprisonment upon his proceeding," does not require his general discharge, nor apply to an insolvent out on bail.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Petition of Samuel B. Wentzel, bound over on the charge of fraudulent insolvency, for discharge under Act March 31, 1860, § 133. Petition denied. Petitioner appeals. Affirmed.

Petitioner was appointed guardian of John H. Gehris and Elmer Gehris, minor children of H. S. Gehris, deceased, on the 30th of September, 1879, and, as such guardian, came into possession of some \$300 or \$400. He subsequently lost a large portion of this. The remainder of it he paid over to his successor in the trust, and, upon his failure to pay over the balance, was placed in custody by order of the orphans' court. He thereupon applied to the court of common pleas for his discharge under the insolvent laws, and was discharged from custody, and directed to present his petition at the next term of court, in accordance with the provisions of the act. This he did, and a hearing was had; at which time he was remanded to the quarter sessions for trial, under Act March 31, 1860, § 133. No bill was presented against him at the "next sessions," nor, although a bill was found at the second sessions, was a trial had thereon at that term, notwithstanding that the postponement of the trial did not "take place at the instance of such petitioner."

George J. Gross, Jr., for appellant. F. K. Flood, Dist. Atty., J. H. Jacobs, and H. P. Keiser, for appellee.

PER CURIAM. By act of April 22, 1863, (P. L. 531,) the provisions of the act of March 31, 1860, were extended so as to include guardians, "in the same manner as executors, administrators, and assignees." The latter act therefore embraces the case of a fraudulent guardian, but the duty of the common pleas, under the 133d section thereof, is not to discharge generally, but only "from imprisonment." It does not appear that appellant has as yet been imprisoned, and hence said section is inapplicable to his case. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(160 Pa. St. 303)

NATIONAL BANK OF CATASAUQUA v NORTH.

(Supreme Court of Pennsylvania. March 12, 1894.)

WHAT CONSTITUTE FIXTURES—STEAM RADIATORS AND VALVES.

Radiators and valves which may be readily detached from the distributing pipes by which a company supplies a dwelling with steam for heating purposes are not part of the realty, though the owner of the house, when he put them in, had an undisclosed intention of making them such.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Detinue by the National Bank of Catasauqua against Frederic A. North to recover certain steam radiators, etc., in a house, No. 217 North Fifth street, Reading, Pa. Judgment for plaintiff, and defendant appeals. Affirmed.

The findings of facts and law by the court of common pleas are as follows:

"Findings of Facts: (1) The house No. 217 North Fifth street from the time of its erection in 1873 was, and still is, a private dwelling house. (2) In 1887, said house was the property of Isaac McHose, subject to a mortgage held by the Provident Life and Trust Company. (3) In the fall of that year, said McHose abandoned the former method of heating his house by means of a furnace, and substituted in place thereof that of steam heating. For that purpose, he, at a cost of \$509, introduced in said house an apparatus, the supply of steam for circulation in which was obtained by connection of said apparatus with the pipes of the Reading Steam Heat and Power Company, laid in said Fifth street; and conducting the steam from a central plant operated by said company to houses of its customers, upon the same principle as gas is furnished to houses by gas companies. (4) Said apparatus, apart from the pipe connecting it with the main in the street, consists of the following: (a) In the cellar—First, of service pipes covered with asbestos, fire-proof, nonconducting paper, fastened by hooks or hangers overhead to the joists; and, second, a regulator trap. Both the latter and the said pipes can be removed without injury to the building. (b) Between the several stories of the house above the cellar—First, of certain pipes called risers, which are inserted in what formerly were the air flues from the heater, and the purpose of which is to carry the steam to the upper floor of the house; and, second, branching out from these risers, pipes laid under the floors of each story, distributing the steam to the various rooms and radiators. The insertion of the risers in the tin flues, and the necessary cutting of the latter to connect the former with the distributing pipes, destroyed the usefulness of the flues for the purpose for which they were originally put in, viz. as carriers of the heated air from the furnace, and thereby rendered the furnace itself useless as a means for heating the house, but said risers may be taken out and replaced without injury to the building. The distributing pipes cannot be taken out without tearing up floors, etc. (These latter pipes were not included in the levy or sale, and are not claimed by the plaintiff in this suit.) (c) In the various rooms, of radiators made up of and divisible into sections, not fastened to, but standing upon the floor, screwed on to the distributing pipes, and having attached to them—First, valves by means of which the steam may be turned off from and into the radiators, and its flow within them regulated, and, second, small air valves for the expulsion of cold air accumulating in the radiators. The radiators, with the valves, are readily removable, without injury to the building, by simply unscrewing them from the distributing pipes. Their removal, however, renders the whole system or apparatus useless for the time being. (5) At the time when he introduced

this system into said house, said McHose, within himself, intended that it should permanently take the place of the former method of heating, and that every portion of it should be part of the realty; but he gave no expression to this intention to any one interested in the apparatus or in the said house. (6) The purpose and object to be served by the introduction of the steam-heating apparatus into his house by said McHose was to further the convenience and comfort of its inmates; the former method of heating by furnace having proved inadequate, and the furnace showing signs of wearing out. (7) On June 14, 1892, plaintiff, in a suit to No. 71 June term, 1892, obtained a judgment for \$4,382.36 against said McHose for want of an affidavit of defense, and thereupon, on September 8, 1892, issued a *fi. fa.* to No. 4 October term, 1892, E. D., under which, on September 10, 1892, a levy was made, *inter alia*, upon 1 radiator, 18 sections; 2 radiators, 15 sections; 1 radiator, 32 sections; 2 radiators, 22 sections; 1 radiator, 20 sections; 5 radiators, 10 and 12 sections; supply pipes,—said McHose being present at the levy, and making no objection thereto. (8) On October 7, 1892, under the above levy, said McHose being present, pointing out the various radiators, and making no objection, the following articles, *inter alia*, were sold to the plaintiff: 3 radiators, \$20; 1 radiator, \$5; 2 radiators, \$2; 1 radiator, (and lamps,) \$1; (two lamps,) radiators, (and fixtures,) \$5; radiators in two rooms, \$5; pipes in cellar, \$5. (9) On October 15, 1892, upon *levavi facias* issued September 22, 1892, upon the mortgage of the Provident Life and Trust Company, the real estate, No. 217 North Fifth street, was sold to Hugh M. North, the landlord of the defendant, the deed to him being acknowledged on October 22, 1892. (10) At said sale notice was given by counsel for plaintiff that, *inter alia*, 'the steam-heat fixtures' in said house were the property of the plaintiff, having been purchased by it at the sheriff's sale of October 7, 1892. (11) About the beginning of May, 1893, said McHose vacated said property, defendant moving into it. Up to that time no attempt had been made to remove any of said articles. Demand therefor was made upon the defendant on May 5, 1893, which was not complied with. Demand was also made upon his landlord. (12) The value on May 5, 1893, of the entire steam-heating apparatus in the house No. 217 North Fifth street, removed, was \$125, its original cost in place having been \$509. The value of the pipes, trap, regulator, and valve in cellar, originally \$35, was, at the same ratio of depreciation, at the same time \$26.32. The value of the radiators (with the valves attached thereto) levied upon on September 10, and sold to plaintiff on October 7, 1892, as separated and removed from the house, was, on that date, \$98.62. The interest thereon, May 5 to December 4, 1893, is \$3.43.

"Upon the basis of the foregoing facts, and as applicable to them, I make the following conclusions of law: (1) Whatever secret intention said McHose had, in 1887, to annex the entire steam-heating apparatus in the house No. 217 North Fifth street, including the twelve radiators and the valves attached thereto, to the realty, and make it part of the same, must be deemed to have been abandoned by him, so far as the said twelve radiators and the valves attached thereto are concerned, and as against this plaintiff, by the acts and silence of said McHose at the levy and sale, and he must be deemed thereby to have consented to the severance of said twelve radiators and valves attached thereto from the remainder of the apparatus. (2) Neither the mortgagee nor the purchaser at the sale of October 15, 1892, under the mortgage, had or has any right to insist upon having said twelve radiators and valves attached thereto treated as permanently annexed to, or as part of, the realty. (3) Said twelve radiators and valves attached thereto, levied upon on September 10, and sold to plaintiff on October 7, 1892, never were part of the realty, but remained personalty severable from the realty, and by said levy and sale became the property of the plaintiff, who thereupon was entitled to possession of them. (4) The pipes in the cellar, with the valves attached to them, the trap and regulator, the risers and distributing pipes, are so permanently annexed to and part of the realty as not to be subject to levy and sale of personalty separate from the same, and no title to or right of possession of any of them was acquired by the plaintiff by virtue of said levy and sale. (5) The plaintiff is entitled in this suit to recover from the defendant the said twelve radiators and the valves attached thereto, or, if he cannot have them, the value thereof on May 5, 1893, with interest thereon from said date, viz. \$102.05, and his full cost of suit. It is proper that I should give my reasons for the legal conclusions just stated, especially as the principal question raised in this case seems to be a new one in our law. The excellent brief submitted by the learned counsel for the plaintiff relieves me of the burden of discussing at length the preliminary question as to what in general, under our law, constitutes fixtures that may, or such as may not, be sold on a *fi. fa.*, separate and apart from the realty. The doctrine of the decisions cited by him in *Voorhis v. Freeman*, 2 Watts & S. 116; *Pyle v. Pennock*, Id. 390; *Christian v. Dripps*, 23 Pa. St. 271; *Hill v. Sewald*, 53 Pa. St. 271; *Meigs' Appeal*, 62 Pa. St. 28; *Patterson v. Delaware Co.*, 70 Pa. St. 381; *Seeger v. Pettit*, 77 Pa. St. 437; *Association v. Berger*, 99 Pa. St. 320; *Benedict v. Marsh*, 127 Pa. St. 309, 18 Atl. 26; *McLean v. Palmer*, 2 Kulp, 349,—to which may be added *Ege v. Kille*, 84 Pa. St. 333; *Morris' Appeal*, 88 Pa. St. 368; *Electric Light Co. v. Goodman*, 129 Pa. St. 206, 19 Atl. 844; *Vail v. Weaver*, 132 Pa. St. 363, 19 Atl. 138,—fully

establishes the rule that, as to all articles not so intimately connected with the freehold as to become essentially a part of it, the intention, not the mere physical fact of their connection with the realty, is the criterion of annexation. But those decisions also unmistakably show that the 'intention' which thus becomes controlling is not the secret design which may dwell in a party's mind, and as to whose existence he alone can speak, but that 'intention' which was either expressly declared by the parties competent to make it the governing rule, or which flows, patent to all, from the nature and character of the act, the clear purpose to be served, the manifest relation which the articles bear to the realty, and the visible consequences of their severance upon the proper and obvious use of it. This meaning of the word is particularly emphasized in *Association v. Berger*, 99 Pa. St., at page 324. It is most unequivocally stated by Knowlton, J., in *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 23 N. E. 327, as follows: 'The intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or may acquire interests in the property. They cannot know his secret purpose, and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible.' I can find no case in which the declaration of him who placed the articles where they were that he thereby intended, secretly within himself, to make them part of the realty, has been given any controlling effect. The decision in *Benedict v. Marsh*, *supra*, does not suggest such a departure from the ordinary rule as to transactions between men that one's undisclosed intent is not to affect the other. *Spencer v. Colt*, 89 Pa. St. 314. In *Benedict v. Marsh* the contest was between the vendee of real estate, a part of which he claimed, a certain steam sawmill which he himself had originally sold to the owner of the land, and which the latter had transferred to the defendant. The case turned wholly upon the question of the intended permanency of the sawmill structure, and the testimony was conflicting on that point. In these circumstances, it was held permissible to ask the purchaser of the sawmill as to what he told the plaintiff, at the time of the purchase, concerning his purpose and intention in the premises, and, in connection therewith, what he said on the same subject to others. This holding is entirely consistent with the rule, as I understand and have endeavored to formulate it. Applying this rule here, it is obvious that the secret 'intention' which doubtless existed in Mr. McHose's mind when he put the steam-heating apparatus into his house is not controlling of this case, even had he not done that which requires the inference that, as against this plaintiff, he had abandoned it subsequently, and that the question of realty

or not realty depends wholly upon what the facts found show concerning the nature, object, purpose, and relation of the improvement in and to the property regarded as a dwelling house. No doubt, this question is primarily and usually one of mixed law and fact, (*Campbell v. O'Neill*, 64 Pa. St. 290; *Hopewell Mills v. Taunton Sav. Bank*, supra,) and therefore for the jury, (*Seeger v. Pettit, Association v. Berger, McLean v. Palmer*, supra.) 'But the principal facts, when stated, are often such as will permit no other presumption than one of law.' *Hopewell Mills v. Taunton Sav. Bank*, supra. And see *Hill v. Sewald*, supra; *Association v. Berger*, 99 Pa. St., at page 324. The matter of Mr. McHose's secret intention being out of the way, this is such a case. That a steam-heating apparatus is indispensable to the occupancy and enjoyment of a dwelling house, as such, cannot be pretended. That it is a convenience whose presence may enhance the rental value and the comfort of a house may be very true. See *Jarechi v. Society*, 79 Pa. St. 403, 405. That, as a means of heating dwellings, it will in a short time be superseded by something superior to it seems but a reasonable expectation. Of no such appliances can it be said that they are of such a nature or character as to be necessary to carry out the obvious purpose for which the building was erected, permanently to increase its value for occupation and use, or to constitute lasting accessions to the property. The same considerations of personal comfort, convenience, and safety that call for their adoption at one time will require the discarding of them later on. So far as they consist of movable articles merely standing upon the floors, though screwed to pipes, in walls or under floors, their relation to the realty itself is no different from that of any other sort of detachable heating apparatus, from a portable furnace down to a gas stove, and the consequences of their severance from the realty are precisely the same in kind. There is, in a word, nothing in the act of introducing such article into a dwelling house, and nothing in their nature, object, purpose, or relation to the house, which can give rise to an inference that they were put there to be a part of the realty, or to increase the security of its mortgagee. There is certainly no more reason for indulging such a supposition with respect to such than with respect to gas fixtures. Steam heat is furnished to houses by steam-heating companies in the same way in which gas is furnished by gas companies. Indeed, the use of gas is far more general in dwelling houses, and it is far more of a necessity to their enjoyment and occupation, as such, than steam heat. Moreover, like in the apparatus here in question, so where gas is used, it is introduced by means of service pipes entering the cellar, vertical pipes conducting it to the upper floors, and distributing pipes carrying it to the various rooms, some of which pipes are exposed, others imbedded in the walls,

others laid under the floors. Again, analogously to the proven relation of the radiators and the valves attached to them to the remainder of the steam-heating apparatus, the removal of the brackets and chandeliers, with their burners and stopcocks, renders the entire system of gas pipes in a house from which they are detached useless for the time. See *Sewell v. Angerstein*, 18 Law T. (N. S.) 300, per Willes, J. But gas fixtures are very uniformly held to be severable from the realty, whether the question of their annexation to it arise between landlord and tenant, vendor and vendee, or purchaser of the personality and mortgagee of the realty, (*Ewell, Fixt.* p. 93, note; *Id.* pp. 299, 436, note; *Vaughen v. Haldeman*, 33 Pa. St. 522; *Jarechi v. Society*, 79 Pa. St. 403; *Heysham v. Dettre*, 89 Pa. St. 506; *Seeger v. Pettit*, supra; *Lawrence v. Kemp*, 1 Duer, 363; *Shaw v. Lenke*, 1 Daly, 487; *Manning v. Ogden*, [Sup.] 24 N. Y. Supp. 70; *Kirchman v. Lapp*, [Super. Buff.] 19 N. Y. Supp. 831; *McKeage v. Insurance Co.*, 81 N. Y. 38; *Hays v. Doane*, 11 N. J. Eq. 84; *Guthrie v. Jones*, 108 Mass. 191; *Towne v. Fiske*, 127 Mass. 125; *Montague v. Dent*, 10 Rich. Law, 135;) the only authority to the contrary in this country that I am acquainted with being *Johnson v. Wiseman*, 4 Metc. (Ky.) 357. Of course, express stipulation may make them pass with the realty, (*Jarechi v. Society*, supra; *Heysham v. Dettre*, supra; *Fratt v. Whittier*, 58 Cal. 126; *Sewell v. Angerstein*, supra;) or an intent to do so may be so clear from the attending circumstances and expressions as to have the same effect, (*Ewell, Fixt.* p. 300; *Funk v. Brigaldi*, 4 Daly, 359; *Central Trust & Safe Deposit Co. v. Cincinnati Grand Hotel Co.*, 26 Ohio Law J. 149.) But, in the absence of such an element, the rule as above stated seems very well settled. In this connection, however, it must not be overlooked what is meant by gas fixtures. There is a clear distinction, pointed out in *Vaughen v. Haldeman*, 33 Pa. St., at page 523, reiterated in *Jarechi v. Society*, 79 Pa. St., at page 408, and recognized in *Ewell, Fixt.* p. 299, and cases there cited, between gas fittings and gas fixtures, the former term including all the piping down to the points of opening where chandeliers, brackets, etc., used for lighting are designed to be attached, the latter only covering those attachments. It is these exclusively to which the rule I have given applies. The analogy between the arrangements for lighting dwelling houses with gas and those for heating such with steam seems to me to be so complete that this distinction must also obtain as to the latter, under the decisions of this state. For this reason I must regard the case of *Jenkins v. Gething*, 2 Johns. & H. 520, cited in *Ewell, Fixt.* p. 129, note, as inapplicable here, and decide that the only portions of a steam-heating apparatus in a dwelling house that do not ordinarily become part of it in such a way as to prevent their being separated as personality from the real estate are the radiators

with the valves attached to them. Whilst the traps, regulators, service and distributing pipes, risers, and the valves belonging to them may fairly be considered as necessary to the completion of a modern dwelling house where the facilities for steam heating exist, and must, in the nature of things, be substantially the same in every case, varying only in dimensions, the radiators, with their valves, are put up in more or less expensive style, according to the taste and means of the person who intends to occupy the house, or according to the purpose for which it may be designed, as a dwelling for his own family or as a house to be rented to others. Hence, upon grounds precisely analogous to those pointed out in *Jarechl v. Society*, *ubi supra*, they, and they alone, are not to be regarded as intended to be annexed to the realty. Of course, applying these principles to the facts of this case, the radiators here in controversy, being personal property, never became subject to the Provident, etc., Co.'s mortgage; the plaintiff's purchase of them, with the knowledge and consent of the owner of both them and the house, gave him a good title even before actual severance, (*Mitchell v. Freedley*, 10 Pa. St. 198,) and the purchaser of the realty at the sale of October 15, 1892, with notice of plaintiff's claim of title, cannot complain. It follows that the levy of September 10, 1892, was good and effectual as to them, and nothing else; that by the sale of October 7 the plaintiff acquired title to them, and nothing else; and that he is entitled, in this suit, to recover for them, and nothing else. There being no special damages laid in the declaration, (see *Schofield v. Ferrers*, 46 Pa. St. 438,) or proven, interest upon the sum representing the value of the articles detained, from the time when their detention became unlawful, May 5, 1893, is the proper measure of damages for such detention, (*McCabe v. Morehead*, 1 Watts & S. 513.)"

Specifications of error: "First. The court erred in dismissing the appellant's first exception, which was as follows: 'The court erred in finding as a matter of fact as follows: At the time when he introduced this system in the said house, said McHose, etc., etc., but he gave no expression to this intention to any one interested in the apparatus or in the said house.' Second. The court erred in dismissing the appellant's second exception, which was as follows: 'The court erred in finding as a matter of fact as follows: On October 7, 1892, under the above levy, said McHose being present, pointing out the various radiators and making no objection, the following articles were sold, *inter alia*, to the plaintiff, etc. The court should have taken into account the fact that, Mr. McHose having told his counsel that his, McHose's, intention was to make the whole of the steam-heating apparatus a part of the realty, (appendix, page 16,) any failure of his counsel to give notice in accordance therewith should not prejudice the rights of the

original holder of the realty, or those claiming under him.' Third. The court erred in dismissing the appellant's third exception, which was as follows: 'The court erred in finding as a matter of law as follows: Whatever secret intention said McHose had in 1887 to annex the entire steam-heating apparatus in the house No. 217 North Fifth street, including the twelve radiators and the valves attached thereto, to the realty, and make it part of the same, must be deemed to have been abandoned by him, so far as the twelve radiators and the valves attached thereto are concerned, and as against this plaintiff, by the acts and silence of the said McHose at the levy and sale, and he must be deemed thereby to have consented to the severance of the said twelve radiators and valves attached thereto from the remainder of the apparatus.' Fourth. The court erred in dismissing the appellant's fourth exception, which was as follows: 'The court erred in finding as a matter of law as follows: Neither the mortgagee nor the purchaser at the sale of October 15, 1892, under the mortgage, had or has any right to insist upon having said twelve radiators and valves attached thereto treated as permanently annexed to or as part of the realty.' Fifth. The court erred in dismissing the appellant's fifth exception, which was as follows: 'The court erred in finding as a matter of law as follows: Said twelve radiators and valves attached thereto, levied upon on September 10, and sold to plaintiff on October 7, 1892, never were part of the realty, but remained personalty severable from the realty, and by said levy and sale became the property of the plaintiff, who thereupon was entitled to possession of them.' Sixth. The court erred in dismissing the appellant's sixth exception, which was as follows: 'The court erred in finding as a matter of law as follows: The plaintiff is entitled in this suit to recover from the defendant the said twelve radiators and the valves attached thereto, or, if he cannot have them, the value thereof, on May 5, 1893, with interest thereon from said date, viz. \$102.05, and his full cost of suit.' Seventh. The court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant, the order being as follows: 'And now, to wit, January 8, 1894, the exceptions filed by both parties are dismissed, and it is ordered that judgment be entered in favor of the plaintiff and against the defendant, according to the decision previously filed, namely: The plaintiff is entitled in this suit to recover from the defendant the said twelve radiators and the valves attached thereto, or, if he cannot have them, the value thereof on May 5, 1893, with interest thereon from date, viz. \$102.05, with his full costs of suit.'"

Henry A. Muhlenberg and A. K. Stauffer, for appellant. Horace Roland, for appellee.

PER CURIAM. By agreement, this case was submitted and tried by the learned judge

of the common pleas without the intervention of a jury. The controlling question was whether the radiators and valves attached thereto levied on and sold by the sheriff to the plaintiff were ever part of the realty, or remained personalty, and by said sale became the property of the plaintiff.

The first and second specifications, charging error in finding the facts therein recited, respectively, are not sustained. Each of these findings was fully warranted by the testimony. The remaining five specifications complain of the conclusions of law therein mentioned. It is unnecessary to consider them in detail. There appears to be no error in either of them. An examination of the record has satisfied us that the learned trial judge was substantially correct in his legal conclusions, as well as in his findings of fact from which they were drawn. His opinion is an ample vindication of the correctness of both, and, for reasons therein given, we think the judgment should not be reversed. Judgment affirmed.

(160 Pa. St. 265)

REIFF et al. v. MACK, (FARMERS' NAT. BANK OF READING, Garnishee.)
(Supreme Court of Pennsylvania. March 12, 1894.)

PROPERTY SUBJECT TO ATTACHMENT—PENSION MONEY.

Under Rev. St. U. S. § 4747, a pension check deposited in a bank to the pensioner's credit and for collection is not subject to an attachment on execution.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Garnishment proceedings by Samuel W. Reiff and James K. Kauffman against the Farmers' National Bank of Reading, as garnishee of William P. Mack. From a judgment dissolving the attachment, plaintiffs appeal. Affirmed.

Endlich, J., rendered the following opinion in the trial court: "The question raised by this rule is a most interesting one, and one upon which I have been directed to no authority in this state both precisely in point and binding upon me. The attachment sought to be dissolved was issued upon a judgment entered against defendant to No. 50, August term, 1893, J. D. On or about 14th August, 1893, defendant received from the government of the United States a check for \$216, pension money. This check he placed with the Farmers' National Bank of Reading for collection. Said bank, as was admitted by counsel upon the argument, collected the check, and put the amount thereof to the credit of the defendant, who has since drawn upon the same as a deposit in said bank. The balance of said deposit, not exhausted by the defendant's drafts thereon, is the subject of this attachment. The United States Revised Statutes, in section 4747, provide as follows: 'No sum of money due

or to become due to any pensioner shall be liable to attachment, levy or seizure under any legal or equitable process whatever, whether the same remains with the pension office or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner.' There can be no doubt that congress has the power to protect pension money against seizure under our state laws until it shall have passed into the hands of the pensioner. U. S. v. Hall, 98 U. S. 343. But a pension being a gratuity involving no claim of right, or agreement of parties, or rights of third persons, (Harrison v. U. S., 20 Ct. Cl. 122,) I am unable to perceive any principle which would render it incompetent for congress to make that gratuity, even in his hands, inaccessible to his creditors. That question, I think, is not one to be determined by reference to the constitution of the United States, or to the powers of congress under the same, but by reference to the law of the state in which the question arises. Now, an unbroken line of decisions, from Fisher v. Taylor, 2 Rawle, 33, down to such recent ones as Overman's Appeal, 88 Pa. St. 276; Thackara v. Mintzer, 100 Pa. St. 151; Stambaugh's Estate, 135 Pa. St. 585, 19 Atl. 1058; Ghormley v. Smith, 139 Pa. St. 584, 21 Atl. 135,—has settled the law in this commonwealth that one may provide for another without exposing his bounty to liability for the debts or improvidence of the beneficiary. If a private person has that right in this state, why not the United States? And what substantial difference can it make whether the provision be made through the medium of a trustee, or directly to the beneficiary? It has never been deemed indispensable that, e. g. in a gift of a separate estate to a married woman, a trustee should intervene between her and the grantor in order to protect her estate against the usual incidents of legal estates of married women. Wright v. Brown, 44 Pa. St. 224. True, in both this and the former instance cited as illustrations, the interest of the beneficiary is an equitable one. But I need not quote authorities to prove that, in this state, equity is part of the law, and that the legal rights and liabilities of persons are determined upon principles of equity. Neither, as I am well aware, is the analogy between the instances cited and a case like this a complete one; and, if it were, analogies are as likely to misguide as to guide safely.' Overman's Appeal, 88 Pa. St. 235, per Woodward, J. I have referred to them simply to show that the theory of our law does not exclude the possibility of the exemption I am discussing. It seems to me, however, that, apart from theory, the question of the right of congress to exempt pension money, even in the hands of the pensioner, from seizure by his creditors under our state laws is no longer an open question, any more than that the language of the pension law is sufficient to indicate an in-

attention so to do. 'This act,' says Mr. Chief Justice Paxson, in *Holmes v. Tallada*, 125 Pa. St. 133, 135, 17 Atl. 238, 'not only protects the pension money from attachment while on its way to the pensioner, but it goes further, and declares that it "shall inure wholly to the benefit of such pensioner;"' and upon the strength of that declaration it was held that where a pensioner, having received a check for accrued pension, indorsed and gave it to his wife, who drew the money and applied it to the purchase of real estate, taking the title in her own name, the property was not liable to seizure and sale for the husband's debt. *Id.* We all know that it is the law of Pennsylvania that where a married woman acquires property by gift, or by means of the proceeds of a gift, from her husband, it may be taken by his creditors, who would otherwise be kept out of their claims. See *Herr's Appeal*, 5 Watts & S. 494; *Duffy v. Insurance Co.*, 8 Watts & S. 413; *Stickney v. Borman*, 2 Pa. St. 67; *Coates v. Gerlach*, 44 Pa. St. 43; *Ammon's Appeal*, 63 Pa. St. 284. It is equally clear that the only exception to this rule can be where the gift by the husband to the wife is of something which, in his hands, would be exempt from seizure by his creditors. See *Robb v. Brewer*, 60 Iowa, 539, 15 N. W. 420. Hence it follows that the logic of the decision exempting the property in the hands of the wife implies an exemption in the hands of the husband of that whereby it was acquired. It is further to be observed that the ruling in *Holmes v. Tallada*, *supra*, was not put upon the ground that the check, not being cashed when indorsed to the wife, represented money in transit from the government to the pensioner, and, for that reason, at the time exempt from seizure under the first clause of section 4747, above quoted. See *Farmer v. Turner*, 64 Iowa, 690, 21 N. W. 140; *Hissem v. Johnson*, 27 W. Va. 652; *Hayward v. Clark*, 50 Vt. 617. It is, on the contrary, based upon the language of the last clause, declaring that the gratuity 'shall inure wholly to the benefit of such pensioner.' Concerning that provision, it is said: 'We think the rational interpretation of this language is that the pensioner may use the money in any manner he may see proper, for his own benefit and to secure the comfort of his family, free from attacks of creditors. * * * In his hands it was not liable to seizure.' *Holmes v. Tallada*, 125 Pa. St. 136, 17 Atl. 238. I cannot understand this decision otherwise than as authorizing the inferences (1) that congress may exempt the gratuity given by it to a pensioner, in his hands, from liability for his debts under the laws of this state; (2) that by the language of its enactment it has done so; and (3) that, therefore, property acquired by means of pension money is exempt from levy and sale upon execution. So understood, the case is in perfect harmony with the decisions in *Orow v. Brown*, 81 Iowa, 344, 46 N. W. 998,

(holding that property purchased by a pensioner with pension money is exempt from execution or attachment by virtue of Rev. St. U. S. § 4747, and overruling a whole line of earlier cases to the contrary;) *Marquardt v. Mason*, (Iowa) 54 N. W. 72, (holding on the authority of *Crow v. Brown*, *supra*, that property purchased by a pensioner's wife with the proceeds of a pension certificate presented by him to her was not to be subjected to the payment of a judgment recovered against the pensioner before the purchase;) *Bank v. Carpenter*, 119 N. Y. 530, 23 N. E. 1108, (holding that, where the receipts from a pension can be directly traced to the purchase of property, the latter is exempt from execution;) *Folschow v. Werner*, 51 Wis. 85, 7 N. W. 911, (holding that the specific money received from the government in payment of a pension cannot be attached;) and a dictum in *Hayward v. Clark*, *supra*, (similar in effect to the rulings in the cases just cited.) I am not unmindful of the fact that there are a number of authorities to the contrary. Besides, in the overruled Iowa cases (*Webb v. Holt*, 57 Iowa, 712, 11 N. W. 658; *Triplett v. Graham*, 58 Iowa, 135, 12 N. W. 143; *Farmer v. Turner*, 64 Iowa, 690, 21 N. W. 140; *Baugh v. Barrett*, 69 Iowa, 495, 29 N. W. 425; *Foster v. Byrne*, 76 Iowa, 295, 300, 35 N. W. 513, and 41 N. W. 22) the doctrine that the exemption from seizure enacted by Rev. St. U. S. § 4747, extends only to pension money remaining in the pension office or its agencies, or while in course of transmission, and not to pension money paid and in possession of the pensioner, or to property bought with such money in his or in his wife's name, seems to be maintained in the following: *State v. Fairton*, etc., Bldg. Ass'n, 44 N. J. Law, 376; *Spelman v. Aldrich*, 126 Mass. 117; *Faurote v. Carr*, 108 Ind. 126, 9 N. E. 350; *Robion v. Walker*, 82 Ky. 61, (overruling *Eckert v. McKee*, 9 Bush, 355); *Johnson v. Elkins*, (Ky.) 13 S. W. 448; *McFarland v. Fish*, 34 W. Va. 548, 12 S. E. 548; *Friend v. Garcelon*, 77 Me. 25, (citing *Knapp v. Beattie*, 70 Me. 410, and the overruled Iowa cases); *Berry v. Berry*, 84 Me. 541, 24 Atl. 967; *Cranz v. White*, 27 Kan. 319; *Falwiler v. Infield*, 6 Ohio Cir. Ct. R. 36. They are, however, clearly inconsistent with the latest deliverance of our supreme court on the subject to which they relate, (*Holmes v. Tallada*, *supra*,) and therefore not applicable to the question before me. Under that decision, and those of other states which agree with it, it is my duty to hold that pension money in the hands of a pensioner, and property acquired by him or his wife with such money, are exempt from execution; and that, I think, settles this case.

"When the defendant placed his check with the Farmers' Bank for collection, and after collection by it received a credit with the bank for the amount, what did he do? He did not receive the money. The bank

received it. The bank, however, does not hold it for him as his bailee. The deposit made the money paid upon the pension check the property of the bank. *Thompson v. Riggs*, 5 Wall. 663, 678; *Scammon v. Kimball*, 92 U. S. 362, 369, 370; *Bank v. Jones*, 42 Pa. St. 536, 537. In return, the bank became debtor to the defendant for that amount, (*Bank v. King*, 57 Pa. St. 202, 205; *Thompson v. Riggs*, supra; *Minling Co. v. Brown*, 124 U. S. 385, 391, 8 Sup. Ct. 531;) i. e. the defendant became the holder of a claim upon the bank, a chose in action, (*Bank v. Millard*, 10 Wall. 152, 157, and cases there cited.) In other words, in exchange for the money paid by the government of the United States as a pension to the defendant, the latter became the owner of another kind of property, (for a chose in action is property,—*Carlton v. Carlton*, 72 Me. 115, 116; *Ide v. Harwood*, 30 Minn. 195, 14 N. W. 884; *Vaughan v. Town of Murfreesboro*, 96 N. C. 317, 2 S. E. 676,) viz. a credit with the bank which enabled him to draw upon it. This property, therefore, (for a credit is property,—*People v. Worthington*, 21 Ill. 171,) being acquired with pension money, and in the hands of the pensioner, was, under the decisions I must regard as conclusive upon me, exempt from seizure for the owner's—the defendant's—debts under the law of this state. Neither can I perceive any inconsistency in this respect between the decision in *Holmes v. Tallada*, supra, which I am following, and that in *Rozelle v. Rhodes*, 116 Pa. St. 129, 9 Atl. 160, relied upon by plaintiff's counsel. The language of the supreme court must be understood with reference to the facts to which it was applied. *Bank v. King*, 57 Pa. St. 202, 208; *Hart v. Carroll*, 85 Pa. St. 508, 511. The money attached, in *Rozelle v. Rhodes*, supra, was pension money. But it was neither in the hands of the pensioner, nor was it, by a general deposit in a bank, converted into another species of property. It had been placed by the pensioner in the hands of another as a bailee for safe-keeping, the identical money to be returned to the pensioner. It was held that, thus in the hands of the bailee, it might be attached. It may not be clear to me why this should be so, whilst in the pensioner's hands, or converted into some other kind of property, it would not be liable. But it is enough for us that it has been so decided, that the present case falls within the latter category, and that, therefore, the decision in *Rozelle v. Rhodes*, supra, is not here applicable. There are, indeed, in *Holmes v. Tallada*, supra, two expressions that may be referred to as making against my interpretation of that decision. The chief justice on page 136, 125 Pa. St., and page 238, 17 Atl., says: (1) 'We need not discuss the question whether property purchased by a pensioner with the pension money, and held in his own name,

would be liable to execution for his debts. No such question is before us.' And, (2) 'In *Rozelle v. Rhodes*, 116 Pa. St. 129, 9 Atl. 160, the pensioner had deposited the pension money with a bailee for safe-keeping, and it was held that it could be attached in the hands of the bailee. So here, if *Jackson Tallada* had deposited this money in his own name in bank, it might, under the authority cited, have been liable to attachment.' (1) The former of these observations simply amounts to a declaration of that which, without it, is self-evident, viz. that the facts of the case were not such as to render the decision upon them an express decision of the status of property acquired with pension money while in the hands of the pensioner. That, however, the point is incidentally covered,—that the proper rule upon it results logically from the decision of the precise question in the case,—is not excluded by that statement. Nor, of course, can the latter by any possibility be construed as being even an intimation that such property acquired with pension money would not, in the hands of the pensioner, be exempt. (2) In the other, the first sentence is but an accurate statement of what was decided in the earlier case, and a recognition of it as authority to that extent, and no further. The second sentence, following in immediate sequence, must be read in connection with the first. So read, the word 'deposit' obviously has reference to a special deposit, such as was proven and passed upon in the earlier case, and is mentioned in *Thompson v. Riggs*, ubi supra. If, however, the learned chief justice had in mind a general deposit in a bank, then it is equally clear, that, that question not being before the court, the observation is to be taken as intended merely for illustration or as an obiter dictum, and in either aspect, upon a very familiar principle, not authoritative.

"It would be an omission not to refer, in concluding my discussion of this subject, to several decisions which, though not binding upon me, are entitled to great respect, and support the views I have expressed. In *Moore v. March*, 16 Wkly. Notes Cas. 239, (1885,) the C. P. of Clearfield county, per Krebs, P. J., held a deposit by a pensioner of pension money in a bank not attachable. In *Clark v. Ingraham*, (1881,) 38 Leg. Int. 393, where defendant, a pensioner, had directed his banker, through whom the pension had been collected, to give to defendant's wife a certificate of deposit for an unused balance of the pension money, it was held by the C. P. of Tioga county, per Williams, P. J., that this deposit could not be attached for the defendant's debt. In *Stockwell v. Bank*, 36 Hun, 583, it was decided that moneys received from a pension, and deposited in a bank in the name of the pensioner, were not subject to seizure by his creditors, the claim of the pensioner upon the bank by virtue of the deposit representing the

pension money itself. True, this decision is directly based, not upon Rev. St. U. S. § 4747, but upon the Civil Code of New York, § 1393, providing that 'a pension * * * granted by the United States * * * for military * * * services * * * is * * * exempt from levy and sale by virtue of an execution * * * or in any other legal * * * proceeding.' But it is manifest that this enactment does not make the matter any clearer, or go any further; than the federal statute with which we are here concerned. The latter speaks of any 'sum of money due or to become due to any pensioner.' The former exempts the 'pension' granted by the United States. Now, a pension is defined to be 'a periodical allowance granted by a government for services rendered.' And Law Dict. ad verb. The word 'pension' as used in the New York statute is, in other words, identical in meaning with the 'sum of money due or to become due to any pensioner,' as used in the act of congress. Hence, if the one is to be understood as including property acquired by means of the gratuity received,—such as a credit in a bank,—the other ought to include it also.

"For the reasons stated, I am of the opinion that the attachment ought to be dissolved. I am glad to be able so to hold, consistently with the decisions in this state, as I understand them, because, apart from any authority, I feel very certain that the act of congress meant to exempt pension money, or property representing pension money, in whatsoever form, in the hands of the pensioner, from liability for his debts. The declaration that it 'shall inure wholly to the benefit of such pensioner,' following so closely upon the direction that it shall not be liable to attachment, etc., clearly indicates that its appropriation, against the pensioner's consent, to the satisfaction of his debts was not regarded by congress as a disposition of it inuring to his benefit, upon the principle 'noscitur a sociis.' Hence that declaration is, to my mind, an unmistakable and emphatic exemption of it from liability to attachment by his creditors."

Rieser & Schaffer, for appellants. Jeremiah K. Grant and Wm. M. Goodman, for appellee.

PER CURIAM. According to the undisputed evidence, the money attached was part of the proceeds of the pension check which defendant deposited with the garnishee bank for collection. It was subject to his check, and was in fact part of his pension money, which, as cash, had not yet come into his hands. In view of the undisputed facts, the learned judge of the common pleas was clearly right in holding that, under the act of congress, the money was not attachable. That act provides that, "no sum of money due or to become due to any

pensioner, shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner." This case is clearly ruled by the principle recognized in *Holmes v. Tallada*, 125 Pa. St. 136, 17 Atl. 238, and other cases cited in the opinion of the court below. The decree dissolving the attachment is therefore affirmed, and the appeal is dismissed, with costs to be paid by the appellants.

(100 Pa. St. 209)

EVANS v. READING CHEMICAL & FERTILIZING CO., Limited.

(Supreme Court of Pennsylvania. March 12, 1894.)

NUISANCE—MANUFACTURING FERTILIZERS—INJUNCTION.

A factory, located in a "prosperous farming community," for making fertilizers from carrion and refuse, will be enjoined where the stench decreases the value of plaintiff's dwelling house by making it almost uninhabitable.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Bill by Hannah Evans to enjoin the Reading Chemical & Fertilizing Company, Limited, from operating their factory. Decree for plaintiff, and defendant appeals. Affirmed.

The master's report is as follows:

"To the Honorable, the Judges of said Court, Sitting in Equity: The undersigned, appointed examiner and master in the above case on November 21, 1891, begs leave respectfully to report: That he met the parties interested, and their counsel, at nine meetings held December 18 and 29, 1891, January 19, 28, April 7, 26, May 18, 19, September 9, 1892, at his office, No. 29 North Sixth street, Reading. Henry C. G. Reber, Esq., and Cyrus G. Derr, Esq., appeared as counsel for the plaintiff, and Jefferson Snyder, Esq., and Ermentrout & Ruhl, Esqs., for the defendant.

"The plaintiff alleges in her bill, filed September 9, 1891, that her property, consisting of a mansion house and farm, is situated in a thickly populated district in said county; that the defendant has recently begun to carry on the manufacture of fertilizing materials in a large building situate but 80 yards from her property, and but 540 yards from her mansion house, which manufacture consists of the gathering together and bringing into the said building, and there boiling, rendering, and mixing, the carcasses, entrails, and offals of animals, whether dead from disease or otherwise, putrid and refuse meat, and other like offensive matter; that the said manufacture causes to be emitted and sent forth noisome and unwholesome smoke, gases, vapors, and stenches, arising and resulting from the boiling, melting, and

mixing of the carcasses, bones, entrails, and offals of animals, putrid and refuse meat, and other like offensive material as aforesaid, which smoke, gases, vapors, and stenches are wafted by the winds and caused to float over her property aforesaid and into her mansion house, rendering the same unfit for human habitation, and rendering her condition and that of her family and guests intolerable; that the carrying on by the said parties of the manufacture and business aforesaid renders her mansion and entire property unfit for residential purposes, depreciates its value in the market, and inflicts irreparable injury upon her. The defendant, by its answer, filed October 23, 1891, denies that the plaintiff's property is situated in a thickly populated district, but admits that it is carrying on the business of manufacturing fertilizing materials in a building located as averred in plaintiff's bill, and that said fertilizing materials are manufactured out of the materials as averred in said bill. It avers, however, that said materials out of which said fertilizing materials are manufactured are collected and brought to the manufactory in galvanized iron cans, duly sealed and protected, and denies that either while in the cans or in the process of manufacture noxious and unwholesome smoke, gases, vapors, and stenches are emitted, which are wafted by the winds and caused to float over the plaintiff's property and into her mansion house, rendering the same unfit for human habitation, thus rendering the plaintiff's condition and that of her family and guests intolerable. It further avers that in the process of manufacturing the fertilizing materials, chemicals and such mechanical instruments are employed which destroy any offensive or injurious odors which arise in the process of such manufacture, and denies that any injury results to the plaintiff or her property by reason of carrying on of the business of manufacturing fertilizing materials as aforesaid.

"After a full and careful consideration of all the evidence, which is herewith submitted, the master finds the following facts: Hannah Evans, the plaintiff, is the owner of a two-story brick and stone dwelling house and a tract of land, upon which the same is erected, situate in Spring township, Berks county, Pennsylvania, adjoining the Berks and Dauphin turnpike road, and lands now or late of Benneville Hiestler, Dr. H. H. Muhlenberg, Thomas Yost, and Allen Van Steffy, containing thirty acres and ninety-one perches, she having acquired title to the same on February 9, 1880, under proceedings in partition upon the estate of her deceased father, John V. R. Evans, to whom it was devised by her grandfather, Philip T. Evans, in 1835. She was born there, and has occupied and used the premises ever since she became the owner, farming it herself with the assistance of a hired man, who, with his wife, lived in the same house with her until April 1, 1891,

when her brother, Miller D. Evans, moved into the house with his family, consisting of his wife and two children, and a servant girl, and he has been farming this land for her ever since. This dwelling house is situated along the Berks and Dauphin turnpike road, a public highway much used, and is about two and a half miles from the city of Reading, and a little over a mile from the village of West Reading by said road, and about the same distance by the same from the village of Sinking Spring, which has a population of about six hundred. The Lebanon Valley Railroad crosses the turnpike a short distance above the house. The Reading Chemical and Fertilizing Company, Limited, the defendant, is a limited copartnership, organized under the act of assembly of June 2, 1874, composed of Albert Thalheimer, Willson B. Angstadt, and K. H. Cleaver, and engaged in the business of manufacturing fertilizing materials in a building situated along the Lebanon Valley Railroad and about sixty or eighty feet from the Berks and Dauphin turnpike, in said Spring township, on a tract of land belonging to the defendant, and containing about forty-two acres. This building is about one hundred and eighty feet long and about forty feet wide, and about one-half of it is three stories in height. It is about eighty yards from the plaintiff's land, and about five hundred and forty yards from her dwelling. The dwelling nearest to the manufactory is about one hundred yards away, and is on the defendant's land, and occupied by its tenant. The next building is the plaintiff's dwelling, and a few hundred feet beyond that is a public schoolhouse. Several other families live in the immediate neighborhood, but further from the manufactory. It is a populous farming district, the average size of the farms being about one hundred acres. In March, 1891, the defendant began to manufacture fertilizing materials at this place, and has continued to carry on the business ever since. The materials used are the carcasses of animals that have died of disease or been killed, bones, blood, flesh, and entrails, and are received by the defendant from the butchers, farmers, and scavenger. Materials in an advanced state of decomposition are not received or used. Butchers' offal is taken there in sealed cans soon after the animals are slaughtered, and carcasses soon after the animals have died or been killed are delivered in open wagons. These materials, after the skins are removed from the carcasses, are cut up and placed in a large steel boiler, called a 'digester,' which is about eight or ten feet high and five feet wide, and are there subjected to a temperature of from 250 to 400 degrees Fahrenheit, and boiled from three to five hours. The digester is covered with a lid, so constructed as to make it tight and prevent the escape of the steam. There is no fire under the digester; the heat is applied by means of a steam pipe. The steam is generated in a large boiler, with a

pressure usually of eighty pounds, and is conveyed from there in pipes. When the materials are thoroughly boiled, the steam is turned off, and the digester cools in six or eight hours. The gas that is generated in the boiling process is conducted into a tank of water. The fat or grease on top of the boiled material is removed to a tank or kettle through a pipe by means of steam being forced under it and blowing it off, and this steam is carried into a tank of water and condensed. The water under the fat in the digester is then pumped into another tank and the solid material is removed to the upper floor, dried, ground, run over screens, mixed with different acids, among them sulphuric acid, and put in sacks for the market. Fourteen men are employed in the manufactory, and the capital invested there is \$35,000. The most improved machinery and appliances and the best processes known to the business are used and employed by the defendant. But, notwithstanding all these precautions, an offensive and disagreeable odor or stench is almost constantly generated and emitted from this manufactory, and carried by the winds for a distance of a mile or two over the surrounding country; its intensity and presence in the different parts of the neighborhood at various times depending upon the distance from the factory, the condition of the atmosphere, and the direction of the winds. At the plaintiff's house it is sometimes exceedingly offensive, at other times less disagreeable, but nearly always noticeable. This stench is, no doubt, caused to a large extent by the gas that is generated in mixing the dried materials with acids, and also in some degree by the vapors that escape in the boiling and separating process; and while it probably does not cause any serious disease, or injuriously affect the workmen in the factory, who are accustomed to it, yet it is offensive and disagreeable to people generally who inhale it, and causes nausea, vomiting, and loss of appetite, and renders the plaintiff's house much less desirable than formerly as a place of residence, and to that extent depreciates its market value. So great is the physical discomfort to the plaintiff and her family that they are no longer able to enjoy the premises as they did before the erection of this manufactory, and their condition there is exceedingly uncomfortable.

"After considering the legal propositions, the master begs leave to submit the following conclusions of law: The business in which the defendant is engaged, when carried on in a populous neighborhood, has been decided by the courts in Pennsylvania to be a nuisance per se, and liable to be restrained by injunction. The business of boiling up the carcasses of dead animals in a thickly populated neighborhood, which causes an offensive smell, is per se a nuisance, and may be enjoined against. *Smith v. Cummings*, 2 Pars. Eq. Cas. 92. No one will for a moment

doubt that we are invested with ample powers to restrain the erection of any building or structure intended for a purpose which will be a nuisance per se, such as bone-boiling, horse-boiling establishments, swine yards or pigsties, and other various like establishments. These not only interfere with the health, but, if they do not reach to that, they do to the usual and ordinary enjoyment of the residences of inhabitants coming within the circle of atmosphere tainted by them, and both property and persons may be prejudiced or injured thereby. The right to claim that such establishments shall be prevented is the right that every citizen has to pure and wholesome air, at least as pure as it may be, consistent with the compact nature of the community in which he lives. *Rhodes v. Dunbar*, 57 Pa. St. 236. If the business is a nuisance per se, no doubt can exist in regard to the remedy by injunction. *Dennis v. Eckhardt*, 3 Grant, Cas. 392. No one doubts the jurisdiction of a court of equity in the case of a nuisance per se, such as a bone-boiling establishment, a swine yard, or a pigsty, or other similar establishments. *City of New Castle v. Raney*, 180 Pa. St. 548, 18 Atl. 1006. In the case of *Ozarniecki's Appeal*, 11 Atl. 660, the plaintiffs, being the owners of real estate in Allegheny county, Pennsylvania, situated from 330 feet to 1,800 feet from the defendant's property filed a bill asking for an injunction to restrain the defendants from erecting buildings and using the same for carrying on the business of boiling bones and the carcasses of horses and other animals. The court below awarded the injunction, because the business was a nuisance per se, and the supreme court of Pennsylvania, on November 11, 1887, affirmed the decree, saying: 'We concur with the court below, so far as its injunction restrains the defendants from using the proposed buildings as a bone-boiling establishment, for every one knows that carrion cannot be gathered together in any populous neighborhood without being offensive. But the erection of the buildings themselves cannot be regarded as a nuisance, and we must therefore direct a modification of the injunction so far as it regards such erection and no further.' The same rule has been applied to a similar business in New Jersey. *Melgs v. Lister*, 23 N. J. Eq. 199. The difference between a nuisance per se and where a lawful business is carried on so as to become a nuisance, is not in the remedy, but only in the proof of it. *Dennis v. Eckhardt*, supra. In the one case the wrong is established by proof of the mere act; in the other, by proof of the act and its consequences. Testimony having been submitted by the plaintiff to prove the act, the burden is upon the defendant to show that it is not such a nuisance; that it does not produce odors and stenches which are offensive and disagreeable to the plaintiff and her family, and to other persons in the neighborhood, who are obliged to inhale them, and

which impairs their physical comfort, and interferes with the enjoyment of their property; and that it is not a populous neighborhood. This the defendant has failed to do. That disgusting and unwholesome stenches are produced in this manufactory and carried over the surrounding neighborhood and into the plaintiff's house, and that it is a thickly-settled farming district, has been clearly established by the evidence. That the defendant has made every reasonable effort to prevent the escape of these vapors and stenches is, no doubt, true, and that it has not succeeded is probably because science has not yet invented the machinery and appliances by which it can be prevented. Your master would therefore recommend that an injunction may be issued perpetually restraining the said defendants, their workmen, agents, employees, successors, and assigns, from carrying on the said manufacture and business as aforesaid, and from injuring and impairing the market value of plaintiff's property; and that the defendant pay the costs of this proceeding. All of which is respectfully submitted. Horace A. Yundt, Master and Examiner."

The opinion of the court of common pleas is as follows:

"Every man has the right to the natural use and enjoyment of his own property, and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*.' Coal Co. v. Sanderson, 113 Pa. St. 126, 146, 6 Atl. 453. The context of the opinion in which this utterance occurs, shows that 'natural use and enjoyment' means such development of its resources, and such customary and appropriate employment of the property itself, as is needful for its complete utilization, according to its inherent qualities or contents and its surroundings, and does not include, in any other case, the bringing upon it artificially of substances not naturally found there. The complement of this rule is that, as to anything beyond such natural use and enjoyment of his property, without negligence or malice, every citizen holds his property subject to the implied obligation that he will use it in such way as not to prevent others from enjoying the use of their property. State v. Yopp, 97 N. O. 477, 2 S. E. 458. 'Sic utere tuo ut alienum non laedas,'—a rule approved and applied in Dennis v. Eckhardt, 3 Grant, Cas. 390; Howell v. McCoy, 3 Rawle, 256; Hutchinson v. Schimmelfeder, 40 Pa. St. 396; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116; Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453, and a multitude of other cases. A use of his property by one in excess of the limitations resulting from the conjoint operation of these principles must, if continuous, (Sparhawk v. Railway Co., 54 Pa. St. 401, 421,) and injurious, i. e. accompanied by damage (Rhodes v. Dunbar, 57 Pa. St. 274, 291) of a substantial character, (Price v. Grantz, 118

Pa. St. 402, 418, 11 Atl. 794,) necessarily be a nuisance, (Dennis v. Eckhardt, 3 Grant, Cas. 391.) If it is such to the right of the public at large, it becomes a crime; if to the rights of individuals only, or specially to them in addition to and distinct from the public offense, (Sparhawk v. Railway Co., supra; Bunnell's Appeal, 69 Pa. St. 59,) it creates a liability for compensation, and under certain conditions to equitable restraint. The fact that the maintenance of a nuisance is a crime does not deprive courts of equity of the power to abate it, (Id.; Pennsylvania Lead Co.'s Appeal, supra; Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55; Ewell v. Greenwood, 26 Iowa, 877; Minke v. Hopeman, 87 Ill. 450;) for when a private injury results from a breach of a public law, the public wrong may be redressed by the private remedy, because the private remedy stops the wrongdoer, (Sparhawk v. Railway Co., 54 Pa. St. 422.) Since, however, equity will not interfere except where the plaintiff's right to its intervention is free from doubt, (Id. 426;) i. e. where a wrong and a resulting injury accompanied with damage recoverable at law are manifest, (Rhodes v. Dunbar, 57 Pa. St. 290, 291,) or certain to follow, (Wier's Appeal, 74 Pa. St. 280,) there is, in respect of the application of equitable remedy by injunction a clear distinction (pointed out by Westbury, L. C., in Smelting Co. v. Tipping, 11 H. L. Cas. 642, 116 E. C. L. 1093) between those acts which produce material injury to property and those which are productive of sensible personal discomfort only. In cases involving the latter,—personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or affects the senses or nerves,—the right to relief must depend largely upon the circumstances of the place where the thing complained of occurs. It is reasonable and necessary that persons living in a community and neighborhood should subject their personal comforts to the consequences of those operations, trades, and businesses that are carried on in the immediate locality, and are actually necessary for trade and commerce for the enjoyment of property and for the benefit of the inhabitants and of the public at large. 'But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade or occupation or business is a material injury to property, then there unquestionably arises a very different consideration,' and, 'in cases of that description the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances the immediate result of which is sensible injury to the value of the property.' Per Westbury, L. C., ubi supra, approvingly cited in Cooley, Torts, 597. Hence, whilst an invasion by one's use of his property of the personal rights, comforts,

etc., of his neighbor may become the ground for chancery interference, yet where this is the ground of complaint, the kind and extent of those personal rights and the question whether it is at all these rights or merely idiosyncrasies or preferences that are involved, depending so much upon the surroundings, upon the usual pursuits of men in the neighborhood, upon the consequent necessities of others in the customary and reasonable enjoyment of their property, upon the public needs of the locality, and the like, a chancellor cannot, with good conscience, declare the complainant's case to be free from doubt, and will therefore refuse a decree, at least until that doubt is set at rest by an action at law and the verdict of a jury, which, as was substantially held in *New Castle v. Raney*, 180 Pa. St. 546, 18 Atl. 1066, and *Com. v. Miller*, 189 Pa. St. 77, 21 Atl. 183, is peculiarly capable of determining such questions. On the other hand, where the wrong complained of is an injurious invasion of a property right, fixed and determined by the law, and depending upon no such shifting and uncertain elements as those which must be regarded as affecting one's personal right of comfort, quiet, etc., in any given neighborhood, chancery is competent to act, and in proper cases must act, in order to preserve the constitutional rights of property owners; for, as is well said in *Hennessey v. Carmony*, (N. J. Ch.) 25 Atl. 374, 378, to refuse equitable relief in such cases, and remit the complainant to his remedy at law, would be, in effect, 'giving the wrongdoer a power not permitted by our system of constitutional government, viz. to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give.' I think this distinction, whilst not explicitly applied by our supreme court as a ratio decidendi in any chancery case that has come under my observation, is nevertheless abundantly sustained by an examination of its decisions. Thus, in *Sparhawk v. Railway Co.*, 54 Pa. St. 401, the alleged nuisance consisted of the rumbling of the street cars in the city of Philadelphia, causing mental discomfort to the complainant. The injunction prayed for was refused in part, because the discomfort was of a mere personal character, incident to the surroundings. In *Richards' Appeal*, 57 Pa. St. 105, the facts found showed the use of a fuel in defendant's works which polluted the air with soot and smoke, annoying, in certain conditions of the atmosphere, the occupants of plaintiff's house and the operatives in his factory, and to a slight extent injuring his buildings. Page 108. This injury was such as to be deemed capable of compensation at law, and wholly inadequate to warrant a destruction of the defendant's business; and the former, being a mere personal inconvenience, inseparable from a manufacturing neighborhood, insufficient to ground an injunction. In *Rhodes*

v. Dunbar, 57 Pa. St. 274, an injunction was sought against the erection of a building for a certain purpose, on the grounds of (a) probable pollution of the air by soot and smoke, (b) likelihood of personal discomfort resulting to complainant from the noise of the proposed business, and (c) apprehension of danger to neighboring buildings from fire capable of being communicated to them in the event of the objectionable structure being burned. In the absence of all proof of actual present or certain future damage, it was held that the first of these grounds could constitute only a personal annoyance or inconvenience of a kind incident to the surroundings; the second, clearly of the same character, was unsustainable by the proofs; and the third, being a mere apprehension, speculative, eventual, and contingent, could not form the basis of equitable interference, even conceding the tendency of the possible prospect of danger from fire to diminish the value of complainant's property by increasing the rate of insurance, because 'mere diminution [of value,] irrespective of any direct damage, is not a ground for injunction.' Page 290. Accordingly, the latter was refused. *Huckenstine's Appeal*, 70 Pa. St. 102, is another case in the same line. The allegation of injury to plaintiff's property was considered disproved, or at least too doubtful, under the evidence, to be of any weight. The remainder of the bill relied upon the annoyance arising from the smoke of brickkiln upon the outskirts of Allegheny City, 'whose every-day cloud of smoke from thousands of chimneys and stacks hangs like a pall over it, obscuring it from sight,' (page 107,) with which 'the heat, smoke, and vapor of a brickkiln cannot compare,' (page 106.) This was held personal discomfort, to which the complainant, in common with others who lived there, had voluntarily subjected himself. It is to be observed that this decision, as well as that in *Rhodes v. Dunbar*, supra, and in the later case at law of *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794, largely relies upon and cites from *Smelting Co. v. Tipping*, supra. In *McCaffrey's Appeal*, 105 Pa. St. 253, the bill went no further than to allege annoyance and discomfort from noise and vibration, caused by defendant's machinery. The vibration was disproved, except as arising from the passage of vehicles in the street. The noise was shown to amount to little more than 'the breakers on a distant beach.' The place was in the heart of a large city. Of course, there was no injunction.

"Passing from these cases, sufficient for the purpose of illustration, to those in which injury to property rights was shown, we find very different results, remembering that the right of private property 'consists in the free use, enjoyment, and disposal of all acquisitions, without any control or diminution save only by the laws of the land.' (*Hutchinson v. Schimmelfeder*, 40 Pa. St. 396, 398,) and that by injury to property is meant

'something materially affecting its capacity for ordinary use and enjoyment,' (Sparhawk v. Railway Co., 54 Pa. St. 426.) Thus, in Dennis v. Eckhardt, 3 Grant, Cas. 390, the maintenance of a shop by a tinsmith and sheet-iron worker, the noise of the hammering and pounding in which made it impossible for the plaintiff to enjoy his property without danger to the health of himself and family, was enjoined. Of the same character, in Ladies' Decorative Art Club's Appeal, (Pa. Sup.) 13 Atl. 537. In Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, an injunction issued on proof that the smoke and vapors from the defendant's establishment settling upon the plaintiff's land, lessened its fertility, poisoned its vegetation, destroyed animals grazing upon it, nauseated its inhabitants, and diminished its value for selling and renting. In Wier's Appeal, 74 Pa. St. 230, the erection of a powder house was restrained, without proof of antecedent damage, but to prevent further injury certain to result to complainant's property by making its enjoyment unsafe and depreciating its value. In Czarniecki's Appeal, (Pa. Sup.) 11 Atl. 600, defendants were enjoined from using their building for the purpose of boiling bones and carcasses of horses and other animals in the manufacture of neat's-foot oil and fertilizers, on the allegation that the smoke, gases, vapors, and stenches resulting from these operations would injure the health and comfort of plaintiffs upon their property, and deprecate the value of the latter. Again, in Rhodes v. Dunbar, supra, it is said, at page 290, that certain establishments, such as powder magazines, nitroglycerine depots, may be enjoined, not only on the ground of their liability to fire, primarily or even secondarily, but on account of the injury with which they menace alike property and persons in their vicinity. It is needless, however, to multiply decisions and dicta to the same general purpose. The rule seems clear that, as soon as a court of equity comes to deal with injuries to property rights, the decision proceeds upon a different plan from that upon which mere personal discomfort and annoyance stand. As to the treatment of these respective classes of cases in courts of law, the same distinction is unmistakably announced by Mr. Justice Williams in the very recent case of Robb v. Carnegie, 145 Pa. St. 324, 340, 22 Atl. 649, in these words: 'If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation; but, if he is affected only in his tastes, his personal comfort or pleasure or preferences, these he must surrender for the comfort and preferences of the many.' Where, however, he is entitled to compensation at law, there, if the injury be continuous, and remediable at law only by a multiplicity of suits, that is to say, irreparable at law, (Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 116, 123,) equity will intervene for his protection by

exercising its restraining power, (Scheetz's Appeal, 35 Pa. St. 88, 95; Dennis v. Eckhardt, 3 Grant, Cas. 390, 392; Pennsylvania Lead Co.'s Appeal, 96 Pa. St. 124; Haugh's Appeal, 102 Pa. St. 42, 45; Bitting's Appeal, 105 Pa. St. 517, 521; Hennessey v. Carmony, [N. J. Ch.] 25 Atl. 374, 377.) That is the very test and foundation of chancery jurisdiction.

"But it is contended by defendant's counsel (1) that in every case a decree of injunction is not of right, but of grace, discretionary; (2) that it will not be granted, even where injury to property rights is made out, if it appears that the injury proceeds from the conduct (a) of a lawful business, (b) without negligence,—i. e. with the most approved appliances; and (3) that it will not be granted where (a) the loss which would result to its owner, or (b) the inconvenience which would result to the public from a destruction of that business would be greater than the injury resulting to the plaintiff from its continuance.

"(1) It was said by Mr. Chief Justice Thompson, in Richards' Appeal, 57 Pa. St. 105, 113: 'An error seems somewhat prevalent in portions, at least, of this commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that as, at law, whenever a case is made out of wrongful acts on the one side, and consequent injury on the other, a decree to restrain the act complained of must as certain follow as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law that in equity a decree is never of right, as a judgment of law is, but of grace.' The same thought is repeated by Mr. Justice Agnew in Huckenstine's Appeal, 70 Pa. St. 102, 106. Speaking of the intervention of chancery by injunction in cases of nuisance, he says, 'The aid is not of right, but of grace.' Similar observations are to be found frequently enough in decisions of our own and other courts, as well as in text-books. That they embody an unquestionable principle of equity jurisprudence cannot be disputed. But what is that principle? It certainly cannot be that a chancellor has the right of acting, in the final settlement of property rights, according to his arbitrary will, uncontrolled by the legal and equitable rules governing those rights. It was said by the late Mr. Justice Woodward, while president judge of this district, that: 'In the administration of justice there is nothing that properly could be deemed discretion. Mere discretionary power has always been mere despotism. In all subjects, some established and recognized principles control the courts.' In re Report of County Auditors, 1 Woodw. 270, 272. At any rate, the true scope of the exercise of discretion in the judicial field, understood as referring to a power to give or withhold at will, 'is found in those matters which affect procedure merely, and not

the ultimate right.' *Hennessey v. Carmony*, (N. J. Ch.) 25 Atl. 374, 379. If, on the other hand, it is intended to be laid down that a chancellor, applied to for a final injunction restraining the continuance of a nuisance, must be discreet, must act with discretion, must discriminate, must take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then it is plain that that is just what he must do in every case coming before him for determination, (Id.) whether it be a case of nuisance, of reformation of an instrument, of specific performance, or what not. It is very clear to me that wherever, in the decisions of our supreme court, reference is made to the grace or discretion of the chancellor as to the granting or withholding of a final decree, this is the kind of discretion intended. The circumstances under which, in the cases above cited, the decree was said to be a matter of grace, show that such was the intention,—circumstances which have been explained above, and shown to have brought the applications within the rule denying injunctions on the ground of mere personal inconvenience. And so does the language of Mr. Justice Gordon, in *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116, 124, where he approvingly cites that of Earl, J., in *Campbell v. Seaman*, 63 N. Y. 568, concerning right to an injunction in equity in cases of nuisance without previous proceedings at law, as follows: "The writ can rightfully be demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits; and its refusal in a proper case would be error, to be corrected by an appellate jurisdiction. It is a matter of grace in no sense except that it rests in the sound discretion of the court;" adding thereto: "Nor have our courts been less ready to adopt the same doctrine."

"(2) At least as far back as *Aldred's Case*, 9 Coke, 57, every nuisance brought into a court of justice has been sought to be excused on the ground that the injury complained of resulted from the reasonable prosecution of a lawful business, and ought, therefore, to be borne by the plaintiff without a murmur.

"(a) It is not quite easy to understand the precise force of the term 'lawful,' as used by defendants in this connection. If it is used in opposition to 'unlawful, prohibited by law, criminal,' it does not seem to be very pertinent; for it is decided that a private plaintiff cannot supplement a defective case by an alleged infraction of the penal laws in the acts complained of. *Sparhawk v. Railway Co.*, 54 Pa. St. 401. If, however, the fact that a business be complained of as a nuisance is unlawful in this sense counts for nothing in his favor, how can the fact of its being not so unlawful count against him? This, therefore, cannot be the meaning of the term 'lawful' as used in those de-

cisions which emphasize the extreme caution to be observed in the exercise of a chancery power that may strike down a 'lawful' business or industry. Its significance lies in its characterization of the business complained of as affecting the individual complaining, and not the public. In *Wier's Appeal*, 74 Pa. St. 230, the erection of a powder house was restrained as a nuisance. In *Dilworth's Appeal*, 91 Pa. St. 247, a decree enjoining the erection of a powder house as a nuisance was reversed. The test was in neither the inherent lawfulness or unlawfulness of the business, but its lawfulness in the one locality and its unlawfulness in the other, measured by its effect upon the plaintiff's property rights. No court, at this day, apart from legislative declaration, would undertake to pronounce any useful industry or manufacturing enterprise unlawful under all circumstances, irrespective of locality or surroundings. But in certain localities and surroundings, the common experience of mankind, of which courts take judicial notice, has found certain pursuits to be universally injurious to health and damaging to property, no matter how carefully conducted. Hence, in such neighborhoods, those pursuits are declared to be nuisances per se; i. e. in themselves nuisances, and not nuisances only if improperly carried on. Such businesses, in such localities, are prima facie unlawful, because prima facie nuisances to near-by property holders. Others are prima facie lawful, because not necessarily attended with such effects, and must be shown to be conducted in such a way as to become nuisances. Thus the difference between the two kinds of nuisances is in the method of proof only. *Dennis v. Eckhardt*, 3 Grant, Cas. 390, 392. The lawfulness or unlawfulness of either is still predicated upon its effects on the plaintiff's property rights. Hence an appeal to the chancellor not to restrain an enterprise because it is a lawful one, is simply another way of asserting that it is not a nuisance per se or under the facts; and to say that a chancellor will not restrain a lawful business is to say that he will not restrain that as a nuisance which is not a nuisance.

"(b) As to the use of approved appliances, all that need be said is that, whilst the employment of inferior methods may render the prosecution of a business otherwise unobjectionable, (*Demarest v. Hardham*, 34 N. J. Eq. 469; *Yocum v. Hotel Co.*, 18 Abb. N. O. 340; *Richards' Appeal*, 57 Pa. St. 106, 112,) it is very clear that the adoption of the 'most approved methods known to science, or which human skill has devised,' will not justify that which is not a 'natural use and enjoyment' of one's property, and which, in spite of those methods, remains a nuisance. (*Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116, 127.)

"(3) In *Richards' Appeal*, 57 Pa. St. 105, 113, 114, the court says: "The chancellor

will consider whether he would not do a greater injury by enjoining them than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If, in conscience, the former should appear, he will refuse to enjoin.' And in Dilworth's Appeal, 91 Pa. St. 247, 250, it says: 'It often becomes a grave question whether so great an injury would not be done to the community by enjoining the business that the complaining party should be left to his remedy at law.' Like expressions are to be found in other cases. None of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public.

"(a) So far as the 'balance of injury' notion refers to the parties of the litigation, it is pointed out in *Higgins v. Water Co.*, 38 N. J. Eq. 538, 544, that its legitimate application is to motions for preliminary injunctions, not to final decrees. Where the question for the consideration of the court is as to the propriety of stopping a business by preliminary injunction upon an ex parte showing, which may or may not be substantiated by further examination of the case in due course, it is very well for a chancellor to take into account the magnitude of the defendant's investment, and compare it with the character of the plaintiff's alleged injury; and if the latter appears trifling beside that which would result from the impairment of the former, he may well refuse to exercise his power until more fully advised. But where, upon final hearing, the mind of the chancellor is satisfied that the complainant's right is clear, and the injury sustained by him substantial, so that his claim to damages at law is indisputable, and where, moreover, such damages could not give him adequate redress except by an endless repetition of suits, a refusal of an injunction upon the ground that plaintiff cannot suffer as great a loss from the continuance of the nuisance as defendant would from its interdiction, would be as far removed from equity as can be. There is, to my mind, no more offensive plea than that by which one seeks to justify an act injurious to his neighbor on the ground of its advantage to himself. 'A person cannot go on and build extensive works and make heavy expenditures of money for the exercise of a trade or business that will invade the premises of another, * * * and then, when called upon to desist, turn around, and claim immunity for his trade or business upon the ground that to stop it would involve him in ruin. * * * Where justice is properly administered, rights are never measured by their mere money value; neither are wrongs tolerated because it may be

to the advantage of the powerful to impose upon the weak.' *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116, 127, per Gordon, J. Wherever, in this state, a final decree of injunction against an alleged nuisance has been refused with a reference to the 'balance of injury' doctrine, as applied to a comparison of the plaintiff's injury with the defendant's investment, it will be found that, as in *Richards' Appeal*, supra, the former was such as to be capable of adequate compensation at law.

"(b) So far as this doctrine refers to the interest of the public, its significance, as shown by the circumstances under which it has been applied, is exhausted, except in applications for preliminary decrees, by the rule already stated concerning the duty of the individual to subordinate his personal preferences to the necessities of the community in which he lives, and for its good to put up with those 'mere trifling annoyances or injuries' referred to in *Price v. Grantz*, 118 Pa. St. 402, 413, 11 Atl. 794, which consist solely in personal inconvenience. I have not been able to find a case in which substantial injuries to property rights, to the rights of enjoying and possessing property, have been sanctioned by a final refusal to enjoin, on the mere ground that the public was interested in their continuance. Such an appeal was made in *Broadbent v. Gas Co.*, 7 De Gex, M. & G. 436. It was said that the undoubted injury inflicted upon the plaintiff's property was slight in comparison with the manifest benefits conferred by the company on the public, and on that account the court ought not to exercise its powers to restrain the manufacture of gas. But Lord Cranworth said: 'I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on;' adding that, in the face of substantial continuing damage, to deny an injunction upon such a ground, and remit the plaintiff to an action at law toties quoties, 'would be a disgraceful state of the law.' The judgment in this case was affirmed on appeal. 7 H. L. Cas. 601. No better has the argument fared in our supreme court, when asserted in justification of injuries to property rights. 'A person cannot,' says Mr. Justice Gordon, in *Pennsylvania Lead Co.'s Appeal*, ubi supra, 'claim immunity * * * on the ground that * * * his trade is a useful one, and beneficial to the community, or to the nation, or that by bringing a large number of workmen into the community it has enhanced the value of the plaintiff's property.' 'There are many trades and many occupations which are not only reasonable, but necessary, to be followed, and which still cannot be allowed in the proximity of dwelling houses, so as to interfere with the comfort of their inhabitants.' *Jessel, M. R.*, in *Broder v. Saillard*, 2 Ch. Div. 692, 701, quoted and approved in *La-*

dies' Decorative Art Club's Appeal, (Pa. Sup.) 13 Atl. 537. The public usefulness of an enterprise 'is no reason why private right should be infringed.' Rogers, J., in *Howell v. McCoy*, 3 Rawle, 256, 269. In *Rhodes v. Dunbar*, 57 Pa. St. 274, 291, the then chief justice enumerated 29 useful establishments which, from time to time, had been declared nuisances. Doubtless, the development of industries and manufactures is a matter of concern to the public, in the furtherance of which the individual must put up with a reasonable degree of inconvenience inseparable from their prosecution. On the other hand, the right of every citizen of 'possessing and protecting property,' (Const. 1874, art. 1, § 1,) and the preservation of the health and lives of the inhabitants of any neighborhood, are also matters of public concern, as opposed to which mere facilities for multiplying dollars and cents may be deemed insignificant. The requirement to surrender a portion of one's personal comforts in aid of public enterprise is a necessity to the existence of any civilized community. The requirement to surrender one's property, without adequate redress, for the benefit of the public, would savor of a kind of socialism which finds no countenance in the constitution, laws, or judicial decisions of this commonwealth. Of course, where, as in *Com. v. Miller*, 139 Pa. St. 77, 21 Atl. 138, the question is whether or not the defendant is guilty of the maintenance of a public nuisance as an offense against the public, considerations of the magnitude and importance of the enterprise, as measured by the capital invested in it, and by its influence upon the prosperity of the community, are altogether legitimate. That is a public, and not a private, question, to be viewed from the standpoint of the public, not of a private property owner; and the annoyance to the public on the one hand may properly be balanced by the benefits to the public on the other. But, as was decided in *Sparhawk v. Railway Co.*, the public aspect of a case before the criminal law has nothing to do with the private remedy in a court of equity. The application of these principles to the record before me lies upon the surface. Whilst the use made by the plaintiff of her property is the ordinary one to which property in that locality is put, viz. farming and residence, the employment by defendants of theirs is not a 'natural use and enjoyment' of it, within the meaning of the phrase in *Coal Co. v. Sanderson*, 113 Pa. St. 126, 146, 6 Atl. 453. It is not an employment indicated as necessary or appropriate, either by the natural resources or the surroundings of the place. The latter is, therefore, not a suitable or convenient one for this business, in the legal sense of those words, meaning 'not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.' Bamford

v. Turnley, 3 Best & S. 65, 75, per Williams, J., quoted in *Cooley, Torts*, 597. The injury complained of does not arise from operations having any necessary relation to the nature or location of the land, but from substances artificially brought upon it, and employed in a business which, carried on amidst surroundings similar to these, has been uniformly, in this and other states, held to be, or referred to, as a nuisance per se. *Smith v. Cummings*, 2 Pars. Eq. Cas. 92; *Rhodes v. Dunbar*, 57 Pa. St. 274, 286; *New Castle v. Raney*, 130 Pa. St. 546, 564, 18 Atl. 1066; *Czarniecki's Appeal*, (Pa. Sup.) 11 Atl. 660; *Meigs v. Lister*, 23 N. J. Eq. 199; *State v. Luce*, (Del.) 6 Cent. Rep. 862; *Fertilizer Co. v. Malone*, (Md.) 20 Atl. 900. Such being its character, there can be no pretense that the business is a 'lawful one.' Proof of the mere act is proof of the wrong. *Ray, Neg. Imp. Dut.* 14. Nor does the evidence leave its result in doubt. It was recently held, in *State v. Neidt*, (N. J. Ch.) 19 Atl. 318, that when offensive smells compel citizens to retire from their porches, and close their doors and windows, cause nausea and sickness of the stomach, produce retching and vomiting, and oblige them to forego their meals, a case of nuisance is made out. The condition of affairs thus stated very clearly describes what is proven to exist here. That the nuisance is not constant, but only when the wind is in one direction, is immaterial. *Meigs v. Lister*, supra. It is not rare and exceptional, within the meaning of *Price v. Grantz*, 118 Pa. St. 402, 413, 11 Atl. 794. That it sensibly diminishes the capacity of the plaintiff's property for ordinary use and enjoyment, and materially impairs its value by destroying physical comfort and menacing health, and is, therefore, actionable at law, cannot be reasonably questioned, being, indeed, involved in the declaration that it is a nuisance per se. That the injury is continuous, and that, therefore, the remedy at law could not be made effective except by a multiplicity of suits, is manifest. Hence there is shown every element calling for equitable interference,—wrong, nuisance, and injury to property rights, irreparable at law. Neither, though this nuisance would seem clearly to be a public one, can it be pretended that the injury to plaintiff is not special, but such only as the public in general sustains. True, persons traveling on the near-by turnpike road and railway are nauseated and annoyed much in the same manner as the plaintiff is in her dwelling, though, of course, not as frequently or continuously. But the traveler is not thereby injured, as the plaintiff is, in his property rights; and no matter how many property holders besides her sustain a like injury to their properties, their injury is special to them, and each of them, as hers is special to her. Equally irrelevant seems the fact that the injury proved is due to the escape of gases resulting rather from the use of chemicals in the

manufacturing and drying process than of highly putrid matter. The former is fully within the allegations of the bill. Nor is it easy to understand upon what theory an ascertained injury to land should be more justifiable, the proved deleterious effect of noxious vapors less objectionable, or recurring fits of vomiting more pleasurable, for the reason that these results, caused by the admixture of chemicals, were, in *Fertilizer Co. v. Malone*, supra, held to constitute an actionable nuisance. Nor does equity defer the granting of relief until the complainant has been driven from his property, (*Fish v. Dodge*, 4 Denio, 311,) or until his health has been destroyed, (*Walter v. Seife*, 4 Eng. Law & Eq. 15, 22,) or until somebody is killed, (*Dennis v. Eckhardt*, 3 Grant, Cas. 393.) I may conclude with the words of Mr. Justice Thompson in the last-cited case, as entirely applicable to the present one: 'I do not forget the admonition against using the strong arm of the chancellor, but that strength was given, and intended to be used in proper cases, and I think this is one of them as it now stands before us.'

"The exceptions will be dismissed, and the master's report confirmed, and counsel may prepare and submit the proper decree *sec. reg.*"

Specifications of error: "(1) The court erred in overruling defendants' first exception to the conclusions of fact by the master, as follows: 'In finding that the defendants' works are located in a populous farming district.' (2) The court erred in overruling defendants' second exception to the conclusions of fact by the master, as follows: 'In finding that, "Notwithstanding all these precautions, an offensive and disagreeable odor or stench is almost constantly generated and emitted from this factory, and carried by the winds for a distance of a mile or two over the surrounding country. Its intensity and presence in the different parts of the neighborhood at various times depend upon the distance from the factory, the condition of the atmosphere, and the direction of the winds."' (3) The court erred in overruling the defendants' first exception to the master's conclusions of law, as follows: 'That the business of the defendants is a nuisance *per se*.' (4) The court erred in overruling the defendants' third exception to the master's conclusions of law, as follows: 'In not finding that the plaintiff has an adequate remedy at law.' (5) The court erred in overruling the defendants' fourth exception to the master's conclusions of law, as follows: 'In not finding that the plaintiff has suffered no special injury and that therefore she cannot maintain her bill.' (6) The court erred in not dismissing the plaintiff's bill. (7) The court erred in making the following final decree: 'And now, February 25, 1893, this cause came on to be heard at this term, and was argued by counsel, and thereupon, upon con-

sideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That the exceptions filed by the defendants to the master's report be, and they are hereby, dismissed, and that an injunction be, and is hereby, awarded, perpetually restraining the said defendants, their workmen, agents, employees, successors, and assigns from carrying on the manufacture and business as in the said bill described, and from injuring and impairing the market value of the plaintiff's property; and, furthermore, that the defendants pay the costs of this proceeding."

Baer & Snyder and Ermentrout & Ruhl, for appellant. Henry C. G. Reber and Cyrus G. Derr, for appellee.

PER CURIAM. We have examined the record with special reference to the specifications of error, and are not satisfied that either of them should be sustained. The findings of the material facts were fully warranted by the evidence, and they are quite sufficient to support the decree "perpetually restraining the said defendants, their workmen, agents, employees, successors, and assigns from carrying on the manufacture and business as in said bill described," etc. If, as was suggested on argument, the defendant has since adopted new and improved methods of conducting its business, whereby the nuisance complained of has been abated, the court below will see that the parties are both protected in their respective rights. The injunction prohibits carrying on the manufacture and business "as in said bill described." For reasons given at length in the report of the learned master and court below, we think the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

FAITOUTE v. SAYRE et ux.

(Court of Chancery of New Jersey. March 20, 1894.)

FRAUDULENT CONVEYANCES—EVIDENCE.

1. Several months before a conveyance of property to her by her husband, defendant gave him \$800. She testified that her husband needed it to pay claims for work done on the property, that she refused to let him have it until he agreed to convey her the property, and that he neglected to make the deed for several months, though frequently urged to do so. Her testimony was corroborated by her husband and father. *Held*, that the money was given in consideration of the conveyance, and was not a loan.

2. A husband conveyed property incumbered to the amount of \$15,000 to his wife for \$800. A real-estate dealer testified that it was worth between \$13,500 and \$14,000, but that he had held it at \$14,000 for some time without selling it; another dealer was unable to sell it for \$18,000, the price at which he held it, but considered it worth over \$17,000; and the tenant of the property had an option to buy it at \$16,000. At the time of the conveyance, no

suit was pending against the husband, and he owed only one debt of \$172. *Held*, that the conveyance was not fraudulent.

Bill by Frederick B. Faltoute against Wilbur T. Sayre and Laura H. Sayre. Decree for defendants.

Sherard Depue, for complainant. Scott German, for defendants.

GREEN, V. C. This is a creditors' bill to set aside conveyances of real estate in Orange, N. J., made by Mr. Sayre, through a third party, to his wife, for the nominal consideration of one dollar. The evidence is that the complainant loaned to Wilbur T. Sayre \$130 on the 23d of August, 1892, for which he took his memorandum I. O. U. of that date. On the 11th of January, 1893, Mr. Sayre gave complainant his note at 30 days for \$133.71, being the amount of the loan and interest. On March 29, 1893, judgment was entered in the Essex county circuit court, in a suit brought by Frederick B. Faltoute against Wilbur T. Sayre, for \$172.20, on which execution was issued, by virtue of which the sheriff levied on the premises in question. Prior to the commencement of this suit, Wilbur T. Sayre and wife, by deed dated September 17, 1892, acknowledged the same day, conveyed the premises in question to Scott German for the nominal consideration of one dollar, and the grantee, by deed of the same date, acknowledged the same day, for the nominal consideration of one dollar, conveyed the same premises to Laura H. Sayre; both deeds being recorded in the Essex county register's office, September 19, 1892.

The law is well settled in this state that a voluntary conveyance is absolutely void as against existing creditors. *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 17 Atl. 946; *Gardner v. Kleinke*, 46 N. J. Eq. 90, 18 Atl. 457; *Francis v. Lawrence*, 48 N. J. Eq. 508, 22 Atl. 259. But the defendant claims that this transfer of the title to her was not voluntary, but was made for a valuable and ample consideration. The property was purchased by Wilbur T. Sayre from a Mrs. Harrison, the purchase price thereof being \$4,200, on which he paid \$1,200 in cash, and gave a purchase-money mortgage of \$3,000. On this land he proposed to erect a dwelling, and, according to his statement, Mrs. Harrison agreed to advance to him money in addition to her purchase-money mortgage, when his house should be sufficiently advanced to justify her doing so; and subsequently this mortgage indebtedness of Mrs. Harrison was increased to the amount of \$6,500. His father-in-law, Edmund O. Hovey, also agreed to advance him certain sums of money, to be expended in the erection and completion of this house, which advances he, from time to time, did make, until the sum amounted to over \$5,000. Wilbur T. Sayre says that the understanding was—and on the faith of which Mr. Hovey made the loan—that the title of the property should be vested ultimately in his

(Mr. Hovey's) daughter, Mrs. Sayre. Mr. Hovey testifies that he, from time to time, begged Sayre to give him a mortgage, but that he was neglectful of his business, and the same was not given until September 18, 1892, when one was executed for \$5,000. This, I assume, was previous to the conveyances in question, because in the transaction it is treated as an incumbrance on the property. The undisputed testimony is that on or about April 28, 1892, Mrs. Sayre gave to her husband the sum of \$800, which she had been given in a legacy of \$1,000 by an uncle living in Utica, for which she received a draft for that amount about January, 1892. She says that her husband was pressed for money to make payments due to persons for work in or about the premises, and that he urged her to let him have this money; that she refused until she could consult with her father; that, on advising with her father, he was of opinion that she ought not to do so unless her husband would convey the property to her; that, on returning to her husband, she informed him that she had consulted her father, and that she would not let him have this money unless, as a consideration therefor, he would convey to her the property in question, and it was only upon his promise to give her a deed of the house and lot that she consented to let him have any of the money, which she limited to the amount of \$800; that it was considered that the property was worth no more than this amount, over and above the incumbrances upon it and the debts due in respect to it, and, on her husband agreeing to give her a deed if she would let him have the \$800, she gave him the draft, which she had retained, either in her own possession, or in the keeping of her father, and that he returned \$200 thereof to her; that she repeatedly urged her husband to give her a deed, but he neglected from time to time, and it was not done until the conveyance was made in September, 1892.

The question is whether this \$800 was given by the wife to the husband in payment of, and on the faith of, his promise to convey the property to her, or whether the deed was an afterthought, and the true transaction was only a loan by the wife to her husband. There is nothing to shake the testimony of Mrs. Sayre, her father, or her husband that this money was given as the consideration of the conveyance of this property, and it leaves only the question as to whether that amount was so inadequate a price as to excite suspicion, or produce the conviction that the transaction was fraudulent. It is to be noticed, in this connection, that no suit was pending against the husband at the time that he says he had no outstanding indebtedness other than that which attached to the improvement of the property, unless it was the debt of the complainant, and some small indebtedness for groceries and other matters. The property was incumbered by the mortgage to Mrs. Harrison of \$6,500, on which there

was \$138 due for interest; a mortgage to Mr. Hovey, on which it is stated no interest was to accrue, in consequence of the understanding that the property was to be conveyed to Mrs. Sayre, the daughter of the mortgagee. There was also a mortgage of \$2,000, held by Rufus R. Cook, on which there was \$50 due for interest. There is no evidence to attack the bona fides of any of these mortgages. There was \$30 due for water taxes; \$268 due for taxes; \$34 for an assessment; \$170 due to the carpenter; \$200 for a furnace; \$235 to the gardener, and \$300 to the architect,—amounting, in all, to \$14,923. Mr. Sayre testifies that the contract price for the house and ground was \$15,500, and the actual cost was between \$14,000 and \$15,000. It appears from the testimony of Mr. Holmes, a real-estate agent, that the house was not, at the time of the conveyance, completed, but that work remained to be done in the hall, and the chandeliers to be put up, which was done by the tenant who rented the property in April, 1893. Mr. Howard, a real-estate agent in Orange, estimates the value of the property in the summer and fall of 1892, as between \$17,000 and \$18,000. He says the land was worth \$70 a front foot, and that the lot was 70 feet front, and he estimates the value of the house at \$13,000. If the estimate of Mr. Sayre is correct that the house and grounds cost between \$14,000 and \$15,000, the price of the land being \$4,900 it would make the cost of the house from \$9,500 to \$10,500. Mr. Holmes estimates the value of the property, at the time of the conveyance, as between \$13,500 and \$14,000. Mrs. Sayre says she considered the house and lot worth \$14,000. Evidence has been given for the purpose of showing what the parties considered the property worth, and consists of the testimony of the real-estate agents as to the price fixed upon it when in their hands for sale. Mr. Howard says that at one time he held it, first, at \$22,000, next at \$20,000, and next at \$18,000, and that he got these prices from Mr. Hovey, who said that it cost \$18,000. Mr. Hovey says that he never placed the figures of \$20,000 and \$22,000 as the price, and that Mr. Howard is mistaken in that regard. Mr. Holmes also had the property for sale, and has held it for sale at \$14,000 for some time. Neither one of these gentlemen have been able to secure an offer at either one of these prices, and Mr. Shaw, who is the tenant, had, under his lease, until the 1st day of July, 1893, the option of buying the property at \$16,000. This testimony as to the amount which the parties wished to obtain for it is of little value on the question at hand. The court will not assume a fraud from inadequacy of price alone, unless it is not only great, but established by convincing testimony. The condition of the real-estate market and the difficulty of making such sales, together with the needs of owners, may have much to do with such estimates. The judgment of Mr.

Howard does not seem to me to be so reliable that I must impute fraud to these parties as a necessary conclusion from his estimate. The testimony of Mr. Holmes would indicate that they had fixed on a fair valuation, as the market then stood, as the price, assuming that this money was to be devoted to the payment of the indebtedness contracted for work on the place as well as taxes and assessments, would bring the consideration up to \$15,723. I am therefore of opinion that the complainant's attack upon the bona fides of this transaction is not sustained by the evidence, and will advise a decree for the dismissal of the bill.

(56 N. J. L. 297)

STATE (CENTRAL NEW JERSEY LAND & IMP. CO. et al., Prosecutors) v. MAYOR, ETC., OF CITY OF BAYONNE.

(Court of Errors and Appeals of New Jersey. Feb. 26, 1894.)

STATUTES—REPEAL—CONSTRUCTION—SEWER ASSESSMENTS.

1. The act of 1887 (page 231), directing the mode of making sewer assessments in cities, repeals and supersedes the provisions of city charters on the same subject.

2. The words, "it shall or may be lawful," in the act of 1887, must be construed to mean "must." The act is not optional.

3. The provision in the act of 1887 that the cost of the sewer shall be assessed on the frontage to the full extent of the benefits received, and that the balance, only, of the cost, shall be levied on other property benefited, is valid and constitutional.

(Syllabus by the Court.)

Error to supreme court.

On certiorari at the suit of Central New Jersey Land & Improvement Company and others against the mayor and common council of the city of Bayonne, certain sewer assessments made by defendants were held valid, and the prosecutors bring error. Reversed.

Geo. Putnam Smith, for plaintiffs in error. James P. Northrop and Wm. D. Edwards, for defendants in error.

VAN SYCKEL, J. This controversy relates to the validity of a sewer assessment made under the sixty-fourth section of the charter of the city of Bayonne (P. L. 1872, p. 719). By the city charter, the cost of the improvement is to be assessed upon property benefited, in proportion to the benefit received, but property not deriving a present benefit cannot be assessed for any part of its cost until lateral sewers are constructed. The act of 1887 (page 231) provides for cases where sewers have been or may be constructed in cities, forming a trunk line into which lateral sewers may discharge, and through which the surface drainage and sewage of a district may be carried, and enacts that in such cases it "shall and may be lawful, in assessing benefits for the construction of such trunk line, to assess the same on all

property benefited, and to be benefited within the entire drainage district," and that "where a direct tapping benefit is or may be secured, either by connecting with the trunk line or lateral sewers already constructed," the assessment, when finally confirmed, shall become collectible at once, as in other cases; but "when the benefit is prospective and depends upon the construction of lateral and connecting sewers, not yet built," the assessments shall become liens only from the time the connecting sewers are built, and shall draw interest only from the date of the confirmation of an assessment for a lateral sewer. By section 62, the commissioners, in making such assessment, are required to first ascertain the benefits conferred on property on the line of the trunk sewer, and deduct their total from the entire cost; and they may then assess the balance of the cost on other property benefited and to be benefited by the construction of lateral sewers. Two questions are presented for adjudication in this case. First, whether the city authorities had the option to make the assessment under either the general law of 1887, or under the city charter; second, whether the act of 1887 is constitutional?

The contention on the part of the plaintiffs in error is that this act repealed the charter provisions of the city of Bayonne, although it contains no repealing clause, and that it provides the exclusive mode for laying assessments for the sewer. The state constitution, as amended in 1875, forbids the legislature to pass private, local, or special laws regulating the internal affairs of cities, and requires that general laws shall be passed. The law of 1887 is general in form, and it must be presumed to have been passed in conformity to the constitutional mandate, and intended to apply in all cases, repealing and superseding all other legislation of a local character upon the same subject. Under no other rule can uniformity in legislation be secured. The doctrine of optional legislation is not to be extended, as it obviously leads to diversity in the conduct of municipal affairs. In *Re Cleveland*, 52 N. J. Law, 188, 19 Atl. 17, an express mode was provided in the legislative act in which cities of the state were to signify their acceptance of the enactment; but in the act of 1887 there is no express provision that it shall be optional, and no mode is indicated in the act in which such option may be expressed. If Bayonne had the option to make this assessment under either act, then one assessment may be made under the city charter, and the next under the act of 1887, at the mere caprice of those in control of the municipal government. If both laws stand, and the option exists, the mere exercise of the option in this case does not impair the integrity of either law. These laws must continue in force, with the option which they confer. Not so with respect to the act in *Re Cleveland*, supra. There, when the op-

tion was exercised in the mode prescribed, the statute became part of the city charter, and superseded inconsistent provisions. The confusion and uncertainty which would flow from the doctrine of optional legislation applied to the act of 1887 would defeat the primary object of the constitutional amendment prohibiting special legislation. Upon general principles, also, irrespective of the mandate of the organic law, the later statute supersedes the charter provision. The true rule of construction, as stated by Chancellor Kent in *Turnpike-Road Co. v. Miller*, 5 Johns. Ch. 112, and approved by our supreme court in *Selpie v. Borough of Elizabeth*, 27 N. J. Law, 407, is this: That, the word "may" means "must or shall" only in cases where the public interests and rights are concerned, and where the public or third persons have a claim *de jure* that the right shall be exercised. In the case last cited, it was of no consequence to the public whether the taxes were collected by the township collector or the borough collector, and therefore the words "it shall be lawful" were properly held not to be mandatory. The statute before us affects the manner in which assessments for public improvements are to be laid, and the general taxation may be burdened in the one mode in excess of what it will be in the other. The public interests are involved, therefore; and that classifies this act of 1887 with those in which the words, "it shall or may be lawful," must be interpreted to be imperative, and not optional. In my judgment, the act of 1887 is general and mandatory, and sewer assessments in all cities must be made in conformity to its provisions, if it is a constitutional act.

The infirmity alleged to inhere in this act is that it imposes on property on the line of the trunk sewer an assessment to the full extent of the benefits imparted to it, and directs the balance, only, of the cost of the work, to be levied on other property within the area benefited. It may be, therefore, that, while property on the line of the trunk sewer may not be assessed in excess of the benefit conferred, the assessment upon it in proportion to the benefit received will be greater than that borne by land not on the line of the main sewer. This, however true, does not, in my opinion, render the act of 1887 abortive. It is competent for the legislature to authorize the assessment of the entire cost of a street improvement upon the frontage, provided it does not exceed the benefits. The excess of the cost over benefits may be imposed upon the general public. Legislation in further ease of the public tax levy may lawfully provide that such excess of cost shall, to the extent of benefits, be laid on other lands not on the line of the work. All lands of the same class—that is, all lands on the frontage—must be assessed in the same proportion; but it has never been held, in this state, that, to constitute a legal

assessment, all lands benefited must be assessed, or that all lands benefited must be assessed in the same proportion. Measured by such a rule, it is doubtful if any assessment hitherto made in this state can be upheld. If the legislature elects to impose the balance of the cost, after assessing all the frontage at its full benefit, upon other lands, instead of throwing it upon the general tax, it operates to the advantage, and not to the detriment, of those who own the frontage. This question is *res adjudicata* in this state, and to subvert this settled rule now would be to imperil the solvency of all our local governments. In *State v. Mayor*, etc., of Paterson, 40 N. J. Law, 244, the supreme court expressly declared that the act requiring commissioners to assess lands fronting on the improvement to the extent of the special benefit received, and the balance on the city at large, is constitutional. In *State v. Mayor*, etc., of Paterson, 42 N. J. Law, 617, this question was finally settled in this court, where it is held, in accordance with long usage and oft-repeated judicial recognition, that assessments for benefits may be confined to the frontage, and that a statute cannot be successfully assailed because the required assessment does not extend over the entire area to which benefits may flow from the public work. If lands not on the line of the improvement may be wholly exempted, it must follow that the assessment on the frontage will not be invalidated by the fact that some burden is cast upon the lands which need not be assessed at all. The competency of the legislature to exercise the greater power must include the right to exert the less. In my judgment the act of 1887 is constitutional, and the assessment made under the city charter is illegal. The judgment below should be reversed.

H. B. CLAFLIN & CO. v. DETELBACH et al.
(Supreme Court of New Jersey. Dec. 14, 1893.)

ATTACHMENT—ORDER BY COMMISSIONER—TWO DEFENDANTS—PROOF OF FRAUD AS TO ONE.

Under Act March 10, 1893, authorizing an order, by a commissioner, of a writ of attachment, where a *capias ad respondendum* might issue against a defendant on an action of contract, an order for attachment on the ground of fraud against two persons cannot stand, though the property of only one is attached, where there is no evidence of fraud on the part of the other.

Action by H. B. Clafin & Co. against Cyrus Detelbach & Co. On motion to set aside attachment, made before DEPUE, J., sitting *ad nisi prius*.

DEPUE, J. I have the papers here in the case of H. B. Clafin & Co. v. Cyrus Detelbach & Co., which was an attachment ordered by a supreme court commissioner under the act of March 10, 1893, found in

the Pamphlet Laws of 1893, on page 181, which authorizes an order by a commissioner of a writ of attachment in all cases in which a *capias ad respondendum* might issue against a defendant or defendants on an action of contract. By the fifty-ninth section of the practice act, provision is made for ordering a writ *ad respondendum* against one of two defendants, allowing the writ to stand as an ordinary summons as against the other defendant. That provision is not incorporated or referred to in this act. The award is against both of the defendants, members of the firm of Cyrus Detelbach & Co., consisting of Cyrus and Emanuel Detelbach. The adjudication of the commissioner is that it is established to his satisfaction that the said Cyrus and Emanuel Detelbach are about to dispose of their property with the intention of defrauding creditors. The order being joint,—against both parties; necessarily so,—it cannot be sustained against either unless it is good against both. The facts in this case are, briefly, these: The firm of Cyrus Detelbach & Co. are debtors of the firm of Clafin & Co. of New York. Cyrus Detelbach sold out his interest on the 29th of November to his son, Emanuel, who was his partner in business in this city. After that time, Emanuel Detelbach confessed judgments to two of his individual creditors, executions were issued upon these confessed judgments, and levies were made on this property, which was advertised for sale; and this writ of attachment was sued out mainly for the purpose of giving the plaintiffs in this attachment case a standing in court, to call in question the honesty of the confession of these two judgments. The property was about being sold, but the writ was placed in the hands of the sheriff, either pending or before the sale, and a bill has been filed in the court of chancery on which an injunction has been issued. The writ, as I have already said, was issued against both parties. It was executed only by the sheriff, by levying on the stock of goods in the store, which had been transferred by Cyrus Detelbach to his son, Emanuel Detelbach, and on which the sheriff had a previous levy under the executions issued on the judgments confessed by Emanuel Detelbach to his own individual creditors. It was executed, in fact, on no other property. And the object of these proceedings seems to have been for the purpose of giving the plaintiff in this proceeding a standing in court for the purpose of calling into question the honesty of the judgments confessed. I was under the impression that possibly I might sustain the writ on that ground, but I am satisfied that I cannot. The writ is general; it is against both; it happens to be executed only on the property of one of the partners,—the one against whom the allegations of fraud contained in these affidavits were directed. There is no power given to the court to suspend the operation or scope

of a writ of attachment given under this act, and consequently, if it is not good *per se*, and giving to it the extent to which the writ would extend, it is not good at all. Now, there is not the slightest evidence to convict Cyrus Detelbach of fraud. There is no evidence against him that is competent, except the mere fact that he made a declaration, after this transfer to his son, that there was no intent to confess judgment, or something of that kind; and the rule is that in all these proceedings there must be evidence, and it must be evidence that would be competent for the purpose of establishing fraud under the issue, if that were an issue triable before a court and jury; not only must it be evidence that is competent, but it must be evidence that tends to establish fraud, and evidence that would justify the court in leaving the question to a jury, if triable before a jury. If this case were before the court and a jury on the issue as to whether Cyrus Detelbach was guilty of fraud, the court, on evidence such as is contained in these affidavits, would overrule the evidence, and direct a verdict in his favor. An order will be made setting aside these attachments. And I may say to commissioners that the execution of this law should be attended with the greatest amount of care. It happens, in the two cases that have been before me, that no special harm was done; but under that act the order of a commissioner may be the means of the destruction of any business man in the community, on *ex parte* affidavits, who happens to be indebted, and the greatest amount of care should be exercised in making these orders. An act similar to this was passed a great many years ago,—I think in 1856,—which survived, I think, one year. When the next legislature met, the act was repealed; and it was repealed because it was the instrument of doing exactly what I have mentioned,—that is, destroying men engaged in business who happen to owe debts. It is not a bankrupt law, nor is it appendant to any proceedings that may be taken under the bankrupt law, where bankrupt proceedings may be properly taken. It is one of those writs which, when issued, if properly issued, and if not set aside, has the cast-iron result of common-law processes properly issued out of a court of common law.

E. S. HIGGINS CARPET CO. v. HAMILTON.

(Supreme Court of New Jersey. Dec. 9, 1893.)

ATTACHMENT AGAINST FEMALE — FRAUD — ACTION FOR CONTRACT PRICE — REPUDIATE TERM OF CREDIT.

1. Under Act March 10, 1893, authorizing an order by a commissioner of a writ of attachment where a *capias ad respondendum* might issue, an attachment cannot be had against a female; *Pr. Act*, § 54, making it unlawful to arrest a female in a civil action.

2. Evidence that defendant, on May 9th, represented that she was not indebted for borrowed money; that on May 17th she was so indebted; that on September 17th she wrote plaintiff, "As you know my situation," without anything to connect the letter with the representation of May 9th, does not show that she was guilty of fraud in her purchase from plaintiff after September 17th.

3. An action for price cannot be brought before the expiration of the term of credit on the ground of fraud, as the contract of sale cannot be repudiated as to the term of credit only.

Action by the E. S. Higgins Carpet Company against Lillian J. Hamilton. On motion to set aside attachment, made before DEPUE, J., sitting *ad nisi prius*.

Leonard Kalish, for the motion. James E. Howell, opposed.

DEPUE, J. I have here the papers in the case of E. S. Higgins Carpet Co. v. Lillian J. Hamilton, which was an attachment ordered by a supreme court commissioner under the act of March 10, 1893, found in the Acts of that year, on page 181. The attachment is in an action on a contract, and is against a female. The motion is made to set aside the writ on several grounds: First, on the ground that, under the limitations contained in this section, no writ of attachment can be entered against a female,—a very different question from that presented to me on a former occasion, where a husband and wife committed joint tort, where a common-law rule was applied, that a *capias* should issue against both, and should be taken and give bail for the appearance of both. *Dannano v. Corello*, 16 N. J. Law J. 376. The case now before the court is purely an action on contract, and in this case the relation of husband and wife and the liability of the husband are not at all involved. It presents the naked question whether a writ of attachment, under this law, can issue against a female. By the fifty-fourth section of the practice act, found in the Revision on page 856, it is provided that "It shall not be lawful to arrest or imprison the person of any female by virtue of any mesne process or process of execution in any civil action." The language of this act and the limitations is that, in all cases "where bail shall be required in any civil action, an affidavit shall be made and filed of the cause of such action, which affidavit may be made before any officer authorized by the laws of this state to administer an oath or affirmation; or, if the plaintiff be out of the state, before any judge of any court of judicature or notary public of the state, kingdom or nation in which he resides or happens to be, and the sum specified in such affidavit shall be endorsed on the writ or process; provided, that nothing in this section shall prevent any court, or any judge thereof, from ordering, as heretofore, the defendant in any action to be held to special bail, in such sum as the said court or judge, under all the circumstances of the case, shall think proper to direct, which sum shall be endorsed on

the process." The limitation contained in this section is to cases in which a *capias ad respondendum* may issue against a defendant or defendants. Now, unless I am prepared to overrule the cases decided in this state, commencing with *Blight v. Meeker*, 7 N. J. Law, 97, and followed by *Pullinger v. Van Emburgh*, 18 N. J. Law, 457, and *Walker v. Anderson*, 18 N. J. Law, 217, and the course of practice that was adopted in construing the original attachment act, it is very plain to my mind that this order will not lie against a female. My impressions were that I could, in view of the language of the sixth section of this act, give this first section of the act a broader construction than that which was given to the original attachment; but it is manifest that no general clause or construction of this act can modify or change the language adopted by the legislature. The legislature makes the law, and liberality of construction can never be permitted for the purpose of modifying or enlarging the scope of a legislative act. The limitation in this case applies to a female, and I am not at liberty to eradicate it from the section of the act. I think for that reason this writ must be set aside.

The second ground was that there was no evidence of fraud. The commissioner adjudged that fraud was proved to his satisfaction. It appeared that the parties had been dealing together for a long time. The defendant made a statement on May 9, 1893, declaring, among other things, that she was not indebted for borrowed money. A judgment was entered by confession against her on November 20, 1893, in the affidavit of which it appears that she was indebted for borrowing money on May 17, 1893. That, of itself, is insufficient to prove that she was indebted on May 9th. The plaintiff relies also on a letter written on September 17th, saying, "As you know my situation," etc. If there were anything to connect this letter with the representation of May 9th, this would be sufficient; but, in the absence of this, the court would withdraw the case from a jury on the ground that there was no competent evidence on which to found a verdict, and this is the rule applied to these affidavits. *Kipp v. Chamberlin*, 20 N. J. Law, 656.

The third ground is stronger. It is that the suit was prematurely brought. These goods were sold after September, 1893, upon terms of credit of four months from October 10, 1893. The debt, according to the terms of sale, was not due when this suit was brought. If an action had been brought, the court, on the trial, would have nonsuited the plaintiff on the ground that the contract had not matured. The plaintiff contends that this rule does not apply when the party is insolvent, and that the seller may rescind the contract. There is a rule that the seller may rescind in case of insolvency, but it does not apply to this case. The seller may rescind, but, if

he does, he must rescind in toto. He may repudiate the sale and bring trover, but if he sues on the debt he affirms the sale. *Benj. Sales, Kerr's Notes; Stoutenburgh v. Konkle*, 15 N. J. Eq. 33-41. When an action is brought for the contract price, the party cannot rid himself of a term of the contract giving extended credit. If he affirms the contract, he affirms it in toto. For either one of these reasons the writ should be set aside.

(56 N. J. L. 361)

MAYOR, ETC., OF CITY OF NEWARK v. WATERS.

(Supreme Court of New Jersey. Feb. 24, 1894.)

MUNICIPAL CORPORATIONS—DEFECTIVE SEWER—RIGHTS OF ADJACENT OWNERS.

1. The neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect.

2. In such a case the circumstance that an individual specially injured gave notice to the municipal authorities is of no avail, if the special injury was in fact part of an indictable offense.

(Syllabus by the Court.)

Case certified from circuit court, Essex county, for advisory opinion.

Action by Annie M. Waters against the mayor and common council of the city of Newark to recover damages resulting from the overflow of a sewer on plaintiff's land. Heard on case certified for an opinion. Judgment for defendant.

The other facts fully appear in the following statement by GARRISON, J.:

This case was tried by the court below without a jury.

The plaintiff offered evidence tending to show the following facts:

The plaintiff, in the year 1875, was the owner of property on the corner of Kinney and Halsey streets, in the city of Newark. A sewer built by the defendant ran through Kinney street, passed the plaintiff's property, and terminated at tide water.

There was a manhole in the street at the intersection of Kinney and Halsey streets, opposite plaintiff's property, and also a sewer basin at each of the four corners of the two streets. The sewer drained a portion of the city on a hill to the west of the plaintiff's property. Another sewer ran through Halsey street from the north, and emptied into the Kinney street sewer at that corner. In that year a connection from another sewer was made into the Kinney sewer above where it passed the plaintiff's property, causing an increased amount of sewage to flow through it, and another sewer was built through Halsey street from the south, that drained into the Kinney street sewer at the intersection of said streets. Before these new connections were made, the Kinney street sewer had sufficient capacity to carry

off all the drainage that flowed into it. After these connections were made, on account of the increased amount of sewage, and because the water coming from the Halsey street sewer encountered, and to some extent dammed up, the flow of the Kinney street sewer, the said Kinney street sewer did not have sufficient capacity at all times to carry off the drainage that flowed into it. As a result, whenever there was a heavy rain, the water backed up from the sewer, and flowed out of the said manhole and sewer basin, ran across the sidewalk in front of the plaintiff's property, and ran into the windows of plaintiff's houses, and damaged the houses and caused loss of rents. The plaintiff then notified the street commissioner of Newark, an officer having charge of the streets and sewers of said city, and also the common council of said city, of the condition of said sewer, and requested that it be put in proper condition. This was not done, and the sewage continued to overflow plaintiff's property, from time to time, down to the time of bringing suit.

On this state of facts the following questions are raised: (1) Can a landowner recover from a city damages caused by new sewer connections being made by the corporation with a sewer lawfully constructed in a public street, when such connections necessarily caused the sewage to flow out of said sewer through a manhole and sewer basins in the street on which plaintiff's property abuts, and flow across the sidewalk and over her property? (2) Can such landowner recover such damages for the continuance of such flow of sewage beyond a reasonable time for putting the sewer in a proper condition, when the city has been notified of the condition of the sewer and the said injury, and requested to remedy it?

The foregoing questions are made and stated as presenting a case of doubt and difficulty, and are hereby certified to the supreme court for its advisory opinion.

Argued June term. 1893, before BEASLEY, C. J., and MAGIE and GARRISON, JJ.

Hayes & Lambert, for plaintiff. Joseph Coult, for defendant.

GARRISON, J., (after stating the facts.) The courts of this state have said in conclusive form that the neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, is a public wrong, to be remedied by indictment, and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect. Board, etc., v. Strader, 18 N. J. Law, 108; Cooley v. Essex, 27 N. J. Law, 415; Livermore v. Camden Co., 29 N. J. Law, 245; Callahan v. Morris Tp., 30 N. J. Law, 161; Livermore v. Camden Co., 31 N. J. Law, 508; Pray v. Jersey City, 32 N. J. Law, 394; Town of Union v. Durkes, 38 N.

J. Law, 21; Safe Co. v. Ward, 46 N. J. Law, 19; Condict v. Jersey City, Id. 157; Little v. Dusenberry, Id. 614, 636; Wild v. Paterson, 47 N. J. Law, 411, 1 Atl. 490; Vorrath v. Hoboken, 49 N. J. Law, 285, 8 Atl. 125.

The doctrine of these cases is that, where the public has been wronged, there is but one redress, viz. the public remedy by indictment. Where, however, such public misfeasance has resulted, not in the creation of a public nuisance for which an indictment would lie, but solely in the infliction of a private injury to the property of an individual, the remedy therefor is by a civil action by the party damaged. Jersey City v. Kiernan, 50 N. J. Law, 246, 13 Atl. 170.

It follows that in any given case of special damage the question as to the right of civil action is narrowed down to the inquiry whether such damage is, or is not, a part of a public wrong for which an indictment would lie.

An examination of the statement of facts certified shows that the sewer maintained by the defendants on Kinney street was not at all times of sufficient capacity to vent the water that reached it through the transverse sewers, and that in consequence of this neglect the public highway upon which the plaintiff abutted was overflowed. It is evident, therefore, that the condition to which the plaintiff refers her special injury was one to which the public at large was to a greater or less extent subjected, and that upon proof of these same facts an indictment would be sustained.

This being so, there is, upon the authorities above cited, no private right of action in the plaintiff.

The circumstance that the plaintiff gave notice to the municipal authorities of the condition of the sewer and of its injury to her property cannot affect the question. Where an exclusively private nuisance has resulted from this sort of official negligence, the public authorities may still owe no duty to an individual until they have been notified by him of the condition injurious to his private rights. In such case the efficacy of the notice is not to change a public into a private injury, but is merely to put the public authorities in wrong, if, with knowledge of the misfeasance of their agents, they permit the private nuisance to continue beyond the time reasonably necessary for its removal. Jersey City v. Kiernan, 50 N. J. Law, 246, 13 Atl. 170.

But, where the private injury is not exclusive of a public nuisance, notification is of no avail to the individual.

The circuit court should be advised that, in the case before it, a public nuisance was occasioned by flooding the highway, for which an indictment would lie, and that, so long as this is the situation, it is the only remedy, and that a notice by the landowner injured does not make the malfeasance actionable by civil suit.

(52 N. J. E. 9)

PULLEN v. PULLEN et al.

(Court of Chancery of New Jersey. March 19, 1894.)

DOWER—DIVESTITURE BY DIVORCE.

In absence of express or implied statutory provision to the contrary, a divorce a vinculo matrimonii, for the fault of either party, will bar dower.

(Syllabus by the Court.)

Bill by Ralph A. Pullen against John W. Pullen, Catherine A. Pullen, and others for partition. Heard on motion and petition to open an interlocutory decree and allow complainant to amend the bill by dismissing defendant Catherine A. Pullen as a party. Granted.

The other facts fully appear in the following statement by McGILL, Ch.:

On the 28th of April, 1891, Ralph A. Pullen filed a bill in chancery for the partition of certain lands of which he and others were tenants in common. He and his wife, Catherine A. Pullen, were then living apart. The wife was made a party defendant to the suit, because of her inchoate right of dower in her husband's undivided interest in the land. She answered the bill, claiming her inchoate right. While the partition suit was pending, Mrs. Pullen brought suit in this court against her husband for divorce a vinculo matrimonii, because of his willful, continued, and obstinate desertion of her for three years and upwards. On the 14th of August, 1891, an interlocutory decree and order of reference was made in the partition suit, whereby, among other things, it was referred to a master to ascertain and report the interests of the respective parties to the suit in the lands of which partition is sought. Pending the master's report, on the 28th of October, 1891, a final decree was made in the divorce suit, by which the bond of matrimony between Mr. Pullen and his wife was effectually dissolved. Motion is now made to open the interlocutory decree in order that the complainant, by supplementary pleading, may set up the divorce, and thus raise the question whether or not the inchoate right of Catherine A. Pullen is extinguished, or amend his bill by striking her out as a party defendant.

George O. Vanderbilt, for the motion.
William Y. Johnson, opposed.

McGILL, Ch., (after stating the facts.) The vital question presented and argued is whether the divorce a vinculo matrimonii bars all right of Catherine A. Pullen in the lands. I regard it as now settled that, in absence of express or implied statutory provision to the contrary, such a divorce, for the fault of either party, will bar dower. The reason is that it is essential to the estate that marriage shall subsist at the death of the husband. A woman cannot have dower who is not the wife of the man in whose lands she claims it at the time of his death. Day v. West, 2 Edw. Ch. 592. In Calame v. Calame, 24 N. J.

Eq. 440, 444, Vice Chancellor Dodd recognized the law as I have stated it. It is true when that case was heard upon appeal, (25 N. J. Eq. 548, 550,) the chief justice (Beasley) said: "It is not necessary to express any opinion on the question whether a decree for divorce a vinculo matrimonii will have the effect in this state which is assumed in this contention. The point was settled the other way in a case receiving great consideration from the court of appeals in New York, the statute of that state being, perhaps, not substantially variant from our own. Wait v. Wait, 4 N. Y. 95."

I find, however, that Mr. Justice Gray, of the United States supreme court, in commenting upon the case of Wait v. Wait, in Barrett v. Failing, 111 U. S. 523, 4 Sup. Ct. 598, states that the ground of decision in that case was a provision in the statute of the state of New York that "in case of divorce, dissolving the marriage contract for the misconduct of the wife, she shall not be endowed," which implied that the wife should retain her right of dower in case the divorce was not for her misconduct, but because of the misconduct of the husband. I do not find a similar statute in our state, or, indeed, any other statutory language which will justify the same implication. I apprehend that the purpose of Chief Justice Beasley was not to pronounce against the correctness of the assumption in Calame v. Calame that by divorce a vinculo matrimonii the right of dower is lost, but to call attention to the fact that the point was not to be assumed without full consideration. His use of the word "perhaps" quite clearly demonstrates that he did not pretend to have made a careful examination of the question. In Barrett v. Failing the question was studied, and the conclusion was drawn that the law is to be regarded as I have already stated it, to wit, that a valid divorce from the bond of matrimony, for the fault of either party, bars the wife's right of dower, unless the dower right be expressly or impliedly preserved by statute. And so, in Legion of Honor v. Smith, 45 N. J. Eq. 466, 469, 17 Atl. 770, Vice Chancellor Van Fleet states it. The parties interested therein having been fully heard upon the question determined, I will permit the complainant to amend his bill by striking out Catherine A. Pullen as a party to it.

(52 N. J. E. 292)

WRIGHT v. FIRST NAT. BANK et al.

(Court of Chancery of New Jersey. March 7, 1894.)

CORPORATION DIRECTORS — LOSS OF OFFICE—CORPORATE MORTGAGE—VALIDITY.

1. Under Revision, p. 180, § 16, providing that the business of a corporation shall be managed by directors who are shareholders, and page 185, §§ 47, 48, providing that no person other than a bona fide holder of stock shall be elected a director, and that a director ceasing to be a bona fide holder of stock shall cease to be a director, a director ceases to be such on

making an assignment of all his estate for the benefit of creditors.

2. Under Revision, p. 181, § 20, providing that when any vacancy in the board of directors occurs by removal, resignation, or otherwise, it shall be filled as provided for by the by-laws of the company, a director who goes into bankruptcy and flees from the state ceases to be a director.

3. Where all the mortgagees lived in the town in which the corporation mortgagor did business, and, several months before the execution of the mortgage, one of the three directors assigned for creditors, and fled the state, his assignment being placed on record, the mortgagees were charged with knowledge that such person had ceased to be a director, and that consequently there was no board authorized to execute the mortgage.

Bill by John Wright, receiver, against the First National Bank and others.

James Buchanan, for receiver. W. D. Holt and Wm. M. Lanning, for defendant First Nat. Bank. G. D. W. Vroom and H. R. Walker, for defendants Crusers.

BIRD, V. C. The defendant was engaged in the business of manufacturing pottery. In the month of June, 1891, it was managed by three directors. In that month one of those directors, Thomas A. Bell, made an assignment for the benefit of his creditors, and almost immediately left the state, and his whereabouts since then have never been ascertained by any of the residents in and about Trenton with whom he had business relations. These facts are admitted on all sides in this case. The deed of assignment was recorded, according to the statute, on the 6th day of July, 1891. In the month of November the company, by a resolution passed by the two remaining directors, executed a mortgage to one of the defendants in this cause, the First National Bank of Trenton, for the sum of \$7,600. That mortgage was recorded on the 27th of November. On the 30th day of August, 1892, the company executed three several chattel mortgages to three of the defendants, which mortgages were duly recorded according to law. Subsequent to all these transactions, a bill was filed for the purpose of declaring the company insolvent and having a receiver appointed. Such proceedings were taken as led to the appointment of the complainant in this cause as receiver. The receiver files this bill for the purpose of determining the rights of the general creditors and these alleged lienholders with respect to such liens.

The facts above outlined are set forth in his bill. It is alleged that the said mortgages are invalid and not binding as to general creditors—First, because there were but two directors at the time of the execution of said mortgages, and consequently no board of directors, either de jure or de facto; and, second, because the mortgagees are not bona fide holders for value without notice. The sixteenth section of the act respecting corporations (Revision, p. 180) declares that the business of every such corporation "shall be

managed and conducted by the directors thereof, who shall respectively be shareholders therein." This section declares that every director shall be a shareholder. The forty-seventh section declares: "It shall not be lawful for any person to be elected a director of any body corporate in this state, issuing stock, unless that person shall be at the time of his election a bona fide holder of some of the stock thereof." Clearly, the legislature intended to guard against every pretense or mere color, and all deceit. The seventeenth section declares: "The directors shall not be less than three in number, and they shall be chosen annually by the stockholders at such time and place as shall be provided by the by-laws of the company, and shall hold their office for one year and until others are chosen and qualified in their stead." The twentieth section declares: "When any vacancy occurs among the directors or secretary or treasurer by death, resignation, removal or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company." The forty-eighth section declares: "When any person, a director of any body corporate, shall cease to be a bona fide holder of some of the stock thereof, he shall cease thereupon to be a director thereof." The forty-ninth section provides for the filing of a list of the directors and all other officers with the secretary of state.

With these explicit requirements of the statute respecting the organization and management of corporations, what must the judgment be upon the first proposition, which is that at the time of the execution of these mortgages there was no board of directors or other authority to execute them? This leads to the inquiry whether or not Bell, in any sense, could be regarded as a director after the assignment, referred to, of all of his estate, real and personal, for the benefit of his creditors. It is urged that he was de facto, if not de jure. This is put upon the ground that his name appeared upon the books of the company as owner of certain stock. But this seems to me to be most fallacious. It will be seen that the forty-seventh section declares that no person shall be elected a director who is not a bona fide holder of some of the stock at the time of such election. The sixteenth section declares that the business of the corporation shall be managed by a board of directors, who shall be shareholders therein. Reading these two provisions together, I think no one will insist that they will be complied with, in the remotest degree, in case that the next day after the person should be elected he should dispose of all his stock, especially when the forty-eighth section is read, which declares that in such case he shall cease to be a director. The assignment of Bell being established, he ceased to be a bona fide holder of stock. He parted with all his interest in such stock for the

benefit of his creditors, and until it is shown that his creditors have been satisfied, and this stock, or some of it, remains undisposed of, the presumption that he is no longer a bona fide stockholder will prevail. Such a case is radically different from the one where stock is hypothecated to secure a loan or other like indemnity. But besides the certain result just established, the like must follow from the fact that Bell immediately fled from the state. To insist upon it that he continued to be a director after this act would be a most flagrant perversion of every principle of the law. Besides, the twentieth section anticipates this condition, and provides that, when any vacancy shall occur "by death, resignation, removal or otherwise, it shall be filled for the remainder of the year in such manner as may be provided for by the by-laws of the said company." I think the provisions of the law are so broad as to fully comprehend this case, and to exclude Bell from the directorship *de facto* as well as *de jure*. To say that when a stockholder and director has gone into bankruptcy, and voluntarily made an assignment of all his interests, and fled the state, he can be regarded as a bona fide shareholder and director, would be extremely inconsistent, and open the way for innumerable frauds. In some respects, at least, as Mr. Justice Depue shows, in the case to which reference will hereafter be made, the law requires and deals with actualities, not with shadows; with facts, and not with fiction; and it often happens that this principle may be invoked by one class of creditors against another when the debtor would not be heard as against the latter. Therefore, Bell not being a director, and the statute expressly requiring three, can the two remaining directors execute a mortgage upon lands or goods and chattels which will give the holders thereof priority over the things mortgaged to the claims of general creditors? It will be seen that the question is not whether or not the company itself is estopped from setting up the illegality or voidable nature of the act, but whether general creditors are estopped from so doing. They have a right to rely upon the provisions of the act. It is their only protection. The general creditors have a right to rely upon the statute, which requires three directors, who are bona fide stockholders, to manage the affairs of the company for their benefit. They are entitled to the advice, skill, and judgment of three. The statute has assured them of this safeguard. The statute declares that every such corporation shall be managed by a board of directors, consisting of not less than three bona fide shareholders. Would it be at all reasonable or just for the court to say, in the face of the statute, that a board may consist of two directors only? There is no authority for such an assumption of power. If a board be constituted of three, and one of them ceases to be a di-

rector for any reason whatever, there is no longer such a board of directors as the statute contemplates, and cannot be until the provisions of the act for such emergency are complied with; that is, the election of a new director by the remaining members of the board. This the twentieth section of the statute provides for. This certainly would be the result in case of the death or resignation of one of three members of the board. I presume this will not be disputed by any one. The insistence that in such case the company could transact no business whatsoever does not, by any means, follow. The ordinary internal affairs of such corporation under such circumstances would be carried on by necessity as well as by fair implication. Such necessity would be of brief duration, for the statute provides that the remaining members of the board may elect a new director. To say that in case of death or removal, or where one director, in any event, ceases to be such, there is still a *de facto* board which may perform all of the duties devolving upon a board of directors, whether it pertain to the indoor or outdoor management of the corporation, is equivalent to saying that one individual stockholder could properly act as a director, and be regarded by the outside world as being a *de facto* corporation. Under such circumstances, it seems to me that it will not do for the courts to allow the continuing members of a board to despise or set at naught the solemn provisions of the law, which were enacted for the protection of the public against fraud and wrongdoing.

I think this case is clearly within the exceptions so fully considered by Mr. Justice Depue in the case of *Water Co. v. De Kay*, 36 N. J. Eq. 548, with respect to the rights and obligations of those dealing with such corporation in matters pertaining to the internal or external affairs of the corporation. With respect to the latter he says (page 568): "In all the external circumstances—competent legislative authority, an organization *de facto*, directors and officers *de facto*, the corporate seal affixed, with the secretary's oath that it was legally affixed—the transaction was proved legal. These are matters which persons dealing in corporate securities are bound to take notice of. The imperfections arose from the omission of acts which the directors should have done in the management of the private business of the company. Those are the matters with respect to which third persons are not obliged to be informed. Finding the power to make the mortgage in the charter, and that the power might be made complete on certain conditions to be performed by the corporation in the management of its internal affairs, third persons would be justified in assuming that such conditions had been complied with, and that everything had been done by the corporation or its directors which was necessary to validate the securities before they were put in

circulation. As against a bona fide holder, who has taken it upon the faith that the security is what it appears to be, a corporation cannot defend on the ground of such omission on its part, or by its directors." In this case the court distinctly held that it was incumbent upon those dealing with pretended corporations to know that there was a de facto corporation and a de facto board of directors. Certainly, there must be such number acting, or who are apparently clothed with authority to act, in order to constitute even a de facto board.

So much with respect to the general fundamental principles in the interpretation and application of statutory provisions to the case in hand. Nor have I been able to find any authority, after the most careful and extensive research, which in any wise questions the conclusions to which I have been led; but my investigations have guided me to authorities directly in point, which very fully support the views above expressed. The first to which I would refer is that of *Coryell v. President, etc.*, 9 N. J. Eq. 457, in which the chancellor announced the following doctrine: "Where the charter of a company required five managers to constitute a quorum, and there were but four present when a resolution was passed, authorizing the execution of a mortgage, the mortgage is null and void, from the fact that it never received the sanction of the board of directors." In *Kupper v. South Parish of Augusta*, 12 Mass. 185, the court said: "Where a parish appointed a committee of three to build a meeting house, a contract made by one of the number was not binding on the parish." In this case materials were furnished, and the parish had the benefit of them. In the case of *Beatty v. Insurance Co.*, 2 Johns. 109, 110, it was held that "where the act incorporating an insurance company provides, that no losses shall be settled or paid without the approbation of at least four of the directors, with the president or two assistants, or a plurality of them, the acceptance of an abandonment by the assured for a total loss will not be valid or binding on the company, unless it appear to have been done at a board of directors, constituted according to the act, and by a majority of them present. A body corporate can act only in the mode prescribed by the law creating such corporation."

But if it should be considered, in such cases, that persons entering into contracts bona fide, and for a valuable consideration, with one or two individuals claiming to be a board of directors, then a further question arises upon the facts before me,—whether or not these conveyances were taken bona fide and without notice. I think that the holders of them are clearly chargeable with notice of the situation. The facts very fully sustain this view. All of the parties interested lived in Trenton, and in the same immediate vicinity. The records of the mortgages and of the other instruments, as well as the ad-

missions of counsel upon the argument, all sustain this view. Bell made an assignment in June, 1891. The assignment was recorded on the 6th day of July following. About the same time, the inventory of the assignee and the three appraisers was filed in the surrogate's office. As stated above, Bell, immediately after making this assignment, fled from the state, and has never been heard of since by any one who is interested in the defendant company. The mortgage of the bank was dated more than four months afterwards, and was not recorded until about five months after the assignment. The chattel mortgages were made and delivered about fourteen months after the assignment. When the public nature of such an assignment is considered,—the recording of the assignment in the surrogate's office and in the clerk's office, both offices for the keeping of public records, and the advertisements and notices required to be given by the assignee, and the numerous creditors interested,—and the nature of the interests of the mortgagee taken into account, together with the vigilance which ordinarily prudent men, under such circumstances, give to their own private affairs, it is impossible to believe that they did not know that Bell had ceased to be a director, and consequently that there was no board of directors. The presumption is so strong that it must stand against them until they overcome it by direct proof. It was urged upon the argument that, notwithstanding the assignment, Bell still had some interest in the things assigned,—that is, that, after the payments of the debts, if any of his estate remains, such estate was his,—and that because of this fact he might be considered to have sufficient interest to enable him to be a director. When his own statements in the assignment, together with the inventory, come to be considered, saying nothing about his flight, it becomes most manifest that the most fertile imagination would not expect the smallest equity to his own profit resulting from the legal process which he had inaugurated. Coming to the conclusion that the mortgages cannot be sustained, it is unnecessary for me to determine the question which was debated with respect to the priority of the one over the other, as against the goods and chattels.

(32 N. J. E. 420)

ALPAUGH v. WILSON.

(Court of Chancery of New Jersey. March 9, 1894.)

LIMITATION OF ACTIONS—SUSPENSION—COVER-TURE.

Limitation does not run during the cove-ture on the note of a husband to his wife.

Bill by Elizabeth C. Wilson, for whom, on her death, was substituted Charles Alpaugh, executor of her will, against Richard H. Wilson, executor, etc., on a promissory note. Decree for complainant.

R. S. Kuhl, for complainant. Charles S. Skillman, for defendant.

BIRD, V. C. Mrs. Wilson brings this suit against the executors of the last will and testament of her late husband, to recover the amount claimed to be due upon a promissory note given by him to her on the 2d day of April, 1883. The principal defense in this suit is the statute of limitations. The parties to the transaction being husband and wife, it must be determined whether or not the statute applies. I think that it is not seriously disputed but that, under the common law, the wife could not maintain an action against her husband, for the reason that in legal contemplation they were one; nor has it been successfully maintained that this unity has been severed by implication, under any acts of the legislature respecting married women. Such acts being in derogation of the common law, all courts have persisted in a strict construction of them. The true view has been clearly expressed by Chief Justice Beasley in *Gray v. Gray*, 39 N. J. Eq. 511, 512. This view was considered controlling in *Yeomans v. Petty*, 40 N. J. Eq. 495, 4 Atl. 631. See, also, *Barnett v. Harsbarger* (Ind. Sup.) 5 N. E. 718; *Dice v. Irvin* (Ind. Sup.) 11 N. E. 488; *Second Nat. Bank v. Merrill, etc., Iron-Works* (Wis.) 50 N. W. 505. The court has therefore to dispose of such questions as justice and equity may require, according to the general rules which have long been established for its guidance. Doubtless, many cases may be presented which would be attended with such circumstances of laches, unfairness, or uncertainty as would justify the court in rejecting them. That the testator received the \$800 has been established beyond question by the production of a note for that amount, with his signature. Nothing has been shown to raise the slightest presumption that the note was ever surrendered, or that any portion of it has been paid. I think that the complainant is entitled to the amount of principal mentioned in the note, with interest, and to be paid by the executors out of the estate in the ordinary course of administration, together with her costs.

KEARNS v. EDWARDS.

(Supreme Court of New Jersey. Jan. 6, 1894.)
ELECTIONS AND VOTERS — RECOUNT — POWER OF COURT—INTENTION OF VOTER.

1 P. L. 1880, p. 229, providing that, when any candidate for member of the senate or assembly shall have reason to believe that an error has been made by any board of election or canvassers in counting the ballots, a justice of the supreme court may order a recount, and revoke the certificate of election already issued, and issue another to the person found to have received a majority of votes, merely authorizes the ministerial act of a recount, but does not confer authority to determine judicially the legality of any ballot cast.

2. Under Act 1890 (P. L. 398), § 89, providing that if any ballot voted at any election shall have thereon any device whereby it can be identified, such ballot shall be absolutely void, the intention of the voter cannot be considered, in determining the legality of any ballot, in canvassing the same.

Petition by William J. Kearns to contest the election of Thomas P. Edwards as member of the assembly, and for the issue to petitioner of a certificate of election. Certificate refused.

In the election of a member of assembly for the seventh district of Essex county, held on November 7, 1893, it appeared, by the return of the officers of election, that Thomas P. Edwards had received a majority of 24 votes over William J. Kearns. An application was made to Judge Depue for a recount, and affidavits were presented setting forth that he had good reason to believe, and did believe, that errors had been made in several boards of election, within the district, in counting the votes, whereby the result of the election had been changed, specifying, in detail, that a certain number of votes in certain precincts had been improperly rejected or counted. An order for a recount was made ex parte, with leave to apply to set it aside. Thomas P. Edwards appeared by attorney, and objected that the petition stated no facts upon which the petitioner based his belief, and showed no grounds for believing that any error had been made in counting the votes. He insisted that the order made upon such a petition was made upon no proofs or evidence, and that it was defective, in not setting out an adjudication by the justice that the petitioner had reason to believe that an error had been made. The petition was held to be sufficient, and the order sustained. A recount was directed to be made, under the supervision of Judge Child. The votes were counted, and testimony was taken, and it appeared that 15 ballots having the name "William J. Kearnes" printed upon them, instead of "William J. Kearns," had been rejected by the election officers, and about 50 others of the same kind had been accepted in other precincts. There were other ballots questioned for various reasons; but the case turned upon the rejection of the Kearnes ballots; and Mr. Kearns' counsel insisted that there had been merely a printer's error, which should be disregarded, and that the ballots should have been counted, and that if they had been it would have changed the result.

Samuel Kallsch, for petitioner. Joseph L. Munn, for respondent.

DEPUE, J. I have the papers here, in the matter of the recount in the Kearns-Edwards contest. I commenced the examination of the ballots that were specifically objected to for several reasons applicable to the ballots themselves, but was very soon confronted with the consideration of the law under

which this proceeding was had, and the extent to which a justice of the supreme court is authorized to enter upon an investigation of this kind, and soon concluded that the law would apply to those ballots on which the name "Keares" appears as well as to other ballots. The constitution provides, in the second paragraph of section 4, art. 4, that each house shall be the judge of the election, qualification, and return of its own members. The constitution having conferred upon the legislative department the power to judge,—that is, judicially determine,—it would not be competent for the legislature to confer that authority on the judicial department of the government. Nor does the act of 1880, under which this proceeding is had, purport to confer any such authority on a justice of a supreme court. The language of the act is as follows (P. L. 1880, p. 229): "That whenever any candidate at any election in this state for member of the senate or member of the assembly shall have reason to believe that an error has been made in any board of election or of canvassers in counting the vote or declaring the result of such election, whereby the result of such election has been changed, such candidate shall within ten days after such election, be empowered to apply to any justice of the supreme court of this state, who shall be authorized to order and cause a recount of such votes to be publicly made under the direction of the court, by the county clerk or such other officer as the said justice may designate, after due notice to the parties interested, of the time and place of such recount; and if it shall appear upon such recount of the ballots cast at such election, that an error has been made sufficient to change the result of such election, as declared by any board of canvassers, then such justice of the supreme court shall be authorized and empowered to revoke the certificate of election already issued to any person as member of the senate or member of the assembly, and shall order to be issued in its place another certificate, duly attested under the seal of the county, to the party who shall be found to have received a majority of the votes cast at such election, which latter certificate shall supersede all others, and entitle the holder thereof to the same rights and privileges as a member of the senate or member of the assembly, as if said certificate had been issued by the county board of canvassers." Now, the language of that act is perfectly clear. It authorized simply the performance of the ministerial act of a recount, a re-examination, a redetermination of the result of an inspection of the ballots cast, and does not purport, in any wise, to confer upon a justice of the supreme court any judicial function to determine who has been elected, nor does it confer upon him power to take testimony. Testimony was taken in this case, but it was wholly extrajudicial, and the evidence taken at the hearing must be taken to be an extrajudicial act.

On this subject I also refer to *State v. Frambach*, 47 N. J. Law, 85. The language used in the headnotes is that a justice of the supreme court has no right to take evidence to determine if the ballot boxes have been tampered with, but has power only to count the votes he finds in the boxes, to ascertain who received a majority of votes cast. The opinion is by Judge Parker, and is directly to the point indicated from the abstracts I have read from the headnotes. This is the language of the judge at the close of his opinion: "The legislature could not invest a justice of the supreme court with the power of determining the election of a member of assembly. The duties of the justice who makes the recount under the law are only ministerial. He has no right to take evidence for the purpose of determining whether the ballots have been tampered with. He has authority merely to count the ballots he finds in the boxes, for the purpose of ascertaining who has a majority of the votes cast." It is a pure ministerial duty, and is not to be determined on the evidence produced before him.

Now, in making this recount, of course, the ballot reform act must control; and I may remark, before I turn to the consideration of this act, that the principle of law that governed the court in the judicial determination of the fact of an election—that is, that the court, from the evidence taken, should endeavor to ascertain what the intention of the elector was, and give effect to it, if possible—has been completely overthrown by the provisions of the ballot reform act. The question of intention that formerly entered into the judicial determination, on evidence, of the fact of an election, has been entirely eliminated from the ballot reform act, and the form in which the elector is to express his intention is prescribed by the language of the act; and it is not competent for the court—if it was competent for the court, judicially, to determine this matter, and take evidence—to depart from the prescriptions of this act; otherwise, the act would be repealed. The fundamental principle that lies at the bottom of the ballot reform act, and the principle on which it rests, is secrecy in the preparation and casting of the ballot by the voter, in order to obviate those evils that were regarded as of so much magnitude as to require the extraordinary interference of the legislature; that is, the intimidation of the voter, and the extraordinary influence brought to bear on an elector. If the provisions of this act on that subject can be set aside by the officers on a recount, the act, instead of accomplishing the results contemplated by the legislature, would only make it more certain that all detection of these influences would be prevented by the secrecy with which the conduct of an elector is required to be regarded. Now, the sections of the act in relation to this subject are the thirty-ninth, the sixty-fourth, and the sixty-

fifth sections, found in P. L. 1890, p. 398. I would say that an earlier section provides for the preparation of the ballots by the county clerk. The sixty-fourth section provides for the mode in which they shall be printed, and makes it a penal offense to violate the provisions of that section. So careful was the legislature with regard to the integrity of the official ballot, and of fixing by legislative prescription the forms and the contents of the ballots, that it made it an indictable offense for the printer to depart from the methods prescribed by the act. Then you come to the thirty-ninth section, which is wholly independent of the intention of the elector, and dependent, wholly, on the fact that the ballot contains on it a designation or device other than that permitted by the act, whereby said ballot can or may be identified. Now, the sixty-fifth section of the act, which makes it a penal offense for the voter to place on his ballot any mark,—anything which would indicate how he voted,—contains language entirely different from that contained in the section to which I have just referred. The section I have referred to refers to the condition of the ballot which shall prevent its being counted, and the section to which I am about to refer makes it a penal offense for any person to mark his ballot. The language of the sixty-fifth section is: "That if any person shall write, paste or otherwise place upon any official ballot or envelope any mark, sign or device of any kind as a distinguishing mark whereby to indicate to any member of any election board or other person how any voter has voted at any election, or if any person shall induce or attempt to induce any voter to write, paste or otherwise place on his ballot or envelope any mark, sign or device of any kind as a distinguishing mark by which to indicate to any member of any election board or other person how such voter has voted, or shall enter into an attempt to form any agreement or conspiracy with any other person to induce or attempt to induce voters or any voter to so place any distinguishing mark, sign or device on his ballot or envelope, whether or not said act be committed or attempted to be committed, such person or persons so offending shall be guilty of a misdemeanor, and being thereof convicted, shall be punished by fine not exceeding five hundred dollars or imprisonment not exceeding one year, or both, at the discretion of the court." "Whereby to indicate"—indicating a purpose on the part of the elector to mark his ballot—where to indicate how he should vote. That is the section that makes it an indictable offense to do that act. But the language of the thirty-ninth section is entirely different. That provides: "That if any ballot voted at any election shall have thereon, either on its face or back, any mark, sign, designation or device other than is permitted by this act, whereby such ballot can or may be identi-

fied or distinguished from other ballots cast at such election, such ballot shall be absolutely void and shall not be canvassed or counted for any candidate named thereon; and if, on the face or back of any envelope inclosing any ballot, there shall be any mark, sign, designation or device whatsoever, other than is permitted by this act, whereby such envelope can or may be identified or distinguished from any other official envelope used at such election, the ballot inclosed in such envelope shall be absolutely void and shall not be counted for any candidate named thereon." Now, wherever a ballot—no matter how honest the intention of the voter may be—wherever the ballot contains on its face or on its back, or on any part of it, anything whereby the ballot itself can or may be identified, etc., the section I have just referred to prevents its being canvassed or counted. This section of the act clearly overcomes and supersedes the common-law rule with regard to a determination of the result by extraneous evidence. I am speaking now only of the counting boards, and of the canvassing and counting of the votes, declaring the result. It supersedes wholly the common-law rule of ascertaining, if possible, what the intention of the voter was.

I may say that in counsel's brief a number of cases are referred to, and almost all of them that are based on the legislative provisions analogous to this section are cases dependent on a judicial determination. Where it appeared that no person of the name resided in the legislative district, the court took those facts to ascertain the intention of the elector. That principle, in my judgment, had been entirely superseded by the provisions of the ballot reform act. Even if the provisions of this act gave the court power to act, it was intended that the court must assume innocence with regard to the appearance of these ballots, and, in the absence of proof, must regard them as legal. That principle would undoubtedly apply to a case where a voter was under prosecution, under the sixty-fifth section of the ballot reform act, for placing a mark or device on his ballot, whereby to indicate how he had voted; but it is perfectly manifest that it is inapplicable to the thirty-ninth section, and cannot be applied to that section without overturning the entire principle of the ballot reform act. If that were to apply to ballots misprinted, it would apply to almost all the ballots that are criticised, and properly criticised, in other respects, as, for instance, where a name is in the wrong position, upside down, or where the man has written the name in different pencil, or written "No good" on the ballot. If the court were called upon to attribute all these acts to a legal purpose, and therefore to endeavor, if possible, to give effect to all those ballots, it would almost fully operate to supersede the provisions of the ballot reform act. There will be no certificate.

(66 N. J. L. 480)

**ATTORNEY GENERAL ex rel. WERTS,
Governor, v. ROGERS et al.¹**
(Supreme Court of New Jersey. March 21,
1894.)

**STATE SENATE—ORGANIZATION—PRESIDENT—QUO
WARRANTO—JURISDICTION.**

1. The courts have jurisdiction to decide whether an organization of the senate has been made in violation of the constitution.

2. Quo warranto will lie to determine title to the office of president of the senate, it being by statute made applicable to every case in which any person unlawfully holds "any office" within this state.

3. Const. art. 4, § 2, par. 2, providing for the division of the seats of the senate into three equal classes, so that the term of only a third shall expire on any year, at which time their successors shall be elected, cannot be held to make the senate a permanent body, by reason of the fact that it was taken from the United States constitution, and the United States senate had theretofore been held a permanent body, as the provision which made such holding possible was one giving to the United States senate an always existent presiding officer.

4. Const. art. 4, § 3, provides that members of the senate and assembly shall be elected yearly, and that the two houses shall meet separately on a certain day after the election, when the legislative year shall commence. Section 2 provides that the senate shall be composed of one senator from each county, elected by the voters of the county for three years. Article 4, § 2, par. 2, provides for the division of the senators into three classes, so that one year the terms of the members of one class shall expire, and their successors be elected, and so on successively, with each of the three classes. Revision, p. 353, § 85, followed for many years, provides that, in the organization of the senate and assembly, certified copies of determination of elections shall be taken to be prima facie evidence of the right of persons therein mentioned to seats in the house. *Held*, that the senate was not a continuous body, so that a newly-elected member could not enter it till his title had been passed on by the old members, but that it expired annually, and all members took part in its organization. Abbett, J., dissenting.

Information by the attorney general, on the relation of George I. Werts, governor of New Jersey, against Maurice A. Rogers and Robert Adrain, to determine title to the office of president of the senate. Heard on answers and reciprocal demurrers of respondents.

The facts are substantially as follows:

On the 21st day of February, 1894, the attorney general presented to this court the petition of the relator, who is the governor of the state, setting forth that the defendants each claimed to be possessed of the office of president of the senate of New Jersey, with all the rights, powers, and privileges appertaining to that office, and that each of them, in pursuance of such claim, is actually engaged in exercising the functions of said office. The petition shows that the interests of the people of this state are being greatly imperiled by these conflicting claims, and that a speedy determination of the same is imperatively demanded, in the interest of good government and public order. On the filing of this petition, a rule was granted requiring the defendants to show cause before this court why leave should not be given to the attorney gen-

eral to exhibit an information in the nature of a quo warranto against them, and each of them, for usurping, intruding into, and unlawfully holding and exercising the office of president of the senate of the state of New Jersey. Leave was also given to all parties to take affidavits, to be used on the return of the rule. The attorney general immediately gave notice to both defendants of the taking of affidavits before a supreme court commissioner on the 24th day of February last. At the time designated, both defendants appeared in person and by counsel, and the examination of witnesses was proceeded with. On behalf of the attorney general and the relator only two witnesses were examined. They were Samuel C. Thompson, secretary of the body which elected Robert Adrain president, and Wilbur A. Mott, secretary of the body which elected Maurice A. Rogers. Several witnesses were sworn on behalf of Maurice A. Rogers, and one on behalf of Robert Adrain. The testimony was closed on Wednesday, February 28th, and the parties are now here to present their case.

The state of facts thus exhibited, in so far as it appears to be pertinent to this inquiry, is as follows: A short time before 3 o'clock on the afternoon of January 9th, the nine Democratic hold-over senators assembled in the senate chamber. At about 3 minutes before 3 o'clock, Samuel C. Thompson, who was secretary of the session of 1893, called the senate to order, and Senator Daly offered a resolution naming Robert Adrain as president pro tempore. This resolution was immediately adopted. Robert Adrain thereupon took the chair, and, after waiting until 3 o'clock or later, ordered a roll call of the senate. The nine senators referred to alone answered to their names. There was then another wait of 3 or 4 minutes, ending in another roll call. To this roll call, also, only the nine senators referred to answered. Thereupon Senator Daly moved a recess of 5 minutes, which motion was adopted. At about 15 minutes past 3 o'clock the senate came to order again. At this time the four hold-over Republican senators, accompanied by the seven Republican senators-elect, entered the chamber, and took their seats on the floor. Immediately after the Republican senators had taken their seats, Robert Adrain, as presiding officer, ordered another roll call. The names of the hold-over senators, both Republican and Democratic, were called. At the conclusion of the call, the secretary announced, in a loud tone of voice: "Mr. President, there are thirteen senators present, and have answered to their names." The secretary testified that he believed the whole 13 did answer to their names. He did not, however, swear positively that they did; and the evidence given by other witnesses makes it very clear, I think, that they did not. However, no objection was made by anybody to the announcement of the result of the roll call by the secretary as above mentioned, and

¹ For dissenting opinion, see 29 Atl. 173.

the president thereupon declared that there was a quorum present. No objection appears to have been made by anybody to this declaration. While this roll call was proceeding, Senator Stokes, one of the hold-over Republican senators, arose, and entered a protest against the organization of the senate on account of its having been effected in the absence of the Republican senators. Senator Adrain ruled him out of order, on the ground that a roll call was in progress. At the conclusion of the roll call, Senator Adrain recognized Senator Stokes, and the latter said he arose to a question of the highest privilege, and asked Senator Adrain, as presiding officer, if the usual custom would be followed, and senators admitted on their credentials. Senator Adrain replied that he was only one of the body, and could not give the desired information. Senator Skirm, another of the Republican hold-over senators, then arose, and announced to Senator Stokes, without addressing the chair, that he had the credentials and affidavits of the seven newly-elected Republican senators. At that point Senator Adrain stated that Senator Daly had a resolution which he thought would cover the matter and give the information desired. Thereupon Senator Daly, one of the Democratic hold-over senators, offered the following resolution: "Resolved, that all certificates of election or other credentials of those claiming seats in this senate by virtue of the election held on the 7th day of November, 1893, together with all protests, petitions, and other communications or papers presented to this senate concerning its membership, be in the first instance referred to a special committee of three, to be appointed by the president, which committee shall report upon the validity of such credentials, and shall make such report concerning such protests, petitions, communications, or papers as shall be necessary." After the resolution was offered, Senator-Elect Voorhees, one of the newly-elected Republican senators, arose in his seat, and attempted to address the chair, stating that he claimed his rights on the floor of the senate as senator-elect from the county of Union. Senator Adrain refused to recognize him, and ordered him to take his seat. Senator Voorhees declined to be seated, and Senator Adrain thereupon directed the sergeant at arms to seat him. Senator Voorhees still refused to be seated, and, after some further protest, invited the Republican senators and senators-elect to withdraw to one of the lobbies of the senate chamber, and they all immediately did so. No notice was taken of the withdrawal of the Republican senators by the nine Democratic senators. Soon after such withdrawal, the resolution last offered by Senator Daly was adopted, and a committee on credentials appointed. Immediately after such appointment, Senator Daly arose, and presented the credentials of Christopher S. Staats, a Democratic senator-elect from the county of War-

ren. These credentials were referred to the said committee, who immediately reported favorably upon them, and Senator Staats was thereupon admitted, sworn in, and took his seat.

Next, a resolution was passed, as follows: "Resolved, that no one shall be admitted to membership of this senate except on motion made for his admission, and its adoption by a majority of the qualified and admitted senators." Senator Daly then offered a resolution "that the officers of the session of 1893 be, and the same are hereby, appointed officers of this session, to hold until further orders shall be made concerning their positions by the vote of a majority of the qualified and admitted members of the senate." After the passage of this resolution, Senator Daly offered the following: "Resolved, that the president pro tempore of this senate shall hold said office of president until his successor shall be elected by the votes of a majority of the qualified and admitted members of the senate." This resolution was also adopted. A number of the old officers thereupon took the oath of office. The president, however, does not seem to have done so. This body, thus organized, continued in session some time after the passage of these resolutions, and transacted, or attempted to transact, considerable business. Among other things, it appointed a committee to wait upon the governor, and inform him that the senate had organized. It also directed the secretary of the senate to inform the house of assembly that the senate had organized. It also passed a resolution adopting the rules of the senate of 1893 for its guidance, and received and referred to committees, when appointed, three or four legislative bills. Ever since said organization, or attempted organization, this body has met as a senate, at intervals of not more than three days each. Its presiding officer has always been Robert Adrain. It recognizes him as president of the senate, and he claims to be such, we are informed, not only by virtue of his election as temporary president, and his after-election as president until his successor should be elected, but also by virtue of his election as president at the beginning of the session of 1893. He has done no act as president, however, so far as the testimony discloses, except to preside over the deliberations of this body.

Upon the withdrawal of the Republican senators and senators-elect, as aforesaid, they proceeded at once to organize a senate in the lobby of the senate chamber, to which they had withdrawn, as above mentioned. Before proceeding with their organization, Senator Stokes stepped into the door opening from the lobby upon the floor of the senate chamber, and announced to the Democratic senators there remaining that the senate was about to proceed to organize, and requested them to participate in such organization. No notice was taken of this announcement, and the Republican senators proceeded to organ-

ize alone. Senator Stokes assumed the chairmanship of the meeting, and Wilbur A. Mott assumed the position of temporary secretary. The credentials of the newly-elected Republican senators were produced and inspected, and handed to the secretary pro tempore. These senators had taken the oath of office before appearing in the senate chamber, and their respective oaths were produced, with their credentials, and handed to the secretary pro tempore. The secretary thereupon called a roll of the senators, including those newly elected. The 11 Republican senators all answered to their names. Thereupon Senator Skirm moved that they go into an election of a president. Maurice A. Rogers was nominated, and upon a roll call he received 11 votes. A secretary and the usual number of officers of the senate were next elected by the same vote. After the officers were elected, they were all sworn in, including Maurice A. Rogers. Mr. Rogers thereupon took his seat as president of the senate. A committee was then appointed to wait upon the governor, and inform him that the senate was organized. A message was also received from the house of assembly to the effect that the assembly was duly organized, and had proceeded to business. The body thus organized has also been in session at intervals of not more than three days each ever since its organization. Senator Rogers regularly presides over it, and is recognized by it as president of the senate. It has passed bills, and Senator Rogers has authenticated them as president of the senate. It has also been recognized regularly and continuously by the house of assembly as the true senate, and has met in joint assembly with the house, and such assembly has elected, or attempted to elect, a state treasurer and comptroller.

Upon this state of facts, the attorney general and the relator ask the court to determine which of these claimants, if either of them, is the true president of the senate of New Jersey.

R. V. Lindabury, for relator.

By our statute, an information with leave of the court lies at the suit of the attorney general, on the relation of anybody desiring to prosecute the same, against any person or persons who shall usurp, intrude into, or unlawfully hold or execute any office or franchise within this state. It has been authoritatively determined, in this court at least, that under this act any intruder into any office of a public character in this state may be judicially ousted by a proceeding in this court. *State v. Utter*, 14 N. J. Law, 84; *Bownes v. Meehan*, 45 N. J. Law, 190.

The office of president of the senate is recognized in the constitution in four places. In article 4, § 4, par. 7, it is provided that "the president of the senate and the speaker of the house of assembly shall, in virtue of their offices, receive an additional compensation, equal to one-third of their per diem al-

lowance as members." In article 5, par. 12, it is provided that, "in case of the death, resignation or removal from office of the governor, the powers, duties and emoluments of the office shall devolve upon the president of the senate, and in case of his death, resignation, or removal, then upon the speaker of the house of assembly for the time being, until another governor shall be elected and qualified." Paragraphs 13 and 14 of the same article are as follows: "13. In case of the impeachment of the governor, his absence from the state or inability to discharge the duties of his office, the powers, duties and emoluments of the office shall devolve upon the president of the senate; and in case of his death, resignation or removal, then upon the speaker of the house of assembly for the time being, until the governor, absent or impeached, shall return or be acquitted, or until the disqualification or inability shall cease, or until a new governor be elected and qualified. 14. In case of a vacancy in the office of governor from any other cause than those herein enumerated, or in case of the death of the governor-elect before he is qualified into office, the powers, duties and emoluments of the office shall devolve upon the president of the senate or speaker of the house of assembly, as above provided for, until a new governor be elected and qualified." On February 14, 1845, the legislature passed the following act: "Section 1. The powers, privileges, duties, and remunerations, granted to or imposed upon the vice-president of council by law, at and immediately before the time when the present constitution of the state took effect, shall hereafter be exercised, enjoyed, and performed by the president of the senate, so far as the same are not inconsistent with the present constitution; and all such powers or duties heretofore exercised or performed by the president of the senate, are hereby ratified and confirmed, and shall have the same force and effect as if exercised or performed after the passage of this act." Revision, p. 748. Since the adoption of the constitution, the president of the senate has been made ex officio one of "the trustees for the support of public schools." *Id.* p. 1081, § 65. He has also, by the same act, been made a member of the "state board of education." *Id.* p. 1071, § 1.

In *Bownes v. Meehan*, 45 N. J. Law, 189, it was contended that the jailer of the workhouse on the county farm of Hudson county is not an independent public officer, but the mere servant of the chosen freeholders, and that, therefore, an information would not lie against him. The court held, however, that as his duties were of a public nature, and his office had an independent existence, it being created by statute, an information would lie against him even at common law, and that much more would it lie under the liberal terms of our statute. It was also contended in this case that as the board of

freeholders could vacate the office of jailer at will, and elect a successor, there was no need to resort to a quo warranto. To this the court replied that the argument failed, because it did not show how the incumbent could be ousted from his station if he chose to retain it after he had been removed by the board of freeholders. In *State v. Utter*, 14 N. J. Law, 84, an information was filed against a usurper of the office of deputy adjutant general of the Essex brigade of militia of Newark. It was objected that the information would not lie, because a deputy adjutant general was a member of the general staff, and belonged to the "family of the commander in chief," and, as such, was removable at his will and pleasure. The court pronounced judgment of ouster. In his opinion Chief Justice Hornblower points out that the office is created by law; that it concerns the public, and is valuable, as well as honorable. He says the question of whether or not judgment of ouster shall be given does not depend upon the tenure by which the office is held, or whether the lawful incumbent may be removed by the ipse dixit of the commander in chief, or can only be ousted by impeachment, or by the judgment of a court martial. He is still the lawful incumbent until lawfully removed.

II. But an information will not lie against a mere claimant to an office. User must be shown in every case. Maurice A. Rogers has presided over his senate, and has attested legislative bills as president of the senate. In so doing, he has executed the office in two of its important functions, and is clearly guilty of a user of that office, unless he has a title thereto. Besides, he has taken the official oath to "perform all the duties of the office of president of the senate," according to the constitution, and that, by all the cases, is a sufficient user to support an information. *King v. Harwood*, 2 East, 177; *King v. Tate*, 4 East, 337; *People v. Callaghan*, 83 Ill. 128.

Robert Adrain has not taken the oath of office as president of the senate, but he has constantly presided over his senate, since its organization, as the president of the senate. I submit that this is a sufficient user on his part.

III. The court cannot inquire into and determine the titles of these gentlemen without inquiring into and determining the status of the respective senates which elected them, but I deny that the court is without the power to do this for any of the reasons stated, or for any other reason.

Nothing can be more obvious than that power must exist in the judicial department of any constitutional government to pass in some way or other upon the constitutional existence of any body setting itself up as the lawmaking power.

In 1868 a man named Barstow usurped the governorship of Wisconsin. The attorney general filed an information against him, on

the relation of the rightful governor. Barstow came into court, and moved to dismiss the information, on the ground that it would not lie against a man occupying the office of governor. The court, however, refused to dismiss the information, and finally gave judgment of ouster, holding that, although it had no control over the executive department of the government, it did have the power to ascertain and decide whether or not the executive held his office according to the constitution, or was a mere usurper. This was the first quo warranto case in this country against a usurping governor, and the discussion of counsel and judges is of very great interest. 4 Wis. 567. After the Wisconsin decision, a similar case arose in Connecticut, and another in Nebraska. In both cases jurisdiction was assumed by the state courts, and, in the Nebraska case, by the supreme court of the United States on appeal. *Boyd v. Nebraska*, (1892,) 12 Sup. Ct. 375; 143 U. S. 135; *State v. Bulkeley*, (1892,) 23 Atl. 186.

In the fall of 1879 a question arose in the state of Maine as to which of the two great political parties had elected a majority of the legislature. By the constitution of that state, a council of seven persons is created to advise with the governor respecting affairs of state, and it is provided that the governor and council shall examine the election returns of members of the senate and house of representatives, and issue summonses to such as appear to have been elected. They are also to make up a list of such members, and the houses are to be organized according thereto. The constitution also provides that the justices of the supreme judicial court "shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the governor, council, senate or house of representatives." The governor and council, being in doubt as to what persons were entitled to be summoned to organize the legislature of 1880, in view of the disputed election referred to, addressed sundry questions to the justices bearing upon that subject. These were duly answered by the justices, but the answers were not regarded by the governor and council, who issued summonses contrary thereto. In consequence, on the 12th of January, two rival legislatures assembled, and both organized at about the same hour. Shortly after its organization, one of these legislatures propounded questions to the judges, which they duly answered on the 16th of January. Thereupon, on the 23d of January, the other legislature propounded questions; and on the 24th of January the judges replied thereto, stating that the solemn occasion had arisen when they were bound to declare that the questions presented were not presented by a legally constituted legislative body, so as to require an opinion from them. In support of their right to thus re-

fuse recognition to the body presenting the questions, they said: "When different bodies of men, each claiming to be and to exercise the functions of the legislative department of the state, appear, each asserting their titles, to be regarded as the lawgivers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people, from whom they derive their power. There can be but one lawful legislature. The court must know for itself whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways it becomes essential that the court should forthwith ascertain and take judicial cognizance of the question, which is the true legislature?" 70 Me. 608. Subsequently, in *Prince v. Skillin*, 71 Me. 367, when a law passed by one of these legislatures was challenged, the court reaffirmed its former decision, upon precisely the same grounds.

In January, 1893, two houses of representatives, each claiming to have been elected by the people, met and organized in the state of Kansas. It is a matter of history that, in consequence, the utmost disorder and confusion prevailed for a long time. Finally, the speaker of one of the bodies issued his warrant for the arrest of a witness named Gunn, who had refused to obey a subpoena to appear and testify. The warrant was duly served, and Gunn thereupon sued out a writ of habeas corpus. Upon the return of the writ, no question was raised except as to the authority of the speaker to issue the warrant, and that, in turn, was conceded to depend upon the constitutional authority of the body which elected him. The whole question, therefore, was as to the title of the speaker, which admittedly depended upon the organization of the house. The court took jurisdiction of the question, and settled the whole controversy upon the return of the writ, holding that to be the legal house, in which, at the time of the organization, there was a majority of duly-certified members. In *re Gunn*, 32 Pac. 470.

The principles here contended for, and illustrated by the foregoing cases, find their best expression in the unanimous resolution adopted by the supreme court of Massachusetts in 1859, in the case of *Burnham v. Morrissey*, reported in 14 Gray, 238.

IV. But it has been argued that as the constitution makes the senate the judge of the election, qualifications, and returns of its members, and as the title of the defendants, respectively, depends not so much upon the

action of their respective senates as upon the qualifications of the members of those senates to act, the court cannot try such titles without passing upon the very questions exclusively committed to the judgment of that tribunal. I admit that the court cannot inquire into the qualifications, election, or returns of members of the senate, but I deny that it is necessary for it to do so in order to determine this controversy. It might be the court could not, upon quo warranto proceedings, oust the uncertified members from either house, but it certainly could, without difficulty, upon a proper case, determine which was the true house, by determining which was organized according to the constitution. Trying them by that standard, it would be found that the true house was that body which organized with a quorum of certified members; and the fact that the other body consisted of 60 members, whose election, qualifications, and returns had been regularly passed upon by their fellows, would go for nothing, because of the fact that the body which passed upon them was without jurisdiction as a court, for want of a quorum. In *re Gunn*, (Kan.) 32 Pac. 470; *State v. Tomlinson*, 20 Kan. 692; *State v. Francis*, 26 Kan. 724.

The simple question to be considered, therefore, is this: Who constitute the senate at the beginning of a session? Upon that question every other question in this case depends, and it is folly to claim that in solving it the court will be required to pass upon the election, qualifications, or returns of any member of the senate.

V. No question can arise in this case as to the de facto existence of either of these bodies. As was pointed out by the judges in both the Maine and Kansas cases, there can neither be two de facto legislatures, nor a de facto and a de jure legislature, at the same time.

Cortlandt Parker, for respondent Maurice A. Rogers.

I. The senate is no continuous body, in the sense of one continuing from session to session. The members all continue members "until the second Tuesday in January of each year, at which time of meeting the legislative year begins." Const. art. 4, § 1, par. 3. During the period between their adjournment sine die and the meeting of the new senate, the old subsists, but in a state of suspended animation. The governor, by calling a special meeting of the legislature, can break this suspended condition. The same is true of the house of assembly. It continues to exist, in identically the same way; that is, the members remain members for the year, without power to convene, except at the governor's call. When the time of meeting which begins the legislative year arrives, then the old members of the assembly go out, and new members take their places. And this is true of one-third of the number of the senators.

They go out, and others take their places. The fact that all do not go out does not make the senators who remain constitute a body. They cannot do so till they meet their new fellows. Then the old and the new make up the senate of that year.

It is urged—and the argument made is upon this alleged analogy—that the senate of New Jersey is like the senate of the United States. Both are made up by classes. That the United States senate is pronounced to be a continuous body, and that, therefore, this is the case with the New Jersey senate. Mr. Clay, quoted by the attorney general, seems nearer right. "In the true contemplation of the constitution, the senate, and the house, too, were supposed to be in existence. The senate and house were, in the contemplation of the constitution, continuous bodies." Mr. Buchanan argued for the senate's being a permanent body, thus: "Its rules were permanent;" not so with our senate. "Its secretary was permanent;" not so with our senate. "The senate always had a president;" not so with ours.

II. If the senate be a continuous body, in any sense, its members possess no power to sit upon the right of their fellows in organization. At the first session of the United States senate, in April, 1789, the members came slowly in. At last, April 6th, the journal shows the presence of senators from eight states, three of them only represented by one senator each. The journal states their appearance by name, proceeding: "Being a quorum, consisting of a majority of the whole number of senators of the United States. The credentials of the aforesaid members were read, and ordered to be filed. The senate proceeded to elect a president, for the sole purpose of counting the votes for president." Hon. John Langdon was elected. April 18th other senators are named as appearing, of whom the journal says that they "severally produced their credentials, and took their seats in the senate." No committee; no approval; no vote of admission. In the second session of the same congress, the journal gives the names of a quorum as appearing, and resolutions then inform the president and the house that they are ready to proceed to business. In the third session new members appear, "produced their credentials, and took their seats." At a later day, P. Dickinson, from New Jersey, "produced his credentials, and took his seat in place of Gov. Paterson."

The ordinary way with the journal is as follows: First. It announces that, the day for session having arrived, the following senators appeared, giving the names of all, both old and new. Then the new are mentioned by name, a second time, and then the journal says: "Who severally produced their credentials, and took their seats in the senate." Such was the entry in 1789. After this "the senate elected a president pro tem., to whom, by motion, Mr. Read administered the oath

required by law." Then a resolution is stated that a message be sent to the house, and to the executive, that a quorum was ready to attend to business. In 1801 the journal gives a list of all, and then names eight new members, who are stated to have severally produced their credentials, and taken their seats. Then came election by all of a president pro tem.,—a legal officer, by force of the statute,—and that officer administered the oath to the new members. In 1803–1805 like entries occur. In 1807, Vice President Clinton being in the chair, the statement is that the new members respectively took their seats, and presented their credentials, which were read, and the oath prescribed by law was administered to them. Hon. John Pope had left his credentials at home, but said he expected soon to get them, "whereupon he took his seat, and the oath was administered to him, as the law prescribes." The same practice obtained year by year. In the twenty-third congress, 1833, the journal is noticeable. A full list of members is given. Then new ones named in it are mentioned, and stated to have produced their credentials, been sworn in, and to have taken their seats. Then occurs this entry: "The president communicated an act of the general assembly of Rhode Island declaring void the election of Asher Robbins, and a certificate by the governor of that state of the election of Elisha R. Potter." Then a motion was made to administer the oath to Mr. Robbins, whose credentials were received at the last session. Mr. Benton then moved to refer the matter to a committee to consider and report. Ayes and nays being called, that motion was lost. Then the motion to administer the oath was put and carried. The oath was administered, and Mr. Robbins took his seat; and then came the resolution of notification that a quorum was in session ready for business. Throughout the long period examined, this is the only case in which action was formally taken upon the right of a member during the process of organization. In this case contest was made by the state, and by an individual contestant himself bringing a certificate of election; and the vote of the court indorsed the law that not even the statute of the state represented, declaring the election void, and the contesting credentials of a governor, authorized considering the members' credentials. Even the practice of the house of lords in England demolishes the idea of a continuous body. There are periods there when no parliament exists. At every new parliament every peer renews his oath of office. New peers present their patents, and take their seats. Peers by inheritance simply take their seats.

III and IV. If any practice has obtained in the New Jersey senate of passing upon credentials of senators-elect, it has no warrant of law, and is not obligatory. On the contrary, it is a breach of the constitution.

What says the constitution? "Members of

the legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation." Then comes the oath comprising allegiance to the Union, to the state, and faithful discharge of his official duty, and the section proceeds: "And members-elect of the senate or general assembly are hereby empowered to administer to each other the said oath or affirmation." Article 4, § 8, par. 1. Taking this oath, or producing it in an assembly of a quorum, is the initial act of organization of the body. It does not complete organization. Something more is necessary before the body is "ready for business." That the quorum must do. They must elect a president and a secretary. They notify the governor and the house of assembly. Communications of like readiness in reply come from the house, and then the legislature can act.

We return, then, to this provision of the constitution, and ask: If a practice has obtained in our senate of passing upon credentials of members-elect, giving hold-over members the right to sit and admit members-elect, and, as argued, the right to refuse or delay, is it not a breach of the constitution? If a man comes, bearing a certificate that he is a member-elect, and an official oath is taken, or has been taken, by him, administered by a fellow member-elect, is not that man a senator, entitled to take his seat, and without legal right on the part of any other man to say him nay? And, more, is it not true that a practice or custom by which hold-over members regard only themselves as the senate is forbidden by the constitution? That this is so, and that no rights exist through the hold-overs forming a "continuous body," appears from the fact that this provision of the constitution applies to both houses. The house of assembly being elected annually, no such question can there arise. There is nobody but the members-elect who can act in the organization. Yet the provision is emphatic and clear: "Members-elect of the senate or general assembly are hereby empowered to administer to each other." So the practice in the house, necessary because there are no members but members-elect, is to be the practice in the senate.

Article 10 of the constitution is as follows: "It is hereby declared and ordained that the common law and statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitation or be altered or repealed by the legislature." Now, at this time (1844) there subsisted a statute passed in 1839, entitled "An act to regulate elections." It regulated the whole subject of elections. By its seventy-eighth section it directs the county clerk to certify the result under the county seal, and deliver the certificate to each member; and by section 94 it provides that, "in the organization of each house, the certified copies of the statements of determination made under the direction of the 78th section shall

be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the houses, respectively, to which they will have been so determined to be elected." P. L. 1839, p. 229. This act then becomes, by the constitution, a temporary part of it. It is not repugnant to it. It had not expired by its own limitation. It was not altered or repealed by the legislature September 2, 1844, when the constitution went into force. It remained upon the statute book untouched for several years. In 1844 an act was passed adding to the section, but renewing this part of it. During this period the senate convened several times. The enactment had the force of all statutes, and, besides, the force of the constitutional adoption and confirmation. Does it not, in combination with the section empowering members-elect to administer the oath of office to each other, settle the question that the late practice of the senate, if it be as described and contended for, is contrary to the constitution, abolishing all argument based on the theory, whether true or false, that the senate is a continuing body? For, the two provisions, taken together, say: "There shall be no question when senators, hold-over and elect, convene for organization, as to the credentials held by those who attend. In organization, these credentials shall be deemed and taken to be prima facie evidence of the right to seats of those who bring them. There is no right, then, to go behind them, and those who bring them are hereby authorized—that is, directed—to administer the oath of office to each other." This act of 1839 was followed in 1846 by an act to regulate elections, approved April 17, 1846, the ninety-sixth section of which re-enacts section 94 of the act of 1839, with an addition. P. L. 222. It is printed also in the Revision of 1847. It reads as follows: "94. And be it enacted that the senate and general assembly shall convene and hold their sessions in the state house at Trenton; and in the organization of each house, the certified copies of the statements of determination made under the direction of the 79th section of this act shall be deemed and taken to be prima facie evidence of the persons therein mentioned to seats in the houses respectively, to which they shall have been so determined to be elected." "So determined to be elected." Every word is important. The election, the right of the member, was determined by the canvassing board, officer, or officers. The certificate of it is a judgment of record, estopping all denial, save that afterwards, when there is a "house," it shall be the judge of the elections, returns, and qualifications of its own members. The section remains the law. It was re-enacted in the last (1876) Revision in the same words. R. L. p. 353, § 85. How any such practice has sprung up as that alleged to exist in the senate, in the face of these enactments, the constitution and the statutes regulating elections, is diffi-

cult to comprehend. It did not begin its sessions thus. The senate journals for 1845, 1846, 1847, and the evidence of Mr. Daniel Dodd, the first secretary of the New Jersey senate, show this, and show also that the practice then begun was according to the constitutional and statutory requirements.

The journals read as follows:

"Trenton, Tuesday, January 14, 1845. This being the time and place appointed by the constitution for the annual meeting of the legislature, the following members of the senate, viz. [eighteen names,] appeared in their seats. John C. Smallwood, Esq., of the county of Gloucester, produced a certificate of election as a member of the senate for the county of Gloucester, which certificate was read and approved. Whereupon he took and subscribed the affirmation prescribed by the constitution and laws of New Jersey, before the Hon. Alexander Wurts, one of the members of the senate-elect, and took his seat in the senate. [Other senators] severally produced certificates of their election as members of the senate of New Jersey, from their respective counties, which were severally read and approved; whereupon they severally took and subscribed the oaths and affirmations prescribed by the constitution and laws of New Jersey, before the Hon. John C. Smallwood, and took their seats in the senate. The members of the senate present, having all been sworn or affirmed, proceeded to the election of a president of the senate. President elected, and other officers elected, and senate communicated with governor."

"Trenton, January 13, 1846. This being the time and place appointed by law for the meeting of the legislature, the following members of the senate, viz. [all the hold-overs and senators-elect.] The senate having been called to order by the late secretary, Mr. Hulme moved that the Hon. Alexander Wurts be appointed president of the senate pro tempore, which motion was unanimously agreed to. The president pro tempore having taken the chair, Mr. Hulme presented the credentials of the Honorable Stephen R. Gower, from the county of Essex, which were read and approved; and, the oath prescribed by law having been administered to Mr. Gower, he took his seat in the senate. Ditto of newly-elected senators. The members of the senate present, having been all sworn or affirmed, proceeded to the election of a president of the senate for the present session."

Trenton, January 12, 1847; January 11, 1848. The same course was pursued these years as in the year 1846.

In 1849 the new practice seems half begun. The hold-overs are stated to have appeared in their seats. The secretary of the last senate called to order. Then one of the hold-overs, on motion, was made president pro tempore. Then one of the hold-overs presented the credentials of a member-elect, which were read and approved; "and, the oath prescribed by law having been admin-

istered to him by the president pro tempore, he took his seat in the senate." So with others newly elected. Then, the journal proceeds, the newly-elected members of the senate having been all sworn or affirmed, the senate proceeded to the choice of a president for the present session.

This is the first time when any one as president pro tempore administered the oath of office. It would seem probable that some one got hold of a journal of the United States senate, and did not notice the difference between its president pro tempore—an officer directed to be created by statute—and one who was a mere chairman of an unauthorized meeting, taking the place of president over such members as appeared in their seats to facilitate an orderly organization. And so the use of the word "approved"—an entirely incorrect word to express the only fact, to wit, that the credentials as read appeared to come from the right source; a word not found in the early minutes of the United States senate—was a mistake. There was no more right to approve than there is in a judge to approve the record of a judgment put in evidence by its production before him; yet it could mean nothing more than that it was in form. Yet, what right had a president pro tempore, as such, to administer the official oath? He did not have it by the constitution, as such, I say. I will not here argue, for it is unnecessary, that he was not a member-elect, and therefore could not swear members-elect in. That would perhaps be giving too narrow a meaning to the phrase "member-elect." And yet the statutes are curiously drawn on this subject. The act relative to oaths and affidavits, (Revision, p. 740,) passed 1857, allows (section 1) all necessary or proper oaths to be taken before a number of officers, but provides that it shall not apply to official oaths required by any officers of this state. Section 4 authorizes the president of the senate to administer oaths in any matter or case under examination, but it does not mention the official oaths of members. The act prescribing oaths of public officers (Id. p. 901) begins with prescribing the oath of allegiance, and (by section 9) empowers any member of the senate or general assembly to administer the oath of allegiance to his fellow members of the same house. But there is no authority given to administer the official oath. So there is more doubt as to the right of the president of the senate, or pro tempore, as such, to administer oaths of office to members-elect than there is of their right to do this to each other. I do not see where either gets his right, except that any member elected comes within the description "member-elect." The result of all this is that the method of organization adopted by the hold-over senators had not the warrant of the constitution of New Jersey or of its statutes, and was, besides, dissimilar to that with which the New Jersey senate began, and to

that which the United States senate has practiced from 1789 to 1849, if not to the present day. And a rightful inference is that, for this reason, there was no lawful claim on the four hold-over senators or the seven senators-elect to remain with the nine hold-overs who convened, and still convene, as the senate of New Jersey, and that this convention of the nine or the ten is not only no senate, but it is yet acting contrary to their duty in refusing to join the majority. This is so even if, in any unsubstantial particular, the proceedings of the eleven who elected the respondent Rogers were irregular. Mere irregularity never vitiates, especially when it occurs on the part of those who, by law, have no responsibility for their conduct to any court. A fortiori is it the duty of the Adrain and Daly party to give up their daily and laborious occupation of adjourning, and enter the room where the eleven meet, because the organization by the eleven was and is in strict obedience to the constitution and the laws.

V. But the insistence is that the action of Messrs. Stokes, Skirm, Hoffman, and Smith in leaving their fellows who had taken their seats as the senate in the chamber appropriated to that body broke up a quorum which had existed, and that a senate had convened, wherefore the majority could create no other. In opposition to this, we say that the presence of these four gentlemen there at that time did not make up a senate.

VI. But, even if this action by the four members was secession on their part, still their union with those whose rights to be and act as members the nine denied transferred the locality of the senate. It created a quorum of that body, and its proceedings then and from thenceforth made a senate de facto and de jure, acting from and after that moment lawfully.

Another view may be taken of this action by the 11 members, leading on different grounds to the same result. They started for the senate chamber in full time to get there. They were physically obstructed. But for this they would have been there, not perhaps as early as the energy of the 9 brought about, but by 3 p. m. They were half an hour late, and their ingress there was far from dignified. The 9 had assembled. What of that? They were not a majority of 21. They had chosen a chairman for themselves. What of it? They had passed, or did pass, a resolution claiming authority to determine upon the rights of certificated members-elect. None of their action was senatorial. None of it was legal. The 11 rescinded what had been done. They might have stayed there, and physically fought out the difference between them. They did not. They simply went into a cloakroom, and then carried out the rescission. They were senators, all of them, because certificated. They were the majority. Like conduct was confirmed in *State v. Foster*, 7 N. J. Law, 107; *Kendell*

v. City of Camden, 47 N. J. Law, 67, indorsing this decision, confining it to action during the same day, and so approving it. This view, of course, takes it for granted that members-elect are members. But surely this is so. And see *Feurey v. Roe*, 35 N. J. Law, 123, where the majority of a board of chosen freeholders, part hold-overs, part members-elect, acted without notice to the minority.

VII. In *Kearns v. Edwards*, (N. J. Sup.) reported in 28 Atl., at page 723, Mr. Justice Depue says: "The constitution provides, in the second paragraph of section 4, art. 4, that each house shall be the judge of the elections, qualifications, and returns of its own members. The constitution having conferred on the legislative department the power to judge,—that is, judicially determine,—it would not be competent for the legislature to confer that authority on the judicial department of the government." He refers to *Ruh v. Frambach*, 47 N. J. Law, 85, where the late Mr. Justice Parker said: "The certificate of election presented to the house is prima facie evidence of the rights of the person holding it. The person producing the certificate issued by authority of the officer or officers issued by law to give the credentials is permitted, in the first instance, to take his seat in the body." In the case of *Feurey v. Roe*, 35 N. J. Law, 123, already mentioned, there seems to have been a dispute which led the majority to ignore the minority of a board of chosen freeholders, and elect without notice to them. The case is not very fully reported, but it appears that in this majority were both some hold-overs and some members-elect, and the votes of those elected the officer whose right was in question. The election was sustained. In the case of *Kendell v. City of Camden*, 47 N. J. Law, 67, also already mentioned, it was held that action by a body, reversing prior action, electing an officer during the session, by electing another, was lawful, and the last man was held elected. Applying this, the action of the 11 is sustainable, as reversing what had occurred before. The cases of *Billings v. Fielder*, 44 N. J. Law, 381, and *State v. City of Patterson*, 35 N. J. Law, 190, are also worthy of attention; as, also, the case of *In re Contested Election of McNeil*, 2 Atl. 341, 111 Pa. St. 235, a well-considered case, arising upon language giving the legislative houses the right to judge as to qualifications, etc., similar to that in our constitution.

S. H. Grey, for Mr. Rogers.

I. The object of the proposed inquiry is to ascertain by what title Rogers holds his office as president: The inquisition can only be made by a tribunal having power to investigate and determine the title challenged. That tribunal is not this court. It is the senate of New Jersey, when organized as a house. The initial inquiry into the question of titles involves the investigation of the "election, qualifications, and returns" of

those claiming to be members of the senate. The constitution expressly confers upon each house the sole power "to judge of the election, qualifications, and returns of its members." This power admits of no division, and is necessarily exclusive. Nor can this court make inquisition for the purpose of deciding whether the senate which, in organizing itself into a constitutional house, elected Mr. Rogers as its president, was or was not composed of a majority of the members of that body, unless it accepts the certificate of election as *prima facie* evidence of right to a seat for organization purposes.

In *People v. Mahaney*, 13 Mich. 481, Judge Cooley said: "While the constitution has conferred the general judicial power of the state upon the courts and officers specified, there are certain powers of a judicial nature, which, by the same instrument, are expressly conferred upon other bodies, and among them is the power to judge of the election, qualification, and returns of members of the legislature. The terms employed clearly show that each house, in deciding, acts in a general capacity, and there is no clause in the constitution which empowers this or any other court to review their action." To the same effect is *Dalton v. State*, 3 N. E. 685, 43 Ohio St. 652-680. In *Robertson v. State*, 10 N. E. 582, 643, 109 Ind. 79, which was a case involving a contest over an election of lieutenant governor, Elliott, C. J., said: "In many instances powers of a judicial nature are conferred upon the legislature, and it has always been held that, where such power is conferred, it is exclusive and supreme." See, also, *Clough v. Curtis*, 10 Sup. Ct. 573, 134 U. S. 361, 371; *Sinking Fund Cases*, 99 U. S. 700-718; *Story, Const.* § 374; 1 Kent, Comm. pp. 221-235; *Cooley, Const. Lim.* pp. 50, 51; *State v. Governor*, 25 N. J. Law, 331-351; *Pangborn v. Young*, 32 N. J. Law, 29, 32, 40, 41; *State v. Pritchard*, 36 N. J. Law, 101, 112, 113.

So well settled is the rule that there is no judicial supervision over the legislative department in the discharge of its duty that Throop, in his work on Officers, lays it down thus, (section 793:) "A very obvious principle of public policy exempts members of the state and national legislature from judicial supervision in the performance of their legislative duty." And again, (in section 814:) "A mandamus will not lie against a member of the legislature to compel his action with respect to a matter pertaining to his legislative duty. Thus, it cannot be granted against the speaker of the assembly, upon the application of a member, to compel him to send to the senate a bill which the relator insists has duly passed the house, and which the speaker insists has not duly passed." See, also, *Ex parte Echols*, 39 Ala. 698.

II. Is the office of "president of the senate" an office of the state of New Jersey as an organized government, one of the "civil offices" spoken of in the constitution, or is it

an office of the legislature only, one of the co-ordinate branches of the state government? If the latter, can this court, under any circumstances, inquire into the title by which it is held? By article 4 of the constitution, the legislative power is vested in a senate and general assembly, and provision is made for the election to these legislative bodies of such persons as possess the requisite qualifications, which are age, the right of suffrage, citizenship, and inhabitancy. The two legislative houses have each the power "to choose its own officers, determine the rules of its proceedings," and punish or expel its members. Article 4, § 4, par. 3. And every "officer of the legislature" is required to take an oath, the form of which is prescribed in the constitution, "before he enters upon his duties." Article 4, § 8, par. 2. The "president of the senate" is an officer described in the constitution, (article 4, § 4, par. 7), and, in virtue of that office, receives an additional compensation, equal to one-third of his allowance as a member. By article 7, § 2, provisions are made for the appointment or election of all civil officers who are to be "commissioned by the governor." Paragraph 10: Their "terms of office * * * shall commence on the day of the date of their respective commissions; but no commission shall * * * bear date prior to the expiration of the term of the incumbent of said office." That the members of the legislature should be absolutely incapable of holding any other state or federal office is expressly provided by article 4, § 5. We have, then, an office created by the constitution, for the express purpose of making the legislative power effective, whose incumbent must possess, as his sole qualification, the character of a legislator, whose title rests entirely upon that of his fellow members, who is chosen from and exercises his official function wholly among them, whose compensation is based upon theirs, whose official oath defines his functions and duties as those appertaining to the exercise of legislative power, and whose term is limited by that of the legislature of which he is a member. Can it be said that such an officer holds an office of the state of New Jersey as an organized government? He is but the "mouth of the house" which elects him. May, Hist. Parl. 193. His duties are all associated with and inseparable from that house. See them defined in Cush. Parl. Law, § 291. The president of the senate holds his office by the warrant, not of the state government, but of the people, who organized that government. They expressed in the constitution, which they made, their purpose to confer upon one branch only of the three co-ordinate governmental agencies the power to make laws. They separated that branch wholly from the other two. They invested it with the only creative power, as all legislative action essentially is, which they were willing to delegate to their agents; and they, in terms, ex-

cluded this, the highest field of sovereign power, from the possibility of interference from or invasion by any persons belonging to or constituting either of the other departments, and by the same article preserved the executive and judicial departments, in the exercise of their proper functions, from invasion by the legislature. Says Judge Cooley, in his work on Constitutional Limitations, (page 133:) "There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. It chooses its own officers, except where, by the constitution or statute, it is otherwise provided. It determines its own rules of proceeding. It decides upon the election and qualifications of its own members." Here it will be seen that the choice of officers is put upon the same plane with the unquestionable legislative powers possessed and used exclusively by the legislature of judging of the "title" of members, and adopting "rules."

How, then, can it be said that such an office as this is an office the title to which may be inquired into as if it were one of the civil offices of the organized state government? Nor does the constitutional provision that the president of the senate shall assume executive functions (article 5, §§ 12-14) indicate that his office as president is other than a purely legislative one. These provisions against the inability of the governor to act are simply means of transmitting eo instanti the executive function, not the office of governor, when the contingency guarded against occurs, to a person designated by the description of the legislative office he holds. In the event of his temporary assumption of executive duty, he is not described as the "governor," but he is described as the "person administering the government." Article 5, §§ 8-10. If it were designed that he should fill the executive office, the functions of which he assumes by virtue of his title to the legislative office which he held, there could be no occasion for the provision to fill the executive office by an election, as there is, but the president of the senate would be governor for the unexpired term. The provision, however, is that he administers the government until "another governor shall be elected and qualified," (article 5, § 12;) thus clearly drawing the distinction between the occupancy of an office and the temporary assumption of its duties. But if the president of the senate were to be regarded as a governor, filling that office, instead of merely administering the government by the exercise for a time of its functions, could his title as governor be here questioned? The provisions of article 5, § 2, would seem to exclude this court from such an inquiry, because "contested elections for the office of governor shall be determined in such manner as the legislature shall direct by law." This is an indication of an intent to exclude purely judicial inquiry into the title to the executive office, emanating direct-

ly from the people, as an independent branch of the government, and to give exclusive control over the method of determining that question to another branch of the government, also directly emanating from the people, i. e. the legislature. That power the legislature has exercised by statute. Revision, p. 353, § 88 et seq. It cannot be claimed that the power of investigating the king's title to his crown ever vested in the king's bench, or that it was there when this state declared its independence of Great Britain, and so this power is not derivative by our supreme court from any claim of unlimited potentiality in that court. Another evidence that the presidency of the senate is a purely legislative office, and not an office under the organized government of the state, described in the constitution as a civil office, is found in the fact that no commission from the governor is necessary to its full investiture, as is the case with "all officers elected or appointed pursuant to the provisions of the constitution." Article 7, § 2, para. 10, 11. No commission ever issues to the presiding officers of either house, nor to the governor himself; and for the same obvious reason they draw their titles directly from the people, as independent agents in the triunity of state government.

III. Another reason why this court cannot take jurisdiction over this matter by a writ of quo warranto is that the question presented is a purely political one, and not in any sense judicial. The president of the senate is a member and presiding officer of a political body. The whole function of legislation is political, essentially. In *Penn v. Lord Baltimore*, 1 Ves. Sr. 444, Lord Hardwicke, Ch., declared that the court of chancery had no original jurisdiction on the direct question of the original right of boundaries of political provinces in the American colonies, and that the power to establish the boundaries was in the king and council; but in this case he took jurisdiction of the subject-matter of controversy because it grew out of a valid contract made in England, over which contract, and the private rights created by and flowing from it, he had jurisdiction. In the case of *Nabob of Carnatic v. East India Co.*, 1 Ves. Jr. 371, 2 Ves. Jr. 56, it was held that the question presented was political, and involved no private rights. The court refused to take jurisdiction, upon the objection to its jurisdiction being raised. The same doctrine was recognized by the supreme court of the United States in the opinion of Chief Justice Marshall in the case of *Foster v. Neilson*, 2 Pet. 306, who said: "The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided. Its duty commonly is to decide upon individual rights, according to those principles which the political departments of the government have established." The same principle is declared in the following cases: *Williams v.*

Insurance Co., 13 Pet. 420, (McLane, J.); *Kendall v. U. S.*, 12 Pet. 524; *Georgia v. Stanton*, 6 Wall. 50; *Galston v. Hoyt*, 3 Wheat. 248, 324; *U. S. v. Palmer*, 3 Wheat. 610; *The Divina Pastora*, 4 Wheat. 52; *Garcia v. Lee*, 12 Pet. 511-520; *Williams v. Insurance Co.*, 13 Pet. 415; *U. S. v. Yorba*, 1 Wall. 412-423; *U. S. v. Lynde*, 11 Wall. 632-638; and in the very recent case growing out of the disputes touching the jurisdiction over Behring sea,—*In re Cooper*, 12 Sup. Ct. 453, 143 U. S. 472, 508. See also, opinion by Judge Woodbury in the great case of *Luther v. Borden*, 7 How. 1, which was the outgrowth of the Dorr Rebellion in Rhode Island, and turned upon the question as to whether the new or the old constitution of the state was the organic law.

IV. But, assuming that the court desires to have the views of counsel upon the situation which the facts present, our claim is that Mr. Rogers is the president of the senate, lawfully elected by its duly qualified, elected, and returned members. The senate of New Jersey is not a continuous, perpetual entity, but a body of limited vitality. Under the charter of July 2, 1776, (Wilson's Laws, P. L., art. 7,) it was provided that the governor, who was elected for one year, "shall be constant president of the council, and have a casting vote in their proceedings; and the council themselves shall chose a vice president, who shall act as such in the absence of the governor." The power to convene the council was in the governor or vice president, but it "must be convened at all times when the assembly sits." Article 6. The speaker of the house of assembly had power to convene that house, if the assembly had empowered the speaker so to do, "whenever any extraordinary occurrence shall render it necessary." Article 5. These powers of convention were not indicative of the continuity of either house as an organized body, because they were both elected "yearly and every year." Article 8. Nor was the fact that the governor (who was elective by the council and assembly for one year) was the "constant president of the council," with a casting vote, any evidence of a continuity of character in the council. As neither the council nor the governor had any official character beyond one year, there could not be the same body continuing from year to year. What there was was a body which, during the official life of its members, was continuously organized, because the charter provided for it "a constant president," hence there was always a council, perpetually clothed with power to act, and ready for action whenever convened by its "constant president" or its own "vice president." There were reasons for this condition of things at that time. The functions of the council were both legislative and judicial. It, with the governor, was then the court of "last resort in all causes of law." But, when the constitution of 1844 came to be made, a marked

difference is apparent. There is no provision for continuous organization of either legislative house. The governor is no longer a "constant president" of the upper house, with a casting vote. Neither does the senate exercise the ultimate judicial power as a "court of last resort in all causes." On the contrary, the legislative year is defined (article 4, § 1, par. 3) as beginning on the second Tuesday of January next after the general election, when "the two houses shall meet separately, * * * at which time of meeting the legislative year shall commence." Here we have an express declaration of the "time of meeting," coupled with a statement that at this "time of meeting the legislative year shall commence." While this language is not substantially different from that of the old charter, which is that "on the second Tuesday next after the day of election the council and assembly shall separately meet," (article 3,) the omission in the new constitution of any provisions for a continuous organization of the upper house or senate is to me conclusive that a new organization should be annually made, and that no power existed in the body which was transmitted from one year to another, of any sort. There could be no power in the senate as a legislative house until it had, by its organization, become a house, as distinguished from a collection of members, qualified to act in effecting an organization of themselves into a house. Hence until there was an organization there was no house, which alone was empowered to "judge of the elections, returns, and qualifications" of its members, (article 5, § 4;) and, consequently, as all stood upon a plane as to the source of their title as members, all were equally qualified to act in accomplishing an organization. This is true of the house of commons, for, upon the assembling of a new parliament, each member participates in the organization, by reason of his election only. The evidence of that election is the return book, in which the clerk of the house records the names of those gentlemen which are returned to the clerk of the crown in chancery, and by him transmitted to the clerk of the house, who holds office for life under royal appointment. These members all vote in selecting a speaker before any of them are sworn. *Hurdle v. Waring*, L. R. 9 C. P. 435, 43 Law J. C. P. 209, 212, 213.

The senate is composed of one senator from each county in the state, elected by the legal voters of the counties, respectively, for three years. Article 4, § 2. The provision for the division of the original senate into three classes was designed to secure annually the election of one-third of the whole body by the people. The title to the office must necessarily be drawn from the people, who, as "the legal voters of the counties, respectively," elect the senator from that county. The evidence of that title is the election, and the evidence of that election is the return

which the law requires to be made, and which is described as a "statement of the determination" of the "board of the county canvassers," (Revision, pp. 346-348;) and, "on the organization of each house," certified copies of these "statements of determination" shall be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the houses respectively to which they shall have been so determined to be elected," (Id. p. 353, § 85.) So that we seem to have provided by the constitution a method of determining the fact of that election for the purpose of "the organization of each house" of the legislature, and thus it seems that we find in the constitution and law, as they now are, and for more than 50 years have been, a sufficient and clear explanation of the invariable rule heretofore pursued in organizing the senate. If, then, the constitution and the statute are to guide the senatorial footsteps in the organization of the senate, the way should be as clear now as it has always heretofore been. The newly-elected senators would have the right to participate in the organization of the senate upon the exhibition of "certified copies of statements of the determination" of their election. This view, it will be seen, excludes the idea of the exercise by the senate of any judicial function, when assembled for organization only, and thus there does not seem to be, under our states system, any senate, existing continuously as an organized body, clothed with perpetual legislative power, including the power which is invested in it only as a legislative house, completely organized, and capable of exercising its full constitutional functions, to be the "judge of the elections, returns, and qualifications of its own members." This latter power is not given to the older senators, erroneously described as "hold-overs," nor to the senators-elect, but to the completely organized senate, which is described in the constitution as a house, (article 4, § 4,) a majority of which "shall constitute a quorum to do business." How, then, can it be legally or logically claimed that there is a senate which, as a senate completely organized, is continuous in character, and clothed with legislative power or senatorial authority perpetually? If this be so, why does the constitution secure to the people, by the annual election of one-third of this continuous body, the power to destroy a chrysolite so perfect in all its parts by the introduction of new and possibly discordant elements? Why does the constitution prescribe a legislative year for the continuance of a legislative body, consisting of a senate and general assembly, the members of which shall be "elected yearly and every year, * * * and meet separately on the second Tuesday in January" next after the election in November, at "which time of meeting the legislative year shall commence?" Article 4, § 1, par. 3. One would suppose that if a leg-

islative year commenced for both the senate and assembly, as by this express provision of the constitution it does, it would scarcely be possible that one of the bodies—the senate—was eternal, without beginning and without end. I am unable to see upon what ground, under the constitution and law of New Jersey, there can be such a thing as a continuous, never-ending legislative body; and, if there is no such body, then, the senate requiring, as it does, organization each year to make of it a constitutional house, that organization must precede its creation as a house, capable of recognition or action as a legislative body, and in this organization members-elect, holding "certified copies of the determination" of their election, have had secured to them by the statute a right to a seat, and, being so entitled to a seat, they can lawfully participate in its organization, as is their duty to those who elected them. The power to organize the senate is in all those who are elected to its membership and who present the statutory credentials. The power "to judge of election returns and qualifications of its own members" is not conferred on individual senators, but upon the collective body. It is given by the constitution to each house, and, as already shown, there is no house until an organization of that house, which is the act welding its elements, its members, into a homogeneous body, has been effected. Then only, and not before, there is given to the house the power to judge of the "election returns and qualifications of its members." Who are its members? Are they those only whose title is more than one year old? This cannot be if "certified copies of statements of determination" of election are valid, prima facie evidence of membership for purposes of organization. The members who participate in organizing are those who produce, or who have before produced, certificates of election. These are the members whose title after organization may be inquired into by the organized body,—the house. If they were not such members, there would be nothing for the organized house to investigate. The power given is to "judge of the election returns and qualifications" of these very members who, with prima facie evidence of title only, are subject to have that title challenged by a claimant, and judged by the house. There is a provision in our state constitution which is not to be found in the federal constitution. It has sufficient pertinence to the subject under consideration to warrant a reference to it. The provision is this: "Members of the legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: * * * And members-elect of the senate or general assembly are hereby empowered to administer to each other the said oath or affirmation." Article 4, § 8.

I have gone far enough to show that the title to the senatorial office is drawn from

the people directly; that the statute law provides a way, by certified copies of determination of election, to evidence that title; that those persons who hold that evidence are entitled to seats for the purpose of organizing the senate; and that as members-elect, empowered and entitled to swear in each other, there is a clear constitutional recognition of their right thus to qualify themselves to participate as members-elect in the organization of the body. The character and value of certificates of election as *prima facie* evidence of the fact of election is universally recognized by legislative bodies and by courts. *McCreary, Elect.* §§ 509-586. In section 586, when dealing with organization of legislative bodies, (chapter 18,) Judge *McCreary* lays down this doctrine: "It is to be observed in the outset that when a number of persons come together, each claiming to be a member of a legislative body, those persons who hold the usual credentials of membership are alone entitled to participate in the organization; and if it is, as we have had occasion several times to repeat, a well-settled rule, that, where there has been an authorized election for an office, the certificate of election, which is sanctioned by law or usage, is the *prima facie* written title of the office." This doctrine is affirmed in all the courts. See *State v. Van Camp*, (Neb.) 54 N. W. 114; also, 21 Cong. Rec. pt. 3, pp. 2906-2910; In re *Gunn*, 32 Pac. 470, 948, 50 Kan. 155-175, 179.

V. Mr. Rogers was elected as president by the majority of all the members of the senate certified and sworn, and so is entitled to his office. As the senators, in organizing themselves into a house, could not look beyond the "statement of the determination" of election to ascertain who were entitled, for purposes of organization, to seats in the senate to which it had been determined they were elected, and as Mr. Rogers' title to his office rests upon his election by the members of a body composed of those whose *prima facie* right to vote is not challenged, the judgment of the court must necessarily be that, looking at the evidence which those who elected Mr. Rogers were bound to consider and be controlled by, and which on this rule controls this action of this court, he was lawfully elected to the legislative office which he fills. Nor can the practice of the senate heretofore affect the question if that practice is inconsistent with the statute, for the statute is the law of the legislature, and not of the senate only. It cannot be disregarded by either house, for such a disregard would be tantamount to a repeal by one house of an act of both which the governor had approved. This is true in England, where it is said by *Hatsell*, in his *Precedents of Proceedings of Parliament*, "that a rule laid down by the house of commons as a regulation of themselves cannot supersede the directions of an act of parliament." 2 *Hats. Prec.* p. 167.

VI. It may be well to examine into the

question whether there is such a position as that of temporary president, which Mr. *Adrain* claims to be an office. The action of the minority of the members of the senate here under inspection was to select a president *pro tempore* in the process of organization. This selection was made before a majority of senators, old or new, had arrived; hence, as the action was not that of a quorum, it was absolutely ineffective to make the position of temporary president, or to fill it if made.

VII. The only power given to a minority of the members of the senate by the constitution is the provision of article 4, § 4, that they may adjourn from day to day, and may be authorized to compel attendance of absent members.

VIII. No argument can be drawn in support of Mr. *Adrain's* position from the fact of the presence in the senate chamber of a majority of the senators. They went there to organize. They found an apparent organization. They denounced it as an usurpation, and, to avoid a breach of the peace, withdrew to another part of the senate chamber, inviting the nine gentlemen to join them, and there organized the senate by the election of Mr. *Rogers* as president, Mr. *Mott* as secretary, and the other necessary officers. It would, indeed, be a new feature of legislative law, more arbitrary than any known ruling, if a dignified protest against an outrageous usurpation could be construed into a participation and acquiescence in the wrong upon the people of this state committed by this flagrant defiance of their lawfully expressed will.

Allan L. McDermott, for Robert *Adrain*.

The legislative scheme of the constitution contemplates a continuous body, composed of three classes of senators, with their terms so arranged "that one class may be elected every year." There is nothing in the constitution preventing the election of a president for three years. Article 4, § 4, par. 3, provides that "each house shall choose its own officers." The senate being a continuous body, it may designate whom it chooses to act as president, during his term as senator, subject to reconsideration. A class goes out each year, but the senate remains. That there may not be an interruption in the life of the senate,—that there may always be two classes remaining,—it is provided that the persons elected to fill vacancies shall be elected for the unexpired terms only. These two ever-existing classes form a senate. No one can become a member of the body except by its action. The constitution provides that each house shall be the judge of the elections, returns, and qualifications of its own members. The argument that the senate, which is to judge of its own membership, must be composed of one member from each county in the state, is fallacious, because article 4, § 2, par. 1, provides that it shall be composed of such senators "elected

by the legal voters of the counties;" and it is the decision of this very question, of whether an applicant for membership was elected by the legal voters of the county he seeks to represent, that is committed to the senate. It may judge, first, of the elections of its members. No man is entitled to a seat in the senate unless he is elected to that body. No one can finally say that a senator has been elected except the senate itself. Section 85 of the general election law is invoked to give value to certified copies of election statements. The legislature cannot give to a return any force subtractive from the power of the senate to examine it, approve of it, object to it, or do whatever it will with the paper. A person must not only be elected; he must be qualified. A person applying for admission must have certain qualifications.

The framers of our state constitution designed the state senate as a continuous body; its prototype, in this particular, being the United States senate. The federal constitution makes provision for a president of the senate pro tempore, but this is to meet such emergencies as may arise, and to qualify the constitutional proposition that the vice president shall be president of the senate. The absence of the vice president and the president pro tempore will not disorganize the senate. The framers of the state constitution intended to make the senate an ever-living body. On the 7th of June, 1844, the composition of the senate being under consideration by the constitutional convention, Mr. Vroom said: "The reason, the great object, of fixing the terms of senators at three years, is not only because they are connected with the executive, but by this means the senate will be a more permanent body than the house of assembly. If the senate is elected annually, you will have a changing legislature, as we always have had." A motion to amend the term of senators from three to two years being considered the same day, Mr. Ogden advocated it, but said: "The reasons given in favor of the permanency of the senate are strong." *Newark Daily Advertiser*, June 8 and 10, 1844. Not only was the provision of our constitution suggested by the federal constitution, but the mode of determining the classes adopted by the first United States senate was adopted by the senate of New Jersey. See 1 Benton, *Abr.* pp. 14, 15; Senate J. 1845, p. 169. The expression of the constitution is not that the terms of senators shall end agreeable to the division, but that their seats shall be vacated. Vacated in what, pray, if not in a continuous body? This provision is in the federal constitution, "so that one-third may be chosen every year." It is in the state constitution, so that "one class may be elected every year." One class of what, if not of a continuous senate? Does the fact that the seats of one of three classes are vacated destroy the senate? Does it, for a second, vacate the seats of the

other classes? The organization is composed of three classes. Does the retirement of one destroy the body? Does it take from it the right to order elections, to elect officers, to transact business, to judge of the elections, returns, and qualifications of its own members? Is it so impotent that it cannot reject an unqualified applicant for admission? Are not the two remaining classes the senate? To answer negatively is to say that the senate may die although two-thirds of its members exist. This cannot be. Those whose seats are not vacated remain the senate. They are the organization. They are the judges of the elections, returns, and qualifications of their membership.

The senators-elect claim that their certificates of election are *prima facie* evidence of their rights to seats. Evidence to whom? In what tribunal are they to present this evidence? Not in this court, because it cannot pass upon their titles. Where, indeed, but in the senate, which is the only judge of the weight of that evidence? And, when this *prima facie* evidence is submitted, its probative force is neither more nor less than is accorded by the tribunal which is to pass upon the evidence. Section 85 of the election law was enacted in 1839, (*Harrison's Laws 1834-43*, p. 368,) and was intended to apply to the conditions as they were found under the constitution of 1776. Then the legislature was composed of a legislative council and general assembly. They were each chosen every year, and they chose, at their first meeting, a governor for one year. In consequence of these provisions, there was not any organization which did not expire within the year that witnessed its inception. The council was then, as the house of assembly is now, annually elected; and as there was not any one to pass upon elections, returns, and qualifications, as there was not any continuing council, it was entirely competent for the legislature to say who should have a seat at the organization. The constitution of 1846 added to the judicial power of the houses. It provides that they shall be the judges, not only of the elections and qualifications of their members, but of their returns,—of the certificates of their election,—and I submit that the adoption of that constitution repealed this provision of the act of 1839. Its re-enactment under the new constitution, if it was intended to serve the purpose claimed, was unconstitutional.

The argument for Mr. Rogers is: The constitution says that the senate shall be the judge of the qualifications, etc., of its own members, and that the senate shall be composed of one senator from each county; therefore it is necessarily a senate composed of 21 members that is to do the judging; and that the rights of a claimant cannot be the subject of senatorial scrutiny until he has been inducted. The contrary is the constitutional proposition. He must be elected, and the judgment of the senate given upon his

election. He must be qualified, and the judgment of the senate must be given on his qualifications. Constitutional provision is made for the election of a successor in case of the death or resignation of a senator. Take the case then presented. A special election is held; a candidate returned. Can he walk into the senate, present his credentials and oath of office, and thereupon successfully demand that his name be placed upon the roll?

I now come to the title of Robert Adrain, and I submit that he was elected by the senate, even if the four hold-over Republican senators had not entered the senate on the 9th of January. At the first moment of that day the membership of the senate was reduced to thirteen members. A majority of these constituted a "quorum to do business." Seven members constituted that majority. These thirteen members were the senate of New Jersey. Their proper place of meeting was in the senate chamber, and they were entitled to meet there at any time after 12 o'clock on the night of January 8th, and form not only a temporary, but a permanent, organization. They were and are the senate of the legislature of 1894. Nine of these thirteen members met at, or within two or three minutes of, 3 o'clock, in the senate chamber, and elected a president. They were not bound to wait for the four other members. They were a majority of the then existing senate. The membership of that senate could not be increased by the action of the gentlemen who were swearing themselves in at the Windsor Hotel. The oath of office should not be administered until the right to a seat has been decided. To give assent to the proposition that a senator-elect becomes a senator by taking the oath of office might result in grave complications. A candidate becomes a senator-elect by the declaration of a county board of canvassers. Learning that his election will be contested, he takes an oath before another senator-elect. The contest results in a revocation of the canvasser's certificate by a justice of this court. What efficacy remains in his oath of office? The taking of the oath can have no effect upon the powers of the senate to determine its membership.

If the four Republicans had remained with the nine Democrats to this day, would the thirteen have constituted a senate? And, if so, what would be a quorum of that senate? Could not the thirteen hold-over members meet this day and legislate? And, if they did, would they not be the senate? And if they are the senate, or were the senate on the 9th of January, are not nine a quorum of that senate? *State v. Farr*, 47 N. J. Law, 208; *Mueller v. Egg Harbor City*, 26 Atl. 89, 55 N. J. Law, 247.

The argument that induction is a condition precedent to the exercise of the judicial powers of the senate is absurd. It amounts to saying that the senate can put the holder of

a certificate of election out, but cannot prevent him from getting in. The time for judgment upon the qualifications of a senator-elect is when he presents his credentials, for the constitution expressly declares that "no person shall be a member of the senate" who has not certain qualifications.

It is said that the body over which Mr. Rogers presides must be the senate, because there are 21 counties, and each of the 11 gentlemen who recognize him as president and themselves as a senate are a majority of 21. But how did the fifth gentleman get into that body? He answers that he had credentials which were *prima facie* evidence of his right to a seat. Who passed upon that evidence? Each gentleman must have passed upon his own case. Each adjudicated that his election and returns were all right, and that he was qualified. But *prima facie* evidence is not conclusive, and, if the position taken for Mr. Rogers is tenable, the body over which Mr. Adrain presides may invite any one who claims to be a senator, from any of the counties in the class whose seats were vacated in January, to present his evidence, adjudicate upon it, and admit him to a seat. If there is any force in the argument that 11 are greater than 10, it is answered by saying that 9 are greater than 4.

Section 85 of the election law is void. The legislature cannot pass any statute making a return evidence of anything whatever. Each house has the absolute and unqualified right to receive or to reject a return. The right to judge the elections, returns, and qualifications of those who apply for admission to the senate cannot be controlled, interfered with, or legislated upon by any action of the house of assembly, whether that action is in the shape of a statute or a resolution. If the legislature had the right to enact this law, and the governor to approve it, why could they not have added, "And the supreme court shall give legal effect to the *prima facie* evidence thus provided for?" If this statute is sound, the *onus probandi* is shifted, and the duty is imposed upon the senate of proving, before they can deny an applicant admission, that he was not elected. If it is *prima facie* evidence, it is conclusive until disproved.

I am asked, "Can the senate seat one who was not a candidate for the office?" May I not answer the question after the manner of the descendants of the Pilgrim fathers, and ask, "Who can question it if they do?" May I not ask, "Cannot the court of errors and appeals in the last resort in all causes decide that not to be the law which that same court formerly adjudicated to be the law?" The senate has the right to oust a senator whom it knows to have been elected by thousands of majority, and to induct one whom not a member voting for the admission believes to have the slightest claim to a seat, and the next senate has the right to undo the wrong. What is the difference between inducting one

who was not a candidate and inducting one whom you know has not the shadow of a title to the seat? And if a candidate receives one vote, and his opponent receives ten thousand, and the senate inducts the candidate who received the single vote, is it within the province of this court to even comment upon the action of the senate?

Thirteen senators participated. There was a quorum present, however, even if it is held that eleven members were necessary to constitute that quorum. The senate journal shows this, and the question of whether they answered to their names or not is wholly immaterial. It was the duty of the thirteen members to attend the first meeting of the session at the usual time and place of such meeting. One moment they are here, protesting that they were not present, and the next moment counsel charges that they were prevented from reaching the chamber. They say: "We were present, but did not answer the roll call." But the roll is called only to find out who is present, not who is ready to proceed to business. Can the four hold-over Republicans present themselves at every meeting, and prevent business by refusing to answer their names?

The court can declare Mr. Adrain president pro tempore of the senate. If the senate is a continuous body, admission to which cannot be obtained against its consent, Mr. Adrain's title is complete. There was a quorum present when it was declared that he should occupy the office until his successor should be chosen. If there were 13 members present when this resolution was adopted, Mr. Adrain's position is as unassailable as that of any man who ever presided over the senate. And the 13 were present, in law and fact. If he was not elected, no man can be elected without the consent of the four Republicans. I have been unable to find any suggestion of a law or rule, governing parliamentary proceedings, which will reduce the number of the senate, at the time that vote was taken, below the number 13. The law says they were present. It being established that the resolution was adopted by a senate, the possibility of another senate is excluded, and any person acting as president of that other body is without right to claim that he is president of the senate of New Jersey.

Frederic W. Stevens, for relator.

We contend that neither Mr. Adrain nor Mr. Rogers has been elected to the constitutional office of president of the senate. We say that Mr. Rogers has not: (1) Because the senate of New Jersey is a continuous body, and that it is to that body that the senators-elect must come and present their credentials. They cannot, with a minority of hold-over senators, leave the body, and go off and organize by themselves. (2) Because, whether the senate is or is not a continuous body, the hold-over senators re-

main as an organized nucleus, which receives, and which alone is competent to receive, the new members, who must come and attach themselves to it. We say, on the other hand, that Mr. Adrain has not been so elected, because a minority of the whole number of members is without power to elect a president of the senate. The constitution provides that the senate shall be composed of one senator from each county in the state, (article 4, § 2,) and that a majority of the senate—i. e. a majority of the senate so composed—shall constitute a quorum to do business, (article 4, § 4.) In the case in hand, 4 hold-over senators left the lawful body, then consisting of 13, before it was permanently organized. The part that remained was therefore without power to pass the resolution which declared that the president pro tempore should hold the office of president until the election of his successor.

We are met at the outset with an objection to the jurisdiction of the court. The language of the quo warranto act is general. It extends in terms to every office. If it does not in fact extend to the office of president of the senate, this can only be because that office has, by the terms of the constitution, been expressly or by implication excluded from the operation of the act.

I will consider (1) the nature and purpose of the quo warranto act; (2) the provisions of the constitution bearing upon the office of president of the senate.

I. While our act is in most other respects a copy of the statute of Anne, it differs from it altogether in respect of the extent of its application. The statute of Anne extends only to corporate offices. Our act extends to all offices. The course of decision is uniform on this point. *State v. Parkhurst*, 9 N. J. Law, 437; *State v. Utter*, 14 N. J. Law, 84; *State v. Crowell*, 9 N. J. Law, 390; *State v. Paterson & H. Turnpike Co.*, 21 N. J. Law, 10; *State v. Gummersall*, 24 N. J. Law, 529; *State v. Tolan*, 33 N. J. Law, 198; *Bownes v. Meehan*, 45 N. J. Law, 198. In *State v. Paterson & H. Turnpike Co.*, Judge Carpenter says: "The language of our statute is more extensive than the statute of Anne, and applies to the intrusion into or unlawful holding of any office or franchise within this state." And Chief Justice Beasley, in *Bownes v. Meehan*, *supra*, says: "Instead of giving the remedy in a limited class of cases, our act in this respect is entirely unrestricted." There can, then, be no doubt that the statute in terms covers the case of all offices. It certainly cannot be denied that the president of the senate is an officer. He is not only an officer, but a constitutional officer. Const. art. 4, § 4, par. 7; *Id.* art. 5, par. 13. Each of the defendants not only claims, but has entered upon the performance of the duties of, the office. Mr. Rogers has taken the oath of office prescribed by the constitution, (article 4, § 8,) and such oath, without user, is a sufficient foundation for the information.

Rex v. Tate, 4 East, 337; High, Extr. Rem. § 327.

II. Do the constitutional provisions relating to the senate or the president of the senate deprive the court of its jurisdiction to try the title to that office? As the president of the senate holds an office, and as the quo warranto act applies in terms to all offices, this court must have jurisdiction, unless some constitutional provision takes it away, or unless the court declines to take jurisdiction on some ground of political expediency. It must be borne in mind that the court is not asked, in this case, to interfere with the action of the senate of New Jersey. There are two persons before the court, each of whom claims to be president of the senate, and each of whom has been elected by a body claiming to be the senate; but it is plain that there cannot be two senates, and two presidents of the senate, in existence at the same moment. One, at least, of the bodies, cannot be the senate; and one, at least, of the presidents, must be a usurper. Can these usurpers, not existing in conformity with the constitution, claim for themselves the privileges and immunities guaranteed by the constitution? What constitutional privileges or immunities do they possess? The moment the court concludes that either of these bodies is the true senate the investigation comes to an end, for my only contention here is that the bodies that elected Mr. Rogers and Mr. Adrain are not the senate. If either of these bodies is found to be the senate, their president is beyond all question the president of the senate mentioned in the constitution.

In the first place, I assert that there is no express provision of the constitution which debar the court from considering the question. There are only two provisions which have any bearing upon it. The first is that which provides that each house shall be the judge of the elections, returns, and qualifications of its own members. This provision obviously relates to the title of members to sit in the senate as senators, not to officers of the senate. We do not attack the title of any senator. There is not the slightest pretense of an effort to interfere with the seating of any senator in any body. All we assert is that one group of senators have attempted to elect Mr. Rogers to the presidency of the senate, and another group of senators have attempted to elect Mr. Adrain to the same office, and that both groups have failed, because neither is in fact the senate. The second provision relied upon is that which declares that "each house shall choose its own officers," but certainly this provision does not, in terms, take from the courts the power to pass upon the title of president of the senate. As well might it be said that, when the constitution provides that clerks and surrogates of counties shall be elected by the people of their respective counties, it delegates to the people the right to pass

upon the validity of the election. Nothing is better settled than that when the legislative body, or an officer of that body, goes beyond its own walls, the ordinary jurisdiction of the law courts attaches. Beyond those walls its adjudication of its powers or prerogatives binds no one. This is well illustrated by the following leading cases: *Ashby v. White*, 1 Smith, Lead. Cas. 281; *Stockdale v. Hansard*, 9 Adol. & E. 13; *Bradlaugh v. Gossett*, 12 Q. B. Div. 233; *Kilbourn v. Thompson*, 103 U. S. 168; *U. S. v. Ballin*, 12 Sup. Ct. 507, 144 U. S. 1. The principle is further illustrated by the case of *Pangborn v. Young*, 32 N. J. Law, 29. These cases show that the courts will not interfere with the action of the senate within its own walls, while it is engaged (according to its own methods of procedure) in discharging its peculiar functions. And if, in the orderly course of procedure, it had chosen a chairman to preside over its meetings and act as its spokesman, it might, perhaps, claim for this chairman immunity from judicial attack. But, the moment it attempted to impose upon the people at large an officer whose duties had no relation to the senate as a legislative body, its acts would be scrutinized and judged in the same manner as that of any other public body or functionary, for the obvious reason that it was then acting, not in a legislative capacity, but as a body of electors, performing identically the same functions as any other body of electors. The limited privilege thus accorded to a body which is conceded to be a true legislative body does not apply to a body which claims to be a legislative body, but is not really so.

But this is not the case of a constitutional senate proceeding in an unconstitutional way, but the case of a body, not the senate, attempting to usurp the functions of the senate in electing a president thereof. Certainly such a body derives no protection in its usurpation either from the constitution or the laws. But it is urged with great earnestness that the question is a political, and not a judicial, question, the point really involved being the status of the two contending senates. In a certain sense, all questions which relate to government, whether they arise under the federal or the state constitution, are political. Thus, questions involving the title conferred upon an officer by an election or appointment, questions concerning the legality of the acts of municipal boards or other public bodies or officers, questions concerning the constitutionality of laws, are political questions, because they are concerned not so much with private right as with the constitution of the body politic, the binding force of laws, and the acts or title of its officers. The court deals with questions like these every day. On the other hand, the case of *Luther v. Borden*, 7 How. 1, which involved the question of which was the true government in Rhode Island, during the time of the Dorr Rebellion; the case of *Georgia v. Stanton*, 6

Wall. 50, which involved the status of the state of Georgia under the reconstruction acts; and the case of *Jones v. U. S.*, 11 Sup. Ct. 80, 137 U. S. 212, which involved the inquiry whether the jurisdiction of the United States extended over one of the guano islands,—are illustrations of a class of political questions which the court will not undertake to decide in opposition to the decision of the president, to whom, under the distribution of powers conferred by the federal constitution, the decision properly belongs.

I freely concede that, if the court were asked to do nothing but to make a declaration as to which senate was the true senate, it would be obliged to decline. But it by no means follows that because the court cannot pass directly upon the status of the legislature, or either of its branches, it cannot do so at all. It is the duty of the court to expound and enforce legislative acts, and, in so doing, it must necessarily determine whether what purport to be laws are, so in fact. If two bodies, sitting at the same time, both claim to be the legislature, and pass acts, the court must determine which of those bodies is the legislature, in order that it may ascertain whose acts it shall enforce. In doing so it necessarily reviews the claims of the contending bodies, and decides between them, i. e. decides the question which is called "political." So, too, if each legislature should, under our constitution, proceed to elect a comptroller and treasurer, the court would necessarily be compelled to decide which of the persons elected were really comptroller and treasurer. The question was presented in the Maine and Kansas cases, and in both the court assumed jurisdiction to decide. *Prince v. Skillin*, 71 Me. 367; *In re Gunn*, 32 Pac. 470. See, also, *Burnham v. Morrissey*, 14 Gray, 226. The cases in which the writ has gone against incumbents of the office of governor are directly in point. See *State v. Boyd*, (Neb.) 48 N. W. 789; *Id.*, 12 Sup. Ct. 375, 143 U. S. 135; *State v. Bulkeley*, (Conn.) 23 Atl. 183; *High, Extr. Rem.* § 634; *McCrary, Elect.* § 347; *Cooley, Const. Lim.* p. 786. The form in which the question arises—whether it be a suit brought to test the validity of the law, a *habeas corpus* proceeding, a proceeding to determine whether a comptroller or treasurer have been elected, or a *quo warranto* proceeding—can make no difference. If it arise in the regular course of a customary proceeding, that is sufficient. In each case the title of the senate is incidentally, not directly, questioned.

Thomas N. McCarter, for Maurice A. Rogers.

This is not the case of a writ filed ex officio by the attorney general without leave, but is a petition by a private relator for leave for the attorney general to file such information. The cases are different, and the

proceedings thereon differ. *Vanatta v. Railroad Co.*, 38 N. J. Law, 282; *State v. Tolan*, 38 N. J. Law, 195; *High, Extr. Rem.* § 605.

In one aspect of this case, to reach a complete determination of the questions affecting Mr. Rogers' claim of title, it would be incumbent on the court to decide whether the body which elected him as president was a lawful senate of the state of New Jersey, whether its members were duly elected and qualified, and whether, being so elected and qualified, they were lawfully organized, and, being organized, lawfully elected Mr. Rogers their president. This court has no power or jurisdiction to enter upon an inquiry which involves a determination of any of those questions. The proceedings which resulted in his election were of a purely legislative character, with which this court cannot interfere. The court cannot inquire into the election or qualification of the 11 members who compose the majority of the senate, and who elected Mr. Rogers as president. The following authorities establish rules and settle principles which absolutely control this part of the case: *State v. Governor*, 25 N. J. Law, 331; *Thompson v. Railroad Co.*, 22 N. J. Eq. 111; *Kendell v. City Council of Camden*, 47 N. J. Law, 64; *Pangborn v. Young*, 32 N. J. Law, 40, 41, also 35, 46; *State v. Frambach*, 47 N. J. Law, 85, (followed by Judge Depue in *Kearns v. Edwards*, [N. J. Sup.] 28 Atl. 723); *People v. Hall*, 80 N. Y. 117; *State v. Marlow*, 15 Ohio St. 114, 134; *Hiss v. Bartlett*, 3 Gray, 468; *People v. Bissell*, 19 Ill. 229; *McCrary, Elect.* § 593, also section 350; *State v. Berry*, (Ohio,) 24 N. E. 266; 6 Am. & Eng. Enc. Law, p. 387, tit. "Elections;" *State v. Tomlinson*, 20 Kan. 692; *Selleck v. Common Council*, 40 Conn. 359; *Kerr v. Trego*, 47 Pa. St. 295-298, (particularly paragraph 5); *Hartranft's Appeal*, 85 Pa. St. 433; *State v. Towns*, 8 Ga. 360; *State v. Jarrett*, 17 Md. 309; *Cooley, Const. Lim.* 131; *Mos. Mand.* 80.

The next question involved in the supposed proceeding would be the legality of the organization of the body and of the election by such body of Mr. Rogers. This, also, is a legislative question, which has been decided by the legislature itself, and from which decision there is no appeal to the supreme court. When we find a quorum of the senate meeting at the place and on the day required by the constitution and laws of the state, and perfecting an organization, and taking the oaths of office, and electing their presiding officer and other officers, and the house has recognized it and acted with it, it becomes, by those facts, a complete legislature, requiring for its legality the recognition of no other person, and subject to review by no other department of the government. Such recognition was within the designation of legislative or political acts over which, by well-settled principles, the court can have no jurisdiction. *Luther v. Borden*,

7 How. 1, 51, (opinion of Woodbury, J.); *Decatur v. Paulding*, 14 Pet. 515, 516; *Kendall v. U. S.*, 12 Pet. 524; *State v. Stanton*, 6 Wall. 50; *People v. Hatch*, 33 Ill. 9; *Com. v. Allen*, 70 Pa. St. 485; *Hartman's Appeal*, 35 Pa. St. 483, cited above; *Burham v. Morrissey*, 14 Gray, 226; *State v. Jarrett*, 17 Md. 309, cited *supra*. See, also, the dissenting opinion of Judge Allen in the late and well-known case of *In re Gunn*, (Kan.) 32 Pac. 948. In many of the cases above cited, the question arose as to the power of courts to deal with the election or qualification of members of city councils or other municipal bodies, and, wherever the courts in such cases did assume to exercise jurisdiction, it was upon the distinct ground that the rule recognized by the courts which made the houses of the legislatures or congress judges of the election and qualification of its own members, and which exempted them from supervision by the courts, did not extend to municipal bodies which were the creators of the legislature; and in every instance it was recognized that, in the case of the supreme legislature, courts would have no power to consider the question.

The claim of the prosecutors of this proceeding is that the senate of New Jersey is a continuous body, and has been from its first organization; that, although 6 go out every year, the remaining 15 continue to be the senate, and, when they meet at the constitutional time, they have power to pass upon the qualification of the new senators; that the new senators do not become members until the old members have admitted them. According to this contention, although the constitution says the senate shall be composed of one member from each county, yet, every year when the senate meets, it shall only be composed of one member from each county that has not elected a new one; and whether it will ever be composed of more or not will depend, not on the constitution, but on the will of the members from the 14 counties holding over. If such choose to admit the new ones, all well; if not, their judgment is final and conclusive.

The argument in support of the doctrine is founded on the supposed analogy between the senate of New Jersey and the senate of the United States. In this particular, the distinction between the two is made manifest by the quotation from the attorney general's opinion, from Mr. Cushing's treatise, in which, for the reasons given by Mr. Cushing, he concludes: "The consequence is that at the commencement of each congress there is a presiding officer of the senate, already in office, ready to proceed at once with his duties as such, and without any further authority from the senate. The secretary and other officers of this branch remain in office until their successors are chosen. There is no necessity, therefore, at the commencement of each congress, for the 'reorganization' of the senate of the United States, in the ordinary

sense of that term. In these points the senate of the United States bears a close analogy to the house of lords." This view expressed by Mr. Cushing is overthrown, so far as the senate of New Jersey is concerned, by the legislative provision that the senate and general assembly shall convene and hold their sessions in the state house at Trenton; and in the organization of each house the certified copies of the statements of determination shall be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the house, respectively, to which they shall have been so determined elected. No writer on this subject has ever claimed that the doctrine of a continuous body, as it is contended for in this case, applies to the house. The house organizes each year, or at each meeting *de novo*, and always has. But this eighty-fifth section provided for the organization of each house, treating both houses exactly alike, and implying that each house will require a new organization every year. The practice in our state from the beginning has always been to re-elect a president at every meeting of the senate, to re-elect the other officers, to adopt new rules, and to take proceedings, all of which would be unnecessary and illogical, if not illegal, if the doctrine of the attorney general were sound. The constitution says: "The senate shall be composed of one member from each county, and that each house shall be the judge of the election returns and qualifications of its own members, and the majority of which shall constitute a quorum to do business." What is the constitutional house? Is it a quorum of the 21, or is it a quorum of 14? There can be no stronger assertion of the right of these newly-elected members to participate in the organization of this senate than that found in McCrary on Elections, which book is quoted as an authority by the attorney general. In section 282 he says: "There can be no doubt but that a certificate of election regular in form, signed by the proper authority, constitutes prima facie evidence of title to the office, which can only be set aside by such proceedings for contesting the election as the law provides. The certificate, whether rightfully or wrongfully given, confers upon the person holding it the prima facie right to the office. If, however, the certificate contains upon its face a recital of facts, and these facts show affirmatively that the party holding it was not duly elected, it may be disregarded." Section 283. "The regular certificate of election, properly signed, is, as we have seen, to be taken as sufficient to authorize the person holding it to be sworn in. It is prima facie evidence of his election, and the only evidence thereof which can be considered in the first instance, and in the course of the organization of a legislative body."

There is enough in this case to justify the court in denying this writ, and refusing to interfere with the title of Mr. Rogers, without

exercising the jurisdiction to try his title, or the election and qualifications of those who elected him, and that is, that Mr. Rogers is the president de facto. The position occupied by him is one which has been recognized by the house, and questioned only by the relator in this case,—the governor of the state. If the court finds from the evidence that he was elected by the quorum of the senate, and that the house has acquiesced in such election, and treated his legislative body as its associate in the making of laws, the court can easily find that he occupies the position of president de facto, without passing upon any other question or trenching upon the jurisdiction of the senate; and the ascertainment of that result would necessarily lead to a denial of leave to file this information, because there cannot be the slightest pretense that Mr. Adrain is lawful president of any senate, or ever has been of the present senate. He does not even claim to be anything more than president pro tempore. It is not claimed for him that, by virtue of that appointment, he can exercise the incidental and statutory functions which ex officio belong to the president of the senate. As before stated, he has never been elected permanent president. He has never taken the oath of the office, and has never done anything but to aid in keeping up a purely temporary organization of a minority of the senate. That minority, failing to meet with the quorum and to participate in its action, can have no legislative power whatever. In the case of *People v. Hatch*, 33 Ill. 164, it is said: "The spontaneous meeting of all the members, except in the case stated, at a time not appointed by law, and without a previous vote for such purpose, would avail nothing. The executive, if he desired, could not recognize it as a legislative body, nor could it perform a legislative act, having any binding authority. This being so, it follows, a less number than a quorum cannot meet and hold a legislative session, no matter under what convictions they may assemble, or what rights they may suppose they can preserve by such meeting. It would be a proceeding not sanctioned by our constitution and laws."

The court, in the exercise of its discretion, ought not to allow the filing of this information. This is a discretionary power, and the case above referred to of *State v. Tolan*, 33 N. J. Law, 195, lays down rules regulating the exercise of such discretion. Taking that case as a guide, this leave ought to be denied on several grounds: (1) The application is not made in good faith. The records and evidence show that, as to Adrain, he has never assumed to act as president of an organized senate. He is merely president pro tempore. He has never been sworn into office. (2) The governor and attorney general are estopped from asking for this relief. This court, in the case of *State v. Tolan*, above cited, said: "In *Rex v. Dawes* and *Rex v. Marten*, 4 Burrows, 2122, which are known as the

'Winchelsea Cases,' Mr. Justice Yates says: 'In all questions of this kind one great distinction is always to be attended to,—that these are applications by common relators, who have no inherent rights of prosecution, but, by the statute of Queen Anne, are left to the discretion of the court whether they shall be permitted to prosecute or not. In the exercise of this discretion, the court is not merely to consider the validity or defect of the defendant's title, but the expediency of allowing or stopping the prosecution under all its circumstances.' In that case, Lord Mansfield, in the exercise of that discretionary power, viewed the facts of the case—First, in the light in which the relators, informing the court of the defect of title, appear from their behavior and conduct in relation to the subject-matter of their information previous to their making the application; secondly, in the light in which the application itself manifestly shows their motives, and the purpose which it is calculated to suit; and, thirdly, the consequences of granting the information,—and the application for leave was denied, although it appeared clear that the title of both the defendants was invalid. *King v. Parry*, 6 Adol. & E. 810; *Cole, Cr. Inf.* 165; *Grant, Corp.* 253; *Willc. Mun. Corp.* 476; *State v. Utter*, 14 N. J. Law, 84." (3) The public interest will not be served by continuing this prosecution. (4) The court is asked to become a party to a political conspiracy, having for its object the reversal of the popular will.

John P. Stockton, Atty. Gen., for relator.

I. There is no doubt of the jurisdiction of the supreme court in a case where there are two conflicting senates, each claiming a right to exercise legislative functions, to determine by which body legislative authority can be lawfully exercised. In the case of *Prince v. Skillin*, 71 Me. 367, the supreme court of Maine said: "When different bodies of men, each claiming to be and to exercise the functions of the legislative department of the state, appear, each asserting their titles to be regarded as the lawgivers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people, from whom they derive their power. There can be but one lawful legislature. The court must know for itself whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways it becomes essential that the court should forthwith ascertain and take judicial cognizance of the question, which is the true

legislature?" See, also, *McCrary, Elect.* p. 396; *Attorney General v. Barstow*, 4 Wis. 567; *In re Gunn*, 32 Pac. 470, 948, 50 Kan. 155.

II. In case of a division of a legislative body that ought to be a unit, that is the legal organization which has maintained the regular forms of organization, according to the laws and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them. The new members, though they be in the majority, must meet with the old at the time and place fixed by law, and proceed regularly with the organization of the body. They must join themselves to the existing body, for the members holding over, though they may be in the minority, and not sufficiently numerous to constitute a quorum, are yet the body, for the purpose of receiving the new members, and acting as the organs of reorganizing the body. Mr. McCrary, in his work on Elections, says: "It is undoubtedly true that, for failure to organize a supreme legislature, there is no remedy which courts of justice can administer; and this fact makes it all the more important that the rules which have been established to prevent such failure, and avoid the anarchy, confusion, and possible bloodshed which might ensue, should be adhered to." Section 593. This high authority also lays down the rule thus: "In case of a division of a legislative body that ought to be a unit, it becomes important to determine which is the legal and which the illegal assembly. In such a case the true test is this: That is the legal organization which has maintained the regular forms of organization, according to the laws and usages of the body, or, in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them." This rule affords the best possible test of legitimate organization. In all cases where part of a legislative body remains, and where the body is to be completed by the reception of new members, the old members who hold over remain as an organized nucleus, which receives the new members, when the whole body proceeds to the exercise of all its functions. The new members, though they be in the majority, must meet with the old at the time and place fixed by law, and proceed regularly with the organization of the body, and they cannot assemble elsewhere and organize the body. They must join themselves to the existing body, for the members holding over, though they may be in the minority, and not sufficiently numerous to constitute a quorum, are yet the body, for the purpose of receiving the new members and acting as the organs of reorganizing the body." *Id.* § 592.

The senate of New Jersey is a continuous body, with hold-over members, as is clearly demonstrated by reference to the constitution. Article 4, § 1, par. 1, provides that the legislative power shall be vested in a senate

and general assembly; and in paragraph 3 of the same section it is provided that "members of the senate and general assembly shall be elected yearly and every year, and on the first Tuesday after the first Monday in November; and the two houses shall meet separately on the second Tuesday in January next after the said day of election, at which time of meeting the legislative year shall commence; but the time of holding such election may be altered by the legislature." Section 2 provides that "the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties, respectively, for three years." Section 4, par. 1, provides that "each house shall direct writs of election for supplying vacancies, occasioned by death, resignation, or otherwise; but if vacancies occur during the recess of the legislature, the writs may be issued by the governor, under such regulations as may be prescribed by law." Paragraph 6 provides that "no bill or joint resolution shall pass unless there be a majority of all the members of each body personally present and agreeing thereto; and the yeas and nays of the members voting on such final passage shall be entered on the journal." Paragraph 12 of article 5 provides that, "in case of the death, resignation or removal from office of the governor, the powers, duties and emoluments of the office shall devolve upon the president of the senate, and in case of his death, resignation or removal, then upon the speaker of the house of assembly, for the time being." The provisions of the constitution of 1844, so far as they concern the creation, organization, and powers of the senate, are manifestly copied from the constitution of the United States. In fact, the words are precisely the same, except in such changes as are rendered necessary by reason of the difference in the terms for which senators are chosen, and the body of electors. Mr. Cushing, in his treatise, "Law and Practice of Legislative Assemblies," (section 272,) thus describes the status and continuancy of the senate of the United States: "The senate of the United States, though it constitutes a branch of each succeeding congress, and its sessions are held periodically, and correspond with those of the house of representatives, is a continuous and permanent body * * * One-third of the members of the senate go out of office every two years; hence, at the commencement of each congress, two-thirds of the senate, at least, which is more than a quorum, are then in office, duly qualified, and ready to proceed to business. The presiding officer of the senate being the vice president of the United States, by virtue of his office, and, in his absence, one of the senators, chosen temporarily, and the former retiring from the senate towards the end of each congress, in order that his place may be supplied by the choice of a temporary president, the consequence is that at the commencement of each

congress there is a presiding officer of the senate already in office, ready to proceed at once with his duties as such, and without any further authority from the senate. The secretary and other officers of this branch remain in office until their successors are chosen. There is no necessity, therefore, at the commencement of each congress, for a 'reorganization' of the senate of the United States, in the ordinary sense of that term." The continuity of both the senate of the United States and the senate of New Jersey is created by the mode of election and term of the members, and not by the manner of providing for a temporary presiding officer. But the state of New Jersey has endeavored to provide a permanent and continuing presiding officer for the senate. The New Jersey law and practice has been to provide for a presiding officer of the senate during the entire existence of the senate, not, as in the case of the United States senate, in advance, but contemporaneously, and with ample power to meet any contingency as it may arise. Under the constitution of 1776, the legislative council was invested with the power of choosing a vice president of council. The governor of the state was the constant president of the council, and, in his absence, the vice president acted in his place. To this vice president were given other powers, among which were those which belonged to the governor, in case of the absence of the governor. In other words, the vice president of the council stood in the same relation to the council that a president pro tempore does to the senate. In the United States senate the vice president of the United States is the president of the senate; the temporary president takes his place in his absence. In the New Jersey senate the governor was the constant president of the senate; in his absence the vice president of the council took his place as constant president of the council. This was the position of affairs in this regard at the time that the constitution of 1844 was considered and adopted. That constitution provided for an officer to be known as the "President of the Senate," who was to preside over the senate and to take the place of the governor in his absence or inability. This officer was not to be a mere presiding officer over the senate while it was in session. He was the continuing officer of the senate, whether that senate was in regular or special session or in recess. He is by law ex officio member of various state boards, which he attends when the senate is not in session. He signs deeds and conveys land as president of the senate, and ex officio one of the trustees of the school fund. While the constitution of 1844 did not say so, the legislature of 1845 took care to supply the omission by providing that "the powers, privileges, duties and remunerations granted to or imposed upon the vice president by law, at and immediately before the time when the present constitution of the state

took effect, shall hereafter be exercised, enjoyed and performed by the president of the senate, so far as the same are not inconsistent with the present constitution; and all such powers or duties heretofore exercised or performed by the president of the senate are hereby ratified and confirmed, and shall have the same force and effect as if exercised and performed after the passage of this act." This provision of a permanent officer, with great general and continuing powers, seems to be as ample a provision for the proper and timely organization of the senate as does that of the federal constitution and custom. This provision has been further fortified by a custom of 50 years' existence that each session of the senate shall be called to order by the secretary of the preceding session, which custom, in origin, duration, and efficacy, has all the force and effect possessed by the custom of the United States senate in providing for a president pro tempore to call the senate to order in the absence of the vice president. The constitution, in settling the succession, recognizes the president of the senate as always existing. It distinguishes between his existence and that of the speaker of the house. The expression is, "the president of the senate, and the speaker of the house, for the time being." It is therefore a question that does not admit of dispute that the senate of the United States is a continuous body, with organized hold-over members, and that that was a construction of the constitutional clause creating the senate before the constitution of New Jersey was framed, and that this was well known to the learned lawyers who were engaged in framing that constitution.

The rule is well settled that where a statute or a constitutional provision of doubtful import has been adopted in one state from the statutes or constitution of another state, after a practical construction has been given to the language by judicial decision, it will be presumed that the interpretation adopted in the state from which it is taken has been accepted, as well as the words. *Gray v. Askew*, 8 Ohio, 406; *Langdon v. Applegate*, 5 Ind. 327; *Rigg v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256; *Rutland v. Mendon*, 1 Pick. 154.

The debates that took place in the convention that formed the constitution of the United States and in the conventions of the states to which it was submitted for approval, the declarations of the United States senate by its ablest constitutional lawyers, the debates in the convention which framed the constitution of New Jersey, all support the rule as laid down by the commentators too firmly to be shaken by the opinions of partisans, promulgated in a time of popular excitement. The statute law of the state also recognizes the constitutional right of the senate to be the judge of the returns presented by members-elect, for it provides that the credentials shall be prima facie evi-

dence. Evidence for what purpose? Before what tribunal? The tribunal is fixed by the constitution. Its jurisdiction is made exclusive, and the statute law provides that the presentation of the credentials shall be prima facie evidence before that court. This, so far from attempting to take away any of the constitutional power of the tribunal, simply reasserts it. No legislative act could interfere with the constitutional power granted to each house. It is not a question committed to legislative action, because each house is given control over its own membership. By the ninety-sixth section of an act to regulate elections, approved April 17, 1846, it was provided "that the senate and general assembly shall convene and hold their sessions in the state house at Trenton; and in the organization of each house the certified copies of the statements of determination, made under the direction of the seventy-ninth section of this act, shall be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the houses, respectively, to which they shall have been so determined to be elected." It will be observed that it is not provided that a member shall be entitled to take his seat on the presentation of the certified copy of the statement of determination. The act could not do this, because the constitution provided that each body should be the judge of the returns of the members. So the act simply confines itself to making this certificate prima facie evidence,—evidence to be submitted to the tribunal which, by the constitution, could alone make the determination; evidence which, if uncontradicted, is sufficient to establish the right to the seat. The act, in connection with the constitutional provision, is an absolute recognition of the right of the senate to adjudge the question of membership. An act was passed on the 11th day of March, 1880, which provided "that whenever any candidate at any election in this state for member of the senate or member of the assembly shall have reason to believe that an error has been made in any board of election or of canvassers, in counting the vote or declaring the result of such election, whereby the result of such election has been changed, such candidate may apply to any justice of the supreme court, who is authorized to order and cause a recount of the votes, and if it shall appear, upon such recount of the ballots cast, that an error has been made sufficient to change the result of such election as declared by the board of canvassers, then such justice of the supreme court shall be empowered to revoke the certificate of election already issued, and order to be issued in its place another certificate to the person who shall be found by such recount to have received a majority of the votes cast." The courts have held, without dissent, that it was beyond the power of the legislature to make a justice of the supreme court a judge

of the election of a member of either house, because that power was committed by the constitution to each house, and not to the legislature; that the power given was simply to recount for the purpose of correcting a mistake, and changing the position of the parties, by revoking the certificate, and granting another, which action would prevent the certificate of the canvassers from being prima facie evidence, as provided by the former statute, and make the certificate of the justice prima facie evidence. The provision of both statutes, the ruling of the courts, and the custom of the body, all recognize the power of each body to render judgment on the presentation of the evidence. The constitution provides that the members of the legislature shall, before they enter on the duties of their respective offices, take and subscribe a specified oath or affirmation, and then adds that members-elect of the senate or general assembly are hereby empowered to administer to each other the said oath or affirmation. It will be remembered that in section 2 it is provided that as soon as the senate shall meet, after the first election to be held in pursuance of this constitution, they shall be divided, as equally as may be, into three classes, etc. It is manifest that the provision permitting the members-elect to take the oath before one another was a necessity in the first organization of the senate. It was a necessity, if they took an oath at all, that some person should be designated to administer that oath. It could not be the president of the senate, because there was no president. The body had to organize. In the senate it was only necessary for the purposes of the first organization, and therefore it appears that from the time the senate was organized as a continuous body to the present time the members-elect have been sworn in by the president pro tempore of the senate, in the presence of the senate. But, even if this were not so, how absurd it is to claim that the power to take an oath, given in one clause of the constitution to a member, constitutes that member the judge of the returns of a claimant, which power, by express provision, is vested solely and exclusively in the organized body, and is necessary to its independent existence.

It is claimed that under the clauses which provided that "members of the legislature shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation," * * * and "members-elect of the senate or general assembly are hereby empowered to administer to each other the said oath or affirmation," senators-elect could take such an oath or affirmation in private; then appear with an attested certificate, and insist upon taking their seats, without permitting the existing senate, even if they were all present, to pass upon their returns. Such a proposition can find no support, either from principle or authority. When it is determined to admit a

senator to his seat because his credentials are regular, he is then admitted to take the oath of office; but he does not become a member of the body by virtue of the oath of office, but by virtue of the judgment of the senators upon his credentials, and their determination that he is entitled to admission. While the official oath may be a necessary part of his induction into office, it does not make him a member of the body until his credentials have been approved by the body who are the constitutional judges.

The constitution provides that "each house shall be the judge of the elections, returns and qualifications of its own members," and the question has been raised as to when this judgment shall be exercised,—shall it be before or after the admission of the members upon these returns? An examination of the records discloses the fact that, as a common practice, the method has been to admit the applicant upon the returns, and then to afterwards examine into the manner. But, in every instance, it is apparent that the body claimed and retained to itself the power to act when and how it pleased. It is difficult to see how it could be otherwise. The power of a legislative body to judge of the election of its own members is an absolute power, controlled by no other tribunal. In this country it was adopted from the English system, and it was embodied in the unwritten constitution of Great Britain, as the result of one of the earliest of the conflicts between the house of commons, on the one hand, and the sovereign or the lords, or both, on the other, and has ever since been admitted to belong exclusively to the house itself, as "its ancient, natural, and undoubted privilege." It is a power held to be essential to the free election and independent existence of a legislative assembly, and it has been guaranteed to the legislative bodies of New Jersey by express constitutional provisions, which have been fully supported and protected by our courts and our executives. It is a power which has always been exercised by every legislative body in this state and country, at its own will, as to time or manner, without the possibility of successful opposition or review, save that of an appeal to the people.

The journal of the senate of 1846, the first continuing senate after the adoption of the present constitution, is in these words: "The president pro tempore having taken the chair, Mr. Hulme presented the credentials of Hon. Stephen R. Grover, elected a senator from the county of Essex, which were read and approved, and, the oath prescribed by law having been administered to Mr. Grover, he took his seat in the senate." This form is continued to the present day, and demonstrates that every admission of a member to the oath and his seat has been made upon, and only upon, the approval of the senate. That approval necessarily involves the power of the senate and its desire to judge of the matter at the time; and whether it happens, as

in the Ames and Revels case, in the United States senate, (Congressional Globe,) forty-first congress, that the admission was denied to the presenting members until the matter had been referred to and reported on by the judiciary committee; or in the Hooper-Torrey case, in the New Jersey senate, (1869,) where the protest was referred to a committee and the presenting member seated; or as at the session of 1887, when, after the temporary organization, the newly-elected senators were prevented for a month from presenting their certificates and their oaths, and taking their part in the proceedings,—the principle is the same; it is an exercise of a power carefully bestowed on each legislative body, and not reviewable by any other.

The record of the 48 senates between 1845 and 1894 show that no senator-elect was ever admitted to his seat as a senator, save after judgment upon and approval of his credentials by the senate, and the taking of the official oath by the senator-elect. In two instances; wherein a statement was made that the credentials had been forgotten, a resolution of the senate was required to waive the presentation of the credentials at that time, and to accept them as if they had been presented and judged. No instance can be found in the history of this state or of the federal government in which a senator-elect ever voted on the approval of his own certificate of election.

1845: The first meeting after the constitution (journal of 1845) they organized in the only way they could organize. There were no hold-over members. It was the first organization provided for by the constitution, and before any division of the senate had been made by law, as prescribed by the constitution; but the credentials of each member were presented, and, after their credentials had been presented, they were, respectively, sworn in by one of their fellow members. On Wednesday, January 14th, a resolution was offered to appoint a committee to report on the proper method of dividing the senate into three classes, as directed by the constitution. The announcement is simply that 18 of the 19 senators appeared in their seats. There was no call of the roll.

1846: In 1846 the journal records that 18 members appeared in their seats. Mr. Hulme moved that Alexander Wurts be appointed president of the senate pro tempore, which motion was unanimously agreed to. The president pro tempore having taken the chair, Mr. Hulme presented the credentials of Grover, etc. Mr. Crowell presented the credentials of Leupp. Mr. Paulson presented the credentials of George F. Fort, of Monmouth. In each case, they were read and approved. It is manifest that the record of the journal that the members-elect, in common with the hold-over senators, "appeared in their seats," is a mere statement of their appearance in the chamber, and not of their participation in the proceedings, be

cause it is always recorded that the credentials of each newly-elected member were presented and approved, that he was then admitted to take the oath, and that after this ceremony was performed he took his seat in the senate; and no vote is ever recorded to have been taken, at which any newly-elected member voted, until he is first recorded to have taken his seat in the senate, showing that no one of the senators took his seat as a senator, or voted on the credentials of any other senator-elect, until after his credentials had been approved, and he had taken the oath of office.

1847: In the journal of 1847, it mentions that 19 senators appeared in their seats. The senate was called to order by Mr. Dodd, the late secretary. Mr. Grover moved that Paulson be appointed president of the senate pro tempore. This was unanimously agreed to, no vote being taken. The president having taken the chair, Mr. Olden presented the credentials of the Hon. Adam Lee, elected senator from the county of Middlesex, which were read and approved; and, the oath prescribed by law having been administered to Mr. Lee by the president pro tempore, he took his seat in the senate. Mr. Leupp presented the credentials of Farlee, from Hunterdon, which were read and approved. And so it is recorded, in the case of each senator-elect, that the credentials were presented and approved, and that then the member took his seat. The words are, "The members of the senate, having all been sworn, proceeded to the election of a president of the senate for the present session;" showing that no newly-elected senator was permitted to vote or to take his seat as a member of the body until after the preliminary organization had taken place, and his credentials had been presented, approved, and he had been sworn in before the body. The journal, in every case, says that they appeared in their seats, but it is careful to note that their credentials were presented and approved; that they were sworn in; and that after that they took their seats in the senate, and proceeded to assist in the election of a president of the session in place of the president pro tempore, who had been elected by the hold-over members.

1848: Records precisely the same circumstances: First, stated that 18 members appeared in their seats, that a president pro tempore was unanimously elected, that the credentials of the new members named were presented, that they were acted upon and approved, that they were sworn in; and then comes the forceful statement that, "the members of the senate having all been sworn in, the senate proceeded to the election of a presiding officer for the session," which, of course, was the first action of the senate of the session. For the first four years after the first organization, ending with 1848, a record is made of the appearance in the senate chamber of the newly-elected members,

but no vote or other act is recorded, showing their participation in any of the business of the senate. On the contrary, although the expression is used that the newly-elected members, in common with the hold-over members, appeared in their seats, it is yet stated fully and explicitly that it was not until after the credentials of the newly-elected members had been presented to the senate, and approved by that body, and the oath administered to each one separately and in sequence, that that member took his seat as a member of the senate. It has been presented in evidence by the counsel for Mr. Rogers that, by the memory of Mr. Daniel Dodd, who was secretary of the senate in 1845, 1846, and 1847, the senators all appeared in their seats at the opening of those sessions, no distinction being made between the senators-elect and hold-over senators, and that all participated in the organization of the senate, or in the selection of a president pro tempore, for that is all that was done before the admission of the new senators. The memory of this witness of events nearly 50 years ago is that, a person being named as president pro tempore, the motion was submitted without contest to the members present; that the vote was taken *viva voce*, and always without a negative; and that he could not distinguish between the voices of the senators in *esse* and the senators in *posse*. This vague and inconclusive memory can hardly prevail against the contemporaneous record explicitly made in every instance, by the same person, that every member-elect was admitted to his seat only after presentation and judgment on his credentials, and his taking of the oath of office. An examination of the journals of the senates of 1845, 1846, 1847, and 1848 shows these indisputable facts: The senate of 1845 was made up of 19 senators, who, in obedience to the constitutional provision to that end, divided themselves into three classes, so that one class would go out at the end of that legislative year, the other at the end of the next legislative year, and the third at the end of the third legislative year. In the first class, which was to expire with the then current year, were: Ihrle, of Warren; Dodd, of Essex; Brown, of Somerset; Combs, of Monmouth; Smallwood, of Gloucester; Howell, of Camden; and Shinn, of Salem. In 1846, when the senate met in session, there were present and in office the senators of the preceding session, as follows: Garrison, of Passaic; Wurts, of Hunterdon; Crowell, of Middlesex; Hulme, of Burlington; Hamilton, of Sussex; Willets, of Cape May; Outwater, of Hudson; Johnes, of Morris; Paulson, of Bergen; Olden, of Mercer; Adams, of Atlantic; and Moore, of Cumberland. The senators-elect who presented themselves were: Grover, of Essex; Leupp, of Somerset; Fort, of Monmouth; Smallwood, of Gloucester; Stafford, of Camden; and Acton, of Salem. Mr. Mackey, of Warren, had been elected, but

did not present himself. The journal states that all of the senators and senators-elect "appeared in their seats;" and verbal testimony has been introduced to show that the senators-elect participated in the proceeding of electing a president pro tempore, and in passing upon the credentials. The journal is silent as to any part which the senators-elect took in the selection of a president pro tempore, as that act was performed without opposition, *viva voce*, except that Hulme, one of the hold-over senators, moved that Wurts, another of the hold-over senators, be appointed president pro tempore. In the presentation of the credentials, Hulme, a hold-over member, presented the credentials of Grover, a member-elect; Crowell, a hold-over senator, presented the credentials of Leupp, a member-elect; Paulison, a hold-over member, presented the credentials of Fort, a member-elect; Adams, a hold-over member, presented the credentials of Stafford, a member-elect; Willets, a hold-over member, presented the credentials of Smallwood, a member-elect; Moore, a hold-over member, presented the credentials of Acton, a member-elect. And then the minutes state: "The members of the senate, having been all sworn or affirmed, proceeded to the election of a president for the present session." In 1847 the members-elect were Ryerson, of Passaic; Farlee, of Hunterdon; Lee, of Middlesex; Richards, of Burlington; Nathan Smith, of Sussex; and James L. Smith, of Cape May. The journal states that these senators "appeared in their seats" with the existing hold-over members of the senate, but they show that Grover, a hold-over senator, moved that Paulison, a hold-over senator, be appointed president pro tempore, and that that motion was unanimously agreed to, *viva voce*. The president pro tempore having taken the chair, Olden, a hold-over member, presented the credentials of Lee, senator-elect; Leupp, a hold-over member, presented the credentials of Farlee, a senator-elect; Grover, a hold-over senator, presented the credentials of Garrison, a senator-elect; Smallwood, a hold-over senator, presented the credentials of Richards, a senator-elect. Fort, a hold-over senator, presented the credentials of Mackey, who then presented his credentials for adjudication and approval, although elected for the previous year; Acton, a hold-over member, presented the credentials of James L. Smith, a member-elect; Adams, a hold-over member, presented the credentials of Nathan Smith, a member-elect; Outwater, a hold-over member, presented the credentials of Ryerson, a member-elect. These credentials were separately read and separately approved, and the member admitted to his seat in turn; and "the members of the senate, having been all sworn, proceeded to the election of a president of the senate for the present session." In 1848 the members-elect were Tonnele, of Hudson; Marsh, of Morris; Haring, of Bergen; Olden, of Mercer; Walk-

er, of Atlantic; and Garrison, of Cumberland. As before, the journal states that these members, in common with the existing senators, "appeared in their seats," and that Richards, a hold-over senator, moved that Fort, a hold-over senator, be appointed president pro tempore, which being done, that Lee, a hold-over senator, presented the credentials of Olden, a member-elect. Richards, a hold-over senator, presented the credentials of Tonnele, a senator-elect; J. L. Smith, a hold-over senator, presented the credentials of Garrison, a senator-elect; Acton, a hold-over senator, presented the credentials of Marsh, a senator-elect; Nathan Smith, a hold-over senator, presented the credentials of Haring, a senator-elect; Stafford, a hold-over senator, presented the credentials of Walker, a senator-elect. These credentials were separately read and separately approved, and the oath was administered to each in turn; and as each qualified himself by his oath, in the presence of the senate, after having presented his credentials and having them approved, he took his seat, and "the members of the senate present, having been all sworn, proceeded to the election of a president of the senate for the present session." It is a notable fact that of all the senators-elect who are recorded as "appearing in their seats," before they were admitted to their seats, not one was ever selected for president pro tempore, nor ever nominated a senator for the temporary presidency, nor ever presented the credentials of a senator-elect, nor ever performed any recordable act in the organization. The grouping of the senators-elect with the existing senators was evidently a blunder by the secretary, committed through the then seeming unimportance of the form of the record, which he has since endeavored to fortify by vague recollections, and which is exposed by the fact that in 1849, when Mr. Dodd had ceased to be the secretary of the senate, and his place had been taken by Philip J. Grey, of Camden, the journal ceased showing that the senators-elect "appeared in their seats," and were subsequently "admitted to their seats," after the important intermediary processes of the presentation of their credentials, the judgment and approval of the senate upon them, and the taking of their official oath. The precedent set by Mr. Grey, in 1849, in recording the participation in the formation of the senate of only those who did in fact participate, has been followed to the present day.

1849: In 1849 there were but 12 members who are recorded as having appeared in their seats. The secretary called the senate to order, and a president pro tempore was unanimously elected. The credentials were presented one after the other, and in each instance approved, and then comes this record: "The newly-elected members having been all sworn or affirmed, the senate proceeded to the choice of a president for the present session."

1850: In 1850 it is recorded that 10 members appeared in their seats. The journal states that a president pro tempore was unanimously elected, and then the credentials of eight senators were presented in succession, and, being read and approved, they took their seats in the senate, and proceeded to the election of a president for the session.

1851: The county of Ocean was admitted, and the number of the senators increased to 20. The minutes report the presence of 18 senators. It is recorded that the secretary of the senate called it to order, and that Asa Whitehead was elected president pro tempore. The credentials of seven senators were separately presented, read, and approved, and the oath prescribed to each in turn. The minutes say that, "the newly-elected members of the senate having been all sworn or affirmed, the senate proceeded to the choice of a president for the present session, whereupon Silas D. Capfield was unanimously elected."

1852: The minutes record the presence of 12 senators; the election of Abraham Zabriskie as president pro tempore; the presentation of the credentials of 8 senators-elect, the approval of those credentials by the senate, as made up. There were 20 senators in this year, and it is recorded, in reference to each of the 8 new senators, that after his credentials were approved, and he had taken the oath, he took his seat.

1853: The senate then consisting of 20 members; 14 are recorded as appearing in their seats. Mr. Allen, the late secretary, called it to order. Mr. Sitgreaves moved that the Honorable Reuben Fithian be appointed president pro tempore, which was unanimously agreed to. The president pro tempore having taken the chair, Mr. Alexander presented the credentials of Mr. Bonnell, of Sussex, which are reported to have been read and approved; and, the oath prescribed by law having been duly administered to Mr. Bonnell by the president pro tempore, he took his seat in the senate. Mr. Zabriskie presented the credentials of the Honorable Joseph W. Allen, a senator from the county of Burlington, which were read and approved; and, the oath prescribed by law having been administered, he took his seat in the senate. The same record is made as to five newly-elected senators, and the statement follows that the newly-elected members of the senate who were present, having all been sworn, proceeded to the choice of a president for the present session.

1854: This being the time and place appointed by the constitution for the meeting of the legislature, the following members of the senate—13—appeared in their seats: The senate was called to order by Mr. Allen, the late secretary, and Mr. Conger was appointed president pro tempore. The credentials of James Cowperthwaite, of Ocean, were presented, read, and approved; and, the affirmation prescribed by law having been duly ad-

ministered to Mr. Cowperthwaite by the president pro tempore, he took his seat in the senate. Mr. Sitgreaves presented the credentials of the Honorable William C. Alexander, from the county of Mercer, which were read and approved; and, the oath prescribed by law having been duly administered to Mr. Alexander by the president pro tempore, he took his seat in the senate. Seven senators presented their credentials in succession, which were, as theretofore, separately read and separately approved; and it is recorded in each individual case that thereupon the member was admitted to take the oath of office, and his seat in the senate. Then comes the minute: "The newly-elected members of the senate appearing, and having all been sworn, the senate proceeded to the choice of a president for the present session." It will be observed that the record is always that the senate was called to order by the late secretary, so that, although the presidents were elected for each session, the senate that was called to order was the continuous body of hold-over members, who, because they had no other presiding officer, chose one pro tempore, in order that the credentials of the newly-elected members might be presented, and that they could then take part in the election of a permanent president of the body.

1855: Thirteen senators present. Seven credentials presented. Usual form of approval and admission to seat.

1856: Thirteen senators present. Six presented credentials. Usual form of approval and admission to seats.

1857: Eleven senators present. Seven presented credentials. Usual form of approval and admission to seat.

1858: Twelve senators present. Union county admitted, making the whole number 21. Eight senators admitted.

1859: Fifteen senators present. Six members admitted in the usual form, the note this year being, "The newly-elected members of the senate appearing, all having been duly sworn, the senate proceeded to the choice of a president for the ensuing session."

1860: Fourteen senators present. Seven members admitted.

1861: Thirteen members appeared in their seats. Eight members admitted.

1862: Fourteen senators appeared. Seven members admitted in the usual form. The election of a president involved a protracted contest, in the course of which the president pro tempore is recorded as deciding that the rules of the last session continued in force until others were adopted.

1863: Thirteen senators present. Seven members admitted. The credentials are reported as being read and approved, and the members duly sworn.

1864: Twelve members present. Six members admitted.

1865: Thirteen senators present. Six members admitted in usual form.

1866: Thirteen members present. Eight members admitted.

1867: Eleven present. Seven admitted to membership in usual form.

1868: Fourteen senators present. Six admitted to membership in usual form.

1869: Fourteen members present. Six admitted to membership in usual form. Subsequently Mr. Bettle presented the credentials of the Honorable John Torrey, Jr., senator from the county of Ocean. On motion of Mr. Robbins, the credentials of Hon. John Torrey, Jr., and petition accompanying it, were referred to a committee on elections. Upon motion of the same senator, the senator was allowed to take the oath prescribed by law, which was duly administered to him by the president pro tempore, and he then took his seat in the senate.

1870: Thirteen members present. Eight admitted to membership in the usual form.

1871: Fourteen senators present. Seven admitted to membership in the usual form.

1872: Thirteen members present. Seven admitted in the usual form. The Honorable John G. W. Havens, a senator from the county of Ocean, appeared without his credentials. Mr. Taylor moved that he be permitted to take the oath of office, and his seat in the senate, without them. The motion was agreed to, and, the oath prescribed by law having been duly administered, he took his seat.

1873: Thirteen members present. Eight admitted in usual form.

1874: Fifteen senators present. Five senators admitted. Subsequently, the credentials of John Hopper, as a senator from Passaic county, were presented. At the same time, a petition from Adam Carr, giving notice of his intention to contest. The notice was read and laid on the table. The credentials of the Honorable John Hopper, senator-elect from the county of Passaic, were then read and approved, and, the oath prescribed by law having been duly administered to Mr. Hopper by the president pro tempore, he took his seat in the senate.

1875: Fourteen members present. Six admitted. Mr. Taylor moved that in consequence of the Honorable J. Howard Willets, senator-elect from the county of Cumberland, not having his credentials present, he be permitted to take the oath of office, and file his credentials with the secretary at his earliest convenience. The oath prescribed by law having been duly administered to Mr. Willets by the president pro tempore, he took his seat in the senate.

1876: Eleven senators recorded as present. Eight admitted in usual form.

1877: It is recorded that the roll was called by the secretary, and 14 senators appeared and answered to the call. These were the 14 hold-over senators, on which Mr. Moore moved that the Honorable William J. Sewell be appointed president pro tempore, which motion was agreed to, and Senators Dayton

and Magie conducted the president pro tempore to the chair, on which the credentials of the new members were presented and approved, and the senators-elect were sworn in, and took their seats.

1878: The roll was called, and 14, being the hold-over senators, answered to the call. William J. Sewell was appointed president pro tempore, and the credentials of Hon. John J. Gardner, senator-elect from the county of Atlantic, were presented by Mr. Magie. They were read and approved, and, the oath prescribed by law having been duly administered to Mr. Gardner by the president pro tempore, he took his seat in the senate; and the same record is made in the case of all the newly-elected members. The senate then proceeded to the election of a president for the ensuing year.

1879: The roll was called, and 13 hold-over senators answered to the call. Mr. Hobart moved that the Honorable George C. Ludlow be elected president pro tempore, which motion was agreed to, and Senators Hobart and Ward conducted the president pro tempore to the chair. Mr. Hobart presented the credentials of the Honorable John F. Bodine, senator-elect from the county of Gloucester. The credentials of six other members were presented, and it is recorded in each case that they were read and approved, and, the oath prescribed by law having been duly administered, the member took his seat in the senate. Then, under the direction of the president, as heretofore, the secretary called the senate, and they proceeded to the election of a president for the ensuing year.

1880: The roll was called by the secretary, and 15 senators answered to their names. Mr. Vall moved that the Honorable Rudolph F. Rabe be appointed president pro tempore, which was agreed to, and Senators Vall and Beekman conducted the president pro tempore to the chair. The credentials of six newly-elected senators were presented, read, and approved, and the oath prescribed by law administered. Under the direction of the president pro tempore, the secretary then called the senate, when 21 senators answered the call. The senate then proceeded to the election of a president for the ensuing year.

1881: The roll was called, and 14 senators answered to their names. After the election of Benjamin Vall as president pro tempore, the new members (seven in number) had their credentials presented and approved, and took the oath prescribed.

1882: The roll was called, and 13 senators answered to their names. Hon. James C. Youngblood was appointed president pro tempore on motion of Mr. Gardner, and the credentials of newly-elected members were presented in the usual form, and approved, and the oath taken as prescribed by law, and a record made of the same in each case.

1883: The roll was called, and 15 hold-over members answered to their names. A president pro tempore was elected by the hold-

over senate, and the credentials of the new members were presented and approved, and the oath administered as recorded in the previous years.

1884: Twelve senators answered to the call. These 12 senators elected a president pro tempore, and the credentials of 7 newly-elected members were presented, approved, and the oath administered, and the member allowed to take his seat as heretofore.

1885: The roll was called, and 13 hold-over members answered to their names. They elected a president pro tempore. The credentials of eight members were presented, and the usual record is made of their approval, and the member taking his seat.

1886: The roll was called, 13 hold-over senators answering to their names. A president pro tempore was elected, and the credentials of seven newly-elected senators were presented, and took the usual course.

1887: The roll was called by the secretary, and 13 senators appeared, and answered the call. Mr. Griggs offered the following: "Resolved, that the organization of the senate be postponed until to-morrow, at the hour of three p. m., and that we do now adjourn until that day and hour;" which was agreed to, and the senate thereupon adjourned. At 3 o'clock on the next day, under the direction of the president, the secretary called the senate, when 14 hold-over senators appeared, and answered to their names. Mr. Griggs then offered the following: "Resolved, that the organization of the senate be ordered postponed until to-morrow, at the hour of three o'clock p. m., and that we do now adjourn until that day and hour;" which was agreed to by the following vote: In the affirmative are recorded 9; in the negative are recorded 5. The senate thereupon adjourned. On the next day 8 senators appeared, and answered to their names, and passed a similar resolution. On the next day, under the direction of the president, the secretary called the senate, when three senators appeared, and Mr. Griggs offered the same resolution, which is recorded as agreed to; and the senate thereupon adjourned. These proceedings were continued from time to time until Thursday, February 1st, when it is recorded that, under the direction of the president, the secretary called the roll, and 13 senators answered the call, and Mr. Griggs moved that the Honorable John A. McBride be appointed president pro tempore. The proceedings then record the presentation of the credentials of 7 newly-elected senators. It will be observed that in this case the newly-elected senators were not permitted to take any part in the proceedings, or to present their credentials, until February 1st, although the senate, under the constitution, commenced its sessions on January 11th, and adjourned from day to day by the adoption of the resolutions offered by Senator Griggs.

1888: In 1888 the roll call was answered by 13 senators, who elected Senator Chase presi-

dent pro tempore, on which the credentials of 7 newly-elected senators were presented in succession, read, and approved, and the oath prescribed by law administered by the president pro tempore; and it is recorded in each case that after taking the oath the member took his seat in the senate.

1889: Fourteen members answered the call. Hon. John J. Gardner was elected president pro tempore. The credentials of six newly-elected members were presented, and the usual record made of their approval.

1890: Fourteen senators answered the call. A president pro tempore was elected. Mr. Smith presented the credentials of George T. Cranmer, which were read and approved, and, the oath prescribed by law having been administered, Mr. Cranmer took his seat in the senate. Mr. Pfeiffer presented the credentials of Hon. George T. Werts, senator-elect from the county of Morris. They were read and approved, and, the oath prescribed by law being duly administered, Mr. Werts took his seat in the senate. Mr. Pfeiffer presented the credentials of John J. Gardner, senator-elect from the county of Atlantic, and the same proceedings are recorded as before. Mr. Nevius presented the credentials of Hon. Edward F. McDonald, senator-elect from the county of Hudson, which were read. Mr. Roe presented a protest, which was read, and referred to a committee on elections, when appointed. The oath prescribed by law having been duly administered to Mr. McDonald by the president pro tempore, he took his seat in the senate. Mr. Smith presented the credentials of the Honorable Henry D. Winton, senator-elect from the county of Bergen, which were read and approved; and, the oath prescribed by law having been duly administered to Mr. Winton by the president pro tempore, he took his seat in the senate. Mr. Nevius presented the credentials of the Honorable Seaman R. Fowler, senator-elect from the county of Cumberland, which were read and approved; and, the oath prescribed by law having been duly administered, he took his seat in the senate. Mr. Werts presented the credentials of John D. Rue, senator-elect from the county of Mercer, which were read and approved; and, the oath prescribed by law having been duly administered to Mr. Rue by the president pro tempore, he took his seat in the senate. They then proceeded to the election of a president.

1891: It is recorded that the roll was called by the secretary, and 12 senators answered to their names. On motion of Mr. Werts, Hon. George T. Cranmer was appointed president pro tempore. The credentials of eight senators were presented, and acted upon in the usual way, with this exception: On the presentation by Senator Werts of the credentials of the Honorable William J. Keys, senator-elect from the county of Somerset, Mr. Gardner presented a protest, which was referred to a committee

on elections, when appointed. It is recorded that, the oath prescribed by law having been duly administered to Mr. Keys by the president pro tempore, he took his seat in the senate.

1892: The roll was called by the secretary, and 13 senators answered to their names. Mr. Werts moved that the Honorable Maurice A. Rogers be appointed president pro tempore, and the secretary appointed Senators Marsh and Werts to conduct the president pro tempore to the chair. The credentials of the newly-elected members (seven in number) were then presented, and acted upon in the usual way, except that when Mr. Barrett presented the credentials of the Honorable Robert S. Hudspeth, senator-elect from the county of Hudson, they were read, upon which Mr. Cranmer presented a protest, which was referred to the committee on elections, when appointed; and, the oath prescribed by law having been duly administered to Mr. Hudspeth by the president pro tempore, he took his seat in the senate.

It is urged that the rule which requires the judgment of the existing body on the returns of its members is unreasonable; that members-elect may be deprived of their seats, and of taking proper part in the organization, by the unjust action of those whom the constitution has made the judges. This is an argument from inconvenience, which goes a very little distance in the consideration of a constitutional question. The very existence of the government depends upon the theory that those in high official position will perform the duty enjoined by the constitution, and to the performance of which they are obligated. There is an argument from inconvenience against almost every provision of the constitution. By way of example: Who can compel the states to elect United States senators? And yet the failure would stop the wheels of the federal government. Who can compel the executive of a state to deliver up fugitives from justice? And yet it is especially required by the United States constitution. Who can compel a legislature to go into joint meeting to elect state officers? The senate, in this state, has often refused to go into joint meeting for the election of important officials. Who can compel the supreme court to action other than that which accords with its own judgment? There is usually an inconvenience on both sides of these propositions, and in this case the constitution has adopted the provision which was considered the least objectionable. If the constitution had provided that without the examination of any certificates, or the judgment of the body, one claiming to have been elected a member of the body could take his seat and act with the body, the legislature, with all its great inherent powers, would be destroyed by intruders. And if it be true, as insisted, that newly-elected members need not show their credentials, or unite themselves to an organized existing body,

and that the courts have no jurisdiction in the premises, the result would be anarchy and civil war, instead of regulated constitutional liberty and civil government.

It is also insisted that it is a majority of the senate, and a larger number than 10, and, for this reason, that the Rogers senate should be recognized as the legal senate. This proposition is founded on the theory that it is the action of individuals which makes laws, and elects United States senators and other prominent state officers. It is not a matter of any importance whatever, so far as the question of organization is concerned, how many members joined the Rogers senate. Unless organized according to law and constitutional provisions, if every member of both bodies were assembled, they would be nothing but a mob, and incapable of making laws, or electing United States senators or state officers. It is impossible to overestimate the importance of observing the distinction between the members of the body individually, and the body itself, as an organized political body. All the members of any body may be assembled together; but, if they are not properly organized, they can do no legislative act. This is not a matter of form, but it is a matter of substance, because it is a matter of constitutional law. The constitution of the state prescribes what the legislature shall be; and, unless it is organized as directed by the constitution, it is powerless. The importance of this principle is not only dwelt upon by all the commentators on the constitution, but is illustrated in the debates in the senate of the United States, in considering the validity of the election of members to that body. One of the most valuable of these cases is Harlan's Case, because it was debated by the ablest constitutional lawyers at that time in the senate, and because it involved no party question. The legislature of Iowa was in session, and it was stated in the debate that, if Mr. Harlan were unseated, he would be immediately returned, both of which circumstances subsequently occurred.

In Reply on Question of Jurisdiction.

It has been contended on behalf of one of the defendants that the court has not jurisdiction in this case, for the following reasons:

First. Because the question submitted is political, and not judicial, and must therefore be decided by the executive, and not by the courts.

Let us see just what the question to be decided is? Stripped of all subsidiary considerations, it is simply this: Which of these two senates is organized according to the constitution? Manifestly, they cannot both be so organized, and that one only can be which has complied with the constitutional forms and requirements. To decide this question, there must be determined—First, what the constitution requires; and, second,

which body, if either, has conformed to such requirements. What is there in these inquiries that is not judicial? Political questions may be raised in a state; but they can only be raised by the supreme power, not by one of its creatures. The people have the right to set up one government, and pull down another; and they have the power to destroy constitutions, as well as to make them. Whether or not they have done the latter in a given case is a political question, and the courts cannot deal with it, because it arises, not under the constitution, but outside and above it. Such was the case in Rhode Island at the time of the Dorr Rebellion.

Second. It has also been argued that the president of the senate is the mere servant and mouthpiece of the senate, and not, therefore, a public substantive officer.

The argument is based upon the character of the office of speaker of the house of commons, which bears only a slight analogy to that of president of the senate of New Jersey. The office is substantive and independent, as well as public, because it was created by the constitution, and will exist without the will of the senate, so long as the constitution remains unaltered.

Third. It has also been contended that, as the senate has the right to choose its own officers, it may elect any one to the office of president of the senate whom it chooses, and the court cannot inquire into his title without interfering with the legislative department of the government.

The senate has the undoubted right to choose its own officers, but it does not follow that it has the right to elect a person to the office of president of the senate who is constitutionally disqualified from holding that position. If he were a mere servant of the senate, its act in electing him, as already conceded, could not be reviewed elsewhere; but, surely, power must exist in the judicial department of the government to pass upon the constitutional qualifications of a person whom the senate puts into the chair of the executive of the state, or makes a member of the state board of education, and to oust him from such position if he be found constitutionally disqualified therefor. But with that question we have nothing to do in this case. We are not here seeking to review the act of the senate of New Jersey in electing either of these respondents. The question here is, has either of them been elected by the true senate? Both, of course, have not been; and, if either of them has been he has an unquestionable title to the office which he claims. There is really but one question in this case. It is simply a construction of those provisions of the constitution which created the senate of New Jersey.

BEASLEY, C. J. This case has been placed before the court on a rule to show cause why an information in the nature of a

quo warranta should not be issued against these respondents, each of whom claims, and to some extent has exercised, the office of president of the senate of New Jersey. Under this procedure, evidence has been taken, and it thus appears that the 21 senators of the state have divided themselves into two bodies; that is to say, 9 of the old members, who were styled in the argument "hold-over members," constitute one of such bodies, and 4 hold-over members, with 7 newly-chosen senators, constitute the other body. Subsequently, a newly-chosen senator joined himself to the body made up of hold-over senators, making that body to consist of 10 senators; the other consists, as just shown, of 11. The former of these bodies will be referred to, in order to avoid periphrase, as the "Adrain Senate," the latter as the "Rogers Senate." The Adrain (so called) senate, has been recognized officially by the governor, and remains in session. The Rogers (so called) senate, is recognized officially by the house of assembly, but has been refused official recognition by the executive. It has passed various laws, and, with the co-operation of the lower house, has appointed a treasurer and comptroller of this state. The above is a description of the general aspect of the case, and it will be sufficient for immediate purposes.

The object of the present course of law is to establish by a judicial judgment which of these contestants is the genuine, and which the spurious, state senate, for they cannot both be genuine. But, before proceeding to dispose of that important question, the counsel of Mr. Rogers' senate have interposed a preliminary one; that is, whether this court can take cognizance of such a litigation. It is inferred that the argument on this subject, denying the existence of the judicial power in this position, has not been impressive. In my judgment, it is founded in all its parts on a sheer *petitio principii*, as on a denial of a legal principle so entirely established as not to be debatable; for it proceeds on the assumption that the senate it advocates is a constitutional senate, in that the judgment of a majority of the senators elected with respect to this position, whether or not they have organized in conformity to, or in violation of, the constitution of the state, is conclusive and final. It will be observed that the contention of the applicants for this writ is that the Rogers' senate has no legal existence, inasmuch as it was organized in a manner contrary to this fundamental law; and the proposition, therefore, would seem very evident that, as no power is vested by the constitution in this majority of senators to construe such law in this respect, the power to expound and enforce it is lodged in the ordinary legal tribunals. Referring to this judicial prerogative, Mr. Cooley, in his work on *Constitutional Limitations*, (page 46,) says: "This right and power of the court to do this are so plain, and the duty

is so generally, we may almost say universally, conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities on this subject." It was certainly, therefore, the unexpected that happened when learned counsel, in reply to the contention that the senatorial organization in question was inconsistent with constitutional prescriptions, assumed the position that this court could not entertain jurisdiction in the case, as the interpretation of the constitution was a matter, in the language of the brief before us, of a purely legislative character. It is believed that no decision has been made for a century past that does not antagonize such a proposition.

It will be understood that, in the vindication of what is esteemed to be the undeniable prerogative of this court, there is not the slightest suggestion of the existence of a judicial capacity to control the legislative authority when exercised within its appropriate sphere. If the question here prescribed had been whether this senatorial body had been organized in the accustomed mode, or in open violation of its own practice and rules, a totally different subject of inquiry would have been sub judice; and it may well be that the decision of such senatorial body itself would have been received as conclusive, and entirely beyond the power of this tribunal to review. This court does not claim the slightest legal faculty to supervise or interfere with such transaction. All that is asserted is that when the inquiry is whether the legislature, or any state body or officer, has violated the regulations of the constitution, it is entirely plain that the decision of that subject must rest exclusively with the judicial department of the government. Nor can we for a moment forget that, in entering upon the inquiry that is now imposed upon us as a duty, we have to do with a subject of great importance and delicacy, and that, before the respective powers of this court can be exerted to interfere with the action of a co-ordinate branch of the state government, we must be as certain as care and diligence can make us that the foundation on which we place ourselves is sure and stable. That this court has the legal right to entertain jurisdiction in this case, displayed by this record, we have no doubt; and we are further of opinion that it is scarcely possible to conceive of any crisis in public affairs that would more imperatively than the present one call for the intervention of such judicial authority.

With respect to the further contention that the presidency of the senate does not belong to that class of officers whose legality can be put to the test by force of a proceeding in the nature of a quo warranto, our conclusion is that such contention cannot prevail. The language of the statute of this state, being broader than its English prototype, describes, in terms of the utmost generality, the scope

of this remedy; for it declares that it shall be applicable to every case in which "any person or persons shall usurp, intrude into, or unlawfully hold or execute, any office or franchise within this state." Consequently, it does not seem deniable that all offices, as well those derived from the legislature as those derived from other sources, are comprehended by this definition; and the consequence must be, therefore, that the statutory provision just cited, justifies the present proceeding unless it can be shown that such action would be inconsistent with the constitution or privileges of the senate, as an independent department of the government. And, indeed, this was one of the positions of counsel on the argument before us; but we think it is obvious that whatever seeming force an argument has is derived from the *petitio principii* before alluded to, for it assumes as its basis that the court is taking proceedings against the officer of a genuine senate. But this assumption is unfounded, as the process that we are now asked to order is to be directed against the appointee of a senate that, it is alleged, is spurious. It seems to be plain that such action cannot be an infringement of the prerogatives of the real senate of this state; and, in disposing of this part of the case, no stress is laid on the fact that each of the respondents, if legally in power, is entitled to hold *ex officio* certain high offices, by virtue of the constitution and the laws of this state, for it seems to be well to place the right of the court to authorize the use of the present procedure on the distinct ground that it is the appropriate and legal remedy whenever it shall be made to appear that any person is holding himself out as a public officer by senatorial appointment, when, in point of fact, such appointing body has no existence, in view of constitutional provisions and regulations. As at present advised, I do not perceive how in any case there can be any judicial interference with the actions, appointments, or proceedings of a true senate of the state, unless the same shall be shown to be out of harmony with the constitution itself. We wish to be understood that we do not intend to, and do not decide anything further than the case now before us. When, by judicial action, it becomes necessary to demark the constitutional lines which separate the jurisdiction and powers of the several independent departments of government, each from the others, we are deeply conscious that in such momentous matters we should be always on our guard, and that our judgment with respect to them should be invariably in the concrete; for experience has demonstrated that theorizing and speculation on such occasions are dangerous in the extreme, and are inventions that have severally returned "to plague the inventor."

Having thus briefly disposed of the preliminary question in favor of the jurisdiction of this court, it becomes necessary to pro-

ceed to an examination of the legal aspect of the case, as presented in the issue upon the record. That issue has been framed in this wise: In order to expedite the determination of the case, counsel of these litigants agreed that, if cognizance should be taken by the court of their controversy, it should be assumed that an information had been filed, and that each of the contending parties had interposed his answer, stating the facts which appear in the evidence and which are not in dispute, by force of which he seeks to vindicate his title, and that reciprocal demurrers should then be put in, thus exhibiting to the court the litigated points to be determined. The facts contained in the answers alluded to are somewhat voluminous, and will be found contained in the statement which prefaces this opinion. Upon looking into the presentation of the facts thus indicated, it will be at once apparent that the central ground of controversy between these rival organizations is with respect to the right of the Adrain senate, or what is called the "Hold-Over Senate," to dominate on the occasion of the introduction of newly-elected members into the senate. In the very able and carefully considered briefs of the attorney general and his associates, this dominance is claimed to exist on the ground that, by the proper construction of the constitution of the state, the state senate is a continuous body,—that is, that it has perpetual life,—and that, consequently, a member elected to one of its seats cannot enter it until his title has been passed upon by the ever-existing body. It has not and cannot be pretended that this doctrine has its root in the actual expressions of the constitution, and it, therefore, is admittedly the creature of the constitution. The only provisions of the constitution pertinent to this subject are the following: Article 4, § 1, provides that the legislative power shall be vested in a senate and general assembly; and in paragraph 3 of the same section it is provided that "members of the senate and general assembly shall be elected yearly and every year, on the first Tuesday after the first Monday in November; and the two houses shall meet separately on the second Tuesday of January next after the said day of election, at which time of meeting the legislative year shall commence," etc. Section 2 provides that the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties, respectively, for three years. By the second paragraph of section 2 of article 4 it is provided "that as soon as the senate shall meet after the first election to be held in pursuance of this constitution, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the first year; of the second class at the expiration of the second year; and of the third class at the expiration of the third

year, so that one class may be elected every year," etc. It is apparent that these recitals fully justify the remark first made,—that the constitution does not attempt to define the life of the senate; yet, notwithstanding such silence, the attorney general and the counsel of President Adrain raise the contention that the state senate, like the senate of the United States, has a continuous existence; that there can be no such things as an old senate and a new senate; and that there has been an unbroken continuity of existence of this body from its birth to this house. And, as a corollary of this doctrine, it is further insisted that this self-sustaining body is the sole judge of the right of newly-elected senators, when they apply for admission to its seats, and that it can, on such occasions, receive or reject them at its will. In the application of this theory to this case, it was claimed that the body presided over by Mr. Adrain had the right to require that the credentials of senators-elect should be placed before it to be retained, and to be adjudicated upon at such time and in such mode as itself might deem proper. If the state senate has the inherent vitality thus asserted, it seems to be undeniable that it had the power to act as it did on the occasion that has given rise to this litigation; for, by the plain language of the constitution itself, it is declared that "each house shall be the judge of the elections, returns and qualifications of its own members." It will be perceived, therefore, that the question now to be considered and decided by this court is, has the senate of the state the perpetuity thus claimed?

The first and most elaborate argument, pressed with such force and earnestness upon the attention of the court by the learned attorney general and his able associate, Mr. McDermott, was grounded almost entirely upon the fact that the clause in the constitution of this state that gives to the membership of the senate a continuity of life by a succession of members, in such a way that provides for the continual presence of a quorum of the body, was a transcript of a similar provision in the federal constitution; and it was thereupon further insisted that the language of the regulation, so adopted, had, before its adoption, a settled meaning, denoting the permanent existence of the body regulated by it. If we were to assume the truth of the foregoing statement, in all its parts, no one could doubt that the reasoning founded upon it would be entitled to great weight. It cannot be denied that the section is, in substance, a copy of a clause of the same import in the constitution of the United States; and if the clause, so imported, had antecedently received an authoritative interpretation, it would be but reasonable to infer that the framers of our organic laws, many of whom were justly of great learning and experience, understood the provision in the sense thus impressed upon it.

Under such circumstances, no other conclusion would be at all rational. The rule is well settled, says this court in the case of *Fritts v. Kuhl*, 51 N. J. Law, 191, 17 Atl. 102, "that where a statute or constitutional provision of doubtful import has been adopted in one state from the statutes or constitution of another state, after a practical construction has been given to the language by judicial decision, it will be presumed that the interpretation adopted in the state from which it is taken has been adopted, as well as its words." If, therefore, counsel, on this occasion, are justified in predicating that the clause under criticism had acquired, in the manner indicated, a settled signification at the time in question, it must be admitted that this would be the sense in which it should be now read and understood. But, upon careful examination of the subject, I am satisfied that the assumption in question is wholly without basis. So far as I have ascertained, no person, whether text writer, jurist, or statesman, has ever asserted that the clause under discussion bears the force and meaning now for the first time imputed to it; and it would have been singular, indeed, if any critic had ventured to express such an opinion, for the constitutional provision obviously would refuse to bear such treatment. The expressions employed do not, in any degree, import the continuance of the senate itself, but simply provide for the succession and length of the terms of the members of that body. It is true that, by providing an always-existent membership, the clause imparts to the body the potentiality of a permanent existence, but it does not impart to the body such continuous vitality. I think it is safe to say that never, on any occasion, has it been suggested that the clause has any further reach than this. The senate of the United States has been declared to be a permanent body, and, when the subject was under discussion, it was on all sides assumed that the section in the federal constitution (from which, as has been stated, our own has been copied) gave to the senate an aptitude for a continuous existence, but it was never alleged that it was possessed of any further effect. The vivifying force that was infused into the body thus made capable of receiving it was looked for and discovered in other constitutional adjustments, and especially in the provision that gave to the senate an always existent presiding officer. This is a factor mentioned and relied on by every one who has written upon the subject, and similarly it has been the principal argument in all debates relating to the longevity of the senate. It was deemed that the permanency of the presiding officer constituted the permanency of the body itself, as, by such a constitution, there was no necessity for periodical reorganization. It is obvious, therefore, that the construction put upon the national constitution can have but little effect in an effort to construe our own. The prob-

lems are differently conditioned, so that the solution of one of them will afford but slender assistance in the solution of the other. We must construe our own constitution exclusively by its own lights. Adopting this method, I will now turn to the several provisions of the constitution of this state that appear to me in any degree to elucidate the question under consideration.

Upon opening this instrument, the first feature of it that, in connection with the subject in hand, strikes our attention, is the declaration that "the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties," etc. In looking at this constitutional mandate, the inquiry at once arises, does it mean that at all times, within the range of human possibility, such shall be the composition of the body in question, or that it shall have such composition only sometimes? Does it mean that on some occasions the senate shall be composed of one senator from each county, and on other occasions, in the orderly working of the system established, it shall be composed of only two-thirds of such members? It is difficult to see how it can be plausibly argued that the clause cited is not designed to establish, as far as possible, a permanent composition of the senate; and this view, it must be admitted, is much strengthened when we look at the purpose of this provision. That purpose obviously is to provide that each county shall be perpetually represented and have a voice in this body on every measure that comes before it, whatever its nature may be. To deprive a county of such a prerogative is plainly unjust, and therefore it is clear that any construction that tends to the production of such wrong should be viewed with distrust, and should not be sanctioned, unless upon considerations that amount to a demonstration of its correctness. And, adopting this as the sound principle, it becomes at once manifest that it is scarcely possible to maintain successfully the proposition that it is not the entire body of senators, but only a class of them, who are to take part in the organization of the senatorial body. The importance of that function strongly repels such a theory.

Organization involves the composition of the body organized, and consequently it involves the right of the counties to participate in the decision of the all-important question which of them shall be represented in the body, and which of them shall be unrepresented. It seems to me that the mandate of the constitution that the senate shall be composed of one senator from each county cannot be reasonably enforced except by the adoption of the hypothesis that each senator shall have a voice in all the proceedings that result in the composition of the body itself. When, therefore, on the occasion that gave rise to the present controversy, it was asserted that one-

third of all the counties of the state should be excluded from all participation in a transaction so vital to their rights, and affecting so intimately the interests of the entire commonwealth, a doctrine was asserted that must be considered as devoid of all reasonable foundation, unless it can be made plainly manifest from the provisions of the primary law of our state. The principle that two-thirds or even a lesser number of the senators chosen by the counties shall have absolute ascendancy in the organization of the senate is, it should be noticed in passing, not only antagonistic to the language and spirit of the constitutional clause just cited, but is likewise in conspicuous violation of that great and fundamental law underlying all our institutions,—that it is the will of the majority of the people that is supreme. He who asserts that this axiom, which may be called “national” in its character, does not prevail on any occasion, must prove his proposition, and must prove it conclusively, for every legal intendment will, a priori, be against its truth. It is not too much to say that with regard to the transaction before us this cannot be done, except by putting a finger on the very section or sections of the constitution in which the alleged heterodoxy is to be found unambiguously written. That this was not done by the counsel arguing before us in favor of the doctrine that in the all-important affair of organizing the state senate it is the minority, and not the majority, that shall rule, is conspicuously manifest from the fact that the only constitutional clause that was relied on was the one that distributes senators into classes; but, as it has appeared that such clause is just as applicable to the supposition of an annual senate as it is to that of a perpetual senate, it is manifest that a reference to that section is altogether futile. But, while this was the only citation relied on for the purpose of proving the existence in this state of an ever-living senate, my examination has led me to the discovery that others exist that cannot, in my opinion, be reconciled with the doctrine contended for. The first provisions of the class indicated are those clauses of the constitution which, to all appearance, provide for a yearly organization of both the senate and the house of assembly. In this respect the two bodies are placed upon the same footing, and subjected to the same regulations. No express power to organize is conferred upon either of them, but, by necessary implication, it belongs similarly to both. The assemblymen and senators are required to meet yearly, at an appointed day. With respect to the former class, each of the class has the undisputed right to take part in the organization, and it would certainly seem to follow that each senator is vested with a similar prerogative. When the power to organize is merely a legal intendment, the power consists in a right to organize in the customary man-

ner, and it therefore excludes the notion of a minority ruling in the transaction. In the case of the assembly, it is admitted that the organization must be effected in accordance with usual modes. In that affair it is not pretended that there can be any dominance of a minority. It does not appear, therefore, how it can be reasonably maintained that the senate, in exercising this important function, shall be subjected to an abnormal condition, and that, in its use, there shall be a dominance of the minority. The organizing power of the senate being derived in its totality by legal implication, it appears to be plain that the law will not imply a regulation that would be both unusual and unjust.

The next provision to which reference will be made appears to be of paramount importance. It is to be found in paragraph 3 of section 1, in article 4. It is thus expressed: “Members of the senate and general assembly shall be elected yearly and every year on the first Tuesday after the first Monday in November, and the two houses shall meet separately on the second Tuesday in January next after the said day of election, at which time of meeting the legislative year shall commence.” This clause is significant with respect to the subject we are considering in all its parts, its first observable feature being that it appoints a day for the organization of both legislative houses. The purpose for the meeting on the day specified cannot be doubted. Indeed, it never has been doubted. It has always been so understood and acted upon. It, therefore, is plain that it is a directum for the senate to organize; for the expression is, “The two houses shall meet separately.” Both houses here are placed upon the same basis for the same purpose, and most assuredly they are thus similarly treated as though an organization were equally essential to the legal existence of each body. The assembly is, of course, a body that needs a yearly resurrection; and the senate is here required, to all appearance, to do precisely what the assembly is directed to do. Beyond all question, we here find that a duty is imposed on both the assembly and the senate to confer at an appointed time, and to effect a yearly organization. Such a regulation is appropriate to a body that expires yearly, but it is inappropriate and unprecedented in its application to a body that is possessed of a permanent life. In the practice of the United States senate, which, we have stated, is an ever-living body, there is no fixed day for the admission of new members-elect. The certificates of incoming senators are presented from time to time, or at convenient occasions, and are thus severally passed upon. From the regulation in question it appears to be, if not the necessary, at least the reasonable, inference, that the senate of this state is no more a continuous body than is the assembly. The two remaining regula-

tions of this section cited lead strongly, as it is deemed, to the same result. The first of these is the direction, in the language of the statute, "that the two houses shall meet separately on," etc. Now, it is obvious that the expression "houses" must, of necessity, be construed to denote the members of such houses. It can mean nothing else, for it is obvious that, at the time specified, there is no house of assembly in existence. Ascribing, then, this necessary signification to this expression, we have a constitutional direction that the members of the senate shall assemble at the time specified, in order to organize. It does not seem that it can be denied that such a regulation, in a very perspicuous form, repudiates the notion of a continuous senate. Also, in the next place, the designation of a legislative year—that is, when such year shall begin, and when it shall end—tends in the same direction. What has a perpetual body to do with prescribed periods of time? The legislative year, thus established, obviously accords with the official life of the assembly, and it appears reasonable to suppose that it was meant to accord with a senatorial life of equal extent. In fine, after a very careful study of the constitution of the state, my conclusion is that its intimations are all to this effect: that the claim, advanced for the first time on this occasion, that the senate is a permanent, continuous body, is without any valid foundation.

Nor has there been found any more substantial basis for the doctrine just discarded in the past practice of the senate in respect to its yearly organization. The practice may be thus generally described: In the first instance, the senate, under the new constitution, was organized as the house of assembly now is,—by the action of all its members. Then, for some years afterwards, upon the senators' convening, a roll containing the names of all the senators was called; but in subsequent years the practice was to call the names only of the senators holding over. This was not an unnatural course, as those senators had before taken the oath of office, and their credentials had already been inspected. In this condition of things, the custom obtained for the incoming members to present their credentials to the body of senators holding over, and upon their approval they were sworn in. The office thus performed by the old senators was, in the substance, purely formal, as much so as though they had been a committee appointed by the body of senators to inspect and to report upon the credentials of the new senators. On no occasion did they exercise any other power, nor did they ever pretend to be possessed of any other power. There is not an instance in which they undertook to adjudicate on the right of a senator-elect to his seat, nor did they ever hold such right in sufferance. If this body has the absolute power now asserted for the first time, and after a lapse of half

a century, it certainly would be a most strange circumstance that during this long period the existence of such power was never manifested by a single word or a single act. The claim of such an imperial authority, made at this late day, is an entire novelty, and, like most novelties in legal matters, is not well founded. It is likewise in this connection important to note that during that long time the senatorial action was regulated by the eighty-fifth section of the act relating to elections, (Revision, p. 353,) which is in the following terms: "That the senate and assembly shall convene and hold their sessions in the state house in Trenton; and in the organization of such houses, the certified copies of the statements of determination made under the direction of the sixty-ninth section of this act shall be deemed and taken to be prima facie evidence of the right of persons therein mentioned to the seats in the houses, respectively, to which they shall have been so determined to be elected." No one can look at this act and fail to perceive that it is absolutely irreconcilable with the theory of an ever-existent senate. This is so entirely the case that the very astute counsel of President Adrain insisted that it was void, as it attempted to prescribe to an existing senate a rule controlling its action in a matter committed to its exclusive jurisdiction by the constitution. On the premises postulated by counsel that the senate is ever-living, his argument was invincible; but the existence of the statute, and a submission to it, for such "a cycle of years," exhibited in a very impressive form the fact that the contemporaneous construction of the constitution in the particulars in question was adverse to the present claim, which I have designated as a "novelty." This statute is not to be misunderstood in this respect that it provides for the introduction of senators by the process of organization; and it rejects altogether the idea of an admission of senators into a body already formed as continually existing. When we add to the fact that the ancient and continued practice has been in pursuance of, and in obedience to, this law, the further circumstance that the senate, as a matter of fact, has been, and must of necessity be, yearly organized, and that, in the performance of this ultimate act in such process,—that is, in the choice of its permanent president,—all the senators elected have invariably co-operated, the pretense of a continuous senate must be declared to be an utter fallacy. The construction that would convert this customary method of senatorial procedure into a practice to admit members into a body always existing, and therefore always organized, seems to me an afterthought; and the fact that such a theory is a novelty, undreamed of for half a century, is of itself enough to explode it. In legal affairs, it is the practical and common-sense view that, in general, is the true view, as neither the affairs of men nor of state can be regulated by logical

refinement. Where subtlety begins the law ends. When I accept, therefore, the understanding that plainly appears to have prevailed for so long a time, I feel great confidence that I have not fallen into error. The doctrine in question stands, as I think, condemned, both by the intimations of the constitution itself, as well as by a long-continued and practical exposition.

The result of the inquiry before us is that we have concluded that the senate of New Jersey is not a continuous body, but that it expires annually, in the same sense that the assembly does. Therefore, our conclusion is that Mr. Adrain has no title to the office that he ostensibly holds, and that the appropriate judgment must be entered against him. With respect to the title of the opposite claimant, Mr. Rogers, we hold that his title must be regarded as constitutional and valid. Our resolution in this regard is founded entirely on the power that, touching the act of reorganizing its own body, the majority of senators are the absolute masters of the occasion. Such action is taken by a body co-ordinate with ourselves, and whose proceedings, when not violative of the constitution of the state, we have no capacity to supervise or control. In our opinion, when a majority of the senators organized the senate, and elected Mr. Rogers as president, such action was and is conclusive upon this court, as well as upon all departments of the government. Let a judgment be entered accordingly.

I am authorized by the following of my associates to say that they concur in these views: Justices DEPUE, VAN SYCKEL, DIXON, REED, GARRISON, and LIPPINCOTT.

ABBETT, J., dissenting.

(18 R. I. 531)

LYNCH, Deputy Sheriff, v. EARLE.

(Supreme Court of Rhode Island. March 20, 1894.)

EXECUTION—LEVY—SALE—ACTION FOR PURCHASE MONEY—PLEA.

1. Under Jud. Act, c. 36, § 11, making no provisions for the manner of levying execution on land, but merely providing that if the officer levy it on land he shall set up notices of sale, levy may be by mere mental process, of which the notice and sale as provided by statute is conclusive proof.

2. The plea, in an action against the purchaser at execution sale for the price, that the interest of the execution debtor sold was that which she had at the time of the attachment on the original writ in the action against her, is not sufficient to prevent recovery, as, no intervening rights appearing, it will be presumed that the interest remained the same.

Action by Michael B. Lynch, deputy sheriff, against Charles H. Earle, for the purchase money on execution sale. On demurrer to defendant's plea. Demurrer sustained.

C. J. Arms, for plaintiff. Walter B. Vincent, for defendant.

TILLINGHAST, J. The material facts in this case, as they appear upon the pleadings,

are as follows, viz.: The plaintiff, who is a deputy sheriff in and for the county of Kent, sold to the defendant, on the 18th of February, 1893, at an execution sale, all the right, title, and interest of Lydia A. Macomber, the execution defendant, on the 12th day of February, 1890, in and to a certain parcel of real estate situate at East Greenwich, in said county, for the sum of \$1,161, said amount having been bid by the defendant for said interest at said execution sale, and said sum being the highest amount bid for said property. One of the conditions of said sale was that the purchaser should at once pay 10 per centum of the amount thereof, which condition was duly complied with by the defendant. Another condition was that the balance of the purchase money should be paid on the 6th day of March then next following, upon the delivery to the purchaser of a deed from the plaintiff. A deed was afterwards duly tendered, but the defendant refused to accept the same, or to pay the balance of said purchase price. The ground of this refusal, as set up in the defendant's amended special plea in bar, is that the plaintiff advertised and sold at auction to said defendant the interest which Lydia A. Macomber, the defendant in said original action, had in said real estate on the 12th day of February, 1890, that being the date of the attachment on the original writ, without making any levy of said alias execution as by law required. To this plea the plaintiff has demurred, and the case is before us on the sufficiency of said plea. The grounds of the plaintiff's demurrer are: First, that the last clause of the last paragraph of said plea, to wit, "without making any levy of said alias execution," is repugnant and contradictory, in that it contradicts the allegation in the first clause of said paragraph, to wit, "that the plaintiff subsequently advertised and sold at auction to the said defendant the interest which the said Lydia A. Macomber had in said real estate;" second, that it is not alleged in said plea that the interest of Lydia A. Macomber in said real estate described in and conveyed by the deed tendered to the defendant by the plaintiff is other than or different from the interest of said Macomber in said real estate on the 12th day of February, 1890; and, third, that in this action, and between these parties, it is immaterial whether the plaintiff made any levy of said alias execution or not. We think the demurrer should be sustained, for while the plea in one part thereof does allege that the property in question was sold without first making any levy thereon by the officer, yet, when taken as a whole, it sets up a state of facts wholly inconsistent with said allegation and facts, which show that a levy must have been made. It shows a valid judgment against the original defendant, Macomber, an issue of execution thereon, and an advertisement and sale, by the sheriff who held said execution, of the defendant's interest at the date of the original attach-

ment in the real estate in question; and, as the sheriff could not have proceeded in this manner without first making a levy of said execution, it necessarily follows that he made the same. In other words, the fact that the sheriff advertised and sold under the execution is conclusive evidence of the levy, it being utterly inconceivable that he could have proceeded in this way to sell the property under the execution without first having formed the intention of so doing; and the forming of such intention to sell, being followed up by proceeding to do the same in the manner provided by statute, was a levy of execution. And in this connection let us inquire as to what constitutes a levy of execution upon real estate. Our statute requires no particular form or ceremony in connection therewith, or as essential thereto. The officer is not directed to make any actual seizure of the land. He is not required to go upon, or even to see, the same, in order to make a valid levy thereon. No copy of the execution is required to be left at the town clerk's office in order to constitute such levy (although such copy must be afterwards filed there, unless the property was attached on the original writ), as is required in case of an original attachment, but the statute simply provides that "the officer charged with the service of the execution, if he shall levy the same on real estate, shall set up notifications of such levy in three or more public places in the town where said real estate lies for the space of three months after such levy, and before the same shall be exposed to sale, * * * and he shall also notify such sale by causing an advertisement thereof to be published once a week for the space of three weeks next before the time of such sale in some newspaper in the county where such estate lies." Jud. Act, c. 36, § 11. The statute, then, failing to require the doing of any particular act or thing by the sheriff in order to constitute a levy of the execution, and this proceeding being one which is entirely regulated by statute, the subjecting of real property to satisfy debts being unknown to the common law, we see no reason why he may not go through with the mere mental process of levying an execution in Foster or Burrillville while sitting in his office in Providence, and at the same time comply with said statutory requirement. The usual and safer mode of levying an execution on real estate doubtless is to indorse on the execution a statement to the effect that it is levied, describing the estate, and noting on the execution the date and time of day of the levy; but this is done mainly for the purpose of aiding the memory of the officer when he comes to make his return thereon. At any rate, it is clearly not essential to the making of the levy, as it can be as effectually done after as at the time when the officer decides to make said levy. In *Herm. Ex'ns*, § 181, it is said that "giving notice of sale as required by statute, under the execution, is all that

is necessary in those states where a sale is the result of the levy." "It may be made by the writing of a levy upon the execution, or, as against the debtor, by any act on the part of the officer showing the intent to sell the specific land, and to subject it to the satisfaction of the judgment." In the case at bar the advertisement and sale of the estate of the judgment debtor furnish the best possible evidence that the sheriff was "causing to be levied of the * * * real estate of the execution defendant" the sum specified in the execution. For the sake of protecting bona fide purchasers, and in view of the fact that in this state a judgment is not a lien on real estate, it would doubtless be better if the statute provided similar formalities in the levy of an execution on real estate, where the same is not attached on the original writ, as are required in attaching the same (see Jud. Act, c. 33, § 10), namely, by leaving a copy of the execution in the town clerk's office; but, as no such requirement now exists, we cannot say that it is necessary. In many of the states some overt act of this sort is required on the part of the officer, in order to constitute a levy. See 2 *Freem. Ex'ns* (2d Ed.) §§ 280a-280l, and cases cited.

The case of *Waters v. Duvall*, 11 Gill & J. 37, cited by the defendant's counsel, holds that, to enable the sheriff to sell and vest in a purchaser at his sale a valid title, a seizure of the land sold is indispensable. The subsequent cases of *Langley v. Jones*, 33 Md. 179, and *Jarboe v. Hall*, 37 Md. 351, are doubtless in harmony with that case. But no such requirement exists in this state, nor is such the general rule. See note to *Waters v. Duvall*, 33 Am. Dec. 697, in which said case is criticised, and its authority doubted. See, also, *Gwynne, Sher.* 308; *Fitch v. Tyler*, 34 Me. 468; *Hall v. Crocker*, 3 Metc. (Mass.) 245; *Bidwell v. Coleman*, 11 Minn. 78 (Gill 45); *Lockwood v. Bigelow*, 11 Minn. 113 (Gill 70); *Hitch. Sher.* § 103. *Streaper v. Fisher*, 1 Rawle, 155, cited by the defendant, simply holds that the levy controls all the subsequent proceedings, as it is the foundation on which they are built. To this doctrine we readily assent, for the levy of the execution is the first step, and a necessary one, in the sale of the property taken thereunder. *Redlick v. Williams* (Tex. Sup.) 5 S. W. 375, holds that, in order to constitute a levy, there must be an indorsement upon the execution, and that no other step can give validity to such levy. But, as already seen, such indorsement is not essential in this state. *Green v. Burke*, 23 Wend. 490, is a case in which the execution was levied upon personal property, and is therefore not pertinent to the case at bar. Of course, the allegation in the defendant's plea, that the plaintiff advertised and sold the interest which said Lydia A. Macomber had in said real estate at the date of the attachment thereof on the original writ, in no way militates against the plaintiff's right to recover, as the plea does

not allege that said interest was other than, or different from, what it was when so attached; and, as no intervening rights appear, it is to be presumed that said interest remained the same. Demurrer sustained.

(18 R. I. 536)

GODDARD et al. v. CITY OF PROVIDENCE et al.

(Supreme Court of Rhode Island. March 20, 1894.)

INJUNCTION—PARTIES—RAILROAD BONDS—GUARANTY BY CITY.

1. Where an ordinance authorizes the mayor to guaranty the payment of certain railroad bonds by and with the advice of the committee on the city debt, the committee are proper parties to a bill to enjoin such guaranty.

2. Where a bill to enjoin a city from guarantying railroad bonds avers that the bonds have all been sold and negotiated, it need not make the railroad a party.

Bill by Robert H. I. Goddard and others against the city of Providence and others to enjoin a guaranty of railroad bonds. Demurrers overruled.

Comstock & Gardner and James Tillinghast, for complainants. Francis B. Colwell, City Sol., for respondent.

PER CURIAM. By the terms of Ordinance No. 713 (an ordinance authorizing the indorsement of the bonds of the Providence & Springfield Railroad Company), the mayor is authorized to guaranty the payment of the bonds only by and with the advice of the committee on the city debt. Their advice is consequently necessary to the mayor's action. This being so, the committee on the city debt is a part of the instrumentality for the carrying out by the city of the action which it is the purpose of the bill to enjoin. We think, therefore, that, in accordance with well-settled principles, the committee on the city debt were properly made parties to the bill. Story, Eq. Pl. § 159; Sully v. Drennan, 113 U. S. 287, 5 Sup. Ct. 453. Their demurrer to the bill is overruled.

The bill avers that the bonds have all been sold and negotiated. If this be so, the Providence & Springfield Railroad Company has ceased to have any interest in the bonds, and, no relief being prayed against it, the complainants could not properly have made it a respondent. Had they done so, the bill would have been clearly demurrable. Pub. St. R. I. c. 192, § 15, provides that any person, on making it appear that he is interested in the subject-matter of a suit, may be allowed to become a party. If the Providence & Springfield Railroad Company is still the holder of the bonds, as alleged, when that fact appears it may be permitted by the court to become a party to the suit, if the complainants do not voluntarily amend their bill by making it a party; but on the allegations of the bill, of which alone, on demurrer, we can take cognizance, we do not think that the Providence & Springfield Railroad

Company is entitled to be made a party, and hence the demurrer of the city of Providence, incorporated in its answer, based on the ground that the bill is defective for the nonjoinder of that company, must also be overruled.

(18 R. I. 529)

O'CONNOR v. O'BRIEN.

(Supreme Court of Rhode Island. March 20, 1894.)

DISTRICT COURTS—JURISDICTION—TRESPASS AND EJECTMENT.

Judiciary Act, c. 8, § 23, giving district courts exclusive original jurisdiction over actions "for the possession of tenements or estates let, or held at will or by sufferance," applies to all tenements or estates held at will or by sufferance, whether they are let or not.

Exceptions from district court, sixth judicial district.

Action by Edward F. O'Connor against Francis O'Brien for possession of real estate. Dismissed. Plaintiff excepts. Reversed.

Dennis J. Holland, for plaintiff. Page & Owen, for defendant.

PER CURIAM. The question raised by the plaintiff's exception is whether a district court has the jurisdiction, under chapter 8, § 23, of the judiciary act, of all actions of trespass and ejectment for the possession of tenements or estates held at will or by sufferance, unless such tenements or estates be also tenements or estates let. The language of the section material to the question is as follows: "Every district court shall have exclusive original jurisdiction * * * over all actions properly brought within its district for the possession of tenements or estates let, or held at will or by sufferance." We are of the opinion that the jurisdiction extends to all actions for the possession of all tenements or estates held at will or by sufferance, whether they be tenements or estates let or others. The language is so plain that it is difficult to understand how there can arise any doubt as to its construction. It is, however, suggested in argument that the jurisdiction is to be limited to actions for the recovery of possession of tenements or estates let. In support of this view, *Champlin v. Horton*, 12 R. I. 123, is cited. In that case the court construed a paragraph of Gen. St. R. I. c. 184, § 2, conferring jurisdiction on special courts of common pleas. The paragraph was as follows: "Of all actions brought for the possession of tenements or estates let, against tenants and others who have broken the terms or conditions of the lease or agreement under which they hold, or who hold or occupy tenements or estates by wrongful entry or detainer, or as tenants at will or by sufferance." The court held that grammatically the first clause of the paragraph qualified all that followed it, and, hence, that the jurisdiction was confined to actions for the possession of tenements or es-

tates let. That paragraph was very different from the clause of the statute under consideration. In the former the words which conferred the jurisdiction were the first 11 words, to wit, "of all actions brought for the possession of tenements or estates let," the remainder of the paragraph simply enumerating the classes of persons against whom such actions could be maintained. The jurisdiction is expressly limited to actions for the possession of tenements or estates let. In chapter 8, § 25, of the judiciary act, on the other hand, there is added to the clause conferring jurisdiction over actions for the possession of tenements or estates let, the further clause, "or held at will or by sufferance." Exceptions sustained and case remitted to the district court of the sixth judicial district, with direction to take off the entry of dismissal, and to enter judgment for the plaintiff for possession and costs.

(18 R. I. 699)

ANTHONY et al. v. CITY OF PROVIDENCE.
(Supreme Court of Rhode Island. March 28, 1894.)

POWER OF ATTORNEY—CONVEYANCE OF STREET.

Where an attorney in fact, having unrestricted power to sell land, platted the same, and sold all of the lots by numbers, the fee in the streets of the plat passed to the grantee, whether the attorney had power to dedicate the streets to the public or not.

Condemnation proceedings by the city of Providence against Caroline M. Anthony and others. There was judgment for plaintiff, and defendants (plaintiffs here) petition for a new trial. Denied.

Irving Champlin, for petitioners. Francis Colwell, City Sol., and A. A. Baker, Asst. City Sol., for respondent.

STINESS, J. Under the provisions of P. L. c. 1018, the city of Providence condemned a tract of land adjoining Roger Williams park, which was formerly owned by John Anthony, ancestor of these plaintiffs, and which had been platted and sold to George L. Tucker. At the trial before the jury, to assess the value of the land, several questions arose as to Tucker's ownership and right to compensation, which are now withdrawn. It is agreed that he was the owner of the lots so taken, and the Anthony heirs withdraw all claim therefor against the city, and said Tucker withdraws all claim against the city for the land laid out for the streets. The jury having awarded Tucker the value of the lots, and found that the value of the land in the streets was nothing, the Anthony heirs now petition for a new trial upon the ground that they were the owners of the fee of the streets, and entitled to be paid therefor by the city, and that the presiding justice erred in refusing to instruct the jury that the deed to Tucker, which described

the land only by numbers on the plat, excluded the soil of the streets. It appears that John Anthony left this state in 1851, and the next year he gave to Joseph G. Johnson a power of attorney to sell his real estate. The John Anthony plat was made in 1854, and it is claimed that it must have been made by Johnson, who had no authority, under the power of attorney, to plat land; that such platting did not bind these heirs; and that the title to the streets remains in them. The language of the power of attorney was very comprehensive. It gave full authority to sell any or all of the real estate of the principal. The attorney could sell in bulk or in parcels, the mode of sale being unrestricted. The platting of land is a very common step towards its sale, and the laying out of ways, if the sale be in parcels, is usually necessary. It is incidental to the exercise of such full authority as was granted to Johnson. Such a power is quite distinct from an attempt to dedicate the land of another to the public. In this case the sale was of all the lots, and so of all the land. The deed given by Johnson, as attorney, described the land as 113 lots in the town of Cranston, giving their numbers, without reference to the plat. The plat itself was fully identified in evidence; the land was sold by the plat; the lots were checked thereon as they were compared with the deed; the plat was delivered with the deed; and the grantee was put into possession of the land by the attorney. Under these facts, the agreement, which, in effect, waives all exceptions to extrinsic proof, and the consequent judgment for Tucker as to the lots, settle his title to them as lots on the plat.

The main question, then, is whether the conveyance of the lots carried a title to the streets. The great importance of ownership in a highway to an abutting owner is so manifest that courts, on grounds of public policy, have established the presumption that a deed which bounds land on a highway is intended to go to the middle of the way, unless the contrary appears. As Kent says: "The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed." Various reasons are given for the inference, as that "the way was taken out of the party that hath other lands adjoining" (*Healey v. Babbitt*, 14 R. I. 533; *Church v. Meeker*, 34 Conn. 421), and that the owner of the land laid out in lots and streets gets his pay for the streets in the increased value of the lots (*Paul v. Carver*, 26 Pa. St. 223), and so purchasers, one after another, pay for the streets in paying for the lots. Of course, parties may agree that the land shall not be

conveyed; and this limitation upon the rule reduces the construction of the deed in a given case to a question of intention, about which there has been a great diversity of opinion. For example, where the boundary, with reference to the highway, has been "by the side of," "by the margin of," "along the line of," and the like, there have been decisions both ways as to whether it gave title to the center of the way. Elliott, *Roads & S.* p. 550, and notes. In this state, a grant of land "lying westward of Back street," and one of its lines running "by the westerly side of Back street," was construed to exclude the street. *Hughes v. Railroad Co.*, 2 R. I. 508. In *Tingley v. City of Providence*, 8 R. I. 493, the questions were whether land marked on a plat for a street, which was claimed as private property by adverse user, would pass under a deed of lots by numbers on the plat, and whether the deed conveyed anything in the street discharged of the easement. The questions were answered in the negative, and rightly, because, if the land had ceased to be a street, it had ceased to be within the presumption which would carry the line to the center of the street. It would need an express grant to convey land acquired by adverse possession, just as it would to convey any other private property. If the land had not ceased to be a street, then, clearly, the ruling that the deed did not convey it discharged of the easement was correct. Had Judge Brayton, in giving the opinion, said no more on this point, the case would have been very plain; but he adds a dictum that it is not clear that anything could pass under the deed beyond the line of the street. He says that the line on the plat separates the lot from the street, and cannot be construed to be in the middle of the street, and that the line drawn actually excludes the street. But why cannot the line of a platted lot be construed to be in the middle of a street, as well as a line described in words, as "on," "by," or "along" a street? Is the line drawn any stronger or more sacred than the line described? And yet Judge Brayton says immediately before this, as everybody else would say, that such a description would carry title to the middle of the street. We see no reason for distinction between a line drawn and a line described. One does not exclude the street any more than the other. The same considerations of inference and policy which apply to lots described as bounding on a street apply equally to lots platted as bounding on a street. In both cases the title to the streets subject to the easement should be in the adjoining owners. The original owner has received his pay for the street. He is presumed to have parted with all his interest in the land, and he can retain no beneficial ownership save that of a possible abandonment of the way. On the other hand, the title to the streets may be of great benefit to the lot owners for projec-

tions, trees, coal vaults, or variations in the line of the way if it should become desirable. *Paul v. Carver*, 26 Pa. St. 223. To say that owners of the land, for such incidental benefits as these, must, unless the title has been expressly reserved, hunt up the persons who laid out the streets, or possibly their heirs, to get their consent, is unreasonable. The trouble in this class of cases has been that courts have not held to the rule that the intention of a grantor to withhold his interest in a road is never to be presumed. It has been presumed from the use of words such as "along" and "by the side of," when there has been no express reservation, and probably none intended. But the terms of boundary on a highway are seldom significant. As Judge Redfield says in the dissenting opinion in *Buck v. Squiers*, 22 Vt. 484: "In ninety-nine cases in every hundred the parties, at the time of the conveyance, do not esteem the land covered by the highway of any importance either way; hence they use words naturally descriptive of the prominent idea in their minds at the time, and in so doing define the land which it is expected the party will occupy and improve." The law should be uniform, and that which is established in case of a boundary "upon" or "by" should apply to all cases, except where there is a clear and express reservation. Such a rule is useful, reasonable, and just. It rests upon no new doctrine, but it is the unavoidable logic of the promise which in any case extends a boundary into the highway. Its utility is evidenced by statutory enactment in several states, and its authority is abundantly sustained by the better reason and greater weight of decision. *Berridge v. Ward*, 10 C. B. (N. S.) 400; *In re Ladue*, 118 N. Y. 213, 23 N. E. 465; *Bissell v. Railroad Co.*, 23 N. Y. 61; *Gould v. Railroad*, 142 Mass. 85, 7 N. E. 543; *Woodman v. Spencer*, 54 N. H. 507; *Gear v. Barnum*, 37 Conn. 229; *Dobson v. Hohenadel*, 148 Pa. St. 367, 23 Atl. 1128; *Andrews v. Youmans*, 78 Wis. 56, 47 N. W. 304; *Jarstadt v. Morgan*, 48 Wis. 245, 4 N. W. 27; *Dovaston v. Payne*, 2 Smith. Lead. Cas. *216. The presumption that the soil to the center of a way belongs to the owner of the adjoining land applies equally to a private, as to a public, road. *Holmes v. Bellingham*, 7 C. B. (N. S.) 329, 97 E. C. L. 329. As to a grantee, if the way be shown upon a plat referred to in the deed, it is a street, and it makes no difference whether it has been opened or not. *Bissell v. Railroad Co.*; *Dobson v. Hohenadel*, supra. The legal effect of the deed which gave Tucker title to the lots on the John Anthony plat gave him title to the streets on which the lots in fact were bounded. There was therefore no error in the refusal of the presiding justice to instruct the jury as requested. This conclusion as to the effect of the deed disposes of all the grounds for a new trial which are now before us, for, since

the petitioners have no title to the streets in question, their petition for a new trial must be denied.

(79 Md. 63)

UNITED STATES ELECTRIC POWER & LIGHT CO. v. STATE.

(Court of Appeals of Maryland. March 13, 1894.)

TAXATION—CONSTITUTIONAL LAW—LEGISLATIVE POWERS.

1. Taxation under Code, art. 81, § 141, providing that the tax commissioner shall deduct from the aggregate value of all the shares of capital stock of a corporation, the assessed value of its realty, and that the quotient obtained by dividing the residuum by the number of such shares shall be the taxable value of each share for state taxation, is not on the stock or on the corporation, but on the owners of the shares, and therefore a franchise tax on the gross receipts of a corporation is not double taxation.

2. Where the same property represents distinct values belonging to different persons, the fact that each is taxed on the value which the property represents in his hands does not constitute double taxation obnoxious to the organic law.

3. The legislature may enact laws providing that, when an unsuccessful attempt is made to defeat the collection of a debt due the state, defendant shall pay, not only the costs usually taxed, but also fees to the attorney representing the state.

Appeal from court of common pleas.

Action by the state of Maryland against the United States Electric Power & Light Company to recover a tax. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Tho. Hughes, for appellants. Atty. Gen. Poe and J. Alex. Preston, for the State.

McSHERRY, J. We find no difficulty in affirming the judgment appealed from in this case. The appellant is a company incorporated under the laws of Maryland, and transacts its business within this state. It has a capital stock divided into shares, and owns real and personal property. This real property has been duly assessed for taxation, and the valuation placed thereon has been deducted from the assessed value of the capital stock, as required by section 141, art. 81, of the Code. The state taxes upon the company's real estate have been paid, and so, also, have the state taxes on its shares of stock. In addition to these taxes, the state levied, under the act of 1890, c. 559, a further tax of one-half of 1 per cent. on the gross receipts of this and other like companies, and for a failure to pay this latter tax the pending suit was instituted. The defense relied on is that the gross-receipt tax is a double tax upon the same property, and therefore unauthorized and illegal. It is claimed to be a double tax because it is insisted that the value which the capital stock possesses after the assessed value of the real estate has been deducted is such, only,

as arises out of the ownership and operation of the franchises of the company, and, as a tax on gross receipts is a tax on the franchise, a tax on the capital stock, whose value is the ownership and use of the company's franchises, is an additional tax on the same thing; but this argument is obviously fallacious. The taxable value of shares of capital stock is fixed by the state tax commissioner. He is required, by the statutes, to deduct from the aggregate value of all the shares of the capital stock of banks and other corporations the assessed value of the real estate owned by the company, and to divide the residuum by the number of shares of the stock, and the quotient is declared to be the taxable value of each share for state purposes of taxation. Upon the valuation thus ascertained, the state tax is levied. But the tax is not a tax upon the stock, or upon the corporation, but upon the owners of the shares of stock, though the officers of the corporation are made the agents of the state for the collection of the state tax. It is not material what assets or other property make up the value of the shares. Those shares are property, and, under existing laws, are taxable property. They belong to the stockholders, respectively and individually, and when, for the sake of convenience in collecting the tax thereon, the corporation pays the state tax upon these shares into the state treasury, it pays the tax, not upon the company's own property, nor for the company, but upon the property of each stockholder, and for each stockholder, respectively, by whom the company is entitled to be reimbursed. Hence, when the owner of the shares is taxed on account of his ownership, and the tax is paid for him by the company, the tax is not levied upon or collected from the corporation at all. The gross-receipt tax is quite another and a different thing. It is a tax imposed upon the corporation because of the value of its franchises as distinguished from its ownership of tangible and visible property. And, while the value of its franchises may to some extent give value to its capital stock, the gross-receipt tax is not a tax upon the owner of the stock measured by the value of the stock, but upon the corporation as the owner of the franchise or right to exist and to transact business, which franchise or right, though property, is the property of the artificial body as a body corporate. It has been repeatedly held by this court that a gross-receipt tax may be validly imposed. *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 379; *State v. Northern Cent. R. Co.*, 44 Md. 169. As, then, the tax, in the one instance, is upon the owner of the capital stock, whose liability is fixed by the value placed upon the shares by the state tax commissioner, and in the other instance the tax is upon the corporation, the extent of whose liability is measured by the amount of its gross receipts, it is perfectly apparent that the two taxes are not upon the same individual, natural or artificial,

in consequence of his or its ownership of the same property, notwithstanding the franchises of the corporation in some measure give value to the shares of stock. But, if this were conceded to be a double tax, it would not necessarily, on that account, be void. The declaration of rights requires equality in taxation, and, in so far as a double tax destroys that equality, it is invalid, but not otherwise. Cooley, Tax'n, 161, etc. Taxes are levied upon the individual, and not upon property, though the value of the property owned by him is the standard by which the extent of the individual's liability is ascertained and measured. Hence, the imposition of a tax twice upon one person for the same purpose, because of his ownership of a particular piece of property, would be a double tax, which, in consequence of its inequality, would not be sustained. But when the same property represents distinct values belonging to different persons, be those persons natural or artificial, both persons may be lawfully taxed, and the amounts of their separate contributions would be fixed by the values which the same property represented in the hands of each, respectively; and this would not be double taxation, in the sense in which it is obnoxious to the organic law.

The second point involved is as to the costs and fees imposed and prescribed by the Act of 1890, c. 559. About this we have no difficulty. The legislature has the undoubted right to prescribe what costs shall be taxed in a case, and, when an unsuccessful attempt is made to resist and defeat the collection of a just debt due to the state, the general assembly may lawfully visit upon the defendant, not only the costs usually taxed, but further costs by way of a fee to the attorney who represents the state. Such legislation is undeniably within the powers of the general assembly, and is neither oppressive nor unreasonable. Finding no errors in the judgment appealed from, it will be affirmed, with costs. Judgment affirmed, with costs.

(79 Md. 173)

BOWDOIN et al. v. HAMMOND et ux.

(Court of Appeals of Maryland. March 14, 1894.)

MORTGAGE—FORECLOSURE—INSURANCE MONEY—USURY.

1. Mortgaged premises, insured by the mortgagor, payable to the mortgagee as his interest should appear, were burned after a sale under a decree to the mortgagee, but before ratification thereof. *Held* that, as the loss fell on the mortgagor, and the purchaser was entitled to apply to the court for an abatement of the price to the extent of the loss, he was not chargeable with the entire price, in addition to the insurance money which he received, though he allowed the sale to be ratified without applying for an abatement, and did not receive the insurance money till after such ratification; the mortgagor having theretofore and till long after conceded his right to it for the purpose of indemnification against the loss.

2. An agreement contemporaneous with the making of a mortgage, that time of payment

shall be extended if the borrower, in addition to the legal interest, pay a "banker's commission" of 1 per cent. quarterly, is usurious.

Appeal from circuit court of Baltimore city.

Suit by William Graham Bowdoin and Alexander Brown, surviving partners of the firm of Alexander Brown & Sons, against Ormond Hammond, Jr., and wife, to foreclose a mortgage. From the decree determining the amount due, complainants appeal. Reversed.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, and BOYD, JJ.

Stewart Brown and Brown & Brune, for appellants. Jos. S. Heusler, Fred. C. Cook, and Charles W. Heusler, for appellees.

ROBINSON, C. J. There is no dispute whatever in regard to the facts of this case. Hammond, the appellee, borrowed of Alexander Brown & Sons \$50,000, to secure the payment of which he mortgaged certain premises in Baltimore city, then used as a cold-storage warehouse. The mortgagor covenanted to insure, and to keep insured, the mortgaged premises, and in pursuance thereof he insured the property to the amount of \$56,000, apportioned as follows: \$33,000 on the buildings, and \$23,000 on the machinery. Each of the 21 policies was indorsed as follows: "Loss, if any, payable to Alex. Brown and Sons, as interest may appear;" and this indorsement was made at the time the policies were issued. Contemporaneously with the execution of the mortgage, and as part of the same transaction, an agreement was entered into between Hammond and Alexander Brown & Sons by which, upon the payment by Hammond of a bankers' commission of 1 per cent. quarterly and interest upon the loan of \$50,000, Brown & Sons agreed to extend the time for the payment of the mortgage until 1885. The mortgagor being in default, the mortgaged premises were sold at public auction on the 26th March, 1891, to the mortgagees, for \$25,000, and the sale was duly reported to the circuit court of Baltimore city, and on the 28th March the sale was ratified nisi. On the same day the order of ratification nisi was passed, the following indorsement was, at the instance and request of Alexander Brown & Sons, the purchasers, written upon 19 of the 21 policies, the Merchants', of Newark, and the Hanover, of New York, being the only policies upon which the indorsement was not made: "The policy continued in name and for account of Alexander Brown and Sons, who have purchased the within-described property under foreclosure sale, subject to ratification by courts." On the 29th March—the day after the passage of the order of ratification nisi—the mortgaged premises were almost totally destroyed by fire. Two of the insurance companies, the Merchants', of Newark, and the Hanover, of New York, each repudiated their liability on a

count of the loss, claiming that their policies were avoided by reason of the sale under the mortgage proceedings without their assent, and suits were brought by Alexander Brown & Sons, the mortgagees, to whom the loss was made payable by the mortgage, against these two companies. The underwriters on the other 19 policies, while they did not deny their liability, insisted that the policies of the two companies which had repudiated their liability should still be considered and treated as existing at the time of the fire, so as to reduce their respective contributions for the loss. There was also some dispute as to the extent of the loss. Adjusters, however, being appointed, the loss was ascertained to be \$17,310.06, and this amount was, with the assent of the mortgagor, paid to the Messrs. Brown & Sons. In the mean time, and before the insurance was paid to the mortgagees, the sale was, on the 2d July, 1891, without objection, finally ratified. Thereupon the proceedings were referred to the auditor, and on the 22d July he filed two accounts,—A and B. In the first the auditor charged Brown & Sons, the purchasers, with the full amount of the purchase money, \$25,000; and, after deducting the expenses and commissions on the sale, the net proceeds amounted to \$23,061.77. In account B he makes the balance due on the mortgage debt \$36,576, and, crediting this amount with the proceeds of sale, there still remains \$13,454.23 due the mortgagees. To this account exceptions were filed by Hammond, mortgagor, on the ground that the auditor had allowed the mortgagees a bankers' commission of 4 per cent., or 1 per cent. per quarter, in addition to the legal rate of 6 per cent., and with the exceptions he filed an account showing that the actual amount due, less the usurious allowance for bankers' commissions, was \$23,335.07, instead of \$36,516, as found by the auditor. When these exceptions were filed, the suits against the two companies which had repudiated their liability were still pending, and the appeals taken to the rulings of the court below in these cases were not decided until February, 1893. After these appeals had been decided, the mortgagor filed additional exceptions to the ratification of account B on the ground that he was entitled to have the mortgage debt credited with the \$17,310.06 insurance money which had been paid to the mortgagees. These exceptions, it will be observed, were not filed until 18 months after the account had been stated, and more than 16 months after the insurance had been paid. Upon these exceptions the court below decreed that the amount due on the mortgage debt, eliminating therefrom the 4 per cent. bankers' commissions, the same being usurious, was \$23,435.07, and, crediting the mortgage debt with the proceeds of sale, \$22,988.59, there remained a balance due the mortgagees of \$447.08. And the court further decreed that the surplus of the insurance, after the payment of this balance, namely,

the sum of \$15,158.09, should be paid by the mortgagees to the mortgagor. So the effect of the decree is to give to the mortgagor the entire purchase money, \$25,000, and, in addition thereto, \$15,158.09 of the insurance; thus making \$40,000 realized by him from the mortgaged premises, the entire value of which was, as we have seen, but \$25,000; and the mortgagees, for the benefit and protection of whom the property was insured, and to whom the loss was made payable, and to whom the mortgagor, it is admitted, was indebted in the sum of \$23,435.07, get the mortgaged premises, which sold for \$25,000, diminished in value by the fire to the extent of \$17,310.06.

It would be strange, indeed, if such an inequitable result as this could be supported by any principle recognized by a court of equity. We say strange, because the property was insured for the purpose of indemnifying the mortgagees against loss, and by the terms of the policies themselves the loss was made payable to them. If the fire had occurred before the sale, they would, it is conceded, have been entitled to the insurance to the extent, at least, of the mortgage debt. The fact that the loss occurred after the sale and before its ratification in no manner affected their right to the insurance payable under the policies. Where property is sold under a decree of the court, and a loss occurs before the sale is ratified, the loss falls upon the owner, and not upon the purchaser, for the reason that the contract of sale is not a complete sale until it has received the sanction of the court. As we said in *Insurance Co. v. Brown*, 77 Md. 64, 25 Atl. 989, the court, in such a case, is the vendor, acting through its agent, the trustee who has been appointed to make the sale. He reports to the court the offer of the bidder for the property, and, if the offer is accepted, the sale is ratified, and thereupon, and not before, the contract of sale becomes complete. Before the ratification, the transaction is merely an offer to purchase, which has not been accepted. The fire in this case having occurred before the ratification of the sale, the loss falls upon Hammond, the mortgagor; but, although the loss falls upon him, the insurance was payable to the mortgagees. The argument, however, is that by the ratification of the sale the Messrs. Brown & Sons, as purchasers, became chargeable with the entire purchase money, and that by applying the proceeds of sale to the payment of the mortgage debt the balance due thereon is \$447.08, and that, after the payment of this balance, Hammond, the mortgagor, is entitled to the surplus of the insurance money. In other words, Brown & Sons are to be treated as having agreed to take the property at their bid of \$25,000, although it was in fact damaged by fire to the extent of \$17,310.06, after the sale, and before it was ratified, and although the property was insured for the express purpose of indemnify-

ing them against loss. Such a contention is against all the facts in the case. As purchasers, Brown & Sons had the right to apply to the court for an abatement of the purchase money to the extent of the loss occasioned by the fire. *Ex parte Minor*, 11 Ves. 559. This, however, they did not do, because they were fully indemnified against such loss by the insurance fund created for that very purpose, and which had been collected and paid to them, with the consent of Hammond, the mortgagor. As a matter of fact, all the parties—the mortgagor, mortgagees, and the underwriters themselves—supposed the loss would exceed \$40,000, a sum more than sufficient to pay the amount due on the face of the mortgage, which was \$36,000; and the mortgagor only claimed the surplus of the insurance after the payment of this sum. It was afterwards found, however, that the value of the property had been greatly exaggerated, and the actual loss, instead of being \$40,000, was ascertained to be only \$17,310.06. Then, for the first time, the mortgagor objected to the ratification of account B on the ground that the 4 per cent. bankers' commissions allowed by the auditor, were usurious, and that, deducting these commissions, the amount due on the mortgage was \$23,335.67, and not \$36,000, as found by the auditor; and then, by way of explanation, he requested Mr. Stewart Brown, counsel for the mortgagees, to say to them that he still considered himself in honor bound to pay these commissions, and would do so if he ever got able, but that his condition was such at that time he could not afford to let a decree go against him for so large a sum. But there was no objection whatever made by him to the mortgagees' right to the \$17,310.06. On the contrary, their right to it for the purpose of indemnifying them against the loss which had occurred was all the time conceded by him; and, such being the case, Brown & Sons were willing to have the sale ratified, becoming thereby chargeable with the entire purchase money, knowing that they were protected against the loss by the insurance which by the terms of the policies was made payable to them. And it was under these circumstances, and with this understanding, that the sale was finally ratified; and not until 18 months after it had been ratified, and more than 16 months after the insurance had been paid to the mortgagees,—in fact not until the appeal cases in the suits against the two companies which had repudiated their liability had been decided,—did the mortgagor set up his present contention. In view of these facts, the ratification of the sale cannot be considered as interfering in any manner with the right of the mortgagees to the full amount of the insurance money paid to them, and to which Hammond himself admitted they were entitled. Whether they could claim the insurance as purchasers, irrespective of the indorsement

on the policies, making the loss payable to them, and without regard to any agreement between them and Hammond, is a question we need not consider. Several cases were cited, it is true, in support of this contention, but at the same time there is some conflict of opinion in regard to the question. In *Rayner v. Preston*, 18 Ch. Div. 1, where the vendor contracted to sell a house which was at the time insured by him, and the house was damaged by fire after the date of the contract, but before the time fixed for its completion, Colton, L. J., and Brest, L. J., both held that the purchaser who had completed the contract and paid the purchase money was not entitled, as against the vendor, to the benefit of the insurance. But, be that as it may, we rest our judgment in this case on the ground that the property was insured for the purpose of indemnifying the mortgagees against loss by fire, and that the ratification of the sale, under the circumstances in this case, in no manner interfered with their right to the insurance. As to the bankers' commission of 4 per cent., we agree with the court below that such a commission must be considered usurious. It was beyond question an agreement to pay 4 per cent. in addition to the legal rate of interest, and calling it a "bankers' commission" cannot exempt it from the operation of the well-settled law of this state against usurious transactions. Decree reversed, and cause remanded.

(160 Pa. St. 232)

PENNSYLVANIA SCHUYLKILL VAL. R. CO. v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. March 12, 1894.)

RAILROADS—RIGHTS OF WAY—STREETS—LOCATED ROUTE.

1. Act Feb. 19, 1849, § 10, empowers railroad companies to survey and fix such route as they may deem expedient, and thereon build and establish a railroad, save through burying grounds, churches, and houses against the owner's will. Act April 4, 1868, § 5, expressly gives companies formed under it all the rights, powers, and privileges of the act of 1849. *Held*, that section 12 of the act of 1868, providing that companies shall not occupy any street or alley in a city without consent of the city first obtained, does not affect the implied power of such companies, with permission, to occupy a street longitudinally.

2. Act March 20, 1860, authorizing the W. R. R. Co. to build from any point on the L. V. Railroad between F. street in Reading and the Schuylkill, by such route and across and along such streets as should be deemed best, to a point on C. street, and to extend thence, etc., granted the company only so much of the streets to be occupied by it with the city's consent as it should actually appropriate and use, and not the whole width of them, to the exclusion of other railroads.

3. When a company has located and staked a route on another railroad's land, and given bonds to condemn it, but has not actually built its track so far, it cannot interfere with a siding built by the other on its own land, across said route, on the ground that such siding is an obstruction because not at grade with the lo-

cated line, when it appears that the siding was so put in for temporary use only, and is in course of being brought to such grade for permanent use, and that it is a necessary connection between its owner's tracks and the wharves of its leased steamboat line.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Bill by the Pennsylvania Schuylkill Valley Railroad Company against the Philadelphia & Reading Railroad Company for an injunction against interference with plaintiff's tracks. Bill and cross bill dismissed; costs divided. Plaintiff appeals. Affirmed.

For former appeal, see 27 Atl. 683.

Following is that part of the master's report which deals with the questions of fact in the case:

"The master finds that at the time of the filing of the bill the Pennsylvania Schuylkill Valley Railroad proposed and had arranged, at and beyond the Lebanon Valley bridge, in the city of Reading, to connect their said railroad with the railroad then about to be constructed by the Reading and Pottsville Railroad Company from the point of connection aforesaid to the borough of Pottsville, in the county of Schuylkill, Pennsylvania. That the Pennsylvania Schuylkill Valley Railroad Company, for the purpose of constructing and operating their railroad and branch aforesaid, and the necessary sidings, turnouts, and other appurtenances thereto, had purchased the following real estate, to wit: 'All that certain piece of ground situate on the south side of River road in the city of Reading, bounded on the north by said River road, on the east by property of William H. Ringler, on the south by the river Schuylkill, and on the west by property of the Schuylkill Navigation Company, as aforesaid, containing in front, on said River road, one hundred and sixty feet, more or less.' That the Philadelphia and Reading Railroad Company, at the time of the filing of the plaintiffs' bill, operated their railroads lying and being between the points named respectively, and to which railroads the railroad and branch of the plaintiffs then being and to be constructed were to be, and are, parallel and competing lines. The master further finds in regard to the matters specifically averred in the various paragraphs of the plaintiffs' bill, without reiterating the various acts under which these corporations were incorporated, as of the time of the filing of said bill, that by virtue of a resolution of the board of directors of the plaintiffs' company, adopted June 11, 1883, the plaintiffs, by corporate action, located the route of their railroad, and that the plaintiffs were about constructing the same between the city of Philadelphia, as averred in the second paragraph of the plaintiffs' bill. The master further finds that at the time of the filing of the plaintiffs' bill the route of the plaintiffs' main line was located, in pursuance of a resolution of the board of directors of June 11, 1883,

and as appears from the map attached to Albert Hewson's affidavit, and from the testimony of George Van Reed, along and upon Front street from the southern side of Penn street to the River road, and thence along and upon the River road to the Lebanon Valley bridge, and beyond in the city of Reading, as averred in the third paragraph of the plaintiffs' bill. The master finds from the testimony of George Van Reed, the plaintiffs' engineer, that on the 11th of August, 1883, a branch road was located and marked with stakes by the plaintiffs on Front street from Penn street to Canal street, on Canal street from Front street to South street, and on South street from Canal street to Furnace street, in the city of Reading, being practically the route that is now occupied by the branch of the Schuylkill Valley Railroad Company on Front and Canal streets, as averred in the fourth paragraph of the plaintiffs' bill; reserving, however, for further consideration and determination the question raised by the defendants in their answer, as to the plaintiffs' power and authority to construct said branch road. The master further finds that the said plaintiffs on the sixth day of August, A. D. 1883, obtained, by ordinance duly enacted, the consent of the city of Reading to enter upon and occupy the said street for railroad purposes, as averred in the fifth paragraph of the plaintiffs' bill; reserving, however, for further consideration and determination the question raised by the defendants in their answer as to the validity of said ordinance. The master further finds from the agreement of consolidation between the Reading and Pottsville Railroad Company and the Pennsylvania Schuylkill Valley Railroad Company that at the time of the filing of the bill the plaintiffs had proposed and had arranged, at and beyond the Lebanon Valley bridge in the city of Reading, to connect their said railroad with the railroad then about to be constructed by the Reading and Pottsville Railroad Company from the point of connection aforesaid to the borough of Pottsville, in the county of Schuylkill, Pennsylvania, as averred in the sixth paragraph of the plaintiffs' bill. The master finds that the Philadelphia and Reading Railroad Company, the defendants, are operating other railroads lying and being between the points named, and to which railroads the railroad and branch so as aforesaid since constructed by the said plaintiffs are parallel and competing lines, as averred in the eighth paragraph of the plaintiffs' bill. The ninth, tenth, eleventh, and twelfth paragraphs of the plaintiffs' bill relate more particularly to the controversy between the parties arising out of the defendants' attempt to relay and extend their siding on the River road, and their attempt to extend the same over and across the location of the plaintiffs' main line, in order to connect their railroad system with the Schuylkill Navigation Com-

pany's canal, which is controlled and operated by the defendants under a contract and lease. To determine the defendants' power and authority in the premises, regard must be had as to the right of their occupancy of the River road, to the use of the siding, and to the object and purpose of the construction. The master finds that this siding on the River road was originally constructed by the Berks County Railroad Company in 1872; that it extended from Court street in a northerly direction, and parallel with the main track of the Berks County Railroad, for a distance of nineteen hundred and forty feet six inches to a point opposite the property now or late of Henry Ruth; that this siding had not been in use for some time prior to the filing of the plaintiffs' bill, but that, after the location of the plaintiffs' main line, the defendants began to relay the siding, and were about extending it across the plaintiffs' location at Buttonwood street, over and upon the defendants' land, to the defendants' wharf at the canal, a distance of eight hundred and thirty-eight feet, when the defendants were restrained by injunction at the instance of the plaintiffs, after which no further efforts were made by the defendants to complete their construction. The defendants had succeeded in laying the track in a temporary way across the plaintiffs' route and on their own property for a distance of about eight hundred and three feet, and were about raising the track to grade, placing it into proper shape, and conforming it to their main line, and making it convenient and serviceable with their siding, when, in obedience to the writ, their construction ceased. The plaintiffs, in entire disregard of the injunctive order, unlawfully tore up and removed the defendants' track back to the line of the Ruth property, a distance of about three hundred and thirty feet, placing the materials upon defendants' land. The plaintiffs then completed the construction of their main track, and have been operating it ever since, whilst the defendants have been entirely deprived of access by rail to their wharf, and have lost a convenient transferring point for freight from the canal to the railroad, or from the railroad to the canal. At this point on the River road, which is sixty feet wide, there are now located the following tracks, namely: The main line of the Schuylkill and Lehigh Railroad, the defendants' lessor; the defendants' siding, which starts at Court street, in part removed; and the main track of the plaintiffs, from which, at a short distance below Buttonwood street, a siding extends parallel with the main line. The plaintiffs contend that the defendants' construction, particularly the crossing over the plaintiffs' route, was in part located upon the River road and upon the plaintiffs' lot, thus appropriating the same whereon the plaintiffs' route was previously located, and that the defendants' track across the plaintiffs' route

was at such a declivity, with reference to the plaintiffs' proposed railroad track, as to render it difficult and impracticable in crossing at grade; that it was an obstruction to the plaintiffs, and was made by the defendants for the purpose of hindering and debarring the plaintiffs from an occupancy authorized by various statutory enactments and by the various ordinances of the city of Reading. In short, the plaintiffs contend that the removal of the defendants' track was absolutely necessary in order to enable them to construct their main track. The defendants, in answer, aver that their construction of this siding was on their own property and across the plaintiffs' proposed railroad, that they were relaying and extending their track on the River road, which was but a continuance of their Court street siding, across the plaintiffs' route and over their own property, for the purpose of preserving their trade and facilitating their business between their railroad and their canal. At this point in dispute the defendants own land on both sides of the River road, and they possess all the rights and privileges of the Berks County Railroad, the power and franchises of its own charter, and the rights, privileges, and franchises of the Schuylkill Navigation Company. It appears that some time prior to the construction of the plaintiffs' railroad, or, rather, before its contemplated location on the River road was made known, an effort was made by certain of the city officers to acquire a portion of the road upon which the siding had been located for public use, the siding being then not actually used for railroad purposes. The defendants declined to accede to the request, and refused to permit the removal of the siding by the city.

"The plaintiffs have submitted certain propositions, which the master proceeds to consider: First, 'That the plaintiffs' railroad between Penn street and the Lebanon Valley bridge was located in March, 1883.' This, in so far as it relates to location, is in accord with the allegation in the third paragraph of the plaintiffs' bill, and, although not admitted by the defendants in their answer, is not denied. The master finds, however, that in point of fact the plaintiffs, in March, 1883, had simply located their route for a railroad over the ground in controversy by preliminary and tentative surveys,—in short, they ran lines and drove stakes; and that therefore there was no actual location or construction of a track over this route in March, 1883. Second, 'That the defendants at the time of the plaintiffs' location had abandoned their route along there.' The testimony of the defendants establishes conclusively that a use was made by the defendants of the track at intervals during the entire period, from the time of the leasing of the Berks County road to the defendants until the date of this controversy. Mr. Dale, in speaking of this track being used, says this track was

always used; that in 1882 he took up a rail, with the calculation of putting it back again; that he never did so, because the road was leased shortly afterwards. He further testifies that 'it is a usual thing to move rails around from one part of the road to the other.' It also appears in evidence that Mr. Roberts, president of the plaintiffs' company, on the 27th of March, 1884, offered to purchase the siding from the defendants; that no sale was consummated, and that within a few days after the offer was made the defendants commenced the construction of the branch in question. The master finds that the defendants had not entirely abandoned this track, as claimed by the plaintiffs, at the time of the plaintiffs' location. Third. 'That the siding formerly extended from Court to Buttonwood streets was the property of Bushong & Craig.' Mr. Craig received some toll for the use of this siding during a portion of the time, but such testimony, when considered with reference to the testimony of his partner, Mr. Bushong, who disavows all ownership, is therefore entirely insufficient to establish any ownership in Mr. Craig. Mr. Bushong, being examined, testified as follows: 'Q. Do you remember the second track on River street, running from Court out up the river? Who put the track there? A. The Berks County Railroad Company. Q. Something has been said about Craig and you claiming the track as owners. A. It never belonged to us; the Berks County Railroad put down that track.' The master finds that the siding is not the property of Bushong & Craig. Fourth. 'That the siding, of which they, the plaintiffs, complained in their bill, which was laid in April, 1884, was made to obstruct the construction of the said plaintiffs' road, and was not practicable for the professed purpose for which this siding was laid.' The master finds, under the testimony in this case, that the siding in question was a practical siding for the purposes of the defendants' business, and that its construction as contemplated was fully authorized by the corporate power and authority of the defendants. The fact that its construction was stimulated by the contemplated construction of the plaintiffs' railroad is unimportant, and the fact that it may have to some extent obstructed the plaintiffs' railroad is likewise immaterial, because it is manifest from the testimony that this obstruction was due entirely to the hastiness of the construction of the siding, and to the defendants' inability to properly complete it, by reason of the plaintiffs' writ of injunction. It is also apparent that the rapid descent of the defendants' track at the point in controversy, specially complained of by the plaintiffs, can, under the testimony of both parties, be easily obviated by properly constructing, grading, and aligning said track, so that the plaintiffs can readily cross the same, and both the defendants' siding and the plaintiffs' railroad can exist. The mas-

ter under these findings, based largely upon the testimony not submitted to the court at the time of its decision continuing the preliminary injunction, does, therefore, not regard the affirmance of that decree by the supreme court as decisive of the question. The master is of opinion that, on the law and the facts, the plaintiffs have no such standing as to entitle them to a remedy by injunction, for such a remedy is never granted unless there is a clear right which is violated, resulting in irreparable injury, and when there is no adequate remedy at law. Such facts have not been established by the plaintiffs. The master therefore, in view of the corporate power and authority of the defendants, and the facts as ascertained, regards the construction by the defendants as having been but the lawful exercise of an undoubted prior right on the River road, and therefore decides that the defendants were lawfully authorized to extend their siding, and to cross the plaintiffs' location at grade, in the construction of their tracks to connect the defendants' railroad system with the Schuylkill Navigation Company's canal, which is controlled and operated by the defendants under a contract and lease. The master further decides that the siding was a practical one for the purposes of the defendants, and that it was no insuperable obstruction to the plaintiffs' railroad."

The following are the parts of the opinion of the court, (G. A. Endlich, J.,) on the master's report and exceptions, necessary to be set out:

"Plaintiffs' Exceptions. Nos. 5, 6, 11, 12, 13, and 15 relate to the power of the defendant to construct, and its bona fides in constructing, the branch, its action in relation to which became the occasion of this suit. In the light of the testimony in the case, it can scarcely be open to dispute that the defendant had the power to build the branch at the time when it undertook to do so. In so far as the legitimacy of the exercise of that power, as dependent upon the bona fides of the attempt, is important here,—the element in this case, indeed, mainly dwelt upon by plaintiff's counsel at the argument,—the finding of the master in favor of the defendant, being based not simply upon deductions and inferences from other facts shown or admitted, but also in a large degree upon direct testimony of witnesses examined before him, is entitled to great weight, (Phillips' Appeal, 68 Pa. St. 130, 138,) and will not be disturbed unless clear error is apparent. The allegations of plaintiff's bill in the particular now under discussion are explicitly denied by the answer. Bearing in mind the rules of equity practice as to the amount of evidence necessary to overcome such denial, (Id. 139,) a review of the testimony fails to show that the master's conclusions are wrong. No. 17 is meritorious in so far as it objects to the recommendation to dismiss plaintiff's bill. The finding

of the master that the plaintiff is not entitled to the injunction it prays for is based, in part, upon the fact that the construction of the defendant's branch will not be an insuperable obstacle to the building and operation of plaintiff's railroad, because, as shown by the evidence, the former may be so accomplished as to enable the plaintiff conveniently to cross it. If this is to be a ground for refusing the injunction, and if it is further true, as the master finds, that the plaintiff has the right to build its railroad in the manner claimed, and that the possibility of the crossing referred to is a condition of the coexistence of the defendant's branch and the plaintiff's road, then, under the general prayer of the bill, the decree ought to be so framed as to conserve whatever equities the plaintiff may have in the premises.

"Defendant's Exceptions. The remaining exceptions raise the two questions chiefly discussed by defendant's counsel at the argument, viz.: (1) Has a railroad company incorporated under the act of 1868, i. e. this plaintiff, the right to occupy any street longitudinally? and, (2) if so, is the previous grant to defendant on these streets exclusive of its exercise in this case? First. A direct judicial expression upon this inquiry, and that in the negative, is contained in the decision of a majority of the judges of common pleas court No. 3, Philadelphia county, in *Pennsylvania R. R. Co. v. Philadelphia Belt Line R. R. Co.*, 29 Wkly. Notes Cas. 202, 40 Leg. Int. 4, which derives no support from the refusal of the supreme court, on appeal, to disturb the injunction granted below. 24 Atl. 210. The doctrine there announced, therefore, is not binding upon us. Since, however, the matter may be said to be on its way towards final adjudication, an exhaustive discussion of it here could serve no rational purpose. I shall restrict myself to briefly indicating the reasons why I am unable to adopt the views taken by the majority judges in the case referred to. The twelfth section of Act April 4, 1868, (P. L. 82,) is not a proviso, and therefore the technical rules relating to the construction of provisos are inapplicable to it. It is an interpretation clause, enacted as an independent section. Couched in negative language, it was manifestly designed to limit the meaning of something which the draftsman and the legislature supposed to be contained in the foregoing parts of the statute, to restrict the interpretation of a grant of right which the draftsman and the legislature thought had been made in general terms. Supposing such an assumption to be founded in error, it is by no means incapable of having the effect of an enactment. Not to multiply authorities upon a proposition so plain, I may instance the case of *Com. v. Hauck*, 103 Pa. St. 536, where an act imposing a penalty for the improper use of sidewalks constructed by individuals in unincorporated villages was

referred to as recognizing the right to construct such sidewalks, thus relieving them from the objection of being public nuisances, and that of *State v. Eskridge*, 1 Swan, 413, where a mere proviso to a statute declaring an act lawful which was so before, and that nothing contained in the statute should be construed to permit the doing of another thing within its general provisions, equally lawful before, was said to have the effect of prohibiting the latter thing for the future. Similarly, the inference unmistakably arising from this section that the legislature assumed that it had granted to railroad companies chartered under this statute the right to occupy the streets of municipalities, showing a clear intention so to do, is a recognition of that right, and a grant of it by necessary implication, although that assumption were unsupported by any other language in the statute. The doctrine of implied grants is as applicable to statutes relating to corporations as to any other, (*City of Bridgeport v. Housatonic R. Co.*, 15 Conn. 475, 501; *City of Williamsport v. Com.*, 84 Pa. St. 487, 493; *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339;) and such a grant is as much a part of the statute as if it were made by express language, (*Hanchett v. Weber*, 17 Ill. App. 114; *U. S. v. Babbitt*, 1 Black, 61.) It is, however, not at all needful to rest the decision upon this implication. The fifth section of the act of 1868 expressly incorporates, in the powers granted to companies formed under it, 'all the rights, powers, and privileges' of Act 19th Feb., 1849, 'as fully and effectually as if said powers were specially incorporated in' their charters. Granted that the act of 1849 had reference only to companies deriving their corporate existence from special legislation, it is nevertheless a general definition of the powers to be exercised by them. In that sense it is imported into the act of 1868, and stands there as its declaration as to what shall be the powers of a railroad company incorporated under it. Act Feb. 19, 1849, § 10, (P. L. 83,) expressly authorizes railroad companies 'to survey, ascertain, locate, fix, mark, and determine such route for a railroad as they may deem expedient, * * * and thereon to lay down, erect, construct, and establish a railroad,' etc., saving from this grant, and denying as excepted from its broad generality, only the right to pass through any burying ground, place of worship, or dwelling house, without the consent of the owners. Now, whilst it is true that the presumption against an intent to deprive the public of anything belonging to it ordinarily forbids the application of a general power to occupy real estate to property already dedicated to and held for a public use by authority of law, as, e. g. public highways, (*Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339, 354; *Pennsylvania R. Co.'s Appeal*, 93 Pa. St. 150,) yet the power to occupy such may be given, not only by express grant, but also by a grant inferable

by necessary implication, (*Com. v. Erie & N. E. R. Co.*, *supra.*) And the latter has been held to arise from the grant to a railroad company of a right to construct its road by the most practicable route its engineers may select, (*Danville, H. & W. R. Co. v. Com.*, 73 Pa. St. 29,) or by a direct practicable route, as to it may seem most advantageous, (*Mayor, etc., of Pittsburgh v. Pennsylvania R. Co.*, 48 Pa. St. 355;) or by the most direct and least expensive route between its termini, (*Railroad Co. v. Speer*, 56 Pa. St. 325.) What substantial difference is there between a grant in any of these terms and the power under the act of 1849 to construct a railroad on 'such route * * * as they may deem expedient?' Surely none that can be arrived at by any process short of hair-splitting, and that is a process the application of which to a question of such magnitude and seriousness would be unworthy. Judged by the significance hitherto attached to legislative phraseology, I think the language of the act of 1849 is sufficient to give the companies to which it applies the right to occupy highways. If, however, the terms used need any strengthening in order to support this construction, it is to be found ready at hand in the enumeration of the exceptions as to burying grounds, etc. 'Expressio unius est exclusio alterius.' I may add that it is very difficult, if not impossible, to read the opinion of Mr. Justice Trunkey, in *Cake v. Railroad Co.*, 87 Pa. St. 311, 312, otherwise than as importing a concession by the supreme court of the existence of the power under discussion by virtue of the act of 1849. If that statute, so understood, is read into section 5 of the act of 1868, then the twelfth section of the latter, instead of being treated in part as senseless verbiage, is given its proper and legitimate operation throughout. Instead of being simply expunged, the last clause, in particular, stands, as it was intended to stand, as a restriction by legislative construction upon the exercise of the previously granted general right to occupy a street, by making it subject, in every instance when it is sought to be exercised in a borough or city, to the consent of the municipal authorities. If the legislature has not seen fit to place a similar limitation upon the power to occupy highways in the country districts, considering the provision made in section 13, Act 1849, adequate for that case, that is an omission which lies at its door. It is not for the courts of justice to provide for the defects and mischiefs of imperfect legislation. *Smith v. Rines*, 2 Sumn. 354, 355,¹ per Story, J. As opposed to this construction of the acts of 1849 and 1868, I confess my inability to see any considerable force in the circumstance that, even after their enactment, and previous to 1874, the power to occupy streets was usually expressly given in the special acts incorporating railroad

companies or conferred by distinct grant. It is a rule of statutory construction, sustained by abundance of authority, that the enactment by the legislature of any specific provision on a particular subject, or the express grant of a specific power in a particular instance, is not to be regarded as a conclusive declaration that the law was different before, or that the power did not exist before. *Montville v. Haughton*, 7 Conn. 543; *Mayor v. Davis*, 6 Watts & S. 269, 278; *Nunnally v. White*, 3 Metc. (Ky.) 584. 'The only inference which the court can draw from such superfluous provisions * * * is that the legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution.' *Maxw. Interp. St.* 379, and cases there cited. Or it may be added, with special reference to these railroad enactments, that it intended to prescribe, as nearly as possible, the exact route for which authority was asked and given. Second. The defendant, however, claims the right to exclude the plaintiff from these streets by virtue of the privilege granted by the legislature to the West Reading Railroad Company, (Act March 20, 1860, [P. L. 471,]) and acquired by it through the consolidation of 4th April, 1873. Upon this question, directly involved in *Philadelphia & R. R. Co. v. Berks County R. Co.*, 2 Woodw. 361, the reasoning and decision of Woodward, P. J., make any further discussion unnecessary: 'The recognition of some distinction,' says the learned judge, 'between the authority of a railroad corporation over a street upon which it has received a license to erect its structures, and the dominion it exercises over land it has bought and paid for, forces itself upon the mind inevitably and instinctively. * * * The grant was not of the streets, nor of a territory sixty feet in width, but of the right of way for a railroad. The company's interests are not to be measured by what they may have claimed or contemplated, but what they did. The portions of these streets which they did not appropriate for the purposes of their road belong to the plaintiffs, (the same who are defendants here,) and are subject to their control no more than the dozen other streets which the West Reading Company might have selected for their line under their charter, and which they did not appropriate at all.' Of the decisions cited by defendant's counsel on this contention, that of *Yost v. Railroad Co.*, 29 Leg. Int. 85, is disposed of in the same opinion, and the rest (*Prather v. Telegraph Co.*, 14 Am. & Eng. R. Cas. 1; *Jones v. Railroad Co.*, 144 Pa. St. 629, 23 Atl. 251; *Railroad Co. v. Williams*, 54 Pa. St. 103; *Allegheny V. R. Co. v. Pittsburgh Junction R. Co.*, 122 Pa. St. 511, 6 Atl. 564) are obviously inapplicable. These exceptions cannot be sustained. There remains only the recommendation to divide costs, objected to by the plaintiff's eighteenth and the defendant's twenty-second exceptions. If both bills

¹ Fed. Cas. No. 18,100.

were to be wholly dismissed, the logical disposition of the costs would seem to be to let the plaintiff pay those apportionable to the bill, and the defendant those apportionable to the cross bill. *Baum v. Wicklein*, 2 Woodw. 242. But the plaintiff's bill is not to be wholly dismissed. In view of this result, it seems to me that an equal division of the costs is justified."

Cyrus G. Derr, for appellant. Philip S. Zieher, Jefferson Snyder, and Geo. F. Baer, for appellee.

PER CURIAM. The facts of this case sufficiently appear in the report of the learned master and opinion of the court below. A consideration of the questions presented by the specifications of error has led us to the conclusion that there is nothing in either of them that requires a reversal or modification of the decree, and they have been so fully considered by the learned judge of the common pleas that further elaboration is unnecessary. The decree is affirmed on his opinion, and it is ordered that the appeal be dismissed, with costs to be paid by appellant.

(160 Pa. St. 359)

BEHLING v. SOUTHWEST PENNSYLVANIA PIPE LINES.

(Supreme Court of Pennsylvania. March 26, 1894.)

NEGLECT—PROXIMATE CAUSE—QUESTION FOR COURT.

Plaintiff's house was on the bank of a run. A pipe line was laid in the run up to the oil wells above plaintiff's house. A branch line from a well across the run connected with the main line near plaintiff's house. Oil tanks on the main line caught fire. The burning oil flowed down the run, past plaintiff's house, till it reached a dam built to prevent its descent into the village, and the heat from the oil burning in the dam caused the branch line to burst, and plaintiff's house caught fire and was consumed. *Held*, that the laying of the pipe lines in the run was not the proximate cause of the burning of plaintiff's house.

Appeal from court of common pleas, Washington county.

Action by Mary Behling against the Southwest Pennsylvania Pipe Lines for damages for negligently causing plaintiff's house to be consumed by fire. From a judgment entered on a verdict for plaintiff, defendant appeals. Reversed.

H. McSweeney, M. F. Elliott, and Boyd & Crumrine, for appellant. Taylor & McIlvaine, for appellee.

WILLIAMS, J. The house of the plaintiff, situated near the bank of Robb's run, in the borough of McDonald, was burned on the night of the 10th of November, 1891. The defendant company was engaged in transporting oil from the wells of the McDonald oil field to its storage tanks, and to the markets in Pittsburgh and other cities. The plaintiff alleges that the burning of her

house was due to the negligence of the defendant in laying its lines, and brings this action to recover its value. The important facts are not in controversy. The McDonald field extends over a large region, covering the country on both sides of the run, and extending over the tops of the hills above it. Many of the wells were unexpectedly large, and considerable oil was lost before the field was accommodated with lines sufficient for its transportation. There were several wells above Mrs. Behling's house, the waste oil from which had run into and down Robb's run before the lines reaching there could be laid. To secure and remove the product of these wells, a four-inch line was first laid up the run and along its course. This proved insufficient, and a three-inch line was placed along by its side. The oil from the wells on the side and top of the hill was drawn into these lines, and conveyed out of the field. Among the wells served by these lines was one known as the "Butler Well," which was some 500 or 600 feet from the Behling house, further up the hill, and near the run. Another was known as the "Church Well." This was on the opposite side of the run, some distance from it, and connected with the pipe lines along the run by a branch made of two-inch pipe. The point of junction was near 100 feet from the house, and, as we understand, lower down the stream. On the night of the 10th of November, 1891, the Butler well took fire. The derrick, engine house, and machinery were destroyed, and the fire was communicated to the tanks, in which about 150 barrels of oil were standing at the time. The tanks soon gave way, and the burning oil flowed into Robb's run, and the built-up part of the town lower down the stream. The people turned out in force to prevent the threatened general conflagration, and built a dam across the run to confine the oil, so that it might burn there, instead of descending to the village. The fiery flood passed the Behling house, and reached the dam, near the point where the branch pipe from the Church well connected with the four-inch line. The intense heat caused by the burning oil in and just above the dam thrown up by the citizens to stop the descent of the oil caused the branch pipe to burst, and for a few moments, until the oil could be shut off, a spray of oil was thrown towards and upon one corner of the house. The house took fire (but whether before or after the bursting of the pipe was one of the disputed questions of fact in the case) and was wholly consumed.

Two questions arise on these facts: First. Was the laying of the defendant's pipe along Robb's run the cause of the destruction of the plaintiff's house by fire? If it was, then the second question is whether the burning of the house was such a circumstance as, in the exercise of a proper measure of prudence, should have been foreseen as a natural

or a probable consequence of the location of the lines along the run. The learned judge of the court below submitted both questions to the jury, and both were found in favor of the plaintiff. The first question rested on facts that were undisputed, and was therefore for the court, and not for the jury. *Railroad Co. v. Taylor*, 104 Pa. St. 306; *Township of West Mahanoy v. Watson*, 112 Pa. St. 574, 3 Atl. 866. The pipe line was laid for the transportation of oil for the producers who were within reach of it. This was a lawful purpose, undertaken by a corporation organized according to law, and carried on in the usual manner. No complaint is made of the material employed, nor of the manner in which the line was laid. It is not alleged that its use for the purposes for which it was intended was dangerous to the property of the plaintiff, nor that it might not have been operated for years without danger to any one. There is no negligence charged in either the construction or operation of the line. What is complained of is that it was located where it could be reached by the burning oil from the Butler well. But the lines following the course of the run did not give way, notwithstanding the heat to which they were subjected. The two-inch branch coming from the Church well was what gave way, at or near its connection with the line. This connection was not far from the bridge and the dam built by the citizens to check the flow of the oil down the run, and it was subjected to greater heat for that reason than it would otherwise have been. The flames from the burning oil were much higher and fiercer by reason of the accumulation of oil in the dam, reaching up, as some witnesses say, to a height of 20 feet or more. This stream of burning oil, descending the run, and passing within 25 feet of the plaintiff's house, was, as to the pipe lines, an independent, intervening cause. But for this the two-inch branch would not have burst, and, if it had, would have done no substantial injury. This is not a case where concurrent causes are involved, for the pipe line without the stream of burning oil was harmless. A stack of hay or straw standing on the bank of the run would have been fired by the flames from the oil, and might have communicated fire to the plaintiff's house, and caused its destruction; but I apprehend it would not be contended that the stack was a concurring cause. In one sense it would have been the immediate cause of the burning of the house, as it was the instrument by which the fire was communicated to it; but the causa causans, the true proximate cause of the burning of the house, would nevertheless be the descending flood of fire that kindled a flame in every inflammable object along its course. This branch line, like the stack of hay or straw, was a harmless object in itself, having no tendency to endanger the plaintiff's proper-

ty. The fire came down the run,—a wholly independent agency,—and, confined by the temporary dam, the heat became so great as to destroy the connection, and set the escaping oil on fire. If the oil did reach and set fire to the house, the parallel between it and the stack is complete. It became dangerous only when it was destroyed by an independent intervening agency or cause, and because of its destruction. The pipe lines were not, therefore, the efficient or proximate cause of the plaintiff's loss. A proximate cause is one which in natural sequence, undisturbed by any independent cause, produces the result complained of. In this case the sequence led, not from the pipe lines or the branch from the Church well, but from the bursting of the tanks at the Butler well, and the descent of the burning oil therefrom. Nor was the pipe line a concurring cause, for neither in its construction nor in its operation did it tend to produce the result. It did not run with the burning oil to effect the destruction of plaintiff's house, but it became the means or instrument of communicating the fire, under the compulsion of an independent efficient cause, by which the destruction was accomplished. The pipe line, like the stack we have supposed to stand on the bank of Robb's run, was an intermediate object, through which the burning oil might communicate its fire to any other object that was within reach. It was the duty of the learned judge, upon the admitted facts of this case, to determine the question of proximate cause, and not to send it to a jury. *Railway Co. v. Trich*, 117 Pa. St. 390, 11 Atl. 627. This is decisive of this case, and renders the discussion of the second question unnecessary. The rule is well settled, however, that one is liable for such consequences of his acts as he should, in the exercise of reasonable prudence, foresee as probable or natural. The question is, did he know, or had he the means of knowing, that the result complained of would be likely to follow the action or undertaking upon which he was proposing to enter? What was the company that constructed this pipe line bound to anticipate and provide for? The answer must be, the natural and probable consequences both of its construction and operation. It was bound, therefore, to care in the selection of the material, in securing good workmanship in its construction, and competent superintendence in its operation. The burning of the Butler well was not a probable or natural consequence of the laying of the pipe line. It had no relation whatever to the line. It was an accident to the property of another, over which the owners of the line had no control. It is true that such accidents occasionally happen in an oil-producing region, and that the owners of the pipe line, like the owners of buildings, have such possibilities to reckon with. But a pipe line to carry oil must reach the wells that provide it, and

in so doing the risk of injury from the burning of a well is one of the unavoidable risks incident to the business. We think the court below might well have disposed of the second question as a question of law, and instructed the jury that a casualty like the burning of the Butler well was not a consequence of the construction of defendant's lines; nor was the possibility of such an accident such an element of danger as the defendant was bound to foresee and provide against for the protection of the property of third persons along its line. The judgment of the court below is reversed.

(180 Pa. St. 345)

STRUNK v. FIREMEN'S INS. CO. OF CHICAGO.

(Supreme Court of Pennsylvania. March 19, 1894.)

FIRE INSURANCE POLICY—CONDITION—INTERPRETATION—ACTION FOR LOSS—INSTRUCTION—HARMLESS ERROR.

1. Where a fire insurance policy provides that it shall be void if the premises become vacant "without immediate notice to the company and consent indorsed thereon," "immediate" means "within a reasonable time;" and, after vacancy followed by such notice, the policy remains in force until consent is refused by the company.

2. Plaintiff requested J., who placed the insurance, to notify the company that the premises were vacant. He had been the agent, and did not notify plaintiff that his agency was revoked, but sent a notice to the company, and it at once refused a permit. The property burned the day before the permit was refused. *Held*, that it was harmless error to charge that though J.'s agency had terminated, yet, so far as concerned the plaintiff, he was still the agent, because she had not been notified of the changed relation.

Appeal from court of common pleas, Monroe county; John B. Storm, Judge.

Action by Maggie C. Strunk against the Firemen's Insurance Company of Chicago, Ill., on a fire insurance policy. From a judgment entered on the verdict of a jury in favor of plaintiff, defendant appeals. Affirmed.

W. W. Watson and Henry J. Kotz, for appellant. Charles B. Staples, for appellee.

FELL, J. The policy of insurance issued by the defendant contained a provision relieving it from liability for loss "if the premises hereby insured become vacated by the removal of the owner or occupant without immediate notice to the company and consent indorsed thereon." The house insured was occupied by a tenant, who moved out on the 4th of April. On the same day the plaintiff requested her husband to go to Stroudsburg, 13 miles distant, and give notice of the vacation of the house to R. M. Jacoby, whom she supposed to be the agent of the company, and ask him to obtain the consent of the company. Her husband complied with her request on the 6th. Mr. Jacoby had, until a month previous, been the agent of the com-

pany, and had placed the insurance. He did not notify the plaintiff's husband that he no longer represented the company, but agreed to give the necessary notice and obtain the consent desired. On the 7th he called on Mr. Bell, an insurance agent, who had business relations with the state agent of the company, who lived at Philadelphia, and requested him to notify them. Mr. Bell, on the 8th, wrote as desired, and his letter was received on the 9th. The agent at Philadelphia at once replied, refusing a permit. On the 8th the house was destroyed by fire.

The sixth assignment of error raises the question of the right of recovery under the terms of the policy after the house became vacant, and the disposition of it is conclusive of the case. The learned judge, in the course of his charge, said: "Vacancy did not, ipso facto, avoid the policy by its terms; vacancy without immediate notice to the company and consent thereon did. The giving of notice was the duty of the insured; the giving of consent, and the indorsing of it on the policy, were optional with the company." The jury was instructed that immediate notice in the policy meant notice within a reasonable time, and that, after vacancy followed by notice in a reasonable time, the policy remained in force until consent was refused by the insurer. We see no error in this instruction. Conditions involving forfeiture and exemption from liability should be strictly construed against the insurer; but the most liberal construction would not relieve the defendant in this case. The evident and only reasonable construction of the clause in question is that given by the learned trial judge. In case the premises became vacant, immediate notice was to be given, and it was then optional with the insurance company to continue or cancel the policy. The fact of vacancy did not work a forfeiture of the policy, but it imposed upon the insured the duty of notice, and gave to the insurer the right of cancellation. There would be no reason for notice and consent if the policy were already void. Immediate notice must be construed to mean notice within a reasonable time, in view of the circumstances and positions of the parties. What would be reasonable time when the parties live in the same city or town, or have means of ready communication, might be very unreasonable if applied to the parties to this suit, one of whom lived on a farm 6 miles from a post office, 12 miles from a railroad, and 13 miles from the town in which the agent of the company who had placed the insurance, and to whom she would naturally look for information, resided.

The fourth assignment of error is to the instruction that although Mr. Jacoby's agency had terminated, yet, so far as concerned the plaintiff, he was still the agent of the company, for the reason that she had not been notified of the changed relation. The thirteenth assignment is to the same effect. This

was not an accurate statement of the law, and, if it were apparent that it might have led the jury to a wrong conclusion, we should feel obliged to send the case back for retrial. This error, however, does not seem to be fatal. Jacoby was not, on April 6th, the agent of the company, and the plaintiff, in her dealings with him, took all risks upon that point; but he became her representative for the purpose of transmitting notice, and, acting for her, he set in motion the agencies which resulted in notice to the insurer on the 9th. What he did was properly in evidence as showing how notice was sent, and also as showing good faith and diligent effort on the part of the plaintiff.

The only remaining assignment of error that requires notice is the seventeenth, which relates to the overruling of an objection to the offer by the plaintiff of proofs of loss; and the sufficient answer to this is that they were offered and admitted for a proper purpose, and read to the jury without objection made at the time. The judgment is affirmed.

(160 Pa. St. 317)

JOHNSON et al. v. FREEMANN.

(Supreme Court of Pennsylvania. March 19, 1894.)

CONTRACT TO CONSTRUCT MACHINE—INTERPRETATION—WARRANTY.

Plaintiffs proposed to build for defendant a street-paving machine "as per drawings and specifications," for a specified sum, "exclusive of patterns which are to be furnished to us." The patterns furnished by defendant were incomplete, and the drawings defective, and he authorized plaintiffs to correct any defects. Plaintiffs then revised their bid, and proposed to build it, "including revised drawings and patterns," for an increased sum. *Held*, that the words "including revised drawings and patterns," in the second bid, did not change the contract so as to require plaintiffs to furnish a machine that would "work satisfactorily as a machine," and that it only required the parts designed and constructed by them to be suitable for the intended purposes, and all the material and workmanship to be good.

Appeal from court of common pleas, Philadelphia county; Pennypacker, Judge.

Action Israel H. Johnson, Jr., and others, trading as Israel H. Johnson, Jr., & Co., against J. S. Freemann to recover the price of a patent street-paving ramming machine constructed by plaintiffs for defendant, in which defendant pleaded a set-off exceeding the sum claimed by plaintiffs, on account of defective workmanship and materials, etc. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. Alexander Simpson, Jr., and J. S. Freemann, for appellant. Hood Gilpin, for appellees.

GREEN, J. The learned court below charged the jury as follows: "It is for you to say whether the breaks which occurred and the difficulties that arose when the machine was taken out for use were due to inherent

defects in the plans and patterns which were furnished, or whether they were due to the lack of proper workmanship on the part of the plaintiffs, or due to some want of skill in the parts designed by them, or in the construction of those parts. If the defects are due to imperfect workmanship on the part of the plaintiffs or to any want in the materials which they used in the construction of the machine, or if the parts which they were to design, and did design and construct, were not reasonably suitable for the purposes for which they were intended, the defendant would be entitled to deduct from the claim of the plaintiffs such an amount as he would be required to expend in repairs in putting the machine in the condition which was arranged for in the plans and designs. He would be further entitled to deduct from that claim the necessary expenses to which he has been put which were a result of those defects. The amounts have been testified to you which he claims to deduct, and you have them before you. If the machine was constructed according to the plans and specifications which were furnished, with proper material, and the workmanship was of a reasonably suitable character, and if the parts designed by the plaintiffs were fit for the purpose for which they were intended, then the plaintiffs are entitled to recover in this suit." The defendant, being examined as a witness on his own behalf, testified as follows, *inter alia*, viz.: "Q. And, as another thing, you do not pretend to say that the plaintiffs guaranteed this machine would do the work which it was designed to do? A. They did not guaranty that. * * * Q. No such undertaking on their part that the machine would be successful so far as the paving the street went? A. No. Q. That was the object you had in making the patent, and they did not guaranty it? They simply guaranteed the work and the materials? A. That is all." The contract between the parties was in writing, in the form of two proposals, the material parts of which are: (1) "We propose to build for you one Johnson's patent street-paving ramming machine, complete, with boiler and engine, as per drawings and specifications, for the sum of \$1,650, exclusive of patterns which are to be furnished to us." (2) "We revise our bid of 15th by proposing to build for you one Johnson's patent street-paving rammer, including revised drawings and patterns, for the sum of \$1,850." The occasion of the revised bid was that a day or two after the first bid, and after the patterns had been examined, it was found that they were incomplete, and that the drawings relating to the locomotive part of the machine were defective. The defendant called on the plaintiffs, and was then informed of these facts. "He then informed the plaintiffs that they should carefully examine all the drawings and specifications, and, if there was anything imperfect or defective, to cor-

rect it. . . . He then requested them to send him another proposition covering everything needed to construct a complete machine, suitable for the work for which it was to be used." The foregoing quoted statements are taken from the defendant's history of the case.

As will be seen by the above-quoted portion of the charge, the court below instructed the jury that "if the defects are due to imperfect workmanship on the part of the plaintiffs, or to any want in the materials which they used in the construction of the machine, or if the parts which they were to design, and did design and construct, were not reasonably suitable for the purposes for which they were intended, the defendant would be entitled to deduct," etc. This portion of the charge is not assigned for error, and it certainly seems to us to express the full measure of the plaintiffs' obligation under the contract. According to the defendant's personal testimony, the plaintiffs did not guaranty, and were not asked to guaranty, that the machine, when constructed, would do the work for which it was made. The plans and specifications were to be furnished, and were furnished, by the defendant. When it was found they were imperfect in some respects, the plaintiffs undertook to furnish revised "drawings and patterns," to correct the imperfections, and did so, and as to these the charge of the court below held them liable if they were not reasonably suitable for the purposes for which they were intended. We are unable to hold, as is claimed for the defendant, that the words "including revised drawings and specifications" in the second bid operated to change the contract so that the finished machine should do its "work satisfactorily as a machine." The revised drawings and specifications were only rendered necessary by the imperfect condition of the drawings and patterns that had been furnished by the defendant. It was merely to supply those defects that the plaintiffs undertook to furnish such as were needed. We cannot consider that this undertaking sufficed to change the whole nature of the contract. The case of *Dubois v. Bigler*, 95 Pa. St. 203, was entirely different from this. There the contractor was to furnish all the drawings for the engines, and guaranteed that the materials and working of the engines should be first class, and satisfactory to the purchaser, and the decision was put upon that ground. Thus Mr. Justice Trunkey, delivering the opinion, said: "The engines and fixtures were for a particular purpose, to be made and placed by plaintiffs according to their drawings and specifications, the working of which was guaranteed to be first class and satisfactory. Materials, workmanship, and plan were embraced in the engines and fixtures, which were warranted to do good work as the motive power for a large sawmill. . . . The plaintiffs contracted for the successful

working of the machinery, and are liable for its failure, unless success was prevented or hindered by the act or default of the defendant." All of these important and controlling features are absent from the present case. We think the case was correctly tried by the learned court below. The instructions as to damages are not important in this view of the case, but, if they were, we think they are correct. Judgment affirmed.

(160 Pa. St. 326)

TURNER v. WARREN.

(Supreme Court of Pennsylvania. March 19, 1894.)

DEED—IN VIEW OF MARRIAGE—DELIVERY—WITNESS—COMPETENCY.

1. I., being about to marry R., had his counsel prepare a deed of land to her, and with H., brother-in-law of R., went before a notary, acknowledged the deed, and handed it to H. to deliver to R., which H. did the same day. Later I. handed it to H., with other papers, to put in the safe for R., where they remained till after R.'s death, some two years after her marriage to I. Held a delivery.

2. Where a man deeds his affianced land on an agreement that after marriage she shall will it to him if he survive her, and after marriage she dies intestate before him, the deed will hold in favor of her heirs.

3. Nor can its effect be destroyed by the grantor's erasure of his signature after his wife's death.

4. Where a widower consults his counsel about taking out letters on his wife's estate, and hands him her papers, including a deed which he had made to her in contemplation of marriage, the counsel is violating no professional confidence in testifying to this transaction and its date, and that after the widower's death, the papers having remained all the while in his hands, he found the signature to the deed erased.

5. A witness incompetent by interest to testify as to transactions with a deceased person swore that he had assigned his interest in good faith; that there was to be no recompense. The court permitted him to be sworn, leaving his credibility to the jury. Held a decision by the court that his assignment was in good faith, as required by Act May 23, 1887.

Appeal from court of common pleas, Delaware county.

Ejectment by Sarah C. Turner against Lillian Warren. Judgment for plaintiff. Defendant appeals. Affirmed:

Geo. P. Rich, Garrett E. Smedley, and Mayer Sulzberger, for appellant. V. Gilpin Robinson and George E. Darlington, for appellee.

GREEN, J. This action was an ejectment for 34 acres of land in Delaware county. Both plaintiff and defendant claimed title from John H. Irwin. The plaintiff gave in evidence a deed for the land in dispute, dated October 12, 1885, to Rebecca J. Elder, who died intestate and without issue, and the title to the land described in the deed passed under the intestate law to her two sisters, Sarah C. Turner and Ella N. Heuckeroth. Mrs. Heuckeroth subsequently conveyed to

Mrs. Turner her undivided one-half interest in the land, thus vesting in the plaintiff the whole estate. John H. Irwin, the grantor in the deed to Rebecca J. Elder, died in 1890, leaving a last will, in which he devised all his estate, real and personal, to the defendant. The question is, which title shall prevail,—that of the grantee in the deed, or that of the devisee under the will? At the time the deed was executed Irwin was engaged to be married to Rebecca J. Elder, and, in view of the approaching marriage, conveyed this land to her on the agreement that after their marriage she should make a will devising the land to him in case he survived her. In about four months after the execution of the deed they were married, and in less than two years thereafter she died, leaving no children. There is no evidence that she ever made the will contemplated by both when the deed was made. It is objected by the defendant that there was no sufficient evidence of the delivery of the deed. As to this the testimony showed that the deed was prepared by Mr. Darlington, Irwin's counsel, at his (Irwin's) request, and sent by him to Irwin by mail; that, on the day it bears date, Irwin, in company with Charles F. Heuckeroth, husband of Miss Elder's sister, went before a notary of Philadelphia and duly acknowledged the deed in the presence of Heuckeroth, to whom he then handed it, to be by him delivered to Miss Elder, and on the same day he did deliver it to her. About a month or six weeks after this Irwin handed this deed, with others, in a package of papers to Heuckeroth, with directions to put them in his (Irwin's) safe for Miss Elder, Heuckeroth being a manager for Irwin and having the combination to the safe. They remained in this safe until after Mrs. Irwin's death, when, at the request of Irwin, Heuckeroth took them out and delivered them to him. The deed was then in the same condition as when put in; the signature was untouched. Mr. Irwin put the deed, with others of his deceased wife's papers, soon after in the hands of his counsel, Mr. Darlington, where they remained until after Mr. Irwin's death, in 1890. On examination then, Mr. Darlington discovered that the grantor's signature to the deed had been erased. If Mr. Darlington and Mr. Heuckeroth were competent witnesses, certainly their evidence proved a delivery of the deed to the grantee, and, in view of the marital relation which soon after commenced between them, the possession of the deed was not inconsistent with such delivery. That a husband should place his wife's papers in his safe, and that they should remain there until her death, needs no explanation, for it is entirely free from suspicion or doubt. As between strangers, it would be improbable that the grantee in a deed would permit it, after delivery, to remain in the possession of the grantor. It is not so, however, where the grantee is the wife of the grantor, and

he has a safe for the keeping of valuable papers. Care would in such case prompt the wife to deposit the deed in her husband's safe.

As to the objection to the competency of Mr. Darlington as a witness, on the ground that the communications of Irwin to him after his wife's death were privileged, being his counsel, we do not think it can be sustained. Irwin consulted him with a view of taking out letters of administration on his wife's estate, and handed him the papers belonging to her, among them this deed. There was no communication made which is protected by the confidential relation. The delivery of the papers, the date of the delivery, and by whom delivered and in what condition they were found after Mr. Irwin's death,—no professional confidence was violated in testifying to these facts. As administrator of his wife's estate, he and his counsel were representatives of that estate, and not of Mr. Irwin individually.

Then, as to the objection to Heuckeroth's testimony on the ground of interest as the husband of Mrs. Irwin's sister, who had by intestacy an interest in the land, we can only say the act of May 23, 1887, clearly makes him competent on an assignment of his interest. Whether such assignment be in good faith is a question for the court. Heuckeroth testified absolutely that it was in good faith; that there was to be no recompense. The court permitted him to be sworn, leaving his credibility to the jury. In effect, this was determining the good faith of the assignment by the court.

The evidence tending to show delivery of the deed was fairly submitted to the jury under proper instructions, and they found it was delivered. This vested the estate in the future wife from the moment of delivery. To revest it in the husband, the mere erasure of his signature by himself after his wife's death was wholly ineffectual.

It seems very clear the negotiations preceding marriage culminated in an agreement that he would immediately convey the land to her by deed, and after marriage she would devise it to him, and she did not do so. But her failure or neglect to make a will could not divest her legal title to the land, unless there were proof of fraud, and there is no such proof in the case. At the time the deed was made by his direction it was termed a marriage portion for his intended wife. The marriage was consummated, and to that extent the purpose of the grantor was not disappointed. He knew his wife might not make a will, or, if she made one, might revoke or destroy it. He therefore assumed the risk that every expectant of benefits under a will runs,—a change of mind in the donor. Besides, the relation of this man and woman was wholly different after marriage from what it was at the time of the agreement. It was of a more confidential nature. Who can say that her neglect to make a will was

not the result of an agreement between them after marriage; that an antenuptial arrangement was not abandoned by mutual consent? We see nothing in any of the assignments of error that calls for a reversal of the judgment. Judgment affirmed.

(160 Pa. St. 327)

**KRAUT v. FRANKFORD & S. P. CITY
PASS. RY. CO.**

(Supreme Court of Pennsylvania. March 19, 1894.)

HORSE RAILROADS—STREET CROSSINGS — DEFECTIVE PAVEMENT.

1. Plaintiff started to cross a street, and saw a car coming on the further track, and, after crossing the nearer track, saw that it was coming very fast. He stopped between the tracks and stepped backward. His foot went among loose cobblestones, and he fell, and his arms were crushed by the car. *Held*, that the unusual speed of the car and the state of the pavement were the two contributing causes, and, since defendant was responsible for both, the question of remote and proximate cause did not arise.

2. There were both holes and loose cobblestones at the crossing. Plaintiff could not say which of these caused his fall. *Held*, that the jury could properly find that such holes or loose stones, and not a mere unevenness in the pavement, caused the accident.

Appeal from court of common pleas, Philadelphia county.

Action by John George Kraut against the Frankford & Southwark Philadelphia City Passenger Railway Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Wm. Henry Lex, Gavin W. Hart, and John G. Johnson, for appellant. O. Percy Bright, Walton Pennewill, and Mayer Sulzberger, for appellee.

FELL, J. The defendant has two tracks on Berks street, which curve northward into Front street. On the night of the plaintiff's injury he was walking south on the west side of Front street with the intention of crossing Berks. The substance of his testimony is that when he reached the corner of these streets, and before he left the pavement, he saw a car coming east on Berks street on the track further from him, and 20 or 30 yards from the crossing. Supposing that he would have time before the car reached him, he started to cross Berks street on the flag or stepping stones. After crossing the tracks nearer to him, he observed for the first time that the car was approaching rapidly, and had almost reached the crossing. He stopped in the space between the tracks to allow it to pass, and then, thinking that in turning the curve the horses would be out of the tracks, he stepped backward a step or two to avoid them. As he did so, his foot went into a hole, or among loose cobblestones, and sank down, and he was thrown forward. He fell with both arms across the track, and in front of the hind wheel of the car, which

passed over them, causing such injuries as to require amputation.

The duty of the defendant to keep the street in proper repair, and the fact that the car approached the crossing at an unusually rapid rate, were either admitted or so clearly established at the trial as not to be in dispute. There was the widest difference in the testimony as to the condition of the crossing,—whether it was well paved and reasonably safe, or whether there were holes in the surface, caused by the displacement of stones which were lying loose. Whether safe or unsafe, there had been no change in the condition of the crossing for some months before the accident. The charge of the learned judge presented clearly and accurately all the questions involved, and the matter proper for consideration now is within very narrow limits. There seems to be no sufficient reason for entering upon any discussion of remote and proximate cause, to which so much attention was given by counsel for the appellant on the trial of the case and its argument here. Assuming the facts as established by the verdict, the plaintiff, on a rainy night, reached a street crossing where there were two tracks. A car at the distance of 60 or 70 feet was approaching. He had but 15 or 20 feet to walk in order to cross in safety before it. He started to do so, and after crossing one track he observed, what he before had no reason to apprehend, that the car was approaching with unusual rapidity. To avoid it he stopped. Instantly it occurred to him that he was too near the track, and he stepped back, and met the second cause of danger,—the defective pavement. The defendant was responsible for both causes. The plaintiff had notice of neither until the necessity for immediate action was upon him, and in his attempt to avoid one he stepped into the other. If either cause had been absent, the accident would not have happened. The unusual speed of the car and the defective crossing were both factors, and, as the defendant was responsible for both, it is useless to speculate as to which was the remote, and which the proximate, cause.

There remains a question which is fundamental, and not free from doubt,—whether there was such a connection between the condition of the street and the plaintiff's fall as to establish the one as the cause of the other. The cause of the fall cannot be said to be clearly established. No witness saw what occurred until the plaintiff was in the act of falling. His injuries followed immediately. It would not be expected that a truthful witness could describe accurately the sequence of events occurring in a single moment between the beginning of his fall and the crushing of his arms. An untruthful one would have supplied all the necessary details. The plaintiff was stepping backward, and did not see the hole or loose stones. Had his injuries been alight, more accurate

details could have been expected, but only as the result of subsequent observation. Taking the case as a whole, we cannot say that the jury was left to speculate as to the cause of the fall. The plaintiff testified: "So, in stepping back, I just stepped into a hole or loose cobblestones, and my foot sank down and pitched me forward, and, in falling forward, I put my hands out to save myself, and both went under the wheels, and after that I recollect nothing." On cross-examination he said that he could not tell whether his foot went down among loose stones or into a hole; that he simply knew that it went down. There was other testimony that there were holes in the surface of the crossing, and loose stones on it. This is not demonstration, but demonstration is not necessary. The exact cause of the plaintiff's fall, whether resulting from holes or loose stones, for which the defendant would be liable, or from mere unevenness and irregularity in the surface of the crossing, for which it would not be liable, is not clear of doubt; but the finding of the jury had a basis of fact and reasonable inference, which takes it out of the realm of mere conjecture. The judgment is affirmed.

(180 Pa. St. 277)

PENNSYLVANIA S. V. R. CO. v. PHILADELPHIA & R. R. CO. et al.

(Supreme Court of Pennsylvania. March 12, 1894.)

RAILROADS—GRADE CROSSING—NECESSITY.

1. Defendant's line was traveled by eight daily trains, and occasional specials. Plaintiff desired to cross to reach business controlled by defendant amounting to about \$40,000 annually. An overhead crossing would change the grades of a number of unopened streets, to the disadvantage of the city and private owners, and would cost some \$60,000, as against \$11,250 for a grade crossing, not counting the damage to property. The point of crossing was visible on both roads at distances from 1,200 feet to a mile. *Held*, that it was not reasonably practicable to avoid a grade crossing. Act June 19, 1871, § 2.

2. Act April 4, 1868, § 9, empowers a company formed thereunder to build branches as needful, and to cross at grade the track of another road, but not to occupy a street in a city without its consent first obtained. *Held* that, in a suit against another road to enforce its right to a grade crossing for a branch within city limits, such company is not bound to show express consent first obtained from the city to occupy the street at that point.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Bill by the Pennsylvania Schuylkill Valley Railroad Company against the Philadelphia & Reading Railroad Company and the Schuylkill & Lehigh Railroad Company to enjoin interference with plaintiff's grade crossing over defendants' main track. Decree for plaintiff. Defendants appeal. Affirmed.

Following are the parts of the reports of the master (Horace Roland, Esq.) necessary to be set out:

"Under an order made by your honorable court, the plaintiff constructed a grade crossing for the purpose of facilitating the construction of the branches named in the plaintiff's bill. This crossing is indicated in the draft herewith appended. It is of a permanent and substantial character, and trains can be moved backward and forward over it with speed and facility. The neighborhood of the crossing is comparatively level, and, with the exception of a few small trees and bushes, the crossing can be seen with ease from all points on the branches, as well as on both plaintiff's and defendant's main lines, at distances varying from one-quarter of a mile to a full mile. At the present time there are no signals, except at the point of crossing, but it is the practice of the plaintiff company to send flagmen along the defendants' line, in order to give warning to approaching trains on defendants' road previous to occupying the crossing. The best system of signals used by railroad companies at the present day is the 'interlocking' system, by means of which an attendant operates with levers, from a tower, signals and derailing switches located at points as far as 1,500 feet distant from the point of crossing, on both the crossing roads, in such a manner that the danger signal must either precede or accompany the adjustment of the derailing switches. The expense of constructing this system is somewhere between \$2,100 and \$3,000; and the annual cost of maintaining the same, including the constant service of an attendant, is about \$1,500. The signal, in its confined sense, in general use, is known as the 'semaphore,' and consists of an arm or board which hangs at an angle of forty-five degrees to an upright post, for safety, and which is moved by leverage to a horizontal position, for danger. This same signal contrivance can likewise be operated in connection with distant switches, prior to each use of the crossing. The only substantial points of difference between such a system and the 'interlocking,' are the absence of a tower and of derailing switches, and a constant attendant; but in point of safety, where the trains are infrequent, and the country level and open, it would seem to equal the latter.

"The Schuylkill & Lehigh is a main line running between the city of Reading and Slatington, a distance of 43 miles, and is leased and operated by the Philadelphia & Reading Railroad Company. At the present time there are four scheduled trains—two passenger and two freight—passing the crossing involved in this controversy, each way, in each 24 hours, and also occasional special trains; chiefly freight. By reason of extended and proposed additional eastern and western connections, notably, by the way of the Poughkeepsie bridge to the east, this line is growing in importance as a coal-carrying road; and it may be necessary, in the course of time, to increase the trackage and the number of trains. The only points at present reached by the plaintiff's

branches and by means of this crossing are the Reading Foundry Company, Limited, and the National Bolt, Nut & Rivet Works, two moderate-sized manufacturing establishments, whose gross freight business amounts to between \$30,000 and \$40,000 per annum. These works are reached by defendants' branches, by reason of which they had a monopoly of the business. The purpose of the plaintiff company is to secure a part or the whole of the same, if possible. A further result of the plaintiff's new connection may be the establishing and fostering of new business and additional manufactories. For the present the latter company will require the use of the crossing four times a day,—one time each in going in and out in the morning, and one time each going in and out in the evening, or, in other words, four times in each 24 hours, aggregating in length of time about five minutes of the 24 hours for all movements. The tracks of the Philadelphia & Reading Railroad Company, and its lines and branches, completely surround and inclose the district occupied by these industries; so that, in order to reach that territory, the plaintiff company must cross the former's road.

"The territory in question lies within the city of Reading, a topographical survey of the same having been duly made and filed, with streets and alleys duly projected, but as yet unopened. Considerable of the land in the vicinity of this crossing is owned by private citizens, and the balance by the railroad companies who are parties to this suit. Your master sees no good reason why, with an increasing population and good railroad and water facilities, the section of the city here involved will not be rapidly improved and settled, both with residences and manufactories. If such is the result, the opening of the streets projected in the locality will become a contemporaneous necessity for the purpose of convenience. The construction of an overhead crossing would change the grade of Marion, Pike, Perry, and Amity streets, and possibly several others, thereby interfering with the rights of the city, and entailing great expense, and it would likewise cause injury and damage to the property of private owners. Grade crossings are in their nature most dangerous, but many of them are being operated successfully, and with very few accidents. A graphic description of the operation of some is in evidence in this case, showing, by comparison with the one here in controversy, the much more frequent and successful use than will be required in the case at hand. At the point of the crossing in question, and for a distance of over a mile in either direction, the main lines of the Schuylkill & Lehigh and the Pennsylvania Schuylkill Valley Railroads parallel each other at a distance apart of only about 21 feet between their nearest rails. The roadbed of the former is about one and one-half feet higher than that of the latter. To cross at grade is comparatively easy and cheap. The actual cost

of constructing the crossing was about \$850, and the entire cost of plaintiff's branch and crossing together is \$11,247.50. In order to cross overhead it would be necessary to attain an elevation above the present crossing of about 21 feet clear, or an elevation of about 25 feet to the top of the track on an overhead bridge. The more gradual the ascent to this elevation, the greater would be the starting distance from the point of crossing. Your master gathers from the testimony that for the purpose of safe and convenient use with the usual engines and heavy loads, and in all kinds of weather, a greater grade than two feet to the hundred is not advisable. The attainment of this elevation at such a grade would indicate a starting point some twelve hundred feet to the southward, with a gradual approach swinging to the westward from the line of the plaintiff's road before making such a curve towards the bridge as would be safe and convenient. This approach would close projected streets, and would occupy, and render substantially useless for any other purpose, the land now occupied and owned by the plaintiff company, and lying to the west of its tracks to the banks of the Schuylkill river. In anticipation of increased business for both roads in the future, room should be left for the multiplication of tracks, thus necessitating a long and expensive overhead structure. Having reached the eastern side, the descent from the bridge must needs be almost as gradual as the approach on the western side, while at the same time affecting the topography of the city streets, and doing damage to private property, as before stated. The expense of this method of crossing, in excess of the cost of the present grade crossing, is variously estimated by the witnesses at from about \$40,000 to \$87,000, irrespective of the damages to the affected property and streets. The variance between these estimates is accounted for in matters affecting the length and breadth, height and depth, of the bridge and approaches, and the materials and character of work in their construction. It is safe to conclude that, for a permanent overhead crossing, good and substantial, of sufficient length to permit additional trackage for both roads, with gradual approaches and easy curves, so as to be safely and conveniently used with ordinary engines, including incidental damages to be paid to third parties, an outlay of at least \$60,000 would be rendered necessary. The superintendent of the Pennsylvania Schuylkill Valley Railroad Company testifies that, if compelled to cross overhead, in view of the expense and the uncertainty of an adequate return from the enterprise, the company would abandon it, and in this he is sustained by a number of other witnesses. Granting that such a crossing is ever permissible, it seems to your master that it would be difficult to present a case in which the allowance can be made with so great a degree of reasonableness and free-

dom from objection as in the case at hand. Under the circumstances hereof, it would seem to be both unreasonable to require, and impracticable and disproportioned to the object in view to construct, an overhead bridge. This is unlike the usual cases in the books in which it is sought to cross main lines by main lines, both of which have, or are likely to have, frequent trains, both passenger and freight, of great speed. The application here is for leave to cross a main line with a short branch or siding designed to reach the freight business of a few manufacturing industries within the limits of a city. The business is, and likely will be, confined to a few movements, at long intervals, requiring one inward and outward use of the crossing, both in the morning and evening, with short trains, and altogether consuming but a few moments of each twenty-four hours. This, coupled with the fact that the point of crossing is visible from almost any point on either of the affected roads, at distances varying from about twelve hundred feet to a mile, offers a situation almost absolutely free from danger, especially if additionally protected with signals. The more important road of the two—the Schuylkill & Lehigh—being the crossed road, it will always be entitled to the right of way, and thus greater protection will be afforded.

"Although it does not expressly and affirmatively appear in the examiner's notes of testimony that the plaintiff company is incorporated under the act of April 4, 1868 (P. L. 1868, p. 62), and its supplements, the undenied averment to that effect in defendants' answer justifies the conclusion that such is the fact. Appeal of Rowley, 115 Pa. St. 150, 9 Atl. 329; Smith v. Ewing, 151 Pa. St. 256, 25 Atl. 62. This act provides, *inter alia*, that 'any company incorporated under this act shall have authority to construct such branches from its main line as it may deem necessary to increase its business and accommodate the trade and travel of the public.' Section 9, p. 64. Section 10, p. 64, provides that 'companies formed under the provisions of this act shall have the right to construct roads so as to cross at grade the track or tracks of any other railroad in this commonwealth,' with provisions following which regulate the payment of the expense of such crossing and the maintenance of signals to prevent accidents. Section 11, same page, provides that 'companies whose roads shall be constructed under the provisions of this act shall have the right to connect their roads with roads of a similar character,' etc., etc. Section 12, p. 65, provides, *inter alia*, that 'this act shall not be so construed as to authorize * * * any corporation formed under this act to enter upon and occupy any street, lane, or alley, in any incorporated city of this commonwealth without the consent of such city having been first obtained.'

"Your master finds from the testimony that the plaintiff did in fact, and he also finds

that the plaintiff did, under authority vested in it by the general laws pertaining to the construction of railroads, survey, ascertain, locate, fix, mark, and determine upon the routes of two branch railroads as set forth in the bill, and as manifested by drawings put in evidence and filed; also, that the said routes and branches were formally adopted by the board of directors of the plaintiff company by resolution of July 12, 1889, a certified copy of which is in evidence and annexed herewith, and that the said branches have since been constructed. The testimony of the witnesses who were questioned in relation to the subject establishes the fact that these short lines of road are more than mere sidings, and are entitled to be named 'branches,' and that plaintiff company deems them necessary to increase its business, and accommodate the trade of the public. At present they would serve no purposes for public travel. The branches are of considerable length, and traverse considerable territory, as is apparent from the drafts in evidence. They cross a number of the projected streets of the city of Reading, as well as the premises of a number of private owners.

"Your master erred in stating that the streets and alleys in the territory involved in this controversy all remain unopened. Centre avenue, which is crossed by the branch to the National Bolt, Nut & Rivet Works, is an old and much-traveled road. Exeter street, also crossed by said branch, is likewise opened, and leads from said Centre avenue toward the Schuylkill river. The only other opened road or avenue in the vicinity, leads from said Centre avenue towards the river, but, before reaching plaintiff's branch, it abruptly turns southward, and thus avoids it. The branch leading to the Reading Foundry Company, Limited, encounters no opened street or avenue. The several railroads occupy and obliterate, in this neighborhood, what was formerly known as the 'River Road.' It appears that defendants' railroad was constructed there almost twenty years ago, and the plaintiff's railroad about eight years ago. The grade crossing, as sought for and as now existing, occupies mainly the junction of Pike street with what was the River road, but said Pike street remains unopened, and is only indicated on the topographical survey of the city.

"At the previous consideration of this case, no evidence was submitted to your master touching that which is now made an important feature of the controversy, namely, the right of plaintiff company to cross or occupy the city streets in the territory covered by these branches. There is no testimony as to the consent, or refusal of consent, by city councils, in the examiner's notes of testimony laid before your master, and therefore the previous report is silent upon the subject. It was for that reason that your master declined to consider the legal side of the

question, when requested by defendants' counsel to do so. The same counsel has now made the offer of testimony heretofore recited with plaintiff's objections, which offer is designed to formally introduce the question for adjudication. Whether this offer can be received now, and by one whose office is only that of master, and whether it can properly be the basis of findings of fact or of a final decree, are serious points to be well considered hereafter. But, inasmuch as the report is mainly referred back in this connection, and the court, in its opinion of reference, expressly points your master to the records of the interlocutory proceedings in this case, the master is justified in stating that he does find upon the records filed in this case an answer made by defendants to plaintiff's petition for leave to renew motion for injunction, etc., in which the defendants deny the right of plaintiff to construct these branches, and aver, by way of reason, that the consent of the councils of the city for plaintiff to occupy the said streets has not been obtained, but that, on the contrary, the said councils have expressly refused such privilege, and, further, that to this answer are annexed certified copies of the files of select and common councils, certified by the city clerk, manifesting the withholding of such leave. Whether any other proceedings were ever had in councils does not appear. Plaintiff company claims to have the necessary consent, but this is all your master has before him, expressly relating to the subject.

"Having noticed so much of the record, it is but fair to heed the plaintiff's request, and to mention that, notwithstanding the answer thus made by defendants, the court, although refusing to award a preliminary injunction, as prayed for, allowed the plaintiffs to construct a temporary crossing for construction purposes in building the said branches, thus recognizing the right to build the branches. This order has not been interfered with by the supreme court in the appeal taken thereto to No. 179, July term, 1892. The testimony before your master discloses that the plaintiff completely constructed these branches in the summer of 1891 at an expense of about \$11,000, or a total, including the cost of crossing, of \$11,247.50, and papers filed with the records of the case indicate an occasional use, under leave of the court, of the crossing and branches, for the transportation of the property of third parties.

"Defendants, in their answer, aver 'that the grade crossing, as proposed, will hinder and delay the defendants in their movement of traffic, and will work irreparable injury to them.' They do not aver, nor have they produced any testimony to show, that any injury will result to them by reason of the occupancy by plaintiff of the city streets, nor do they show any complaint on the part of the officers of the commonwealth, the municipality, or the public."

Following are the opinion and decree (Ementrout, P. J.):

"It was deemed advisable, after argument and examination of this cause, to refer the report of the master back for further examination and report. Upon some of the disputed points the master heard testimony, although he considered that, under a strict interpretation of the reference back, and the duties of his appointment, he was precluded from so doing. In order that there may be no misunderstanding on this point, the course of the master, in the taking of the additional testimony and reporting it to the court, is approved; and, for the purpose of this cause, the additional testimony so taken will be considered in its disposition. We have also been aided by further argument, and, in company with the master, proceeded upon the grounds, for the purpose of inspecting the locality where the grade crossing is sought to be established.

"The master fell into error, through inadvertence, in stating Exeter street is an 'open street, crossed by the branch in proceeding northward to the National Bolt, Nut & Rivet Works.' An inspection of the record of the court of quarter sessions (No. 4, June sessions, 1891) shows that Exeter street was opened on the 16th of September, 1891, but only to a point on the east side of the railroad, and not covering the tracks of the railroad; and by proceedings (No. 3, December sessions, 1891) instituted December 16, 1891, confirmed March 24, 1892 (begun on the erroneous supposition that this portion of Exeter covered by tracks had been opened), the portion so covered was expressly vacated. After a careful examination of the locality and the master's report, we have determined to confirm his report. The supplementary report and his first report present the controversy in the fullest manner. From an examination of the testimony, aided by an inspection upon the grounds, we will adopt his conclusion that it is not reasonably practicable to avoid a grade crossing. The reports are so full, and contain, in the main, so satisfactory a discussion of the evidence upon which his findings of fact are based, that we deem it unnecessary to review his action in detail.

"And now, September 1, 1893, this cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: First. That the crossing now constructed at grade, as indicated by the draft submitted, filed with, and attached to the master's report, remain free from defendant's interference, for the use and purposes of the plaintiff, and that plaintiff be required to maintain the same in constant, first-class order and condition, and also that the trees and brushes which now obstruct the view in the vicinity of the tracks and crossing be removed. Second. That distant switch semaphore signals be

forthwith constructed by plaintiff, to be operated in connection with said crossing, so as to give notice of danger at a distance of not less than one thousand feet both to the northward and southward from the crossing, each time before adjusting the crossing tracks for use and occupancy of the same, with locomotives or cars, and that said contrivances be kept by plaintiff in constant, first-class working condition. Third. That plaintiff's use and occupancy of said crossing be restricted to four times in each twenty-four hours, and that the time of occupancy, in the aggregate, in each twenty-four hours, shall not exceed twelve minutes; and, further, that the passing and repassing over the same shall only occur at periods not less than twenty minutes after, nor ten minutes before, the schedule time of defendants' trains at that point, and likewise at the same period of time, from the times of the passing of any special train on defendants' railroad, of which defendants shall have given plaintiff notice. Fourth. Should it become necessary, in order to accommodate increased traffic, for plaintiff to use the said crossing more, in any respect, than as restricted in the foregoing paragraph, such increased use shall be permitted, so that the use and occupancy of said crossing shall be limited so as not to occur more than eight times in each twenty-four hours, the aggregate time occupied in crossing in each twenty-four hours not to exceed twenty-four minutes, and the times of passing to be adjusted to the times of defendants' trains at that point, as specified in the foregoing paragraph. In case, however, that the plaintiff company shall avail itself of the privilege granted in this paragraph (No. 4), then it shall forthwith erect and maintain, in an adequate manner, in first-class working condition, the system known as the 'interlocking,' with distant signals and derailing switches, and shall erect a tower in connection therewith, to be occupied by an attendant, whose sole duty it shall be to operate the same for the avoidance of danger and accident at said crossing. Fifth. That the costs of this proceeding be paid by the plaintiff."

Philip S. Zieber and Baer & Snyder, for appellants. Cyrus G. Derr, for appellee.

PER CURIAM. It is unnecessary to refer in detail to the facts of this case. They are fully set forth in the reports of the master and opinion of the court below. The purposes of the bill were to determine plaintiff company's right to a grade crossing over defendant company's tracks, and to regulate the exercise of that right, and in the mean time to restrain defendant from interfering with the construction of said crossing. The questions involved depended largely on facts and circumstances which to some extent are peculiar to the case: and they appear to

have received the careful consideration of both the learned master and the court below. The first four and sixth specifications, respectively, charge error in not sustaining exceptions to the master's report and supplemental report. The remaining specifications complain of (1) the following portion of clause "first" of the decree: "That the crossing now constructed at grade, as indicated by the draft submitted, filed with and attached to the master's report, remain free from defendant's interference for the use and purposes of the plaintiff,"—and (2) the refusal of the court to dismiss the bill. The residue of the decree, providing for the maintenance of said crossing regulating the time and manner of using the same, etc., is not the subject of complaint, except in so far as it may be embraced in the general assignment of error to the refusal of the court to dismiss the bill. An examination of the record, with special reference to the several questions involved in the specifications above referred to, has failed to convince us that either of said exceptions to the master's report should have been sustained, or that there is any error in that portion of the decree above quoted. Further discussion of the questions so fully and carefully considered and disposed of by the learned judge of the common pleas would serve no useful purpose. The facts found by the master and approved by the court are sufficient to sustain the decree. We find nothing in the record that requires its reversal. Decree affirmed and appeal dismissed, with costs to be paid by appellant.

(53 N. J. E. 390)

AMOS H. VAN HORN, Limited, v. COOGAN et al.

(Court of Chancery of New Jersey. March 26, 1894.)

TRADE-NAMES—RESTRAINING WRONGFUL USE.

1. One trader has no right to use a name, a mark, letters, or other indicia by which he may induce purchasers to believe that the goods he is selling are the goods of a rival trader.

2. Where one trader is attempting to palm off his goods as the goods of his rival, it is not necessary that the injured trader should show, in order to entitle himself to relief, that he has an exclusive property in the name by which his goods are distinguished on the market, for equity will restrain the use of any imitative device by which one trader attempts to beguile the public into buying his goods as those of his rival.

3. The law governing the rights of rival traders is founded on honesty, and designed to rebuke and suppress fraud. Hence, if it appears that he who asks protection against the fraud of his rival is himself defrauding others, no protection can be extended to him.

(Syllabus by the Court.)

Bill by the Amos H. Van Horn, Limited, a corporation, against Dominick Coogan and another, for an injunction. Heard on pleadings, affidavits, and depositions taken pursuant to order of court. Writ granted.

Robert H. McCarter, for complainant. Abner Kalisch, for defendants.

VAN FLEET, V. O. This is an application for an injunction to prevent the defendants from fraudulently competing in business with the complainant. The complainant is a corporation, and has succeeded to the business, business reputation, and good will of Amos H. Van Horn. Mr. Van Horn is its president. For more than 30 years prior to the complainant's organization, Mr. Van Horn had carried on business in Newark as a dealer in household goods, and had established a large and lucrative trade. Among the articles which he sold for two or three years prior to the time when he transferred his business to the complainant was a cooking stove or range, called "Portland," which was made for him alone, and sold by the manufacturer to no other dealer in Newark. In consequence of extensive advertising, and its qualities, this stove became well and favorably known in the Newark market, and a large number were sold at a handsome profit. For the year preceding the commencement of this suit, the complainant sold over 500. Until the defendants put their stove on the market, no dealer in Newark, except the complainant and its predecessor in its business, had, for some years, dealt in a cooking stove known on the market by the name "Portland." The complainant and defendants are rivals in business. Their places of business are on the same side of the same street, with but one building intervening; the street number of the complainant being 73, and that of the defendants being 77. A few days before the bill in this case was filed, the defendants commenced selling at their store a cooking stove which they had caused to be named "Portland," and which is quite similar in appearance to the stove of the complainant, but which had been previously sold on the market as the "Columbian Dandy." The defendants undersold the complainant, and, when they commenced the competition of which the complainant complains, they advertised their stove by hanging placards and signs in front of their store containing these words: "Famous Portland." "Famous Portland Range Reduced. Has No Equal." They had previously hung out signs in front of their store with the number 73 on them. The complainant insists that they did this for the purpose of deceitfully luring purchasers who were looking for its store into theirs. The special protection for which complainant asks is that the defendants may be restrained from making any use of the name "Portland" which will enable them to palm off their stove on purchasers as the stove of the complainant.

The legal principles which must govern the decision of this case are well established and familiar. The law not only allows, but encourages, fair, open, and honest competition; but while it demands that the markets shall

be open and free to all dealers, and that each shall enjoy the utmost freedom in competing, by fair and honest means, with his rivals, it absolutely interdicts each from taking a fraudulent advantage of his rivals, by dealing under false colors, and selling his goods as those of his rival, and thus cheating the public and defrauding his rival. In the words of Mr. Justice Knapp: "Rivalry of that kind is not fair competition. It is closer akin to piracy." *Tobacco Manufactory v. Commerce*, 45 N. J. Law, 18, 24. As declared by Lord Kingsdown in *Leather-Cloth Co. v. American Leather-Cloth Co.*, 11 H. L. Cas. 523, 538: "The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot, therefore, be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods he is selling are the same goods sold by a rival trader." This is, in substance, the rule laid down by Lord Langdale in *Perry v. Truefitt*, 6 Beav. 66, and which has been generally adopted by the courts as a correct exposition of the law.

But it is contended that a geographical name, like "Portland," cannot be a trademark, nor be so used as to give the dealer who first adopts it an exclusive property in it. This, I think, may be conceded, without impairing in the slightest degree the complainant's right to the protection it asks; for, as was said, in substance, by Lord Langdale in the case just cited, the question, in cases like this, is not whether the complainant has a property in the name by which his goods are distinguished in the market; but, on the contrary, the pertinent inquiry is, has the defendant a right to use the name by which the complainant's goods are known, for the purposes of deception, and in order to attract to himself that custom which, without the improper use of such name, would have flowed to the complainant? And the answer to the inquiry is that the defendant has no such right. The supreme court of the United States, in *Coats v. Thread Co.*, 149 U. S. 562, 566, 13 Sup. Ct. 966, recently said, speaking by Mr. Justice Brown, that there can be no question as to the soundness of the proposition that, irrespective of the technical question of trade-mark, one trader has no right to dress up his goods in such manner as to deceive an intending purchaser, and induce him to believe he is buying the goods of a rival trader. "Rival manufacturers may lawfully compete for the patronage of the public in the price and quality of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals." Chief Justice Fuller had in the prior case of *Lawrence Manuf'g Co. v. Tennessee Manuf'g Co.*, 138 U. S. 537, 549,

11 Sup. Ct. 396, announced the same doctrine; and, in stating the grounds upon which it rested, he cited with approval the views expressed by Mr. Justice Bradley in *Nail Co. v. Bennett*, 43 Fed. 800. The complainant, in the case just mentioned, alleged that it had been engaged for some years in making and selling bronzed horseshoe nails; that the bronzing of its nails constituted a trade-mark; and that the defendants had recently bronzed the nails which they sold in imitation of the complainants, and were by this means enabled to palm off their nails on the public as the nails of the complainant. The complainant also alleged that purchasers had been deceived and misled into buying the nails of the defendants in the belief that they were those of the complainant. The defendants demurred, insisting that the complainant could not acquire a trade-mark by simply bronzing its nails. In overruling the demurrer, Judge Bradley said: "Whether this [bronzing nails] is in itself a good trade-mark or not, it is a style of goods adopted by the complainant, which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainant. This is a fraud. * * * The allegation that the complainant's peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge." These authorities demonstrate, I think, that the complainant is not bound to show, as an indispensable prerequisite to its right to relief, an exclusive property in the name "Portland," but that its right to the protection it asks must be considered to be fully established if it satisfactorily appears that the defendants have made use of this name as an imitative device for the purposes of deception,—to beguile the public into buying their stove under the belief that they were buying the stove of the complainant. That such was the purpose of the defendants is proved, I think, by their own acts. It is undisputed that they changed the name of their stove from "Columbian Dandy" to the name by which the complainant's stove was known in the Newark market, and under which it had there achieved a renown, and that they then advertised their stove, by signs and placards, as the "Famous Portland Range Reduced;" meaning, obviously and unquestionably, that they were selling, at a reduced price, a range which had become famous in the Newark market under the name "Portland." The truth, however, appears to be that until a few weeks before the commencement of this suit the defendants had never sold a stove by the name of "Portland," and also that, when they first offered a stove for sale by that name, its name had just been changed, so that when they hung out placards, advertising their stove as the "Famous Portland Range," the fact was that their stove was wholly un-

known by its new name. It was without reputation or fame, and unknown. The only stove then on the market in Newark which was known by the name "Portland" was the stove of the complainant. These facts will bear but one interpretation. They show that the defendants meant to defraud the complainant by beguiling the public into buying their stove under the belief that they were buying the stove of the complainant.

But the defendants set up another defense. They recriminate. They charge that whatever reputation the complainant's stove acquired on the market has been established by falsehood and deception. They allege that the stove which the complainant calls "Portland," and sells under that name, is in all respects identical with a stove known as the "Canopy," and which has been on the Newark market for a long time, and is now sold by dealers in Newark for less money than the complainant sells its stove for. The charge, it will be perceived, is that the complainant is selling its stove under a false name. There can be no question that a complainant who seeks judicial protection, in a case of this kind, must, to succeed, come into court with clean hands and a pure conscience, nor that it will be the duty of the court to refuse him protection against the fraud of his rival, if it appears that he is himself committing a fraud on the public. No such thing as an exclusive privilege to defraud the public is known to the law, and no man can successfully assert a right to judicial protection for profits derived from a business carried on in such manner as to deceive and cheat the public. The law governing the rights of rival traders is founded in honesty and good sense. It is not intended to protect fraud, but to rebuke and suppress it, and to promote honesty and fair dealing. While the cases so declaring are numerous, only three will be cited: *Petridge v. Wells*, 4 Abb. Pr. 144; *Wolfe v. Burke*, 56 N. Y. 115; *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436. The branch of the defense now under consideration rests on these facts: That the complainant is engaged in selling a stove which was originally named "Canopy," but which, for some years past, the complainant and its predecessor in business have called "Portland," and sold under that name, while other dealers in Newark have sold, and are now selling, the same stove, under its original name, for less money than the complainant does. If this is assumed to be true, how does it show fraud, or furnish evidence of falsehood or deception? There is no law forbidding a manufacturer from changing the name of a stove made by him, provided the change is not made to be used as an imitative device, by which one trader may sell his goods as those of his rival. The proof shows that the practice is quite general among stove manufacturers to make a stove for a single dealer, in one market, by a certain name, and to make the same stove for another deal-

er, in another market, by a different name. If it had been shown that there was a stove on the Newark market, with an established reputation, by the name of "Portland," superior to the stove called "Canopy," and that the complainant had been engaged in palming off the inferior stove under the name of the superior, the proof of deception would be sufficient to disentitle the complainant to relief. But there is no evidence of that kind. There is no stove now on the Newark market called "Portland," and has not been for years, except those offered for sale by the complainant and defendants. The Buckwalter Stove Company is the only manufacturer that makes the stove called "Canopy." It also manufactures the Portland, sold by the complainant, and is under an obligation to the complainant not to make the Portland for any other dealer in Newark. The Portland and Canopy are not identical. They differ in material respects. The Portland is made with a duplex grate, and the Canopy with a flat grate. The weight of the evidence shows that the former is better than the latter. The Portland is manufactured with a separate base, called a "plano" or "portable" base, on which it is set, and may be lifted off, while the Canopy rests on feet, which are driven or pushed into clinches on its bottom. The Portland has a receiver or pan into which the ashes drop, and the Canopy has not. The Portland is made with ventilated doors, and the Canopy with solid doors. And the Portland has a grate shaker or agitator, and the Canopy has not. Some of the most important of these additions and improvements were made by the direction of the complainant. Looking at them in their entirety, it is obvious, as I think, that although the Portland is, in its body, constructed after patterns made for the Canopy, still that the two stoves differ so widely, in important respects, that their maker was fully justified in putting them on the market under different names, and that in doing so no wrong of any kind was committed. In my judgment, nothing has been shown which disentitles the complainant to the relief it asks. An injunction will be granted.

(53 N. J. E. 290)

KALMUS v. BALLIN et al.

KANTROVITCH et al. v. SAME.

(Court of Errors and Appeals of New Jersey.
March 12, 1894.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS
OF CREDITORS.

1. Since an assignee for the benefit of creditors may attack previous fraudulent transfers of property made by his assignor, when such property is necessary to satisfy the demands of creditors, he owes a duty to certain creditors to make such an attack, and upon failure to perform such duty a creditor to whom it is due may file a bill in his own name to avoid such transfers.

2. A creditor may thus supplant the assignee, and assert his rights, when the latter,

by his connection with the fraud or otherwise, is disabled from asserting them, or when, upon proper notice, he has neglected or refused to perform his duty in that regard.

3. A mere request to take proceedings to set aside transfers of the assignor's property will be insufficient. He must be informed of facts tending to show the transfers fraudulent, and a reasonable ground for contest.

4. If, upon request, the assignee declines to act, on the ground that there are no funds to make the contest, it should appear, to justify a creditor in supplanting the assignee in the litigation, that his excuse was false, or that creditors had offered to supply the necessary funds or indemnify against loss.

5. The creditor who may demand performance of the assignee's duty, and upon his default may act, is one who has presented his claim against the assignor to the assignee in the manner provided by the statute.

6. The orders appealed from were made upon affidavits. *Held*, that the affidavits did not sufficiently establish the material allegations of fraud contained in the bill to justify the appointment of a receiver, and the peremptory sale of the disputed property.

Abbett and Lippincott, JJ., dissenting.

(Syllabus by the Court.)

Appeal from court of chancery; McGill, Chancellor.

Bill by Louis Ballin and others, as partners, and others, against Hannah Morris, Jacob Kalmus, Aleck Kantrovitch, and others. From three separate orders made by Chancellor McGill, defendants Kalmus, Kantrovitch, and others appeal. Reversed.

A. B. Seymour and Gilbert Collins, for appellants. William P. Douglass, for respondents.

MAGIE, J. The bill in this cause was filed by Louis Ballin and others, partners, in behalf of themselves and other creditors of Hannah Morris. It was founded on an attachment sued out by them in the Hudson county circuit against her property. It averred, among other things, that Hannah Morris had, previous to the attachment, made a bill of sale of a stock of goods in her store to Jacob Kalmus, and that he had made three chattel mortgages on the goods,—one to Aleck Kantrovitch, one to Leopold J. Liberman, and one to Charles Flank. It charged that the bill of sale and mortgages were made without consideration, and for the purpose of defrauding the creditors of Hannah Morris. The prayer was that they should be set aside, and the property be subjected to the lien of the attachment, or sold for the benefit of creditors. The bill further showed that Hannah Morris had subsequently made an assignment for the benefit of creditors to one Lowy, but he was not made a party. Kalmus and the three mortgagees were made defendants. Upon the bill, with affidavits annexed, being filed, an order to show cause was made, returnable December 27, 1892, and a restraining order. On December 27, 1892, another order was made, permitting respondents to amend their bill by striking out all the charges respecting the attachment (which had then been dissolved), and by

adding a more particular statement of the assignment for the benefit of creditors, an averment that the assignee had been requested to take proceedings to set aside the bill of sale and mortgages, and that he had refused, and an additional prayer for a declaratory decree that the title of the goods passed under the assignment to the assignee. It further permitted respondents to make the assignee a party defendant, and continued the order to show cause to January 3, 1893. It also appointed a receiver of the goods, and directed him to dispose of them in the usual course of business at retail. The order to show cause was brought to hearing on January 3, 1893, upon the bill and the annexed affidavits and counter affidavits and exhibits. The order was made absolute, and the receiver continued. On January 12, 1893, upon a report of the receiver that the business was unprofitable, and no insurance could be obtained upon the stock of goods, an order was made directing him to sell the stock as a whole. Kalmus has appealed from the orders of December 27, 1892, and of January 3 and January 12, 1893. Kantrovitch and the other mortgagees have appealed from the two last-mentioned orders. All the appeals were argued together.

It is first contended that, if it be assumed that respondents had a status to question the transactions which the bills sought to avoid, the allegations material to the relief prayed for were not so established by the affidavits as to justify the orders seizing the disputed property and disposing of it by the receiver. The propriety of these orders must be determined upon a consideration of the affidavits then before the court below. A review in detail of the affidavits will serve no useful purpose, and it will be sufficient to indicate the conclusions reached. In respect to the bill of sale, the charge is that it was without consideration, and designed to defraud creditors. As to its consideration, unless the counter affidavits are rejected as unworthy of credit, for which I can find no reason, it clearly appeared that the transfer to Kalmus was for a consideration of \$6,000, which was no less effective because it was partly paid by a release of Hannah Morris from a debt due to him for borrowed money, and by the assumption of the payment of her note, which he had indorsed for her accommodation, and which was then held by a bank which had discounted it, and partly by his undertaking to assume debts which she owed to Kantrovitch, Liberman, and Flank for borrowed money, and to pay her note which Kantrovitch had indorsed for her accommodation, and which was also held by a bank which had discounted it. Nor do the affidavits show any such inadequacy of consideration as to justify an inference of fraud. Nor can there be discovered therefrom any ground for holding that the transfer was made to hinder, delay, or defraud creditors within the prohibition of our statute. If the

affidavits justify an inference that Hannah Morris made the transfer with that intent, it will not be sufficient to sustain this allegation of the bill. It must also appear that Kalmus participated in the fraudulent intent, or knew at the time of facts and circumstances from which such intent was a natural and legal inference. *Tantum v. Green*, 21 N. J. Eq. 364. It is true that the effect of the transfer is to prefer creditors, but, in the absence of the restrictions of bankrupt or insolvent laws, debtors may prefer creditors, and the latter may accept preferences without fraud. In respect to Kalmus, the orders of January 3d and 12th were made without sufficient proof, and should be reversed. As to the chattel mortgages, appellants' case is still stronger. The affidavits annexed to the bill showed no fact from which any inference that they were without consideration, or made to defraud creditors, could be drawn. The counter affidavits establish that they were given by Kalmus to secure his notes made in pursuance of his agreement with Hannah Morris, and substituted for her obligations held by the mortgagees. The consideration of the mortgages was thus established, and there was nothing to justify even a suspicion that the mortgagees conspired to defraud the other creditors of their debtor. Upon their appeal there should be a reversal of the same orders.

It is next contended that respondents had no status to maintain the action and file the amended bill. This contention is applicable to the orders already considered, but particularly to the order of December 27th, which permitted the amendment. By such amendment the whole scope and purpose of the bill was altered. From a bill to enforce the lien of an attachment, interfered with by alleged fraudulent transfers, it became a bill by particular creditors to establish the rights of an assignee for the benefit of creditors upon such property as against such transfers. It was conceded in argument that the duty to attack fraudulent transfers of the assignor's property primarily devolves on the assignee. In general, he cannot be supplanted in the performance of that duty, unless it is one which, from the circumstances, he cannot properly perform, or which he will not perform. If there are no circumstances showing disability or intention not to discharge his duty, the proper course is for a creditor to whom he owes the duty to give him notice to perform it. Then, if he refuses or neglects to do so, the creditor may become an actor in a suit for the relief he thinks should be afforded. *Le Gendre v. Goodridge*, 46 N. J. Eq. 419, 19 Atl. 543; *White v. Davis*, 48 N. J. Eq. 22, 21 Atl. 187; *Id.*, 49 N. J. Eq. 567, 25 Atl. 936. There was nothing in the bill or affidavits to indicate that Lowy, the assignee, was disabled from attacking the transactions which the bill seeks to avoid. All that was before the court to indicate his refusal or neglect

to perform a duty in that regard is contained in an affidavit of the solicitor. He testifies that, on a day not specified, he applied to the assignee to take proceedings to have the bill of sale and mortgages set aside as fraudulent, and that the assignee refused to comply with his request, alleging as an excuse lack of funds to make such a contest. This affidavit does not establish neglect or refusal on the part of the assignee. In the first place, it does not appear that he knew or was informed of any facts tending to show that the bill of sale and mortgages were fraudulent, or that there was reasonable ground for a contest respecting them. It cannot be said that he neglected a duty of which he is not shown to have been aware. In the next place, the assignee was not bound to enter on such a contest at his own expense. He based his refusal on that ground, and such refusal was not wrongful, unless it is made to appear that his excuse was false, or that the creditor who applied to him offered in good faith to supply the necessary funds, or to indemnify him against loss.

It is further contended that an application to an assignee in a case of this sort can only be made by creditors to whom he bears a relation which imposes upon him a duty in respect to them, and that respondents are not such creditors. This contention is applicable to all the orders, for it involves the right of respondents to intervene in case of his refusing their request, and to maintain such a bill. The bill does not show that respondents had obtained judgment against Hannah Morris upon their claims, or that they had presented their claims to the assignee under oath or affirmation, as required by section 3 of the assignment act (Revision, p. 37). It was conceded in argument that, when amended, the bill was one filed by general creditors, whose claims had not been ascertained and fixed by judgment, and had not been presented to the assignee, so as to entitle the claimants to share in the assets of the debtor when distributed by the assignee; and it is in the capacity of general creditors that respondents claim the right to compel the assignee to attack the alleged fraudulent transfers, and, upon his refusal, to attack them themselves. The general rule settled in this state is that creditors only acquire a status to challenge a fraudulent transfer of property by their debtor by having first obtained a judgment or other lien, which, but for the transfer, would affect the property. Debts which are made liens by statute confer such status upon the creditor. *Haston v. Castner*, 31 N. J. Eq. 697; *Button Co. v. Spielmann*, 50 N. J. Eq. 120, 24 Atl. 571; *Spielman v. Knowles*, 50 N. J. Eq. 796, 27 Atl. 1033. Respondents do not fall within this rule, and their right to maintain this action arises, if it exists at all, from the fact that their debtor has made the assignment for the benefit of creditors. The right

of an assignee for the benefit of creditors to attack a previous fraudulent transfer of property by his assignor was first discussed in this state in the supreme court, and, although the question was not necessarily presented, Mr. Justice Potts indicated his opinion to be that such an assignee could attack such fraudulent transfers, and, because he was trustee for creditors, they could compel him to do so. *Garretson v. Brown*, 26 N. J. Law, 425. The question arose afterwards in the court of chancery, and Chancellor Zabriskie held that an assignee could not attack the fraudulent transfers of his assignor on the ground that the latter could not impeach the fraudulent transactions in which he took part, and was incapable of giving authority to another to do so. *Van Keuren v. McLoughlin*, 21 N. J. Eq. 163. This case was followed by Vice Chancellor Van Fleet in *Pillsbury v. Kingon*, 31 N. J. Eq. 619. The last-named case was brought to this court by appeal. The case was one of a conveyance of lands by a debtor in fraud of creditors, an assignment for the benefit of creditors under which creditors had presented their claims, and the property in the hands of the assignee was insufficient to pay such claims in full. The bill was filed by the assignee for the purpose of setting aside the fraudulent conveyance. The right of the assignee to attack the fraudulent transfer of property by his assignor was thus in question, and it was settled that he had such right. This was put on the ground that, although the assignee was the grantee of one of the fraud doers, yet he was to be regarded as the representative of creditors so far as to enable him to institute proceedings to set aside such a conveyance when the property affected thereby is needed to satisfy creditors. The assignment was declared to create ipso facto a trust for the benefit of creditors. But it was also held that the fraudulent transaction would only be set aside so far as was necessary to satisfy the demands of creditors. *Pillsbury v. Kingon*, 33 N. J. Eq. 287. Upon the doctrine thus settled, Lowy, the assignee in the case before us, became a trustee for the benefit of creditors, and entitled to attack fraudulent transfers of property in the interest of creditors, and to the extent necessary to satisfy their claims; but obviously he owed a duty in this regard only to the creditors with whom the trust relation was established. He is, no doubt, trustee for all creditors who may, within the prescribed time, and in the required mode, present their claims, which thus become, prima facie, ascertained and fixed; but until a creditor presents his claim he is a stranger to the assignee, and cannot impose on him the burden of a trust in his favor. When a creditor presents his claim, the trust relation with the assignee comes into existence. The assignee owes to such a creditor a duty to attack, on proper request, fraudulent transfers of property nec-

essary to satisfy such claims. Upon the neglect or refusal of the assignee to comply with such a request, such a creditor acquires a status to act in the assignee's stead. This conclusion is not, as argued, in conflict with previous decisions. In *Hays v. Doane*, 11 N. J. Eq. 84, the bill was filed by a judgment creditor to set aside a fraudulent assignment for the benefit of creditors, and fraudulent transactions by the assignees. The creditor had not presented his claim to the assignees. The relief finally granted was confined to property which the assignees had improperly transferred, and the complainant's right to such relief was sustained, not as a general creditor, but as a creditor who had ascertained and fixed his debt by a judgment which would entitle him to any surplus after creditors who had presented their claims were satisfied. In *Davis v. White*, 49 N. J. Eq. 567, 25 Atl. 938, the bill was also filed by a judgment creditor, and its purpose was to set aside various transfers of property, and also an assignment for the benefit of creditors, made by the debtor, in fraud of creditors. The defendants demurred to the bill, and thereby admitted the fraudulent character of the transactions. This court, in affirming the decree overruling the demurrer, approved the course which Vice Chancellor Van Fleet had indicated as proper to be taken, which was, not to set aside the assignment, though admitted to be fraudulent as to the complainant; but this approval was expressly put on the ground that the assignment ought to be preserved for the purpose of administering the equities of all the creditors. The result is that respondents were not in a relation of trust with the assignee, and not entitled to require him to attack the transactions set out in the bill. Respondents had, therefore, no status to attack the transactions. All the orders must therefore be reversed.

ABBETT and LIPPINCOTT, JJ., dissenting.

(53 N. J. E. 516)

COLLIGNON v. COLLIGNON et al.

(Court of Chancery of New Jersey. March 7, 1894.)

CANCELLATION OF MORTGAGE BY MISTAKE.

In an action to foreclose a mortgage executed by complainant's husband and another, and assigned to complainant, complainant testified that her husband mutilated it without her consent, and by mistake. The mortgagors subsequently made an agreement reciting that the mortgage had been mutilated through mistake, and declaring that no advantage would be taken of it, and thereafter interest was regularly paid on it. *Held*, that it was valid as against a judgment creditor of a subsequent owner of the premises mortgaged, though the agreement was not recorded, the mortgage never having been canceled of record.

Bill by Catharine Collignon, executrix of the will of Nicholas Collignon, deceased,

against Sarah Collignon and another. Decree for complainant.

William M. Johnson, for complainant.
Sherrerd Depue, for defendants.

GREEN, V. O. This bill is filed by Catharine Collignon, sole surviving executrix of the last will and testament of Nicholas Collignon, deceased, late of the county of Bergen, to foreclose two mortgages, one dated November 22, 1884, made by Claudius O. Collignon upon certain property in Bergen county to secure the payment of \$17,710 on the 22d day of November, 1884, with interest at 6 per cent. It is conceded that the complainant is entitled to a decree on this mortgage. Objection is raised by the Clinton Bank, a judgment creditor of a subsequent owner of the premises, as to the enforcement of another mortgage, given to secure a bond of Nicholas Collignon to one John J. Demarest, both dated April 4, 1862, conditioned to pay \$1,000 within one year from date, with interest at 6 per cent. This mortgage was made by Nicholas and Claudius O. Collignon to John J. Demarest upon two tracts of land, the first of which was included in the first tract described in the complainant's first-mentioned mortgage. The bond and mortgage were assigned by John J. Demarest to the complainant by deed of assignment dated April 5, 1862, which assignment was recorded May 22, 1862. The bill alleges that afterwards, by inadvertence and mistake, said bond and mortgage, although not paid or satisfied, were mutilated by tearing off the seals and part of the signatures. The bond and mortgage were presented in evidence by the complainant. The first purports to be a bond of Nicholas Collignon to John J. Demarest, for the payment of \$1,000, dated April 4, 1862, and is mutilated by having the lower right-hand portion of the first page torn off, destroying the seal and the signature, except the letters "Nicholas." The mortgage, which purports to have been made by Nicholas Collignon and Claudius O. Collignon to secure the payment of the said bond, has been similarly mutilated, leaving of the signature the Christian name "Nicholas," and the letter "C" of the surname, and the letters "Clau" of the signature of Claudius. The signatures of Nicholas and Claudius O. Collignon and of Garret S. Demarest, the subscribing witness, all of whom are dead, were proved on the trial. This mortgage is registered in the clerk's office of Bergen county, May 22, 1862, in Book Q of Mortgages, page 295. The bond has indorsed upon it payments of interest "in full to date" on May 1, 1869, and on May 1st in every year from 1873 to 1884, when follows this indorsement: "Interest on this bond has been adjusted to the 22d of November, 1884," signed "Catharine Collignon." After this there are receipts of interest of \$50 each, (the rate of interest apparently having been changed,) under the date of Novem-

ber 22d in each year from 1885 to 1891. The mortgage has not been canceled of record.

The complainant, who is the only living witness, says that she saw her husband tear the seals off these papers, but that she did not consent thereto, and has never received the amount of the bond and mortgage. She says, substantially, she does not know the date on which the seals were removed, but that he was looking over some papers at the house, she thinks, in the evening. That he kept his papers in the living room, in a safe. That he had just come back from Squire Demarest's, and had been fixing some other papers he had there in his hand. She does not know what he intended to tear. She was sitting beside him, looking at the papers. That there were some papers that had to be torn off. That he had some papers from the squire's, and that he said some papers had to be canceled, and sent to Hackensack; and that he tore the wrong ones. The testimony of the complainant as to details of the transaction, it must be admitted, is somewhat confused, and her memory of all the incidents in a measure misty; but it must be remembered that she is a lady of advanced years, not accustomed to attending to business, and that she is speaking of an event which happened from 25 to 30 years ago. But I think she is sufficiently corroborated by writings and subsequent actions of the parties. An agreement was offered in evidence, dated January 18, 1868, executed under the signatures and seals of Nicholas and Claudius O. Collignon, their respective signatures and that of the subscribing witness being proved. It recites the making of the mortgage to John J. Demarest, and that the bond and mortgage, although not paid or satisfied, have been inadvertently, and through mistake, mutilated, by tearing off the seals and part of the signatures; and that said parts so torn off have been lost, and cannot be found to be replaced; and that, in order to have the said bond and mortgage remain in full force and effect, and to have said mutilation explained and remedied, it witnesseth that the said Nicholas Collignon and Claudius O. Collignon do thereby covenant and agree to pay and fulfill the conditions and responsibilities mentioned and required to be done and performed by them, according to the conditions and requirements mentioned in said bond and mortgage; and that no advantage will be taken of the mutilation above mentioned; and do thereby bind themselves, and their heirs, executors, and administrators, for the due performance of the agreements and the conditions stipulated to be done and performed by them in and by said bond and mortgage notwithstanding said mutilation. This document has the appearance of age, and bears an internal revenue stamp of the United States, canceled with the initials "N. C.," under date of January 18, 1868.

Nicholas Collignon, the husband of the

complainant, died in June, 1879, leaving a last will and testament, which was proved by his widow, Catharine, and his brother, Claudius, the executors. By an agreement dated November 22, 1884, between Claudius O. Collignon and the complainant, as executors of Nicholas Collignon, deceased, and the said Claudius O. Collignon of the second part, it was agreed, as part of the settlement of the affairs of a partnership existing between Nicholas and Claudius, that the said executors should convey to said Claudius certain lands therein described, being the lands mentioned in the mortgage first mentioned, and which include the property embraced in the mortgage made to John J. Demarest; and that part of the consideration thereof was that Claudius O. Collignon was to assume and pay the said mortgage for \$1,000, given by himself and Nicholas Collignon to John J. Demarest, and then held by Catharine Collignon. It is not disputed that, in pursuance of that agreement, the executors, by deed dated November 22, 1884, conveyed to Claudius all the interest and estate of said Nicholas in the lands, subject to the said mortgage, payment whereof was assumed by Claudius. Claudius O. Collignon departed this life April 17, 1891, leaving complainant sole surviving executrix of the estate of Nicholas. Claudius left a will, by which he gave and devised the whole of his estate, after certain specific legacies, to his wife, Sarah Collignon, and appointed her sole executrix. Sarah Collignon, by deeds dated April 1, 1892, conveyed part of the premises to Peter C. Collignon, such deeds being made expressly subject to the lien of both of said mortgages, payment whereof was assumed by the grantee.

The bill makes the Clinton Bank a defendant on the allegation that the Clinton Bank, on March 21, 1893, recovered a judgment in the New Jersey supreme court against Sarah Collignon for \$4,227.92, and that on April 17, 1893, another judgment was recovered by it against her in said court for \$6,433.66, and that subsequently said bank exhibited two bills of complaint in this court against the said Sarah Collignon and Peter C. Collignon, alleging that the aforesaid conveyances from Sarah to Peter were fraudulent and void as against the creditors of said Sarah, and praying to set the same aside. That notice of the pendency of the first of these suits was filed in the office of the clerk of Bergen county, March 29, 1893, and notice of the second on May 19, 1893. The Clinton Bank resists the allowance of the \$1,000 bond and mortgage on the ground that by their mutilation they were destroyed as valid and existing incumbrances on the property; that the subsequent paper did not revive them, as against a judgment creditor, because it was not acknowledged and recorded; that there is no clear evidence that the mutilation was by mistake, but, if so, that it was an act of complainant's agent, of such gross negli-

gence that a court of equity will not relieve against it. I think the evidence does establish that the mutilation of the bond and mortgage was a mistake on the part of Nicholas Collignon; that he intended to cancel some other papers, and by mistake tore the seals and part of the signatures off those in controversy. The testimony of the complainant, the subsequent agreement of the two mortgagors, reciting the mistake, and attempting to rectify it, the assumption of the payment of this mortgage by Claudius, and the payment regularly of the interest, in my judgment, leave no room for doubt on this point. There are many cases in which the court has said that equity will not relieve against a mistake resulting from the complaining party's own negligence. In most of the cases this was a declaration not subject to criticism with reference to the facts under determination; but it is not to be accepted as a canon of universal application. Prof. Pomeroy, in 2 Pom. Eq. Jur. § 856, and notes, vigorously disputes the correctness of any such contention. Chancellor Green, in *Banta v. Vreeland*, 15 N. J. Eq. 108, which was a suit brought to foreclose two mortgages, one of which had been, by mistake, surrendered by the complainant to the defendant, and canceled of record, says (page 107) of the rule referred to: "The principle is usually applied in relieving against contracts entered into under a mistake, although it is doubtless susceptible of a wider application. The present case, however, does not fall within the operation of the principle. The complainant received no consideration for the act, and defendant gave none. The complainant entered into no engagement from which he asks relief. Under a mistaken impression that the mortgage was satisfied, he consented to its cancellation. It is clearly against conscience that the defendant should avail himself of the mistake to escape the payment of an honest debt." If Nicholas or Claudius Collignon had sought to take advantage of the cancellation of this bond and mortgage, under the circumstances proved, without its having been paid and satisfied, then the attempt would have been a fraud on their part upon the mortgagees, which this court would not have lent its aid to perpetrate. But they did no such thing. They attempted, as far as was in their power, to rectify the mistake. The document which they signed is not to be regarded as a mortgage requiring acknowledgment and record to make it effective against judgment creditors and subsequent mortgagees and purchasers. They already had notice of the mortgage by its record, which was not canceled. The agreement was a solemn admission by them, under seal, that the mutilation of the bond and mortgage was done through a mistake of fact, as well as a promise to pay the amount intended to be secured thereby. It was an attempt to rehabilitate the former instrument. Tearing

off the seals and part of the signatures by mistake, however, did not, in equity, destroy the enforceability of the instruments. It is in the power of the court, even when the record has been canceled, to annul the cancellation (*Lockard v. Joines* [N. J. Ch.] 23 Atl. 1075), and enforce the debt by the foreclosure and sale of the mortgaged premises (*Banta v. Vreeland*, supra). In this case the bond was afterwards recognized by the payment of interest, and when Claudius O. Collignon, after the death of his brother and partner, Nicholas Collignon, came to buy the property, he expressly recognized the mortgage as an existing incumbrance, and assumed its payment as part of the consideration of the purchase. Claudius, in his lifetime, in the face of these facts, could not have successfully insisted on the annulment of these instruments from their accidental cancellation. Catharine, his devisee and legatee, stood in his shoes. She had no other or greater rights than her source of title, and her estate was subject to all equities existing against it, or him through whom she claimed. The judgments of the Clinton Bank give it no standing in a position which she would not be entitled to hold. I will advise a decree for the complainant on both mortgages.

(56 N. J. L. 312)

HAINES v. MERRILL TRUST CO.

(Court of Errors and Appeals of New Jersey.
March 6, 1894.)

ACTION ON NOTE—BONA FIDES OF HOLDER—QUESTION FOR JURY.

1. Fraud at the inception of the notes in suit would have justified the defendant below in rescinding the notes as against the payees therein. There was sufficient evidence thereof to go to the jury, and, when such fraud was proven to the satisfaction of the jury, it was necessary for the plaintiff to prove, in order to recover, that he took these notes before maturity, bona fide, and for value.

2. That, under the rules as to peremptory instruction by a judge to a jury to find a particular verdict, as laid down in *Railroad Co. v. Shelton*, 26 Atl. 937, 55 N. J. Law, 345, and *Crue v. Caldwell*, 19 Atl. 188, 52 N. J. Law, 218, the trial judge erred in directing a verdict for plaintiff in this case, and there should, therefore, be a new trial, and the question should be left to the jury to find whether these notes were taken by the plaintiff before maturity, bona fide, and for value.

Garrison and Bogert, JJ., dissenting.
(Syllabus by the Court.)

Error to supreme court.

Action on promissory notes by the Merrill Trust Company against Louis A. Haines. Judgment was directed for plaintiff, and defendant brings error. Reversed.

D. J. Pancoast, for plaintiff in error. A. B. Endicott, for defendant in error.

ABBETT, J. This action was tried at the circuit, and the court directed the jury to find for the plaintiff for the full amount claimed. The question to be determined is

whether the judge erred in taking the case away from the jury. The Merrill Trust Company brought suit upon two promissory notes, made by Louis A. Haines to the order of Ezra F. Merrill. The defense interposed was that the notes were procured by false and fraudulent representations on the part of Ezra F. Merrill, the payee. The trust company claimed that it was a bona fide holder of these notes, for value, before maturity. The court directed a verdict for the plaintiff, apparently upon the ground that the fraud of Ezra F. Merrill, was no defense as against the plaintiff. The question to be determined in this case is raised by the following assignment of error: "That the circuit judge, at the trial, overruled the defendant's defense, and directed the jury to find for the plaintiff company \$4,870.53, as the amount of the notes in suit, with interest." The questions presented in this case are: Was there sufficient evidence to go to the jury—First, upon the alleged fraud of Ezra F. Merrill in obtaining the notes in question? and, second, if such fraud is proved, did the plaintiff become the owner of these notes before maturity, bona fide, and for value? The case, as presented by the plaintiff to the trial judge, seems to rest only on the second question,—that of the bona fides of plaintiff, and the obtaining by the company of the notes for value, before maturity. That there was sufficient evidence of fraud on the part of Ezra F. Merrill in the inception of these notes to go to the jury on the first question is clear. If the suit had been between Ezra F. Merrill as plaintiff and Louis A. Haines as defendant, and the jury had found for the defendant, no court would have disturbed that verdict upon the evidence in this case. The fraud alleged, if found by the jury, was such that the defendant would have been justified (as against Merrill) in rescinding the notes. *Conlan v. Roemer*, 52 N. J. Law, 53, 18 Atl. 858. The real question in the case is whether, admitting the fraud of Ezra F. Merrill, the payee of these notes, can this fraud be charged against the plaintiff, so as to invalidate these notes in its hands? It has been held that where a defendant, who is the maker or indorser of negotiable paper, proves that it was obtained from him by fraud, or that it was fraudulently put in circulation, the plaintiff must prove, in order to recover, that he bought it before maturity, bona fide, and for value. *Duncan v. Gilbert*, 29 N. J. Law, 524. Fraud in the inception of the instrument having been established, the burden is laid upon the plaintiff, subject to the rules laid down in *Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488, and in *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 513, 7 Atl. 318, hereafter stated, to build up a title in himself better than that of the original party. He can recover only in virtue of the merits of his own title, arising from the consideration he has paid and the circumstances under which it came into his

hands. *Knapp v. Mayor, etc.*, 39 N. J. Law, 396, 397. Mere notice of facts such as would have put a prudent person on inquiry is not sufficient to impeach the title of the holder of negotiable paper taken for value, before maturity; and his right to recover can be defeated only by proof of such circumstances as show that he took the paper with knowledge of some infirmity in it, or with such suspicion with regard to its validity as that his conduct in taking it was fraudulent. *Bank v. Young*, 41 N. J. Eq. 538, 7 Atl. 488. Where mala fides is the point of inquiry, suspicious circumstances must be of a substantial character, or the court may arrest the inquiry. *Fifth Ward Sav. Bank v. First Nat. Bank*, 48 N. J. Law, 517, 7 Atl. 318.

The trial judge took this case away from the jury, and directed a verdict for plaintiff. This direction is error, "where the evidence is such that a contrary verdict would not be set aside on the ground that there was not enough evidence to sustain it, or that it was clearly against the weight of evidence." *Railroad Co. v. Shelton*, 55 N. J. Law, 345, 26 Atl. 937. The rule is also stated as follows: "It is well settled that a jury should be controlled in its verdict by a peremptory instruction only where the testimony is of such a conclusive character as would compel the court, in the exercise of a sound legal discretion, to set aside a verdict if one were returned in opposition to such testimony; or, to put it more forcibly and more accurately, if the evidence be such that the court would set aside any number of verdicts rendered against it, the jury may be controlled." *Crue v. Caldwell*, 52 N. J. Law, 218, 19 Atl. 188. The defendant having shown fraud in the inception of the notes sued on sufficient to go to the jury, did the plaintiff prove by uncontradicted and unimpeachable evidence that the Merrill Trust Company obtained these notes before maturity, bona fide, and for value? This proof on plaintiff's part rests upon the testimony of Ralph F. Alvord. It will be sufficient to dispose of this case to say that his testimony is unsatisfactory, and that a verdict which disregarded it, under the suspicious circumstances of this case, would not be set aside as against the weight of evidence. The evidence in this case shows that the first note was dated Atlantic City, September 6, 1889, and was for \$3,600, drawn to the order of E. F. Merrill, payable at the Atlantic City National Bank, twelve months after date. It was indorsed, "E. F. Merrill," and also, "Pay to the order of the Atlantic City National Bank for collection. Merrill & Alvord." The protest of the note shows that it was in the hands of the Atlantic City Bank at maturity, and that it was protested for nonpayment, at the request of said bank, September 9, 1890. The second note, for \$333.33, was dated Cleveland, Ohio, January 9, 1890, drawn to the order of E. F. Merrill, payable eight months after date,

with interest. It was indorsed: "Pay to the order of A. E. Alvord. E. F. Merrill;" and also: "Pay to the order of the Atlantic City National Bank for collection. A. E. Alvord." The protest of this note also shows that it was in the hands of said bank at maturity, and that it was protested for non-payment, at the request of said bank, September 12, 1890. The \$3,600 note was given by the defendant to E. F. Merrill for the purchase of three shares of the stock of the Haverhill Roller Toboggan Company, owned by Merrill, and of the par value of \$300. The \$333.33 note was given for the purchase by the defendant of Merrill of stock of the Philadelphia Roller Toboggan Company. There is evidence sufficient to go to the jury that all this stock in both companies was worthless when sold, and that false representations were made to the defendant to induce him to purchase. Ralph F. Alvord testifies that these notes were taken by the firm of Merrill & Alvord, the eastern agents of the Merrill Trust Company, and that they discounted these notes, and applied the proceeds on Mr. Merrill's stock, which at that time was not fully paid for; and he says they were discounted August 17, 1890. There is nothing to show these notes were discounted for plaintiff, except the uncorroborated testimony of Ralph F. Alvord, who was one of the firm of Merrill & Alvord, which firm were the eastern managers of the Ness County Bank, and eastern agents of the Merrill Trust Company, two Kansas corporations. The indorsements on the notes show that the Atlantic City National Bank only held them for collection, and had not discounted them. It would appear from the indorsements on the notes that the \$3,600 note had been deposited for collection by Merrill & Alvord, and the \$333.33 note deposited for collection by Alfred E. Alvord. The firm of Merrill & Alvord was composed of Nathan C. Merrill, Alfred E. Alvord, and Ralph F. Alvord. This Nathan C. Merrill, a son of Ezra F. Merrill, the payee of the note, was also the president of the Ness County Bank, and the president of the Merrill Trust Company. Alfred E. Alvord, a brother of Ralph F. Alvord, was second vice president of the Ness County Bank and vice president of the Merrill Trust Company. Ralph F. Alvord, the other member of said firm, and the principal witness for plaintiff, was, through his firm, one of the managers of the Ness County Bank. Ezra F. Merrill was also a stockholder in the Ness County Bank, and a director in the Merrill Trust Company. The firm, the bank, and the trust company seem to have been controlled by the Merrills and Alvords, as the evidence does not show any one else to have had any control thereof. Under these circumstances, when the \$3,600 note became due, and the Atlantic City Bank did not collect it, and returned it to the firm of Merrill & Alvord, that firm brought suit upon it, and claimed that said note be-

longed to said firm. When the \$333.33 note became due, that note was returned, after maturity, to Alfred E. Alvord, by the Atlantic City Bank. He brought suit upon it in his own name, claiming to be the owner thereof. These parties, after their depositions had been taken in suits in the circuit court thereon, apparently discovered that there was fraud charged, and that, if the notes remained in their hands, they might be charged with notice of Ezra F. Merrill's fraud, so as to invalidate the notes in their hands; and possibly for that reason, and not for the reason stated by Ralph F. Alvord, they discontinued the two suits in the circuit court for Atlantic county, and brought suit on both notes in the supreme court, in the name of the Merrill Trust Company, one of their corporations, alleging that Ezra F. Merrill was indebted for stock he had in that company; and they claimed that said firm, as agents of said trust company, had used these notes, or the proceeds thereof, as discounted by them, to pay for installments due on said stock. Two members of this firm were then, respectively, president and vice president of the Merrill Trust Company. They also claimed, notwithstanding what had been alleged in said two suits, that this plaintiff corporation was a bona fide holder of said notes, for value, before maturity. This same Alfred E. Alvord had, however, as second vice president of the Ness County Bank, notified Haines, before the maturity of the \$3,600 note, that the Ness County Bank held said note, and directed him to remit the money therefor to the said bank, through the Atlantic City National Bank. The letter of Ezra F. Merrill to Alfred E. Alvord is also significant as bearing on the smaller note, and the bona fides of plaintiff's claim, as a holder thereof before maturity, for value. These facts, and the other evidence in the case, would have sustained the verdict of a jury if it had held that the plaintiff had failed to prove that the trust company had obtained these two notes before maturity, bona fide, and for value. The case should have gone to the jury on the whole evidence, under proper instructions from the trial judge. The circuit judge having taken the case away from the jury, the judgment below should be reversed, and a new trial ordered.

GARRISON and BOGERT, JJ., dissenting.

HANES v. DENBY et al.

(Court of Chancery of New Jersey. March 23, 1894.)

FORECLOSURE OF MORTGAGE—SALE OF LAND—INVERSE ORDER OF ALIENATION.

Where a mortgagor conveys a part of the mortgaged land with covenants of warranty expressly excepting the mortgage, and subse-

quently conveys the residue, the land should not, on foreclosure, be sold in the inverse order of alienation.

Bill by John Hanes against Thomas W. Denby and others to foreclose a mortgage.

C. H. Sinnickson, for complainant. Thomas E. French, for defendant Fagan.

GREEN, V. C. This bill is filed to foreclose two mortgages on property in the township of Pilesgrove, in the county of Salem. The first is dated April 1, 1850, and is made by Thomas Long and wife to William J. Shinn upon a tract of land containing 6¼ acres, to secure the payment of a bond of Thomas Long to William J. Shinn, conditioned for the payment of \$94.50 in three years, with interest. The complainant became the owner of the bond and mortgage March 23, 1874, through various mesne assignments. The fee of the mortgaged premises became vested, through mesne conveyances, in Mahlon D. Dickinson, to whom it was conveyed December 19, 1854. March 8, 1858, Dickinson and wife conveyed 4.39 acres of the tract to John Williams, and afterwards, by sheriff's deed, October 16, 1858, the right, title, and interest of John Williams was conveyed again to Mahlon D. Dickinson. Dickinson and wife, by deed dated November 22, 1858, conveyed the 4.39 acres to Emeline Sullivan, wife of Lloyd Sullivan. The grantee was generally known by the surname of "Selvey." The deed from Dickinson and wife to Sullivan is for the expressed consideration of \$121, and contains covenants against the acts of the grantors, except a mortgage held by William J. Shinn for the sum of \$94, with a covenant of warranty against demands made by any persons claiming by, from, or under the grantors. June 24, 1867, Emeline Sullivan conveyed to the trustees of the African school one-half an acre, part of the 4.39 acres. She died intestate November 7, 1873, leaving issue. Four of her heirs, by deed dated March 7, 1873, conveyed four-fifths of the remaining part of the 4.39 acres to Edith Sturgis, the other heir, and wife of Littleton Sturgis, "subject, nevertheless," as expressed in the deed, "to a certain mortgage held by Amos Cowan [the mortgage in question] for a balance against said premises of \$50, and all interest due and to become due thereon, which said mortgage and interest the said Sturgis hereby binds himself and his heirs and assigns to pay, and save said party of the first part clear of all or any payment by virtue of said mortgage," with a general covenant of warranty, "except the mortgage and interest aforesaid." November 10, 1873, Edith Sturgis and her husband mortgaged the 4.39 acres, less the one-half of an acre, to Moses S. Selvey and others for \$170.71. This mortgage was afterwards foreclosed, and the property conveyed by sheriff's deed, November 22, 1885, to John E. Fagan. Fagan and

wife, January 2, 1886, conveyed those premises to the defendant Denby, and Denby gave back a mortgage to Fagan, conditioned for the payment of \$400. The trustees of the African school district conveyed, November 7, 1872, part of the half acre to the trustees of the African church. There is indorsed on the bond that the interest has been paid in full to April 1, 1856, and as paid to William J. Shinn since that time, as follows: November 8, 1862, \$6; August 24, 1863, \$5; September 23, 1863, \$10; January 27, 1864, \$5; March 23, 1864, \$50. As paid to Cowan, March 1, 1870, \$5.50; September 23, 1870, \$10; January 27, 1871, \$9; October 21, 1871, \$5; November 7, 1871, \$5. Paid to Complainant John Hanes, March 15, 1875, \$5.99; March 17, 1879, \$10; March 24th (year not given), \$10.34.

The claim made by the defendant, that this bond and mortgage will be presumed to be paid, is met by the positive testimony of the complainant that he has been the owner of the mortgage since it was assigned to him, in 1874, and that no payments other than those mentioned by him have been made. The complainant claims that the whole of the money due on this mortgage should be raised by the sale of the 4.39 acres. On the other hand, the defendant Fagan claims that the mortgaged premises remaining after the conveyance of the 4.39 acres had been conveyed should be first sold to raise the money due upon this mortgage. The general rule is that, where a mortgagor or his grantee has conveyed away a portion, or successive portions, of the mortgaged premises, and the mortgagee forecloses, the several portions are to be held liable and sold in the inverse order of their conveyance. The rule applies where the conveyance contains covenants of warranty. If this rule applies in this case, the 2.36 acres remaining vested in Mahlon D. Dickinson after his conveyance to Emeline Sullivan of the 4.39 acres would be liable first for the payment of the mortgage debt. The covenants contained in this deed are limited covenants against the acts of the grantors, but the covenants contain an express exception of the mortgage in question. The rule is said by Vice Chancellor Pitney in *Gray v. Hattersley*, 50 N. J. Eq. 206, 24 Atl. 721, at page 211, 50 N. J. Eq., and page 721, 24 Atl., to be based upon the intention of the parties, either expressed in the writings passing between them or implied from the facts and circumstances of the case. When this property was conveyed by Dickinson to Sullivan, so far as it appears from the evidence in this case, it was subject to no other incumbrances than the mortgage in question, and this mortgage is expressly excepted in the covenant of warranty which the deed contains. What, then, is the effect of such a reservation in the deed upon the rule stated? In *Hoy v. Bramhall*, 19 N. J. Eq. 563,

one deed contained the following clause: "Subject, however, to the payment by said grantee of all existing liens upon said premises." And the other: "This conveyance is made subject, nevertheless, to the payment by said parties of the second part of all existing liens on said premises." It was held both by the chancellor and by the court of appeals that the language of the stipulations in these deeds, with reference to the complainant's mortgage, might not be sufficient to create a covenant, on which a strictly personal liability could be based (page 569), "but the effect is clearly to make the part conveyed subject to its proper proportion of the incumbrances, so as to relieve to that extent that part of the mortgaged premises retained by the mortgagor, by force of which the lots conveyed and those retained must contribute towards discharging the common burden according to their relative values." Applying this principle, the insertion of the words quoted in the deed from Dickinson to Sullivan have the effect of not making the rule referred to applicable to this case, but to leave the mortgaged debt chargeable proportionately upon the 4.39 acres conveyed, and the 2.36 acres still retained by Dickinson. When the heirs of Emeline Sullivan conveyed four-fifths of what remained of the 4.39 acres to the other heir, the deed was made subject to this mortgage for a balance of \$50, said to be due thereon with interest; with the further provision that "the said Sturgis hereby binds himself and his heirs and assigns to pay and save said party of the first part clear of all or any payment by virtue of said mortgage." This assumption of payment was by Littleton Sturgis, the husband of the grantee, who was a stranger to the title, and cannot affect the question under consideration. I do not see that this last conveyance in any way changed the rights of the parties, or the liabilities of the respective tracts of land; and my opinion is that the two parcels must ratably contribute to the discharge of the mortgage. Mahlon D. Dickinson and wife, by deed dated February 4, 1864, conveyed the residue of the property, 2.36 acres, to Moses S. Selvey, who conveyed it to one Edward Richardson, by whom a mortgage was given thereon September 24, 1869, to secure the payment of \$100, to Elizabeth W. Russell, who, October 6, 1873, assigned the mortgage to the complainant. The 2.36 acres were afterwards conveyed to the defendant Fanny A. Richardson. If parties cannot agree on the value of the several parcels of the mortgaged premises, there must be a reference to a master to ascertain the same, with amounts due on the several mortgages. If parties can agree, I will ascertain the amounts without a reference. The copy of the proposed decree and notice of settlement must be served upon the counsel of defendants.

(36 N. J. L. 487)

LEAR v. BUDD.

(Supreme Court of New Jersey. March 12, 1894.)

APPEAL FROM INFERIOR COURT—TIME OF TAKING.

If a party, desiring to appeal from a judgment rendered in a court for the trial of small causes, neglects to demand an appeal on or before the first day of the term of the common pleas next after the rendition of the judgment, his right of appeal expires.

(Syllabus by the Court.)

Action by Moses W. Lear against Rheese Budd. Plaintiff had judgment, and defendant applied for stay of execution. Heard on rule to show cause. Rule discharged.

Argued February term, 1894, before AB-BETT and DIXON, JJ.

Mr. Fluck, for plaintiff. Mr. Kuhl, for defendant.

DIXON, J. On October 9, 1893, the plaintiff recovered a judgment against the defendant in a court for the trial of small causes in Hunterdon county, which judgment was docketed on October 22, 1893, in the Hunterdon common pleas, and on October 24, 1893, in this court. On October 27, 1893, execution was issued out of this court, which was returned at the November term unsatisfied, and on December 15, 1893, an alias execution was issued, returnable at the present term. Application is now made to stay the further execution of this writ, in order that the defendant may demand from the trial court an appeal to the Hunterdon common pleas, and it is resisted on the ground that the time for taking such an appeal has ended. The justice's court act, upon which the right of appeal rests, contemplates that the appeal is to be taken on or before the first day of the term of the common pleas next after the rendition of the judgment. This appears by sections 79, 82, and 83 of the act, as interpreted by our decisions. *State v. Judges of Common Pleas*, 3 N. J. Law, 738, note 2; *Stevens v. Scudder*, 5 N. J. Law, 503; *Miller v. Martin*, 8 N. J. Law, 201; *Dyer v. Ludlum*, 16 N. J. Law, 531; *Wilcox v. Smith*, 46 N. J. Law, 342. In *Lacy v. Cox*, 15 N. J. Law, 469, the rule was relaxed to this extent: that where the party had in due time endeavored to demand an appeal, but had been prevented by the absence of the justice, the court of common pleas might, on seasonable application, extend the time for bringing in and perfecting the appeal. In the case before us there was nothing to hinder the defendant in making due demand of his appeal on or before December 12, 1893, when the term of the Hunterdon common pleas opened, except the laches of himself or his attorney. A negligent failure to comply with the requirements of the statute cannot be deemed legally tantamount to actual compliance. We think that on December 13th last the defendant's right of appeal had expired, and therefore the exe-

cution of the judgment should not be stayed. The rule to show cause must be discharged, with costs.

(18 R. I. 456)

LONG ISLAND BRICK CO. v. ARNOLD.
(Supreme Court of Rhode Island. Jan. 12, 1894.)

MECHANICS' LIENS—OWNERSHIP OF THE LAND.

1. A vendee in possession under a contract of sale is not the "owner" of the land, within the meaning of Pub. St. c. 177, § 1, as amended by Pub. Laws 1888, c. 696, giving a lien in case the building is constructed at the request of the owner.

2. The vendee's equitable ownership cannot be subjected to the lien on petition against the vendor and his interest.

Petition by the Long Island Brick Company against Frank W. Arnold to enforce a mechanic's lien against certain described lands and buildings, and the right, title, and interest of said Frank W. Arnold therein. Judgment for respondent.

Stephen O. Edwards, for petitioner. Nathan W. Littlefield and Walter R. Stiness, for respondent.

PER CURIAM. This is a petition for a lien for materials furnished in the erection of a building on a lot of land described in the petition, on the right, title, and interest of the respondent, Frank W. Arnold, as the owner of the land in fee simple. The testimony discloses that the contract for the erection of the building was made, not with Frank W. Arnold, but with William H. Arnold, to whom Frank W. Arnold had agreed to convey the land, and who was in possession of it under the agreement of sale. As the contract for the building was made with William H. Arnold, who was not at the time the owner of the land, we do not think that the petition can be sustained, since the lien given by Pub. St. R. I. c. 177, § 1, as amended by Pub. Laws R. I. c. 696, of March 21, 1888, is in case the building, etc., is constructed, etc., "by contract with or at the request of the owner" of the land. The petitioner argues that as a contract for the sale of the land to William H. Arnold had been made, he, as vendee under the contract, may be regarded as the equitable owner of the land within the meaning of the statute; but, even if this be so, the petition does not run against William H. Arnold, nor does it seek to subject his interest in the land to a lien.

(18 R. I. 455)

MATHEWSON v. MATHEWSON.

(Supreme Court of Rhode Island. Jan. 23, 1894.)

DIVORCE—DEFENSES—UNFAITHFULNESS OF PETITIONER.

When a man is presumptively dead, and his wife, having reason to believe him dead in fact, marries another man, but he afterwards

returns, the wife's continued cohabitation with the other man after her first husband's return deprives her of right to a divorce from the latter for desertion and adultery.

Petition by Sophronia W. Mathewson against Luther W. Mathewson for divorce from bed and board, and separate maintenance. Dismissed.

Stephen O. Edwards, for petitioner. Nathan W. Littlefield and Walter R. Stiness, for respondent.

TILLINGHAST, J. This is a petition for divorce from bed and board, and for separate maintenance, on the grounds of desertion, neglect to support, and adultery. The parties were married October 2, 1853, and lived together until 1861, when the respondent deserted the petitioner, telling her he was going away on business, and entered the service of the United States, as a soldier. He wrote to her once or twice shortly after leaving, after which she heard nothing from him, directly, for 27 years, but it was commonly reported that he was killed in the army during the late Civil War; and the petitioner, supposing that he was dead, remarried in 1872 to one James M. Place, with whom she lived as his wife until August, 1892. About five years ago the respondent returned with another wife and several children, and the petitioner became aware of this act as early as January, 1890, when she saw him, and had a talk with him. She also saw and consulted with an attorney of this court as to her relations with said Place about two years ago, shortly after which she ceased to cohabit with him, and filed this petition for divorce. In this state of the proof, the respondent's counsel contends that the divorce should not be granted, as it appears that the petitioner was herself guilty of adultery, or at any rate of such gross misconduct and wickedness, repugnant to, and in violation of, the marriage covenant under which she is now seeking relief, as to bar her from asserting any claim against her husband.

The petitioner was perhaps justifiable in contracting said second marriage, her husband being presumptively dead, and as she believed, and had reason to believe, dead in fact. As soon as it came to her knowledge, however, that he was living, if she intended to claim her conjugal rights, she should have immediately ceased cohabitation with her second husband; her marriage with him not being voidable merely, but absolutely void. Pub. St. R. I. c. 163, § 5.¹ She was only justified, therefore, in living with Place during the continuance of her belief that the respondent was dead. By continuing to live with

¹ Pub. St. c. 163, § 5: "All marriages when either of the parties have a former wife or husband living at the time of such marriage, or where either of them shall be an idiot or lunatic at the time of such marriage, shall be absolutely void."

him after the return of the respondent, she certainly forfeited all legal claim to the support of the latter if, indeed, she did not thereby commit the crime of adultery (1 Bish. Mar. Div. & Sep. § 1511); and hence is in no position to complain of the wrongs committed by him. She alleges, as does every petitioner for divorce, that, ever since her marriage with the respondent, she has, "on her part, demeaned herself as a faithful wife, and performed all the obligations of the marriage covenant," while her own testimony shows that she has grossly violated the same, and therefore that she does not come into court with clean hands, as the law requires. But, on the other hand, the proof shows that, had the respondent been himself free from legal fault at the time of the commencement of this suit, he would have had a good and sufficient ground for divorce against the petitioner. It appearing, then, that the petitioner, whether equally guilty with the respondent or not, has been guilty of conduct which would be a sufficient ground for divorce, she is not entitled to the relief prayed for in her petition. 5 Am. & Eng. Enc. Law, 824, and cases cited in note 10; Church v. Church, 18 R. I. 687, 19 Atl. 244; 2 Bish. Mar. Div. & Sep. § 349; Browne, Div. & Alim. 84. For circumstances that would excuse cohabitation with a second husband while the first marriage was still subsisting, see Pratt v. Pratt, 157 Mass. 503, 32 N. E. 747. Petition denied and dismissed.

(18 R. I. 436)

DEAN et al. v. ROUNDS et al.

(Supreme Court of Rhode Island. Jan. 3, 1894.)

LEGACY—EQUITABLE OFFSET—WHAT CONSTITUTES
— SUBROGATION — SETTLEMENT OF EXECUTOR'S
ACCOUNTS—JURISDICTION—PRIORITY.

1. Where part of a trust estate consists of joint notes of a residuary legatee and her husband, given in part payment of a farm conveyed to her, and in renewal of a note for money borrowed by her while sole from the trust estate, the amount of the notes should be deducted from her legacy. Chafee v. Maker, 24 Atl. 773, 17 R. I. 739, reaffirmed.

2. Where the amount of a mortgage, given to an executor by a legatee and her husband to secure notes which are equitably her debt, is deducted from her legacy, her legatees are not entitled to be subrogated to the rights of the mortgagee.

3. Where letters have issued to an administrator, and bond has been given by him in the usual way to account to the probate court, the jurisdiction of that court is not affected by the filing of a bill in the supreme court against him for an account, and he will not be enjoined from prosecuting in the probate court the settlement of an account filed by him therein.

Bill by Calvin T. Dean and others against Thomas M. Rounds and others for an accounting by defendant Rounds, as administrator of the estate of Mary S. Rounds, deceased, and to enjoin the prosecution by him of a settlement of his account in the municipal court of the city of Providence, which is pending on appeal in the common

pleas division of the supreme court. Injunction denied, and case allowed to stand to await the settlement of such account.

After the decision rendered in this cause, reported in Index MM, 117, 27 Atl. 515, the complainants filed a petition to enjoin the respondent Thomas M. Rounds from further prosecuting the settlement of his account as administrator on the estate of Mary S. Rounds, which he had presented to the municipal court of the city of Providence since the filing of the complainants' bill, and which was pending on appeal in the common pleas division of the supreme court. The case was then reargued.

James Tillinghast and Theodore F. Tillinghast, for complainants. Joseph C. Ely and Isaac H. Southwick, Jr., for respondents.

TILLINGHAST, J. Upon the presentation by the respondents' counsel of a final decree in said case; subsequent to the decision heretofore rendered therein, the complainants' counsel made an extended reargument of the entire case, and filed an elaborate brief, reviewing all the proceedings connected therewith, and urging that the court had erred in said decision, and particularly in relation to the power of a married woman to bind herself by contract, and of the right of subrogation contended for by him, and ought, therefore, to reconsider or modify the same, so that it shall be in accord with the well-settled law of the land and the previous decisions of this court. In connection with, and as a basis for, a part of his said reargument, he filed a petition for an injunction against the respondent Thomas M. Rounds, administrator, to restrain him from the further prosecution of the settlement of his account before the common pleas division of this court, in which the case is now pending on appeal from the municipal court of the city of Providence, on the ground that, the supreme court having first taken jurisdiction over the same on the bill before us, said account should be settled here, and not in the municipal court.

And, first, then, as to the criticism of the complainants' counsel to the effect that the opinion referred to goes to the extent of deciding that the contracts of a married woman create a legal obligation binding at law upon her and her legal representatives, or enforceable at law against her or them, or against her general estate. In Chafee v. Maker, 17 R. I. 739, 24 Atl. 773, we held that the notes in question were equitably the debt of Mrs. Rounds, and hence that the amount due thereon might be retained by Chafee, the complainant in that suit, out of the \$3,000 legacy which was payable by him to said Thomas M. Rounds as administrator on her estate. In our former decision in this cause we intended to affirm the doctrine thus expressed, and we now reaffirm the same. We never have supposed, however, nor are we

conscious of having decided, that a married woman is legally bound by her contracts, except as provided by statute. We have not said that an action at law could have been maintained against Mrs. Rounds by Chafee for the recovery of the notes in question, for it is perfectly clear that it could not. But we have said, and we think rightly, that said notes were equitably the debt of Mrs. Rounds, and payable out of her estate, for the reason that they were given for, and inured to, her sole and separate benefit and accommodation, the principal one having been given in part payment for the farm which was conveyed to her by said Chafee, which note was secured by a mortgage on said farm, given by her and her husband in the manner required by law, and the other by way of a renewal of the balance due on a note originally given by her, while sole and unmarried, for the sum of \$1,000, for money which she borrowed from the trust estate, which said renewal note was signed by her husband solely for her accommodation, and to enable her to adjust her accounts with her trustee at the time of the purchase by her of said farm. In equity and good conscience, therefore, the trustee should be allowed to reimburse himself out of money in his hands belonging to the estate of Mrs. Rounds for the money advanced to her to enable her to purchase said estate, which estate was by law absolutely secured to her sole and separate use, and also for the balance due on said note of \$1,000, given before her marriage with said Thomas; and said trustee should only be called upon to turn over to the administrator the balance that shall remain after so reimbursing himself; for can it be seriously contended that, had Mrs. Rounds become entitled to said \$3,000 legacy in her lifetime, she could have recovered the same from her said trustee without permitting him first to deduct therefrom the amount which she equitably owed him on said notes? We think not. And if she could not, then certainly her administrator, who only succeeds to her rights in the premises, can only claim from said trustee the balance due after deducting her said indebtedness. That the particular language which was used by the court in said second decision relating to the power of a married woman to make contracts which should be binding upon her and her estate, if taken by itself, might be misleading, is perhaps obvious. But when taken, as it should be, in connection with the facts previously set forth therein, no greater force would ordinarily attach thereto than the nature of the case required. In any event, all that we intended to say was that the notes in question were equitably the debt of Mrs. Rounds, and should be paid out of her estate in the manner aforesaid.

And, secondly, as to the question which the complainants again raise, namely, whether they are entitled to be subrogated, under

the mortgage referred to in said previous decisions, to the rights of said Chafee. We stated in our former opinion that the principle of subrogation did not apply in this case, and we are still of the same opinion. Subrogation applies where one party pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. *Sheld. Subr. § 1*, and cases cited in note on page 2. Where a mortgage debt, for instance, is paid by one who is entitled to pay it for his own protection, but is not under any legal liability to do so, he is subrogated by operation of law to the rights of the mortgagee, the doctrine being founded upon the principle that one who thus pays the mortgage debt is equitably entitled to the mortgage security. As said in *Keely v. Cassidy*, 93 Pa. St. 319: "The general principle upon which subrogation rests is that whenever any one pays a debt for which he is liable as surety or guarantor it is equitable that he should be substituted in place of the creditor." It is also stated in the same case that "the principle which governs in all cases of substitution is one of equity merely, and is to be carried out in the exercise of an equitable discretion with a due regard to the legal and equitable rights of others." In *Bank v. Cushing*, 53 Vt. 321, 326, the court say: "It is only in cases where the person paying the debt stands in the situation of a surety, or is compelled to pay in order to protect his own interests, that a court of equity substitutes him in the place of the creditor as a matter of course, without any special agreement." See, also, *Cole v. Malcolm*, 66 N. Y. 363; *Stevens v. King*, 84 Me. 291, 24 Atl. 850. By the settlement with the administrator, which we allowed the trustee to make in *Chafee v. Maker*, supra, the estate of Mrs. Rounds simply paid a debt which she owed. It was not paid by the complainants, or either of them. They were under no obligation to pay it, nor was it paid with their money. The assets of Mrs. Rounds' estate were not diminished, and no one was wronged, by this proceeding, for the complainants were not entitled to her personal estate in gross, but only to the net amount thereof,—that is, to what remained after the payment of her debts. But the complainants' counsel urges that the doctrine of subrogation almost universally, if not strictly always and necessarily in a case of this character,—of legatees,—only arises where debts which the legacy moneys are taken to pay are legal debts of the testator; that the doctrine almost universally rests upon the fact that the moneys are assets in the hands of the executor or administrator, which, so far as he is concerned, he has rightfully used and applied to pay the proper legal debts of the estate, for, if he wrongfully used them, he and his bondsmen would be liable personally; and it is because he has so properly applied them in his administration of the estate—an ap-

plication which, being thus legally and properly made, the legatee could not prevent—that a court of equity, applying this, its own peculiar and exclusive doctrine of subrogation, substitutes the legatee in the place of the creditor thus paid under, and gives him the benefit of, the creditor's security. He therefore contends that, so long as the money which Chafee, trustee, was allowed to retain out of the \$3,000 legacy due to the estate of Mrs. Rounds, which money otherwise and rightfully belonged to the legatee under her will, was, by way of set-off as aforesaid, taken to pay the secured debt of the testatrix, her legatees have the right to be substituted in the place of said Chafee under the mortgage.

As to specific legacies the law doubtless is that in marshalling the assets of an estate such legacies cannot be applied in exoneration of a devisee from an incumbrance to which the testator had subjected the devised estate (*Johnson v. Child*, 4 Hare, 87; 2 Jarm. Wills, *636, 637), although the devisee is entitled to have his estate exonerated out of the general personalty, unless it is clear from the will that he was to take it cum onere. And, such being the rule, if a specific legatee is deprived of his legacy by the payment of a debt secured by mortgage, he is entitled to be subrogated to the rights of the creditor against the land, to the extent of his legacy, or to the value of the personal estate so appropriated. And there are cases which hold that the exoneration of a devisee cannot be claimed even as against a pecuniary legatee, and that to the extent to which it is thus exonerated such legatee is entitled to stand upon the devised estate in the place of the mortgagee. *Wythe v. Henniker*, 2 Mylne & K. 635, 645; 2 Woerner, Adm'n, § 494; *Sheld. Subr.* § 211. See, also, the dictum of *Brayton, J.*, in *Gould v. Winthrop*, 5 R. I. 319, 323, and the dictum of the master of the rolls in *Selby v. Selby*, 4 Russ. 336, 341. But whether this latter doctrine is correct or not we are not now called upon to determine, for the reason that, as we construe the will of Mrs. Rounds, the personal estate bequeathed to the complainants included only what should remain after discharging her liabilities. In short, that the clause, "all moneys or legacies coming to me from any source, I give and bequeath to my brother and sister, including my step-son Walter B. Rounds, to be divided equally to share and share alike," included all the personal estate of the testatrix not otherwise disposed of, and is, therefore, a general residuary bequest; and hence the case falls clearly within the decision of *Gould v. Winthrop*, supra, which holds that such a bequest is chargeable with all the debts of the testator, and that it is only the rest and residue thereof which passes to the legatee. It is true there is no direction in the will to pay the debts of the testatrix, but every person who makes a will is presumed to know the law, and to make his will in reference to

it; and his estate is equally bound without as with such a direction, and in the order required by law; and as all the gifts in the will before us, excepting the one in question, are clearly specific, it is fair to infer that the testatrix intended that this should be subject to the payment of her debts. That a bequest of this sort is residuary, see *Walker's Estate*, 3 Rawle, 229; *Hinckley v. Primm*, 41 Ill. App. 579; *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750; *Walte v. Combes*, 5 De Gex & S. 676; *Cadogan v. Palagi*, 25 Ch. Div. 154. There are, therefore, no equities in the case which the complainants are entitled to urge.

And, finally, as to said petition for an injunction. It sets forth that the complainants filed their bill in this case on the 13th day of July, 1892, in which they pray, among other things, that an account may be taken under the direction of this court of the personal estate, debts, and expenses of said Mary S. Rounds as administered by said Thomas M. Rounds; that since the filing of their said bill said Thomas has filed his account as administrator in the municipal court of Providence, and that the settlement thereof is now pending on appeal in the common pleas division of this court; and prays that said Thomas may be enjoined from the further prosecution of said account before the common pleas division. The ground of this petition, as stated in the brief, is that, as this court has concurrent jurisdiction with the municipal court over the matter in question, and as it first obtained jurisdiction thereof, it must exclusively adjudicate the same. In *Blake v. Butler*, 10 R. I. 133, which is specially relied on in support of this contention, this court refused to entertain a bill for the settlement of the administrator's account, saying that the court of probate which granted administration on the estate was the appropriate tribunal to which the respondent was required to resort for that purpose. It is true that in that case the account of the administrator was presented to the probate court for allowance, prior to the filing of the bill, while in the case at bar it was not presented until after the filing of the bill in this court; but letters of administration had been issued to the administrator in this case, and bond had been given by him in the usual way to account to the municipal court in his said capacity, before the filing of this bill. So that, while the account which we are now urged to pass upon had not been presented in the municipal court, yet the court had taken jurisdiction of the subject-matter in question prior to the filing of the bill in this suit, and, under the authority of *Blake v. Butler*, supra, "the court which first takes jurisdiction of the subject, must exclusively adjudicate, and neither party can be compelled into another court for anything that may be adjudicated by the first." We think the more appropriate place for the settlement of the accounts of an administrator in the first

instance is in the probate court from whence he obtained his authority to administer, and to which he expressly bound himself to account. But, as said in *Wood v. Hammond*, 16 R. I. 98, 110, 17 Atl. 324, and 18 Atl. 198, "applying the rule invoked by the petitioners most strictly, we do not think it would exclude the court from using other courts as auxiliary to itself." The petition for injunction is denied, and the case will be allowed to stand to await the settlement of the administrator's account in the common pleas division of the court.

(18 R. I. 459)

DOUGLASS v. BARBER.

(Supreme Court of Rhode Island. Jan. 24, 1894.)

DISTURBANCE OF SCHOOL — WHAT CONSTITUTES — ARREST WITHOUT WARRANT — WHEN JUSTIFIABLE — FAILURE TO PROCURE WARRANT — EFFECT — MITTIMUS.

1. A person who enters a schoolhouse, and locks the door from the inside, thereby preventing the teacher and pupils from entering, violates Pub. St. c. 241, § 7, which provides a punishment for persons who willfully interrupt or disturb any school.

2. A person who willfully interrupts or disturbs a school, in violation of Pub. St. c. 241, § 7, is guilty of a breach of the public peace, and may be arrested by an officer without a warrant, when the offense is committed in his view.

3. Where an officer rightfully arrests a person without a warrant and makes a complaint for the offense before the district court, he is not guilty of a trespass because the district judge fails to issue a warrant.

4. A mittimus which sets forth the offense, the plea, and an order that defendant give recognizance or stand committed till the order is performed, conforms substantially to the requirements of Pub. Laws, c. 598, § 20, and is not fatally defective in not stating that the commitment was for failure to give recognizance.

Exceptions from district court, Providence county.

Action by Josephine E. Douglass against George F. Barber to recover damages for an illegal arrest. There was a verdict for defendant, and plaintiff excepts. Exceptions overruled.

Albert B. Crafts, for plaintiff. Dexter B. Potter, for defendant.

STINESS, J. This is an action of trespass for an alleged illegal arrest, which the defendant justifies in a special plea setting forth that the plaintiff, at the time of the supposed trespass, had entered a schoolhouse in the town of Exeter, locked the door from the inside, and was detaining possession of said schoolhouse, thereby preventing the teacher and scholars of said school from entering therein; and the defendant, being an officer of the law, to wit, a constable, thereupon arrested the plaintiff, and took her before the justice of the district court, where a warrant was issued, upon which she was ar-

raigned and committed. The case is before us on exceptions to the refusal of the judge to charge the jury as requested at the trial.

The first request was to charge the jury that if the plaintiff took possession of the schoolhouse, and was ejected before the school was called to order, and before school time, she was not guilty of a misdemeanor. The third request may also be considered with the first. It was this: "If the complainant took peaceable possession of the schoolhouse, and locked the doors, so as to keep the teacher and scholars out, and stayed inside, making no threats and using no violence to retain possession, then the defendant had no right to arrest her and carry her to Wickford, but did have a right to remove her from the schoolhouse properly, and that only." Pub. St. R. I. c. 241, § 7, provides a punishment, by fine or imprisonment, for persons who willfully interrupt or disturb any public or private school.¹ From the nature of the offense, which violates public order, and interferes with public and personal rights, as well as the specification of the offense in the statutes under the head of "Offences against the Public Peace and Property," it is clear that the interruption or disturbance of a public school is a breach of the public peace, for which an offender may be arrested by an officer without a warrant, when the act is done in his view. 1 Bish. Cr. Proc. §§ 169-183, and notes; 1 Am. & Eng. Enc. Law, 734, and notes; 1 Burn, J. P. tit. "Arrest;" Com. v. Tobin, 108 Mass. 426. The requests to charge are based upon the claim that the acts of the plaintiff, in this case, amounted only to a trespass, or forcible entry and detainer. But we think that they were more, and that they amounted to a violation of the statute. To interrupt and disturb a school necessarily includes, not only acts which disturb the school while in session, but also those which prevent the school from assembling. A school is as much interrupted or disturbed by preventing the assembly as by breaking it up after it is assembled. The statute is aimed at the protection and peaceable conduct of schools. The fact of calling to order, therefore, is without significance. It would be a very narrow construction of the statute, which could neither be justified by its purpose nor language, to say that a disorderly act after a school had been called to order would be an interruption or disturbance of the school, and an offense, but one which prevented both the holding and calling to

¹As follows: "Sec. 7. Every person who shall wilfully interrupt or disturb any town or ward meeting, any assembly or people met for religious worship, any public or private school, any meeting lawfully and peaceably held for the purposes of moral, literary or scientific improvement, or any other lawful meeting, exhibition or entertainment, either within or without the place where such meeting or school is held, shall be imprisoned not exceeding one year or be fined not exceeding five hundred dollars."

order of the school would not be an interruption or disturbance, and so no offense at all. Accordingly, we find that similar statutes relating to religious meetings have been held to extend protection "to the assemblage when it is in the act of gathering together at the place appointed for worship, while the exercises are in progress, and until there is a dispersion of the persons who have come together, and they cease to be an assemblage or congregation." *Lancaster v. State*, 53 Ala. 398; *Dawson v. State*, 7 Tex. App. 59; *State v. Lusk*, 68 Ind. 264; *State v. Ramsay*, 78 N. C. 448; *Williams v. State*, 3 Sneed, 313. In *State v. Gager*, 28 Conn. 232, cited by the plaintiff, the statute provided only for the disturbance of a school "while the same is in session," and the court followed the language of the statute. Of course, it is not to be understood that disorderly conduct in a schoolhouse, so long a time before or after school hours as not to interfere with the assembly or session of the school, would be a violation of the statute. But that is not this case. It appears from the record that near school time the teacher and a number of scholars arrived. The teacher tried to enter the schoolhouse, but the plaintiff prevented her, and then she was obliged to send for help. The defendant came, who, after a demand of entrance by him, and refusal by the plaintiff, was obliged to break open the door. Not only might all this take enough time to go beyond the usual hour, but it was sufficient to show an interruption and disturbance in the assembling of the school. The requests to charge, therefore, were too broad, and were rightly refused.

The second request was to charge that an officer arresting a person without a warrant for a crime committed in his presence must, in order to justify such arrest, procure a complaint and warrant for the identical offense so committed. It appears that the plaintiff had been guilty of disturbing the school while in session, on the day before her arrest; that the defendant took her before the judge of the district court, and made complaint for the same offense which he had seen that morning, and for which he had arrested her. The district judge, not being sure that locking the teacher and scholars out of the schoolhouse was a breach of the peace, thought it best to make out a complaint and warrant for the disturbance on the previous day, and did so. Undoubtedly, the law requires an officer who makes an arrest without a warrant to make a complaint for the offense, and this the officer did. He has no control over the magistrate, and, having made the complaint, he can do no more. If he was justified in the arrest, the action of the magistrate cannot make him a trespasser, and we know of no decision which goes to that extent. We think, therefore, that the failure of the officer to procure a complaint and warrant for the offense committed in his presence was not decisive of

his justification in the arrest, and that the request so to charge was rightly refused.

The fourth exception was upon a refusal to rule that the mittimus was fatally defective, in not stating that the commitment was for failure to give recognizance. The record shows that the mittimus set forth the offense, the plea, and the order that the respondent give recognizance, or stand committed until the order is performed. The record of the case, and the jailer's book, show that the plaintiff was committed for want of recognizance, and the defendant was entitled to show the fact that the mittimus was properly issued. Moreover, as it was in the usual form, under the practice in this state, and conformed, substantially, to the statute (Pub. Laws R. I. c. 598, § 20), the request to charge was properly refused. Exceptions overruled.

(18 R. I. 539)

NELSON v. PIERCE.

(Supreme Court of Rhode Island. March 31, 1894.)

SEDUCTION—CIVIL ACTION—SUFFICIENCY OF EVIDENCE—REASONABLE DOUBT.

1. In an action for seduction of plaintiff's daughter, she testified positively to the time and place of her seduction by defendant; that she charged him with being the father of her child, and asked him to assist her, whereupon he gave her \$10, and promised her more. She also testified to other facts tending to sustain the charge. Defendant as positively denied the charge and the alleged assistance and promise, and produced evidence to sustain his denial. *Held*, that the evidence supported a verdict for plaintiff. *Matteson, C. J.*, dissenting.

2. A criminal offense charged as the basis of a civil action need not be proved beyond a reasonable doubt, but it is sufficient if it be proved by a preponderance of the evidence.

Action by George O. Nelson against Everett H. Pierce to recover damages for the seduction of plaintiff's daughter. There was a verdict for plaintiff, and defendant petitions for a new trial. Petition dismissed, and judgment ordered on the verdict.

George J. West, for plaintiff. Tanner & Gannon, for defendant.

TILLINGHAST, J. The court is of the opinion that there is sufficient evidence in the case to sustain the verdict. The plaintiff's daughter testifies with much positiveness as to her seduction by the defendant, giving the time and place of the occurrence, together with the unfortunate condition in which she subsequently found herself; that she personally charged the defendant with being

¹As follows: "Sec. 20. In every case in which a district court shall require the accused to give recognizance for his appearance before some court, and in which he shall not give such recognizance, the accused shall be forthwith committed to the jail in the county in which such district court is, there to remain until he shall give such recognizance or be discharged pursuant to law."

the father of her child, and asked him to assist her, which he did by giving her \$10 and promising her more,—together with other facts and circumstances, tending to sustain the plaintiff's allegation. The defendant as positively denies the charge made against him, together with the said alleged assistance and promise of assistance, and produces evidence tending to sustain his denial. The case is therefore one which it is peculiarly the province of the jury to determine. The witnesses were before them, and, as said by this court in *Kelley v. Brennan*, 18 R. I. 35, 25 Atl. 346: "There may have been that in the conduct or appearance of the plaintiff or of the defendant which, in their judgment, entitled her to belief rather than the defendant." And while there are circumstances connected with the case which might raise a probability that another man than the defendant was the guilty party, yet they are not so strong and conclusive as to warrant the court in interfering with the verdict.

The point made by defendant's counsel, that "when, in a civil suit, a criminal offense is charged in the pleading, such offense must be proved beyond a reasonable doubt," is not in accordance with the uniform practice in this state (*State v. Bowen*, 14 R. I. 165), nor with the well-settled rule of evidence generally; for, while there are cases which uphold this doctrine (see *Insurance Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489, and cases cited), yet the overwhelming weight of the authorities is to the effect that all issues of fact in a civil case are to be determined in accordance with the preponderance or weight of the evidence (3 Greenl. Ev., 13th Ed., § 29; 1 Rice, Ev. § 89a; 2 Rice, Ev. pp. 801-804). Petition for new trial denied and dismissed, and case remitted to the common pleas division with direction to enter judgment on the verdict.

MATTESON, C. J., dissenting as to the sufficiency of the evidence to sustain the verdict.

(18 R. I. 455)

KELLEY v. RYDER et al.

(Supreme Court of Rhode Island. Jan. 12, 1894.)

PLEADING IN EQUITY—ANSWER.

An answer to a bill in equity which does not confess and avoid and only denies the allegations of the bill by implication is insufficient.

Bill in equity by Thomas J. Kelley against James J. Ryder and others to dissolve partnership. Appeal by complainant on exceptions to the answer. Exceptions sustained.

John F. Lonsdale and Bernard J. Padien, for complainant. George J. West, for respondents.

PER CURIAM. The rules of equity pleading require that an answer should confess and avoid or expressly deny the allegations

of the bill. *Place v. City of Providence*, 12 R. I. 1. The answer of the respondents James J. Ryder and Catherine E. Ryder does not, in the particulars excepted to, comply with this requirement. Instead of expressly denying the allegations of the bill, it sets up matters of defense which deny the allegations of the bill only by implication. From such an answer it is difficult, if not practically impossible, to determine what are the real issues involved in the suit. Exceptions sustained.

(79 Md. 126)

FIRST NAT. BANK OF BALTIMORE v. LINDENSTRUTH et al.

(Court of Appeals of Maryland. March 14, 1894.)

CHATTEL MORTGAGES—VALIDITY—AFTER-ACQUIRED PROPERTY.

1. A mortgage of a stock of goods, providing that all stock replaced after the sale of any of the stock conveyed should be substituted therefor, and be liable for the debt, is ineffectual to create a lien on after-acquired goods.

2. Where, with the mortgagee's knowledge, and for its benefit, the after-acquired goods have been so intermingled with the property embraced in the mortgage as not to be distinguishable therefrom, a judgment creditor may levy on and sell the whole, or so much thereof as may be necessary to satisfy his debt.

Appeal from circuit court of Baltimore city.

Bill by the First National Bank of Baltimore against August M. Lindenstruth and another for the appointment of a receiver for property alleged to have been conveyed by defendant Lindenstruth to his codefendant in fraud of creditors, and asking that the property be sold and distributed under the direction of court. From a judgment for defendants, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

J. Alex. Preston and Alex. Preston, for appellant. Peter J. Campbell, C. D. McFarland, and Thos. C. Weeks, for appellees.

McSHERRY, J. On August 20, 1890, Lindenstruth borrowed \$5,500 in cash from the George Bauernschmidt Brewing Company, of Baltimore, and at the same time, and to secure the repayment of the loan, executed and delivered to the lender a mortgage conveying both real and personal property, and likewise all of the mortgagor's "stock in trade, such as whiskies, brandies, wines, liquors of any sort and description." Among other things, the mortgage contained the following provision: "And it is hereby expressly understood that all stock and goods hereby granted shall be held liable for the said sum of five thousand five hundred dollars, and the interest thereon, until paid, and that all stock of goods replaced after the sale of any or all of the stock, goods, merchandise, and other property hereby granted shall be substituted for those hereby grant-

ed; and the debt hereby secured shall be a lien upon all of said stock or goods now on hand, or substituted for the stock, goods, and other property granted." In November, 1892, the First National Bank of Baltimore obtained a judgment against Lindenstruth upon a cause of action which existed prior to the execution of the mortgage. A *fi. fa.* was issued on this judgment, and was returned *nulla bona*, and shortly thereafter the bank filed a bill of complaint in circuit court No. 2 of Baltimore city, alleging that Lindenstruth was largely indebted; that he was without the means to pay his debts, apart from the property covered by the mortgage; that the conveyance was made to hinder, delay, and defraud his creditors,—and that it contained provisions which were utterly void. Later on, an amended bill was filed, charging, in addition to the averments of the original bill, that the mortgage had in fact hindered, delayed, and prevented the plaintiff from collecting its judgment, and, further, that the property was more than sufficient to pay the mortgage debt and the plaintiff's claim. It also charged that some of the goods and stock conveyed by the mortgage had been sold, and replaced by other goods and stock, and that these latter had been so mixed and intermingled with those covered by the mortgage that they could not be identified, or distinguished from the goods and stock originally transferred by the mortgage. The relief prayed was that the mortgage might be set aside, that a receiver might be appointed, that the mortgaged property might be sold, and that the claim of the plaintiff might be paid after the debt secured by the mortgage had been first satisfied. There was likewise a prayer for general relief. A demurrer was interposed to the amended bill, but was overruled, and the answers previously filed to the original bill were adopted as answers to the amended bill. Testimony was taken, and upon final hearing the court dismissed the bill of complaint, with costs; and from that decree this appeal was taken.

The testimony shows, beyond a cavil or a doubt, that the cash was actually loaned by the brewing company to Lindenstruth, in absolute good faith, when the mortgage was executed, and there is nothing whatever in the record even suggestive of a suspicion that the mortgagor and mortgagee combined or confederated to defraud any creditor of Lindenstruth. Indeed, it was not pretended, in the discussion at the bar, that there was any evidence of actual fraud, apart from that which, it was insisted, the provisions of the mortgage disclosed. These provisions are the ones we have already quoted, and they are relied on as sufficient to condemn and avoid the instrument.

It is quite true courts of high authority have held that a mortgage conveying a stock in trade, and containing an express covenant, or accompanied by an independent agreement, permitting the mortgagor to remain in

possession for the purpose of selling the mortgaged articles for his own use and benefit, or for the purpose of replacing such of them as he might sell, is null and void, as to creditors of the mortgagor, because fraudulent in law, without reference to the bona fides of the mortgage debt, or the honesty of the mortgagor's intention. *Robinson v. Elliott*, 22 Wall. 510; *Davenport v. Foulke*, 68 Ind. 382; *Voorhis v. Langsdorf*, 31 Mo. 451; *Collins v. Myers*, 16 Ohio, 547; *Freeman v. Rawson*, 5 Ohio St. 1; *Southard v. Benner*, 72 N. Y. 424; *Place v. Langworthy*, 13 Wis. 629; *Edgell v. Hart*, 9 N. Y. 213. And it is also true other courts, entitled to equal respect, have held that such a mortgage is not *per se* void, but that the reservation of a power thus to sell is only evidence of a fraudulent intent, for the consideration of the tribunal which has to determine the question of fraud. *Oliver v. Eaton*, 7 Mich. 108; *Cheatham v. Hawkins*, 76 N. C. 335; *Fletcher v. Powers*, 131 Mass. 333; *Vanmeter v. Estill*, 78 Ky. 456; *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 308. But we are not now confronted with this precise question. The mortgage contains no clause giving the mortgagor power to sell the mortgaged property, either for his own use or for the purpose of replenishing the stock, and there is no evidence in the record tending to establish the existence of a collateral, independent agreement between the mortgagor and mortgagee, conferring upon the former such authority. Mere possession by the mortgagor of the mortgaged property is not, under our registry laws, a badge or indication of fraud, and to hold that a merchant cannot mortgage his goods without closing his doors would be to hold that a chattel mortgage upon such property is worthless. *Gay v. Bidwell*, 7 Mich. 520. The clause we have cited from the mortgage attempts to make provision for subjecting to the lien of the mortgage after-acquired stock in trade, and while contemplating, as its language imports, the obvious contingency that some of the stock would or might be sold in the ordinary course of business unless the mortgagor should close his doors at once, and discontinue his occupation altogether, it did not, in terms, reserve to him either the right or the power to sell the mortgaged property for his own use and benefit, or for any other purpose. On the contrary, the clause in question, by declaring that all stock substituted for the stock sold should be subject to the lien of the mortgage, indicates that the parties intended that the mortgagor should not make such sales for his own interest and advantage, but that, if he did make any sales of the mortgaged stock, they should inure to the benefit and security of the mortgagee. This clause, therefore, while conferring no authority upon the mortgagor to make sale of the mortgaged stock in trade, made, or undertook to make, provision for subjecting after-acquired stock in trade to the lien of the mortgage. But

such a provision, while not, of itself, rendering the mortgage void, as fraudulent, is, at law, simply a nullity. It is the settled doctrine of the Maryland courts that a provision such as this in an ordinary mortgage creates no lien, at law, on after-acquired property. *Hamilton v. Rogers*, 8 Md. 301; *Rose v. Bevan*, 10 Md. 466; *Wilson v. Wilson*, 37 Md. 1; *Crocker v. Hopps* (Oct. Term, 1893) 28 Atl. 99. There are conditions under which a covenant like this would be held valid in equity, but they are not presented here. *Butler v. Rahm*, 46 Md. 541.

Inasmuch, then, as the mortgage was ineffectual to create, at law, a lien upon after-acquired property, it follows that, as to all such property, the mortgage was no impediment to the enforcement of the execution issued on the bank's judgment. And if, with the knowledge of the mortgagee, and for its benefit, this after-acquired property has been so intermingled with the property embraced in the mortgage as not to be distinguishable from the latter, as alleged in the amended bill of complaint, a judgment creditor of the mortgagor could lawfully levy upon and sell the whole, or so much thereof as might be necessary to satisfy his debt. *Hamilton v. Rogers*, *supra*; *Chappell v. Cox*, 18 Md. 513. It results, then, that as the clause which we have been considering was wholly ineffective, at law, to include after-acquired property, and as the mingling of such property with that covered by the mortgage destroyed the identity of the latter, and rendered the whole of it liable to seizure and sale under the *fi. fa.*, there was no necessity for resorting to a court of equity to set aside the mortgage, and there was no power or jurisdiction in that court to grant, under these circumstances, the relief sought under the bill of complaint. Necessarily, therefore, the decree dismissing the bill was right and must be affirmed. Decree affirmed, with costs.

(78 Md. 589)

NORTH BALTIMORE PASS. RY. CO. v. ARNREICH.

(Court of Appeals of Maryland. March 13, 1894.)

STREET CARS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

Where a pedestrian started to cross a street, simply looking before him, and was struck by a horse car which turned onto the street after he had partly crossed, and which was coming from behind him, the question whether his negligence contributed to the accident is for the jury; he not having seen or heard the car, and there being evidence that, at the turn, the driver of the car whipped up the horses, and continued to look along the street from which he was turning.

Appeal from superior court of Baltimore city.

Action by John Arnreich against the North Baltimore Passenger Railway Company for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Argued before BRYAN, FOWLER, PAGE, BOYD, ROBERTS, and BRISCOE, JJ.

R. D. Morrison, H. Munnikhuisen, and N. P. Bond, for appellant. George Savage and Arch H. Taylor, for appellee.

ROBERTS, J. The defendant company owns and operates a street railway in the city of Baltimore. At about half past 7 o'clock in the evening of January 15, 1892, the plaintiff, going northward on Howard street, sought to cross Centre street, and was run over and injured by one of the defendant's cars. The railway track of the defendant extends up Howard street to Centre street; then turns to the right, and continues in an easterly direction down Centre street. The plaintiff, coming up on the east side of Howard street on the evening of the accident, was compelled to pass over the track of the defendant at the point where it curves from Howard into Centre street, and while so crossing Centre street the accident happened. It appears from the testimony on the part of the plaintiff that he was familiar with the locality, and had been for nearly five years accustomed to cross the track of the defendant at the same point where the accident occurred, and that, if he had seen or heard the car, all that was necessary for him to have done was to stand still and let the car pass, but that he looked before him, and saw no cars and heard none; that, after the car turned into the curve, it was in the rear of the plaintiff, and distant about 15 feet from the point when he was struck. Mrs. Eickler, a witness on the part of the plaintiff, testified: That she was a passenger on the car in question, and was, at the time of the accident, looking out of the front window at the driver and the horses. That, when they reached the curve, the driver hit the horses, and they went quickly around the curve. That she saw the plaintiff on the track just as he was struck. That he was just about stepping over, but the car was coming too fast. That the driver did not see the plaintiff go under the car, but was speaking to another car driver coming down Howard street. If the car had not gone so fast, the plaintiff could have gotten over first; but it was impossible,—the car was coming too fast. The pole struck the plaintiff on the left side. The driver was looking to the left, and spoke to a man coming down Howard street. The car did not stop at the turntable. Other testimony was given tending to prove that the driver whipped the horses in his car in such manner as to cause them to rear and become frightened, and gallop around the curve. The testimony offered by the defendant materially conflicts with that of the plaintiff.

The question which has been chiefly argued at the hearing in this court is whether, on the facts stated, the plaintiff had not, by his own negligence, directly contributed to

produce the injury complained of, and accordingly debarred himself all right of recovery, and whether, in this state of case, the court below had not committed error in refusing to grant the defendant's first prayer, which would have taken the case from the jury. We have repeatedly held that in cases of this character the court is never at liberty to withdraw the case from the consideration of the jury unless the material facts in issue in the cause are undisputed, and clearly establish the controlling fact that the negligence of the plaintiff has directly contributed to produce the injury complained of. Since the decision in the exchequer chamber, of *Tuff v. Warman*, 94 E. C. L. 583, this court has steadfastly adhered to the rule there laid down, as furnishing the clearest and most satisfactory guide in cases of this kind. For convenient reference, we here repeat it, as follows: "It appears to us the proper question for the jury in this case, and, indeed, in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover; in the latter, he would not, as but for his own fault the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such that but for such negligence or want of ordinary care and caution the misfortune could not have happened, or if the defendant might, by the exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff." In considering the mutual rights and privileges of pedestrians using the streets of a city, and those which the law accords to street-car companies, who supply to the public the means of convenient travel, careful consideration should be given, and a just discrimination exercised, in order that no unreasonable exaction be required of, or unfair burden imposed upon, either. There is undoubted force in the observation of Mr. Justice McFarland in *Driscoll v. Railway Co.*, 97 Cal. 553, 32 Pac. 591, when he says: "Street railways are an established feature of modern city life; they are a convenience and a necessity to all classes of people, and are desired by all; but their operation on crowded streets is necessarily attended with considerable danger to pedestrians,—a danger which all people are bound to know, and against which they should protect themselves by the use of at least reasonable caution. While, therefore, the owners of their railroads are to be held to due care in the management of their lines, they, when exercising such care, are not responsible in dam-

ages to a person who, in a careless or reckless or absent-minded way, walks suddenly in front of a moving car, and is injured before there is time to stop it." This court has already held that notwithstanding the negligence of the plaintiff, if the defendant, by the exercise of reasonable care, could have avoided the consequence of the neglect or carelessness of the plaintiff, the defendant is still liable. *Kean's Case*, 61 Md. 158; *Green's Case*, 56 Md. 84; *McMahon's Case*, 39 Md. 449; *Wallace's Case* (Md.) 26 Atl. 518.

The appellant's main contention is that the court below erred in refusing to grant its second prayer, which reads: "The defendant prays the court to instruct the jury that it appears from the uncontradicted evidence in the cause that the plaintiff, by his own negligence, directly contributed to the happening of the injury complained of, and that their verdict must be for the defendant." From the statement of proof hereinbefore set out in this opinion, it is very clear that this prayer was properly rejected as being both misleading and misdirecting to the jury. To have instructed the jury that it appeared from the uncontradicted evidence in the cause that the plaintiff, by his own negligence, directly contributed to the happening of the injury complained of, would have been, in effect, saying to the jury that they were at liberty to ignore all the testimony offered by the plaintiff, notwithstanding there was evidence in the cause from which the jury could have inferred that the defendant, by the exercise of reasonable care, might have avoided the happening of the injury complained of. In *McDonnell's Case*, 43 Md. 552, which is in some respects closely analogous to the case under consideration, the late Mr. Justice Grason, delivering the opinion of the court, said: "It was contended by the counsel of the defendant that, if the driver saw that the railroad track was clear, and no one upon it, he had performed all that ordinary care and prudence required of him, and it was not for him to suppose that any one would put himself in the way of the car by attempting to cross in front of it. In a large, populous city, where all descriptions of vehicles are constantly passing and repassing, as well as persons on foot, including the aged and infirm, as also children who are young and wanting in prudence and discretion, it is the duty of drivers of cars not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track. Unless he does so, he does not exercise that ordinary care and prudence which the law imposes upon him. In this case there is proof tending to show that, instead of exercising such watchfulness, his attention was occupied by a young lady standing in the door of a house on the opposite side of the street from that from which the plaintiff was approaching." We think the court committed no error in submitting the case to the

consideration of the jury, and, finding no error in any of its rulings, the judgment appealed from will be affirmed. Judgment affirmed.

(79 Md. 1)

STEELE v. SELLMAN.

(Court of Appeals of Maryland. March 13, 1894.)

ACTION ON NEGOTIABLE INSTRUMENTS—DEFENSES—SET-OFF—WHEN ALLOWABLE—PLEAS—SUFFICIENCY.

1. The obligor on a single bill can make the same legal defenses against the assignee as were available to him against the assignor at the time of the assignment, and to the same extent.

2. Code, art. 75, § 12, providing that in an action on a sealed writing defendant may file any demand he has against plaintiff on a sealed writing in bar, or plead it in discount of plaintiff's claim, does not deprive defendant in such an action of his right to file a demand due a third party on a sealed instrument, and assigned to defendant, in bar of plaintiff's right to recover.

3. Where two parties execute a joint and several bond, it is the separate debt of each, and may be set off by the obligee in an action against him by either of the obligors.

4. In an action on a single bill executed by defendant and S. and assigned to plaintiff, a plea alleging that plaintiff's assignor was at the time of the assignment indebted in a greater amount to defendant on a sealed instrument executed to S. and assigned to defendant prior to the assignment to plaintiff, that plaintiff's assignor was insolvent before the assignment to plaintiff, and has been ever since, states a sufficient answer to plaintiff's claim.

5. A plea setting up that, before the assignment to plaintiff, assignor released all his right in the instrument assigned, is bad.

6. The facts that defendant had commenced suit on his single bill, and that the suit was still pending, were no sufficient answer to the plea of set-off.

Appeal from circuit court, Washington county.

Action by Robert Sellman against Nicholas Steele. From a judgment for defendant, plaintiff appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, PAGE, and BOYD, JJ.

C. B. Fink, for appellant. W. A. McKelip, H. M. Clabaugh, Jos. D. Brooks, Alex. Armstrong, N. B. Scott, Jr., and Jas. A. C. Bond, for appellee.

PAGE, J. This action was brought by Robert Sellman against Nicholas W. Steele, the surviving obligor of James H. Steele, Jr., to recover the amount due upon the joint and several obligation of the Steeles for the sum of \$2,000, payable five years after the 17th day of August, 1886 (the date of the bill), to Pinkney L. Davis, who assigned the same to the plaintiff on the sixth day of July, 1891. The defendant pleaded: (1) That Pinkney L. Davis was at the time of the assignment indebted in a "greater amount" to the defendant upon his writing obligatory to James H. Steele for \$5,000, etc.,

which obligation the said James assigned to the defendant prior to the assignment in the declaration mentioned, and that the same was not paid, and the defendant was willing to set off against the plaintiff's claim; (2) being for defense on equitable grounds the same facts set out in the first count, and, further, that Pinkney L. Davis was, prior to the time of the assignment to the plaintiff, hopelessly insolvent, and ever since has been, and still is; and (3) that, before said assignment to the plaintiff, Davis released in writing all his right, title, and claim to the said writing obligatory. A demurrer to these pleas was sustained. The defendant then filed an amended plea, and, a demurrer to this having been sustained, filed a "second amended plea," in which it is alleged that the obligation in the declaration mentioned is joint and several, that Davis, the payee, at the time of the assignment to the plaintiff was, and is still, indebted in "an equal amount" upon the bill obligatory of James Steele, as set out in the original first plea. Replication: That the defendant on the 14th September, 1891, before this suit was instituted or plea pleaded, brought suit on the single bill in the plea mentioned, and that said suit was still pending. Rejoinder: (1) That the true amount owing by Davis to the defendant was greater than that due to plaintiff, and that said suit was brought for the excess; (2) that, before filing his plea, the defendant had dismissed the said suit; and (3) by way of equitable defense, that, at the time of said assignment to the plaintiff, Davis was, and is yet, insolvent as set out in defendant's third original plea, and, further, that the assignment was without valuable consideration and fraudulent. To the third, a demurrer was sustained; and, upon the first and second, issue was joined. At the trial two exceptions were taken by the defendant upon the admissibility of evidence, and two to the action of the court in granting and rejecting the respective prayers offered by the parties.

The first questions we are called upon to consider arise upon the disposition of the pleadings. The plaintiff was the assignee of a nonnegotiable chose in action. He, therefore, took it subject to all the legal and equitable defenses of the debtor to which it was subject in the hands of the assignor at the time of the assignment. The defendant, therefore, could make the same legal and equitable defenses against the plaintiff as were available to him against Davis at the time of the assignment, and before notice thereof, and to the same extent. Code, art. 8, § 3. This is so well settled that it is unnecessary to cite cases to sustain it. *Giddings v. SeEVERS*, 24 Md. 376; *Harwood v. Jones*, 10 Gill & J. 405; *Timms v. Shannon*, 19 Md. 296. Our Code confers the right to plead set-off in the broadest terms. "In any suit brought on any judgment or bond or other writing sealed by the party, if the de-

defendant shall have any demand or claim against the plaintiff, upon judgment, bond or other instrument under seal, * * * he shall be at liberty to file such demand or claim in bar, or plead the same in discount of the plaintiff's claim, and judgment for the excess of the one claim," etc. Code, art. 75, § 12. Thus, liberty is granted to file such demand or claim in bar, or plead the same in discount, and no restrictions are imposed as to the amount. If the demand or claim filed in bar be for a larger amount than the plaintiff's claim, in a proper case, judgment will be given for the defendant for the excess. In a case like this, however, where the set-off arises on account of what is due by a third party, no judgment, it is true, can be rendered in the same suit for the excess, but we think no valid ground can be assigned why the statute should for that reason be held to operate so as to deprive the defendant of his liberty to file his demand or claim in bar of the plaintiff's right to recover. *Wat. Set-Off*, §§ 657, 660; *Kast v. Kathern*, 3 Denio, 344; *Peacock v. Jeffery*, 1 Taunt. 426; *Byles, Bills*, 353. The objection that the set-off is bad because the plaintiff's cause of action was executed by the two Steeles, whereas the bill mentioned in the plea is the act of James Steele only, we think cannot be sustained. The plaintiff's cause of action is the joint and several obligation of the parties, and it is well settled that, where two or more parties enter into a joint and several bond, it becomes the separate debt of each, and may therefore be set off by the obligee in an action brought against him by either of the obligors. *Wat. Set-Off*, §§ 230, 232; *Fletcher v. Dyche*, 2 Term R. 36; *Culver v. Barney*, 14 Wend. 161; *Pate v. Gray*, *Hemp*, 155; *Owen v. Wilkinson*, 5 C. B. (N. S.) 526. We are of the opinion, therefore, there was error in sustaining the demurrer to the first of the defendant's original pleas. The second of the original pleas, though stated to be on equitable grounds, is substantially a plea of set-off. The facts therein set forth, if admitted to be true, would constitute a full and sufficient answer to the plaintiff's claim; the plea, therefore, ought to have been maintained. The third of these pleas was properly held to be bad. The demurrer to the replication to the second amended plea should have been overruled. That the defendant had commenced suit on his single bill, and that the suit was still pending, was no sufficient answer to the plea of set-off. Though, as was said in *State v. Baltimore & O. R. Co.*, 34 Md. 374, set-off is "in the nature of a cross suit, the object of which is to prevent circuity of action," and does "not exist where the subject-matter of the set-off could not form the ground of an independent suit," yet it is a defense, and is to be raised by plea. The statute (Code, § 12, art. 75) expressly recognizes this. It permits the defendant to "file such demand or claim

in bar or plead the same in discount." And this has always been so held. In *Evans v. Prosser*, 3 Term R. 187, the declaration was in assumpsit; plea, set-off; replication, the defendant had brought an action against the plaintiff on the same cause of action, and the plaintiff had paid the money in court; held, on the authority of *Baskerville v. Brown*, 2 Burrows, 1229, "that the replication was ill." In *Naylor v. Schenck*, 3 E. D. Smith, 138, the court said: "They [the defendants] are not prosecuting two actions, one of which abates the other. In an endeavor to recover their damages, they find themselves prosecuted by their adversary. They may defend by setting up any matter which the law recognizes as a defense, whether it be a cause of action or whether it be a judgment. * * * The principles governing the defense of set-off are, in this respect, distinctly applicable to this subject, and it was held, so early as in the time of Lord Mansfield, that the pendency of a prior action for a defendant's claim did not prevent his using it as a set-off—not even if his prior action had progressed to a verdict." *Stroh v. Uhrich*, 1 Watts & S. 57; *Lightbody v. Potter*, 10 Wend. 534; *Wiltsie v. Northam*, 3 Bosw. 165; *Lindsay v. Steward*, 72 Cal. 540, 14 Pac. 516; *King v. Bradley*, 44 Ill. 342; *Gunn v. Todd*, 21 Mo. 303.

As to the rulings of the court below contained in the first and second exceptions, we do not think it is necessary for us to consider them. In the view we have expressed, it is quite immaterial whether the suit in the Baltimore city court was pending or not. The rejection of the evidence set out in these exceptions could not affect the defendant's case. The prayers of the plaintiff being founded upon the theory that the defendant could not maintain his defense if, at the time of the institution of the suit or of the filing of the plea, there was a suit pending to recover the claim mentioned in plea, for the reasons above expressed ought not to have been granted. We think there was also error in rejecting the defendant's prayer. The judgment will be reversed, and a new trial awarded. Judgment reversed and a new trial awarded.

(79 Md. 153)

WETHERED v. SAFE-DEPOSIT & TRUST CO. OF BALTIMORE.

OWINGS et al. v. SAME.

(Court of Appeals of Maryland. March 14, 1894.)

WILLS—LIABILITIES OF DEVISEES.

The net income, for the first year after testator's death, of the residue of his estate, which consisted of cash and stocks, all of which net income he devised to one, in trust, for life, is not chargeable with the payment of testator's debts, funeral expenses, and costs of administration; such debts, expenses, and costs being payable out of the corpus of the estate.

Appeal from circuit court of Baltimore city.

Bill by the Safe-Deposit & Trust Company of Baltimore, trustee under the will of George Y. Wethered, deceased, against George Y. Wethered, Jr., Elizabeth E. Owings, Mary L. Owings, and others, for the construction of said will. From the decree rendered, George Y. Wethered, Jr., Elizabeth E. Owings, and Mary L. Owings appeal. Affirmed in part, and reversed in part.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, ROBERTS, and BOYD, JJ.

Wm. A. Fisher, for appellants. W. Cabell Bruce and D. K. Este Fisher, for appellees.

BOYD, J. The Safe-Deposit & Trust Company of Baltimore, as trustee under the will of George Y. Wethered, filed its bill of complaint against Elizabeth Wethered and others interested, asking the court to assume jurisdiction in the administration of the trust, and to construe and declare the true meaning of several clauses and parts of said will. The court below construed the will, and from the decree George Y. Wethered, Jr., who is one of several tenants for life in the residue of the estate, and two infant children of Mrs. Owings, who are interested in the same as remainder-men, have appealed.

One question involved in the decision below was whether Mary Wethered was the owner of certain furniture mentioned in the proceedings, which she claimed was given to her by the testator in his lifetime. The court decided adversely to her claim, but, as she has not appealed, that controversy is not before us.

The appeals of the Owings children presented an interesting question, which it is necessary for us to pass upon, viz.: Are the life tenants entitled to the whole net income from the residue of the estate from the death of the testator, or is said income, or any part thereof, liable for the debts of the testator, and costs of administration?

The general principles governing the rights of the several kinds of legatees are quite well established; but, as is the case with most litigation arising from the construction of wills, there is an apparent conflict between some of the authorities on the question now before us, which, however, can, in a great measure, be reconciled by a careful examination of the facts. A specific legacy ordinarily entitles the legatee to income, profits, or proceeds of the article from the death of the testator, because such legacies "are considered as separated from the general estate, and appropriated at the time of the death of the testator." General legacies bear interest from the time the principal is payable, and, when the testator fixes no time for payment, interest is usually allowed from one year after his death, because the executor has that time to ascertain the indebtedness, to reduce the estate into possession, etc.; and the

courts presume that such has been done, and fix one year as the time when general legacies are payable. There are, of course, well-known exceptions to this rule, but it is unnecessary for us to refer to them. Annuities given by wills ordinarily commence from the testator's death, and, according to most authorities, a bequest of the residue of the personal estate for life, with the remainder over, generally entitles the life tenant to the income, commencing from the death of the testator; certainly, as between the life tenant and remainder-man. Of course, the income from all the personal estate is as liable for the debts of the decedent as the principal, and must be so applied, if necessary; but when the estate is ample to pay all debts, expenses of administration, and legacies, and there still remains a considerable residue, the income of which is, by the terms of the will, to be paid to life tenants, and then the corpus or principal to go to remainder-men, the above principles will apply, unless the testator has provided otherwise, or there be some peculiar circumstances which would change the general rule. If the intention of the testator can be gathered from the will, his wishes should be gratified in these matters, as well as others, unless in conflict with some well-established rules of law. In ascertaining the intention of a testator, courts must consider all the circumstances properly before them, and must not place such construction upon the provisions of the will as will do injustice to any of the parties, or would be contrary to what a reasonable man would likely intend, unless the terms of the will be so clear as to admit of no doubt as to what the testator did intend.

In the case before us, the record shows that the testator's estate consisted of personal property appraised at \$31,614.50, and \$2,025.59 cash in bank. Nearly \$22,000 of the inventory consisted of interest-bearing bonds, and the remainder, with the exception of furniture valued at \$487.50, and a watch and wearing apparel valued at \$28, was invested in shares of stock of two corporations. Three of the bonds were of the denomination of \$100, three of \$500, and the remainder of \$1,000. The testator directed the executors, after payment of funeral expenses and just debts, to pay the cemetery authorities \$100 for the charge of keeping his lot in the cemetery in order. He then directed them "to erect and pay for, out of my estate," head and foot stones at his grave, similar to those at his wife's grave, and gave his watch and wearing apparel to his nephew, George Y. Wethered, Jr. He then gave all the rest and residue of his estate, of every kind, wherever situated, to the appellee, in trust for the following uses, purposes, and trusts: "First. To divide all the net income of my whole estate into five (5) equal parts, and semiannually to pay one of said portions to each of the following persons during the lifetime of said persons, viz.: One fifth part to Elizabeth

Wethered, widow of my brother Samuel Wethered, and one fifth part to each of her four children" (naming them). He then directed what should be done in the event of the death of the life tenants. There is nothing in the record to show what debts, if any, the testator owed when he died, nor is there anything to show the amount of the expenses connected with the administration. The administration accounts are not in the record, although apparently filed with the bill. The reference to them in the record simply gives the date they were filed, and the fact that the balance was transferred to the appellee, without stating what that balance was. There were, of course, funeral expenses, and costs of administration, in addition to the \$100 to be paid to the authorities of Greenmont Cemetery, and the costs of the stones for testator's grave. The testator directed that the latter should be paid "out of my estate." If he had intended that the income to be derived from the residue of his estate should be used in the payment of them, would he not have said "out of the income of my estate," or something to that effect? Again, he directed the trustee "to divide all the net income of my whole estate into five (5) equal parts, and semiannually to pay one of said portions to each of the following persons during the lifetime of said persons," etc. When he directed the trustees to divide all the net income of his whole estate, he evidently did not mean part of the net income, but must be presumed to have meant what he said in plain language. So far as his will indicates it, we think his intention was not to charge the life tenants with the whole or part of the costs of administration, funeral expenses, and other charges named, for that is what it practically amounts to, if the income on the residue for a year is to be so used; but knowing that his estate was of such a character as to be easily settled, and that as much as necessary could be used to pay these charges without disturbing the investments of the rest of the estate, he evidently contemplated that they would be paid out of the cash on hand, and by sale of such bonds or stocks as might be necessary. The funeral expenses could with safety be paid at once, under section 5, art. 93 of the Code, and the debts, if any, at the end of six months, under section 109 of that article. There are not only no difficulties disclosed by the record in the way of a speedy and easy settlement of the estate, but, on the contrary, it was an unusually simple one to settle. Under such circumstances, we do not think it would be equitable to call upon the life tenants, or the income that would otherwise go to them, to pay the expenses of administration, or other charges to be paid.

It only remains to see if the former decisions of this court stand in the way of such a conclusion. We think not. In *Evans v. Iglehart*, 6 Gill & J. 192, the court, after deciding "that the increase and income result-

ing from personal property specifically bequeathed, where the assets are abundant to pay debts and legacies, inure to the benefit of the specific legatees, and form no part of the general residue," said: "We can discover no solid ground of distinction between the rights of a legatee for life to the increase and profits of a specific legacy, from the testator's death, and the rights of a similar legatee of a general residue to like interests from the same period." In *Merryman v. Long*, 49 Md. 545, this court decided that the income received by the executor during the first year after the death of the testator should be applied to the payment of debts and expenses of administration, but in that case the property consisted chiefly of improved leasehold estate, appraised at \$7,335. It was necessary either to apply the income or to sell the leasehold property. Under those circumstances the court thought it would not be equitable to require a sale of the leasehold property to pay the debts and costs. The court was of the opinion that no real injury was done the life tenant by thus relieving the corpus of the estate of the indebtedness, and thereby saving it from a sale. It can readily be seen how, under such circumstances, it might work a great hardship on remainder-men to sell the property. They would not only lose so much of the proceeds as would be necessary to pay the debts and costs, but a sale would probably result in having a much less satisfactory investment of the surplus. While leasehold property is personality, and as such devolves on the executor, and is held by him subject to the rights of creditors, yet, so far as the safety of the investment is concerned, it resembles real property; and a remainder-man is generally better protected with an interest in productive real estate than he would be if his interest was simply in stocks, bonds, or personality of that character. A court of equity might well hesitate to require the sale of the whole corpus of other kinds of personality to pay debts and costs, when the use of the income for a year would avoid the necessity of a sale which might jeopardize the surplus of the principal in a worse investment. But there was nothing in the will of Long to cause the court to conclude that he intended the property to be sold, or did not intend the income to be applied, if necessary, to the debts, etc. The terms of the portion of the will quoted in the opinion of the court would seem to indicate the contrary. He bequeathed the property in trust for the use of his wife, "so that she be permitted and suffered to hold and enjoy the same property and estate, and the rents, issues, interest, and income thereof, after payment of all ground rents, taxes, insurance, repairs, and expenses upon said property, * * * and after her death in trust for the testator's grandchildren." The circumstances of that case differ very materially from the one we are now considering.

In *Abell v. Abell*, 75 Md. 64, 23 Atl. 71, and 25 Atl. 389, this court concurred in the conclusion of the court below "that the daughters (the devisees and legatees for life) are entitled to the net income, without any deduction from the payment of costs of administration, debts, and legacies," for the reasons stated in the opinion of the learned judge of the circuit court. In that opinion the judge said: "As to the circumstances of the estate, they present a striking contrast to those disclosed in *Merryman v. Long*, 49 Md. 546, where a reasonable necessity existed for the application of the first year's income to the payment of debts." What was said in the *Abell* Case applies equally well to this, and we think that the testator's intention, as gathered from his will, and the nature and character of his estate, fully justify us in distinguishing this case from *Merryman v. Long*, and deciding, as we do, that the income from the residue of the estate of Mr. Wethered for the first year after his death is not to be applied to the payment of debts, funeral expenses, costs of administration, the \$100 left to the cemetery association, or the costs of the gravestones, but they should be paid out of the cash on hand, and the proceeds of sales of so much of the principal as may be necessary to be sold for those purposes. Of course, the income of so much of the principal as must be sold and used for the purposes herein stated will not be payable to the life tenants, as the residue of the estate is lessened to the amount of the principal so used. The case of *Lovering v. Minot*, 9 Cush. 156, is in accord with our conclusions. See, also, *Green v. Green*, 30 N. J. Eq. 451, affirmed in *Green v. Blackwell*, 32 N. J. Eq. 768; *Townsend's Appeal*, 106 Pa. St. 268; *In re Bailey*, 13 R. I. 560; *Pell v. Mercer*, 14 R. I. 432; *Custis v. Adkins*, 1 Houst. 382, 2 Williams, Ex'rs (6th Am. Ed.) 1391, 1393, and notes. Several of those cases show that the fact that the property is left to trustees, instead of to the life tenants directly, makes no difference. The *Abell* Case is also in point in that respect.

We are also asked to construe the will in reference to several other matters that may hereafter arise. This prayer is based on the provisions of the Code of Public General Laws embraced in sections 26-32 of article 16, subtitle "Declaratory Decrees." The case was very ably argued, and the court would be greatly aided in reaching a proper construction of the will both by the oral arguments and the briefs filed presenting the views of the respective counsel. But we have not been convinced that this is a proper case to exercise the discretion vested in us by the statute above referred to, by passing upon the questions which have not yet arisen,—some of which may never arise. As was said in *Pennington v. Pennington*, 70 Md. 430, 17 Atl. 329: "In all cases the court should see that there is a real, bona fide question for controversy involved, as between the

parties to the case, and that there is an existing propriety for its immediate decision." Hugh Wethered having died without issue, there can be no doubt, under the several clauses of the part of the will which provides for the trust, about the right and duty of the trustee to pay the net income to the four survivors, Elizabeth Wethered, Mary Wethered, George Y. Wethered, Jr., and Eliza Y. Owings, as long as they all live. Nor can there be any doubt, under the will, that upon the death, without issue, of Mary Wethered, George Y. Wethered, Jr., or Eliza Y. Owings, or upon the death of Elizabeth Wethered, the survivors are to receive the net income; and it was perfectly proper for the court below to construe the will that far. But beyond that we do not feel justified in doing so. Parties not now in being, or not before us, may be interested in, or affected by, the determination of the questions involved in the disposition of the corpus of the estate and of the income in the event of Mary Wethered, George Y. Wethered, Jr., or Eliza Y. Owings dying leaving issue; and unless there is some apparent necessity for it, or at least "an existing propriety for its immediate decision," it is safest to defer a decision that might affect such persons until the contingency arises, if it is then brought before the court. Being of the opinion that the court ought not, under the circumstances of the case, to have passed upon the disposition of the corpus of the estate or of the income in the event of Mary Wethered, George Y. Wethered, Jr., and Eliza Y. Owings, or any of them, dying leaving issue, we must reverse so much of the decree as undertakes to do so (without desiring to be understood as differing with the court below on such construction, as we express no opinion on those questions), and will affirm the decree in other respects, excepting as to the furniture claimed by Mary Wethered, which is not before us. Decree reversed in part, and affirmed in part; costs to be paid by the appellee from the corpus of the estate.

(79 Md. 130)

TAYLOR v. STATE.

(Court of Appeals of Maryland. March 14, 1894.)

UNLAWFUL TAKING OF OYSTERS — PLEA TO JURISDICTION—EVIDENCE.

1. On a prosecution tried in A. county for unlawfully taking oysters in a bay at a point not within the bounds of any county, a plea to the jurisdiction, naming the place at which the oysters were taken, and alleging that it was within the bounds of T. county, but not showing distinctly that it was within such bounds, was properly overruled.

2. On a prosecution, tried in A. county, for taking, without a license, oysters in a bay at a point not within the bounds of any county, defendant may introduce a license granted him by T. county to take oysters in such bay within the bounds of T. county, without stating that he intends to follow it with evidence that the point at which he took was within T. county.

Appeal from, and writ of error to, circuit court, Anne Arundel county.

Greenleaf Taylor was convicted of taking oysters in Chesapeake bay without having taken out a license, and appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, ROBERTS, and PAGE, JJ.

Jos. B. Seth and Wm. E. Stewart, for appellant. Atty. Gen. Poe and E. C. Gantt, for appellee.

BRYAN, J. Greenleaf Taylor was indicted in the circuit court for Anne Arundel county on the charge that he, not having been licensed according to law, did employ a certain boat called a "bugeye" in taking oysters with an instrument called a "scoop," within the waters of Chesapeake bay, and not within the body of any county. He pleaded to the jurisdiction of the court, and averred in his plea that he was, and for 18 years had been, a citizen of Talbot county, and had been a resident thereof for more than 12 months next preceding the taking of the oysters, and that the place where they were taken was within the waters of Talbot county, opposite and to the westward of Tilghman's island, and not more than a mile and a half therefrom, and inland from a line drawn from Sharp's island to Poplar island, and that he was duly licensed, according to law, by the clerk of the circuit court of Talbot county, to take oysters at the place aforesaid with scrapes and dredges. The state demurred to this plea, and the court sustained the demurrer, and overruled the plea. Thereupon the traverser pleaded not guilty, and, after conviction and sentence, took an appeal to this court, having first taken an exception to a ruling of the court at the trial. He also filed a petition, and obtained an order for the transmission of the record to this court as upon a writ of error.

The traverser is not amenable to the jurisdiction of the circuit court for Anne Arundel county for an offense committed within the body of Talbot county. The plea to the jurisdiction avers that the boat was employed in taking oysters within the limits of this county, east of its western boundary. The boundaries of the county are defined by legislative enactment. The act of 1706 (chapter 3) reads as follows: "From and after the 1st of May, 1707, the bounds of Talbot county shall contain Sharp's island, Choptank island and all the land on the north side of Great Choptank river, and extend itself up said river to Tuckahoe bridge; and from thence with a straight line to the mill commonly called and known by the name of 'Swetnam's Mill;' and from thence down the south side of Why river to the mouth thereof, and from thence down the bay (including Poplar island) to the first beginning; also Bruff's island in Why river." We are at present more particularly concerned with

the boundary from the mouth of Why river. It is described as running thence "down the bay (including Poplar island) to the first beginning." According to its literal terms, it must be run so as to include Poplar island; that is, it must be run on its outer or western side. In this way, only, can the waters between Poplar island and the mainland be comprehended within the territory of Talbot county. But that they are so comprehended ought not to be regarded as a matter of doubt. The act of 1884, c. 468 (codified as section 155 of the Public Local Laws of Talbot County), requires the clerk of the circuit court for Talbot county to issue a license to any person who had been a resident of the county for 12 months next preceding his application, which license authorizes him to employ any boat of the capacity of 10 tons or less in taking oysters with dredge, scoop, or scrape in the waters of Choptank river; and it then provides that the waters of Talbot county lying between Black Walnut point and a line drawn from Tilghman's point to the southwest point of Parson's island shall be open to the citizens of Talbot county, licensed as above mentioned. It excepts, however, from these waters of Talbot county, a certain designated portion of the body of water between Poplar island and the mainland; and it further provides that the waters of Choptank river lying north of a straight line running from Benonis point to Cloras point are reserved for tongmen, and that it shall not be lawful to catch oysters with scoop, scrape, dredge, or similar instrument northward of said line. Now, this legislation shows three things which are important in this investigation: First, that the territory of Talbot county includes the water between Poplar island and the mainland; secondly, that it also includes other waters between Black Walnut point and a line drawn from Tilghman's point to the southwest point of Parson's island; and, thirdly, that it also includes waters south of a straight line running from Benonis point to Cloras point. This being so, the bounds described in the act of 1706 from the mouth of Why river "down the bay (including Poplar island) to the first beginning" must be run in such manner as to include these waters. This is easily done. A straight line must be drawn from Tilghman's point to the most northerly point of Poplar island. The line must then run on the western side of this island until it reaches its most westerly point, and then a straight line must be drawn to the southern extremity of Tilghman's island, and thence to Cloras point, which is on the north side of Choptank river at its mouth. We regard this as the place denoted by the phrase "first beginning" in the act of 1706, because this is the point where the boundaries begin to run. Previously to mentioning the land on the north side of this river, the statute states that the bounds shall contain Sharp's island and

Choptank island; but they are merely mentioned as contained in Talbot county just as Bruff's island in Why river is mentioned. No boundaries are stated as extending from them, as in the case of the north side of Choptank river. Sharp's island is in Chesapeake bay, several miles distant from the nearest point of the mainland. If we have stated the boundaries correctly, the plea to the jurisdiction does not show distinctly that the place where the boat was employed in taking oysters was within the limits of Talbot county. It avers that it was not more than a mile and a half to the westward of Tilghman's island. There are points much less than half a mile to the westward of Tilghman's island, which are not in Talbot county, but are in Chesapeake bay. It also avers that it was inland from a line drawn from Sharp's island to Poplar island; but such a line is not one of the boundaries of Talbot, and therefore this location of the point does not show that it was within the limits of the county. Of course, if any offense is committed on the Chesapeake bay, not within the body of any county, the offender may be tried in any county in which he may be arrested, or into which he may be first brought. Code, art. 27, § 280. We think that the plea to the jurisdiction was properly overruled.

At the trial, under the plea of not guilty, the traverser proved that he was the owner and master of the boat in question, and that it was of less than 10 tons burden, and that he was, and for many years had been, a citizen of Talbot county; and then offered to prove that he had a license from the clerk of the circuit court for Talbot county, authorizing him to use his boat in taking oysters with dredge, scoop, or scrape in certain waters of Talbot county specified in the act of 1884. On objection by the state, the court refused to admit the evidence. If the oysters were taken in these waters, and if the traverser had the requisite license from the clerk, he had a right to prove these facts, and they would have shown that he was not guilty of the offense charged. It was essential that he should prove a license, and he was not obliged to state in advance that he would prove that the oysters were taken in the waters covered by the license. If such evidence were in his possession, he had a right to offer it afterwards. It was his unconditional right to pursue his own order in offering his proof; and it was the duty of the court to admit any legal evidence material to the issue, although it would not be sufficient to maintain the issue on his part, unless followed up by other proof. *Plank-Road Co. v. Bruce*, 6 Md. 464; *Patterson v. Crowther*, 70 Md. 132, 18 Atl. 531. The state had offered evidence tending to prove that the alleged offense "occurred at the place charged in the indictment." Surely, the traverser had a right to show that it occurred elsewhere,—that is to say, in the

waters of Talbot county,—and that he had a license which protected him in what he did. The judgment must be reversed, and the cause remanded. We will take this occasion to say that we see no reason why there should have been a writ of error in this case, inasmuch as, since the act of 1892, the appeal would have brought before us the question decided on the demurrer. Reversed and remanded.

(79 Md. 94)

ABELL et al. v. BRADY et al.

(Court of Appeals of Maryland. March 13, 1894.)

EXECUTORS AND TRUSTEES—COMMISSIONS.

1. Where the same persons are both executors and trustees under a will, the income from the estate, collected after the expiration of the time allowed by law for the settlement of the estate, will be treated as collected by them as trustees.

2. Where an estate is large, and demands considerable time and the exercise of good judgment, a commission to the two trustees of 5 per cent. on the collection of an annual income of \$160,000 is proper.

3. Where executors of a large estate are allowed 2 per cent. commission for the income collected by them during the time allowed by law for the settlement of the personal estate, an additional 3 per cent. will be allowed them as trustees for the distribution of the fund.

Appeal from circuit court of Baltimore city.

Edwin F. Abell and George W. Abell, as executors and trustees of A. S. Abell, deceased, file a bill against Walter R. Abell and others for a construction of the will and directions in the administration. Plaintiffs appealed from the decree, which was modified, and the cause remanded. Appellants, as executors and trustees, filed their accounts, which were referred to a special auditor, who filed his report, to which both appellants and appellees excepted. The court passed on the exceptions, and referred the matter to the auditor to state an account in conformity with the views of the court. From the order ratifying this account as stated, and from the order referring the matter to the auditor, both parties appeal. Affirmed in part, and reversed in part.

For former reports, see 23 Atl. 71; 25 Atl. 889.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, PAGE, and BOYD, JJ.

R. M. Venable, for appellants. Wm. A. Fisher and C. J. Bonaparte, for appellees.

ROBINSON, C. J. In the former appeal, involving the construction of the will of the late A. S. Abell, the court decided that the trust created by the sixteenth clause continued so long as any one of the five daughters of the testator shall survive; and the court also decided that the daughters were entitled to the net income from the five-eighths parts of the real and personal estate devised in trust, from the time of the testator's death, without any deduction for the

payment of debts, legacies, or costs of administration, all of which were to be paid out of the cash on hand and debts due the estate, and, if these should be insufficient, then out of the corpus of the personal estate. *Abell v. Abell*, 75 Md. 44, 23 Atl. 71, and 25 Atl. 389. The case being remanded, the appellants, as executors and trustees, on the 4th of March, 1892, filed their accounts, showing the receipts and disbursements by them in each of these capacities. These accounts were referred to the special auditor, and he, on the 2d of April, filed his report and account, to which both the appellants and appellees excepted. Testimony was then taken, and, the court having passed on these exceptions, the matter was referred to the auditor to state an account in conformity with the views of the court. From the order ratifying this account as thus stated, and from the order of 18th May, referring the matter to the auditor, both parties appealed. The testator died in April, 1888, and the net income received by the executors from the personal estate from that time up to December, 1891, a period of three years and eight months, amounted to \$451,870.10, and upon this sum they were allowed commissions as executors. The income thus collected by them as executors they transferred to themselves as trustees, and they now claim as trustees a commission on the same fund on which they had been allowed commissions as executors.

The fundamental error which pervades not only the first account filed by the auditor, but the final account, also, which was ratified by the court, is the assumption that the income from the five-eighths part of the personal estate which was devised in trust for the daughters, and which was collected by the executors from the testator's death in April, 1888, to 31st December, 1891, was rightfully collected by them as executors. Now, if there is a principle of testamentary law settled beyond controversy in this state, it is that, where the same person is both executor and trustee under a will, the law will adjudge the fund to be in his hands, in the capacity of trustee, after the time limited by law for the settlement of the personal estate; and this, too, whether he has or has not passed his final account in the orphans' court, for the reason that that which the law has enjoined upon him to do shall be considered as having been done, and from that time he holds the fund by operation of law in that character in which he would be entitled to receive it upon a final completion of his trust as executor. This we have said in *Hanson v. Worthington*, 12 Md. 418, and in *State ex rel. Gable v. Cheston*, 51 Md. 352, and the same principle is fully recognized in *Seagar v. State*, 6 Har. & J. 162, and *Watkins v. State*, 2 Gill & J. 220. And it is equally well settled that one who sustains this twofold relation cannot, of his own election, continue to act in the capacity of executor after the

time allowed by law for the settlement of the estate has elapsed, "and after the arrival of the period when he ought to have acted as trustee, and discharged his duties pertaining to that capacity." *Gable's Case*, 51 Md. 352. And this rule of law applies with the greater strictness in this case, for the reason that the testator, by the sixteenth clause of his will, directs that the executors shall, within a reasonable time after his death, set apart five-eighths of both the personal and real estate, and hold the same in trust to collect the income thereof, and pay the same to his five daughters, so long as any one of them shall survive. The executors, it appears, in October, 1888, passed their first administration account, and, after the payment of debts, legacies, and costs of administration, there remained in their hands the sum of \$2,650,382.92. Why they did not set apart five-eighths of the personal estate thus devised to them in trust after the passage of this account, or at least after the expiration of the time limited by law for the settlement of the estate, does not appear. Be that as it may, they had no right, after that time, to collect the income from the trust estate as executors, and the law will treat the income received by them after that time as having been collected in their capacity as trustees; and upon this basis the auditor's account ought to have been stated.

Assuming, then, that the net income collected by the executors from the trust estate during the 13 months allowed by law for the settlement of the estate was in fact transferred to themselves as trustees, and that the income after that time was collected by them as trustees, and not as executors, we come to the question as to the commissions to be allowed as compensation for the services thus rendered, and to be rendered by them hereafter, as trustees. It can hardly be necessary to say that in England no allowance is made, by way of compensation, to one holding a fiduciary relation for services rendered by him in the discharge of his duty as trustee, unless the instrument creating the trust provides for the payment of compensation. The principle on which the rule is founded, it has been said, is that he shall not make a profit out of his trust; and the reason of the principle is that he shall not be placed in a position where his interest may be opposed to his duty. The office of a trustee is considered as being one of honor and conscience, and, having been selected by reason of some special confidence arising from the ties of kindred or friendship, he was presumed to have accepted it voluntarily from a sense of duty, and not with a view to pecuniary gain or profit. And in the early case of *Green v. Winter*, 1 Johns. Ch. 26, that eminent jurist, Chancellor Kent, declared that, even were he free from the weight of English authority, he should hesitate greatly before he undertook to question the policy or wisdom of the rule. This

rule, however, with the exception of two or three states, has never been adopted in this country. From the earliest legislation, provision was made for an allowance of commissions to executors and guardians, and, by analogy to these statutes, courts have deemed it just and equitable to allow compensation to a conventional trustee for actual services rendered by him in the execution of his trust. As far back as *Ringgold v. Ringgold*, 1 Har. & G. 45 (decided in 1826, after the fullest consideration, for it was a case of importance, and argued by the most distinguished lawyers in the country), the court held that, by an equitable construction of the statutes allowing commissions to executors, administrators, and guardians, and the principles upon which these statutes are based, compensation ought to be allowed to a conventional trustee, as a reasonable and just indemnity for services rendered by him in the discharge of his duties as trustee. And, in trusts of this kind, the rule ordinarily is to allow 5 per cent. upon the income. But this rule is by no means an inflexible rule. In prescribing the rate of commissions, courts will take into consideration the nature and character of the trust estate, and the time and labor required of the trustee in the execution of the trust. The estate in some cases may be of little value, and yielding but a small income, but involving, at the same time, a good deal of labor in its care and supervision, and in such cases 5 per cent. might not be a just and reasonable compensation. On the other hand, where the income is very large, that rate might be considered as excessive. After all, it is a matter resting largely in the discretion of the court, its reason and judgment, taking into consideration all the facts and circumstances surrounding the trust. In this case we are dealing with an income from five-eighths of a very large and valuable real and personal estate. The personal property alone exceeds two and a half millions of dollars, and the real estate is of still greater value. The annual net income collected by the trustees from the real estate has averaged \$135,169.35, five-eighths of which will be collected by them as trustees so long as the trust continues; and the net income from the personal estate has averaged \$122,990.40, five-eighths of which is to be collected also by them during the same period of time. So their commissions may therefore be safely calculated upon an ordinary yearly revenue of \$160,724.84. The personal estate to be set apart for the daughters, the testator directs shall be invested in mortgages upon real or leasehold property or in state or municipal bonds of the most assured standing, and the collection of the income from these sources cannot impose any great labor or trouble. The real estate consists of warehouses, city and county dwelling houses, offices, buildings, unimproved city and suburban property, and some real estate in Washington and other

places. The general care and management of so large a real estate as this must necessarily require not only time and labor, but the exercise of sound judgment, especially in the development of the unimproved city and suburban property. The auditor, in the first account, allowed a commission of 5 per cent., and at this rate the trustees' commissions annually would exceed \$8,000; and this we all agree is a fair and liberal compensation for the services to be rendered hereafter by the trustees for the collection and disbursement of the income from the estate devised in trust for the daughters. We cannot agree, therefore, with the court below, that here is any just ground for increasing the rate of commissions to 6½ per cent., thereby imposing an additional annual burden on the *cestui que trustent* of \$2,400. And as to the income collected from the trust estate after the time limited for the settlement of the personal estate, and which the law adjudged was collected by them in their capacity as trustees, and not as executors, they are for the same reasons entitled to the same commissions; but, inasmuch as they have been allowed 2 per cent. on this income in their administration account, and to which they were not entitled as executors, this amount must be deducted from the 5 per cent. allowed to them as trustees. In regard to commissions on the income collected by them, as executors, within the 13 months limited by law for the settlement of the personal estate, and which they had a right to collect as executors, there is some difference of opinion. In view of the fact that their duties as executors and trustees are distinct and separate, and that they were obliged, under the will, to transfer the fund to themselves as trustees, and as such to disburse it among the *cestui que trustent*, they are, in the judgment of a majority of the court, entitled to commissions for the responsibility thus incurred and the services thereby rendered. This income they had, however, collected as executors, and for which they had been allowed a commission of 2 per cent. as executors; and it seems to us, therefore, that an additional commission of 3 per cent. would be a just compensation for its disbursement, thus making 5 per cent. for its collection and disbursement. The right to appeal from the order of the court fixing the rate of commissions is questioned in the brief of the appellants, but the decision in *Diffenderfer v. Winder*, 3 Gill & J. 314, is, we think, conclusive as to the question in the case of a conventional trust, like the one now under consideration.

We come, then, to the question of "repairs" and "betterments." In the former appeal we decided the *cestui que trustent* are properly chargeable only with ordinary expenses and repairs, and that the cost of new buildings and such improvements as may amount to betterments must be paid out of

the corpus of the estate; and certain items charged in the auditor's account to the corpus of the estate as betterments, it is contended, ought to be charged as repairs, and, as such, payable out of the income. It does not seem to us, however, that this objection can be sustained. All buildings are subject, more or less, to natural and unavoidable decay, "and ordinary repairs," when used in reference to buildings, means expenses reasonably incurred in keeping the property in good condition and order. "Betterments" it may not be so easy to define. All buildings are better by being repaired; but "betterments" means something more than mere repairs, and may be said to mean improvements upon the building itself, or so near to it as to enhance its value. Any addition or alteration made to the building, or expenses incurred in draining or paving, may be said to be betterments. The items in the account, such as constructing partitions in warehouses, whether temporary or permanent, for the special accommodation of tenants; boilers and engines and furnaces for heating; elevators, gas machines, asphalt pavements; opening and widening streets adjacent to the property,—these and other like expenses cannot be said to be expenses incurred for ordinary repairs. Whether they are to be classed as betterments or improvements, or some of them as fixtures, they are not properly chargeable to the repair account.

As to the "Sun Building," the witnesses differ widely as to its fair rental value, all the way from \$8,000 to \$13,000. The entire building now rents for \$11,760, of which sum Messrs. Abell & Co. pay \$6,760 for the part occupied by them, and, besides, they furnish, at their own expense, heat for the entire building. We agree with the court below that the rent now paid is a fair and reasonable rent, and that the rent paid by Messrs. Abell & Co. for the part occupied by them is about a fair proportion. We agree, too, under all the circumstances, that \$800 is a fair rent for "Woodburne." The property in its present condition might, according to the testimony, rent for \$1,000 or \$1,200; but it must be borne in mind that Mr. Edwin F. Abell, the tenant, has expended not less than \$10,000 of his own money in permanent improvements, thereby largely enhancing its value, and of which the estate will reap the benefit. So, all things considered, we see no just reason for increasing the rent fixed upon by the court.

It follows from what we have said that in the appeal of Edwin F. Abell and George W. Abell, executors and trustees, the decree must be affirmed in part and reversed in part, and the cause remanded, in order that an account may be stated in conformity with the views of the court; and for the same reasons the order on the appeal of John W. S. Brady, executor and administrator, will be affirmed in part and reversed in part, and the cause remanded. Order affirmed in part

and reversed in part, and cause remanded; each party to pay one-half of the costs of the appeal

(79 Md. 115)

ZIMMERMAN v. BITNER et al.

(Court of Appeals of Maryland. March 14, 1894.)

GIFTS—CONFIDENTIAL RELATIONS—EVIDENCE.

Where an old, illiterate man makes a deed of gift of a valuable farm, which was practically all of his property, to the husband of a niece, with whom he had lived for several years, and who during that time had been his general agent, to the exclusion of a sister, with whom he was on the best of relations, and other nieces and nephews, the burden is on the donee to prove that the gift was the voluntary and deliberate act of the donor, and that he knew at the time he signed it that he was divesting himself of all interest, and transferring it to the donee; and it cannot be sustained where, in a suit by the donor's heirs to set it aside for undue influence of the donee and his wife, neither they nor the draughtsman testify, and the notary who took the acknowledgment states that the deed was not, in his presence, read to the donor.

Appeal from circuit court, Washington county, in equity.

Suit by Catharine Bitner and others against James M. Zimmerman. From a decree for complainants, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

Geo. W. Smith, Jr., and Alex. Neill, for appellant. Alex. Armstrong, N. B. Scott, Jr., and W. J. Zacharias, for appellees.

ROBINSON, C. J. This is a bill filed by the heirs at law of John Bitner to set aside a deed of gift made by him of a valuable farm, containing 290 acres of land, which, with the exception of a few hundred dollars, constituted the entire property belonging to the donor. The bill alleges that the most intimate and confidential relations existed between the donor and donee, and that the deed in question was procured by the importunities and undue influence exercised by the latter over the donor. Before proceeding to consider the law, as applicable to cases of this kind, we shall refer briefly to the facts and circumstances surrounding the execution of the deed, and the relation in which the parties stood to each other: The donor was at the time of the execution of the deed of gift in his seventy-fifth year. He was very illiterate, unable to read or write, but at the same time seems to have been a person of ordinary judgment,—equal, perhaps, to the common purposes of life, and competent to execute a valid deed or contract. He was born in Pennsylvania, and lived with his father on a farm until the death of the latter, which occurred about 24 years ago. After his father's death he lived with his sister, Catharine, on the home place, until 10 years ago, when he bought a farm in this state, for which he paid \$21,500, the

voluntary conveyance of which is the subject-matter of this litigation. This farm he rented to one Zimmerman, who had married his niece, and for some years prior to the deed of gift to Zimmerman he lived with him and his family; spending, however, a part of each year with his sister, Catharine, with whom the most affectional relations existed. On Thursday, the — of February, 1891, he was taken sick, and, although not seriously sick at that time, Zimmerman and his wife sat up with him all night; and what took place during that night, what was the subject-matter of conversation, and whether anything was said about the disposition of his property, the record does not disclose. On the next day, Dr. Mason was called to see him, and found him walking about the room, with his coat off. Before the doctor had time to make any examination as to his condition, Bitner said to him that he was very sick, and, if there was any danger of his dying, he wanted to know it, as there were some matters he wanted to attend to. The doctor did not, however, consider him seriously sick, and so told him. On Sunday following, the doctor again called to see him, and upon examination found a slight congestion of the right lung; and thereupon the doctor told him that he regarded him as a very sick man, and if he had any matters to look after he had better attend to them. He then requested the doctor to ask Mr. Smith (a highly-esteemed member of the Hagerstown bar) to come and see him, as he wanted him "to write a deed and a will." The next day, Mr. Smith and Mr. Middlekauf, a justice of the peace, went to Bitner's house; and in his room the deed and will were both prepared by Mr. Smith, during the preparation of which Zimmerman and the justice of the peace sat in an adjoining room. After the papers were drawn the justice of the peace was called into Bitner's room to take the acknowledgment of the deed, and Mr. Smith and himself attested the execution of the will. By the deed, Bitner conveyed his farm to Zimmerman, without reserving any interest whatever to himself, the consideration named in the deed being the nominal sum of five dollars, and love and affection. By the will, he bequeaths to Zimmerman his entire personal property, and then, by way of explanation, the testator says: "I thus give to the said J. Monroe Zimmerman all my property and estate, because he is married to my niece, and I have been living with them for many years, and have a high regard and affection for them, and desire they shall enjoy the same to the exclusion of my other relations." On Saturday following the execution of the deed and will, Bitner died, leaving surviving him his sister, Catharine, and a number of nephews and nieces, his heirs at law. For some years prior to the execution of this deed of gift, the donee had been the general agent of the donor, and as such was intrust-

ed with, not only the general management of the farm, and all improvements to be made thereon, but also with all other matters, such as buying fertilizers, the sale of the crops, and the receipt and deposit of the proceeds of sale. He was in fact the trusted and confidential adviser of the donor, and one upon whom he relied for advice and counsel in all matters concerning his affairs. So the case with which we are now dealing is one in which an old and illiterate person makes an absolute deed of gift of all his property, with the exception of a few hundred dollars, to one who stood in the closest and most confidential relation to him; and, dealing with such a case, there cannot be, it seems to us, any question as to the principles of law by which it is governed. And, although the law does not declare invalid a gift or conveyance of property to one standing in a confidential or fiduciary relation to the donor, yet courts always watch with a jealous scrutiny all such dealings and transactions, not merely for the purpose of ascertaining whether the donor understood the nature and effect of the transaction itself, but also for the purpose of ascertaining whether the benefit received by the donee was procured by reason of the influence possessed by him, and exercised over the donor. And it is well settled by a long line of authorities that when such a gift or conveyance is questioned the onus is upon the donee to prove to the satisfaction of the court that the conveyance was the free, deliberate, and voluntary act of the donor and made by him with full knowledge as to its effect and operation; in other words, that he knew that conveyance itself operated to divest him of all title to the property, and to vest it in the donee.

A good deal has been said as to what constitutes a confidential relation, within the operation of the principle, but courts have always been careful not to fetter the operation of the principle by undertaking to define its precise limits. The cases of parent and child, guardian and ward, trustee and cestui que trust, principal and agent, are familiar instances in which the principle applies in its strictest sense. But its operation is not confined to the dealings and transactions between parties standing in these relations, but extends to all relations in which confidence is reposed, and in which dominion and influence resulting from such confidence may be exercised by one person over another. No part of the jurisdiction of the court is more useful, it has been said, than that which it exercises in watching and controlling transactions between parties standing in a relation of confidence to each other; and, being founded on the principle of correcting abuses of confidence, it ought to be applied to every case in which a confidential relation exists as a fact,—where confidence is reposed on the one side, and the resulting superiority and influence on the other. *Billage v. Southee*, 9

Hare, 534; Tate v. Williamson, L. R. 1 Eq. 528; Id., L. R. 2 Ch. App. 55. The broad principle, says Vice Chancellor Wood, on which the court acts in cases of this description, is that wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed to exert influence over the person trusting, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. Tate v. Williamson, L. R. 1 Eq. 528.

Tested by these well-established principles, the relations existing between the donor and donee in this case were, beyond question, of such a character as to cast the onus upon Zimmerman, the donee, of proving that the deed of gift was the voluntary and deliberate act of the donor; that he knew at the time he signed it that he was thereby divesting himself of all interest in the property, and was in fact transferring his entire interest to the donee. And this the donee has wholly failed to do. There is no evidence in the record to show that the deed was ever, in fact, read to the donor. Mr. Middlekauf, the justice of the peace, says he was called into the room to take the acknowledgment of the deed, and that it was not read over to the donor in his (the witness') presence. Nor is there a particle of evidence to show that any explanation was made to the donor as to the effect and operation of the deed, or that he understood its import and meaning. Mr. Smith, who prepared the deed, and who, it is but fair to presume, knew all the facts and circumstances surrounding its execution,—who knew, at least, whether it was read over to the donor, and whether its legal effect and operation were explained to him, and whether he understood it, and whether any reasons were assigned by the donor why he made Zimmerman his beneficiary, to the exclusion of his own sister and other relations,—is not even examined as a witness. And though the bill charges that the deed was procured through the acts, importunities, and undue influence of Zimmerman and his wife, neither of them is examined, or offered to testify. But this is not all. After the case had been argued and submitted to the learned judge below, finding the proof defective in these particulars, he wrote to the counsel (one of whom was Mr. Smith, the draughtsman of the deed), and suggested that additional testimony ought to be taken, and referred to the fact that Zimmerman himself had not testified, and offered to remand the case at the instance of either party. But these suggestions and this offer on the part of the judge, the donee, through his counsel, declined to accept, and replied by saying they preferred to have the case decreed upon the testimony already taken.

Here was an invitation to the donee to go upon the witness stand, and to make a clean breast of the transaction,—to explain the circumstances surrounding the execution of the deed, and to deny, if he could, the charge that it was procured by the importunities or undue influence of himself and his wife,—and yet this invitation he declined. We cannot escape the conclusion that the refusal on the part of the donee to testify in regard to facts peculiarly within his own knowledge, and to offer evidence which it was in his power to produce, was because he felt and knew the evidence would be unfavorable to him. In the recent case of Bishop Ames' Will (Hiss v. Weik [Ind.] 28 Atl. 400), against the probate of which a caveat was filed on the ground of fraud and undue influence practiced by Mr. and Mrs. Hiss, the beneficiaries under the will, and in the trial of which neither Mr. nor Mrs. Hiss offered to testify, we said: "It is a generally accepted rule of law that the suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds such evidence, where he has it in his power to produce it." And this we said in a case where there was a caveat to a will, and the burden of proof was upon the caveators. Here we are dealing with a gift to one standing in a confidential relation to the donor, and upon whom the burden of proof is to show to the satisfaction of the court that it was the voluntary act of the donor, and was not procured by any influence exercised over him by the donee.

Not only has the donee failed to offer any evidence to rebut the presumption arising from the confidential relation in which he stood to the donor, but there is another fact,—and suspicious one, it seems to us,—and that is the donor should want both a deed and a will prepared at the same time. He was, as we have said, without any education, unacquainted with legal forms, and unused to the transaction of legal business, and it seems highly improbable that he should suggest the necessity of making a deed and a will. There is, of course, a wide distinction between a deed, which is irrevocable, and which transfers the title to the property upon its execution and delivery, and a will, which is revocable, and does not take effect till the testator's death. But we can hardly suppose that such a distinction suggested itself to a person of the donor's capacity and intelligence. On the contrary, it is more probable that it was the suggestion of some one else. But, be that as it may, we rest the affirmance of the decree below on the ground that the donee has failed to offer any evidence to rebut the presumption arising from the relations of the parties against the validity of the deed. To sustain a voluntary deed, upon the proof before us, would be to break down the safeguards which courts of equity have thrown around the

dealings and transactions of parties standing in a confidential relation to each other; and, instead of shutting the door to temptation, it would invite persons to secure benefits to themselves, to the detriment of those, the confidence of whom they had betrayed. The case of *Eakle v. Reynolds*, 54 Md. 305, relied on by the appellant, differs widely from the one now before us. In that case the uncle conveyed to a favorite nephew a farm valued at between twelve and fifteen thousand dollars, but he was careful enough to reserve a life estate to himself. Prior to the deed of gift he had made three wills, in each of which he gave legacies to other relatives, making his nephew the residuary devisee. He had lived with his uncle from early childhood, and for some time prior to the execution of the deed he had occasionally transacted business for him, and during his uncle's sickness had the general management of the farm. Whatever suspicion attached to the execution of the voluntary deed in that case, the donee proved that it was the free and voluntary act of the donor, and that the latter signed with full knowledge of its import and meaning. Mr. Syester, then a member of the bar, who prepared the wills and the deed in question, testified that the donor fully understood the legal effect and operation of the deed, and assigned the reasons which induced him to make it. Among other things, he said he was afraid that the legacies bequeathed in the will would be considered as charges upon the farm, and that, to pay them, his nephew would be obliged to sell part of it, and this he wanted to avoid. He further said that a large part of his property was the result of the joint labors of his brother William, the father of the nephew, and he thought the father's interest ought to go to his son, and he wanted his part to go to him also. All such proof, however, is wanting in this case. Decree affirmed.

(180 Pa. St. 350)

**PHILLIPSBURG HORSE-CAR CO. v. FIDELITY & CASUALTY CO.
OF NEW YORK.**

(Supreme Court of Pennsylvania. March 19, 1894.)

INDEMNITY—SCOPE—HORSE-CAR COMPANIES.

A policy indemnifying a horse-car company for damages on account of injuries to persons not employes, resulting from "accident to, or caused by, the horses, cars, plants, ways, works, machinery, or appliances used in the business of the insured, and described in the application," does not insure against injuries caused by the use of omnibus sleighs, not described in the application, though customary in the neighborhood when the tracks are obstructed by snow and ice.

Appeal from court of common pleas, Northampton county.

Action by the Phillipsburg Horse-Car Company against the Fidelity & Casualty Com-

pany of New York on a policy of insurance. Judgment for plaintiff. Defendant appeals. Reversed.

W. S. Kirkpatrick, for appellant. H. J. Steele and Russell C. Stewart, for appellee.

FELL, J. The policy of insurance upon which this action is founded was issued by the defendant to the Phillipsburg Horse-Car Company, the plaintiff, upon an application in writing in which the insured set out the number of miles of road operated, the number of cars and horses in use, the number of trips per day, the schedule time, and other matters intended to give the fullest information to the insurer of the character and extent of the risk, and ended with the statement, "There is no information tending to vary the risk, except as herein stated." The insurance was "against all liability for damages for or on account of fatal or nonfatal injuries suffered by any person or persons, other than employes of the insured, resulting from any and every accident to, or caused by, the cars, horses, plants, ways, works, machinery, or appliances used in the business of the insured, and described in the application herefor, which is hereby made a part of the policy." The plaintiff owned three large omnibus sleighs, which were used in place of cars whenever the tracks were obstructed by snow or ice. During some winters they were used for a few days only, during others for weeks, and occasionally for months. They bore the name of the company, and were a part of its appliances for transportation. No mention of these was made in the application for insurance. The recovery against the car company was for injuries sustained by a passenger by the upsetting of one of these sleighs, and the only question we need now consider is whether the accident for which indemnity is claimed is within the terms of the contract.

The verdict could have been properly rendered, and can now be sustained, only upon the ground that the contract of insurance covered the use of other means of transportation than those mentioned in the application, and was against all risks incident to the general business of the company. The learned judge before whom the case was tried entertained this view, and, in a charge in which the merit of clear and distinct statement is conspicuous, instructed the jury that: "The words described in the application herefor, limiting the liability of the company, do not apply to the machinery, appliances, plant, horses, cars, etc., described in the application of insurance; but they apply to the business of the insured 'described in the application herefor,' and therefore mean more than accidents, etc., occurring by the use of the property which is described in the application." This view was based upon the construction of the contract, and the fact, of which there was evidence, that sleighs were at times used

by street-railroad companies in conducting their business in the section of country in which the plaintiff's road was operated. This view does not seem to us to be correct. The words of the policy limit the insurance to indemnity from liability for damages on account of injuries "resulting from any and every accident, to or caused by, the horses, cars, plants, ways, works, machinery, or appliances used in the business of the insured, and described in the application." The insurance is against accidents caused by certain things used in the business, and described in the application, not things used in the business which are described in the application. There was testimony that for some years the car company had used sleighs when its tracks were obstructed by snow or ice, and that their use was customary under the same circumstances in neighboring towns; but it also appeared that the use of sleighs was restricted to that section of country, and that it was only one of the ways, in common use, of overcoming the difficulties caused by snow and ice. The testimony was far short of establishing a use so general that the parties would be presumed to have taken it into consideration in entering into a contract. The plaintiff was incorporated as a horse-car company, and as such had constructed and was operating a street railway by horse power. The use of any other vehicle than a horse car was not authorized by its charter, and could be justified only as a means of overcoming a temporary interruption of its operation, resulting from an emergency. The policy, by its terms, was based upon statements made in the application, which were to be considered as warranties; and it was restricted to injuries caused by or to certain enumerated ways, means, and appliances used in the business, and described in the application. The defendants would not have been liable, under the terms of the policy, if the motive power had been changed by the use of steam or electricity, instead of horses; and we are not able to see that the result is different when one kind of vehicle is substituted for another. This is not the case of the temporary use of another means of transportation upon a part of the line, made necessary by reason of the accidental destruction of cars, tracks, or bridges, nor of the use of plows or sweepers to clear the track; but it was an entire abandonment, during portions of the winter season, of the use of the road as a horse railroad, and the substitution of a distinct and different mode of transportation. Whether the risk would be increased or diminished would depend upon the circumstances of the particular case, but it is evident that the risk in the use of sleighs differs from the risk in the use of cars. It includes the danger of upsetting, the chances of collision with other vehicles, the liability to loss of control of the horses,—risks which are minimized in the use of street cars. The conditions from which accidents would probably result in the

use of sleighs differ from those from which they are likely to happen in the use of cars; and, whether the difference is great or small, it is for the insurer to decide whether he will accept the risk. We are therefore of opinion that the sixth point, asking for a peremptory instruction to the defendant, should have been affirmed; and, as this sustains the eighth assignment of error, it is unnecessary to notice the other assignments. The judgment is reversed.

(160 Pa. St. 451)

COMMONWEALTH v. BREYESSE.

(Supreme Court of Pennsylvania. March 26, 1894.)

MURDER—SELF-DEFENSE—INSTRUCTIONS—VERDICT.

1. An instruction that if, when he fired the fatal shot, defendant believed himself in peril of death or great bodily harm from the assailant, this would not be murder in the first degree, though he meant to kill, and in fact had no cause to fear, was affirmed so far as it related to the degree of the crime, the court adding that, if the law of self-defense were intended to be stated, the instruction omitted the essential element that defendant "had no other means of escape." *Held*, that this action gave defendant no cause for complaint.

2. One who fires with deliberate purpose to kill A., and kills B., is as guilty as if he had killed A.

3. There is no error in an instruction that the extent to which defendant is contradicted by witnesses, the character of their testimony, the reasonableness of defendant's testimony and its consistency with the proven facts, are all to be considered on the question of his credit.

4. The verdict was delivered and recorded in the usual manner, and the jurors were discharged, and directed to the commissioners' office for their pay. The clerk then discovered on the back of the indictment a penciled form of verdict against a person of another name, and showed it to the judge, who ordered the jurors recalled, and told them that if the name written was a mistake, and their verdict entered was correct, they might say so. They said that the verdict as recorded was correct. *Held*, that there was no ground for arrest of judgment.

Appeal from court of oyer and terminer, Allegheny county.

Noel Breyesse, alias Maison Noel, convicted of murder in the first degree, appeals. Affirmed.

T. H. Davis and W. A. Blakeley, for appellant. Clarence Burleigh, Dist. Atty., for the Commonwealth.

WILLIAMS, J. This case appears to have been tried with great care in the court below. The distinctions between murder of the first and of the second degree were plainly pointed out, and the facts were submitted to the jury in a manner of which no just complaint can be made. The conviction of the defendant of the crime of murder of the first degree was the result of the overwhelming weight of the evidence against him. The learned counsel for the defendant assigns error to the answers made by the learned judge to his first and second points.

These points were answered in the affirmative, subject to a qualification, and it is of the qualification that complaint is made. These points drew the attention of the court to the testimony given by the defendant, and asked, in effect, that if, at the time the fatal shot was fired by the defendant, he believed himself to be in danger of death or great bodily harm at the hands of the assailant, and that, "acting on that belief, he fired a revolver, which killed the wife of the assailant, this would not be murder in the first degree, even though, at the time the shot was fired, the defendant intended to kill; and this though, in point of fact, there was no foundation for the apprehension of danger to the defendant." The learned judge affirmed this point so far as it was directed to the degree of the murder committed, but added: "If it is intended to state the law of self-defense, it lacks one of the essential elements,—that he had no other means of escape." We think the defendant had no reason to complain of his answer. It gave him the benefit of an unqualified affirmation of his point so far as it related to the degree of the offense committed, and it stated correctly the law of self-defense. Life may be lawfully taken in self-defense; but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him. It is the duty of one who is assailed to flee, if flight is possible; and it is only when he is persuaded that he must suffer death or grievous bodily harm at the hands of his assailant, or take the life of his assailant that he may save his own, that he can justify his act as done in self-defense.

The qualification of the answer to the third point was also a proper one. Where a deliberate purpose is formed to kill A., and the defendant fires a pistol at him for that purpose, the fact that the ball misses its intended victim, and takes effect on B., and kills him, does not relieve the murderer. He is equally guilty, whether his effort to kill A. results in the taking of his life or the life of B.

The fifth assignment of error is equally untenable. The learned judge instructed the jury in the tests they should employ in determining the credibility of the defendant. He told them that the extent to which he was contradicted by the witnesses, the character of the testimony given by them, the reasonableness of his own testimony, and its consistency with the established facts in the case, were all proper subjects for consideration in determining the credit to which his testimony was entitled. This was a proper instruction to give, and was not harmful to the defendant unless his testimony was of such a character that the application of these tests led the jury to reject it.

The remaining assignment relates to the overruling of the motion in arrest of judg-

ment. The reasons in support of this motion rested on the following circumstance: When the jury came into court to render their verdict, it was delivered and recorded in the usual manner, after which the jurors were discharged, and directed to the office of the county commissioners, to receive their pay. After they had left the box, the clerk discovered a form for a verdict in pencil on the back of the indictment, in which the defendant was named "August Maison, otherwise called August Breyesse." The clerk called the attention of the judge to this indorsement, and he ordered the jurors recalled to the box, drew their attention to their verdict as already entered, and to the indorsement on the indictment, and told them if the name as written on the indictment was a mistake and their verdict as recorded was correct, they might say so. The jurors thereupon answered that the verdict as recorded was correct. The defendant's counsel took exception to this action, and moved in arrest of judgment, alleging that the verdict was uncertain, as it was against one person in the pencil indorsement, and against another as recorded. It is a sufficient answer to this motion to refer to the well-settled rule that the verdict as recorded is the verdict of the jury, and that the form prepared in the jury room, though handed to the clerk, is no part of the record, and has no significance whatever. *Dornick v. Reichenback*, 10 Serg. & R. 84; *Rees v. Stille*, 38 Pa. St. 138; *Scott v. Scott*, 110 Pa. St. 387, 2 Atl. 531. It was wholly unnecessary to recall the jury. It was done out of abundant caution, but it did neither good nor harm. The verdict had been entered on the record in proper form, against the defendant on trial, and the pencil memorandum was without the slightest legal significance. The reasons in support of the motion in arrest of judgment were properly overruled, and the judgment appealed from is now affirmed. The record is remitted for purposes of execution.

(100 Pa. St. 466)

HODENPYL et al. v. HINES et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

ASSIGNMENT FOR CREDITORS—EFFECT—POWER OF PARTNER.

1. Act April 17, 1843, declaring that all assignments made by debtors to trustees, to prefer one or more creditors, shall inure to the benefit of all the creditors pro rata, applies to a deed of the whole stock and accounts of a store to two creditors, as trustees, to sell, and pay in full certain creditors, including themselves; the surplus, if any, to be paid pro rata to other creditors named.

2. Delivery to one of two assignees is sufficient.

3. An assignment takes effect on its delivery, subject only to defeat for failure to record within 30 days. Act March 24, 1818.

4. A partner who, with sufficient notice that his copartner, the manager of the business, has

made a firm assignment for benefit of creditors, fails to dissent therefrom within a reasonable time, is deemed to have ratified it, and it will stand against subsequent executions against the firm.

5. A partner who can confess judgment for the firm can assign its property for benefit of creditors; and those to whom he has confessed judgment cannot, as execution creditors, attack his prior assignment.

Appeal from court of common pleas, Lackawanna county; R. W. Archbald, Judge.

Sheriff's interpleader by A. J. G. Hodenpyl and A. B. Williams, assignees of De Gontard & Reynolds, against Samuel Hines and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Following are the findings of fact and conclusions of law by the trial court (R. W. Archbald, P. J.):

"By the agreement of the parties filed of record, a jury was dispensed with, and the case submitted to the court for its decision, in pursuance of the statute in such case made and provided. From the evidence taken, the facts are found to be as follows:

"(1) For several years prior to the 23d day of May, 1892, the firm of De Gontard & Reynolds were engaged in the general jewelry business at Scranton, Lackawanna county, Pa. The partnership was composed of Walter De Gontard, who had his residence at Scranton, and was the managing partner, and Dr. Samuel Reynolds, who lived at Reynolds-ville, Jefferson county, Pa., about 300 miles, or a day's travel, distant from Scranton.

"(2) About six months prior to the said 23d day of May, 1892, the said firm became financially embarrassed, and was compelled to secure an extension of time from its creditors, upon an agreement to make certain monthly payments. In May, 1892, these payments had not been kept up, and the firm was at least two months in arrear. The liabilities were about six or seven thousand dollars, and the stock and fixtures were worth somewhere from seven to nine thousand dollars, but the firm had no ready money, and was not able to meet its obligations as they came due. In order to make the payments which had so far been made on the extension obtained from creditors, it had been compelled to raise money by the pledge of some of the stock and fixtures of the store, and at least one of the creditors had begun to press the firm by suit. Mr. De Gontard had also given three notes, with confessions of judgment in the name of the firm,—one to Samuel Hines, one of the defendants in this issue, for \$1,000, dated March 4, 1891, payable one day after date; another to James Stone, another of the defendants, also for \$1,000, dated April 1, 1890, and payable in one year from its date; and the third to T. B. Byner, another of the defendants, for \$249.54, dated February 5, 1892, payable in four monthly installments. These notes were outstanding, and in large part unpaid, at this time.

"(3) In view of the condition of things re-

cited in the last paragraph, Mr. De Gontard, the managing partner, went to New York city on May 23, 1892, to consult with some of the largest creditors of the firm, who had assisted in securing the previous extension, and see what could be done. This step was taken without notifying his partner, Dr. Reynolds, or advising with him as to the situation of the business. As the result of this consultation, and under the advice of Mr. Hodenpyl and Mr. Openheimer, representatives of two of the principal creditors, Mr. De Gontard was prevailed upon to then and there execute a deed of trust in the name of the firm to Mr. A. J. G. Hodenpyl, of New York, and Mr. A. B. Williams, of Scranton, for the benefit of creditors. This deed was a complete assignment of all the stock, fixtures, outstanding accounts, and property belonging to the business of the firm, and provided that out of the proceeds of the sale of said property the following creditors should be preferred and paid in full, viz.: The Traders' National Bank of Scranton, of which Mr. Williams, one of the assignees, was cashier, \$1,500; Hodenpyl & Sons, \$744.52; H. E. Openheimer & Co., two bills, one of \$879.20, and one of \$364.20; and other smaller creditors to the amount of about \$1,700. After these preferences were paid, the surplus, if any, was to be paid pro rata to certain other creditors named in the deed. Immediately after the execution of this assignment, it was sent by mail to Scranton for record, and the next morning (May 24th) Mr. Hodenpyl sent his clerk to the same place to take an account for him, as assignee, of the stock of the firm.

"(4) The deed of assignment was filed for record in the office for recording deeds, etc., at Scranton, Lackawanna county, Pa., on May 24, 1892, at a quarter before ten o'clock p. m. The same day an execution for \$1,000 was issued out of the common pleas of said county, to No. 518, June term, 1892, on a judgment entered in favor of Samuel Hines v. De Gontard & Reynolds, which execution was received by the sheriff the same day at five minutes past three o'clock p. m. Another execution for \$500 was also issued the same day against the same defendants on judgment in favor of James Stone (No. 522, June T., 1892), and received by the sheriff at a quarter past 5 o'clock the same afternoon. These judgments were entered on the confessions of judgment referred to above in the second paragraph. Similar executions were issued the next day in favor of Martha E. De Gontard, Everett Warren, trustee, H. E. Openheimer, trustee, and H. L. Jacobs, trustee, on confessions of judgment given by Mr. De Gontard, in the name of the firm, May 25, 1892, and made payable on demand, and by T. B. Byner for a small balance due on the confession of judgment mentioned above. Under the several executions the sheriff seized upon the personal property of the defendant's firm, found in the store at Scranton, and advertised the same for sale; and

these goods being claimed by Hodenpyl and Williams, as assignees under the deed of assignment, the sheriff applied for and obtained a rule for an interpleader, and an issue was directed. This is the issue now being tried, the assignees being the plaintiffs therein, and the execution creditors defendants. Subsequently, the sheriff was allowed to go on and make sale of the property under an arrangement between the assignees and the execution creditors that this should be done, and the right to the proceeds be determined by the result of the issue.

"(5) The deed of assignment referred to above was executed and delivered by Mr. De Gontard, in the firm name, without the knowledge or assent of Dr. Reynolds, his partner; but a telegram was sent from New York by Mr. Openheimer, the same evening, to the latter, and also a letter notifying him that an assignment had been made. The telegram does not appear to have been received. After Mr. De Gontard got back to Scranton from New York, he telegraphed to Dr. Reynolds to come on, stating that the store was in the hands of the sheriff. He said nothing, however, about the assignment having been made; not understanding, himself, that such was the case; his idea of the trust deed being that it was merely an arrangement for still further carrying on the business. The first intimation Dr. Reynolds had that the property of the firm had been transferred to trustees for the benefit of creditors was by the letter of Mr. Openheimer, which was received by mail May 28, 1892. Prior to that, on the 25th, he received the telegram from Mr. De Gontard stating that the store was in the sheriff's possession. In a letter written to Mr. Openheimer May 26th, he expresses his inability to reconcile these statements, and his ignorance with regard to the actual condition of affairs; he declares that he is anxious to have all creditors paid in full; that he had hoped that an arrangement for an assignment could be made; that a sale by the sheriff will be a sacrifice; that there ought to be enough property to pay all creditors, and, with judicious management, leave a balance over; and that he was willing to sign anything to this end. May 30th he followed this with a telegram from Reynoldsville to Mr. Openheimer, at New York, saying: 'Get an assignment. It is the only way to get anything.' And the same day he wrote to him to the same effect, and repeated that he was willing to sign any papers that would aid in this purpose. June 23d he wrote again, inquiring why they did not prevent the sheriff from selling; that an assignment, with proper management, would have paid all claims, but that a sheriff's sale would only realize enough to pay the judgments. Other than this, Dr. Reynolds does not appear to have ever expressed any assent to or dissent from the assignment made by Mr. De Gontard. In the mean

time, on June 20th, the sheriff, under the arrangement above referred to, went on, and made sale of the effects of the firm.

"The following are the conclusions of law applicable to these facts:

"(1) The deed of assignment executed by Mr. De Gontard, so far as it was effectual, was, by the statute law of the state (Act April 17, 1843, § 1; P. L. 273), a general assignment for the benefit of creditors, notwithstanding the attempted preferences therein.

"(2) The said assignment, if valid, took effect from the time of its delivery, subject only to its being recorded, within thirty days from its date, in the recorder's office of Lackawanna county (Act March 24, 1818, § 5; 7 Smith's Laws, 132), which was duly done.

"(3) The delivery of the said assignment was effective, though made to but one of the assignees.

"(4) As a general rule, one member of a general partnership cannot make an assignment for the benefit of creditors without the authority or consent of the other members of the firm; but, if such an assignment be made by one partner, it will be good, as against subsequent execution creditors of the firm, unless the other partner or partners dissent therefrom.

"(5) Dr. Reynolds had sufficient notice that an assignment for the benefit of creditors had been made to call upon him to express himself with regard thereto; and, he having failed to dissent therefrom, the assignment holds good, as against the defendants who are merely subsequent execution creditors.

"(6) The question in this issue is one of title, and the assignment by Mr. De Gontard to the plaintiffs was sufficient to transfer the title of the firm to the property in dispute, unless Dr. Reynolds, the other partner, positively dissented therefrom, which he is not shown to have done.

"(7) The authority of one partner to confess a judgment against the firm stands on no higher plane than his authority to assign the firm property for the benefit of creditors; and as the defendants in this issue are execution creditors on judgments confessed against the firm by Mr. De Gontard, one of the partners, while the plaintiffs claim title to the property in dispute by virtue of a prior assignment executed for the firm by the same partner, the defendants are not in a position to call said assignment in question.

"(8) On the facts found, the plaintiffs are entitled to judgment."

W. W. Watson, for appellant W. H. Hines.
Jno. P. Albro, for appellants T. B. Byner & Co.
A. R. Zimmerman, for execution creditors.
J. Elliott Ross, for appellant Stone.
E. N. Willard, Everett Warren, and Henry A. Knapp, for appellees.

PER CURIAM. The learned judge of the court below, who sat without a jury in this case, has disposed of the questions of fact and of law with discrimination and ability. We affirm the judgment upon his opinion. Judgment affirmed.

(160 Pa. St. 453)

BROWN v. BURR.

(Supreme Court of Pennsylvania. March 26, 1894.)

ACTION FOR SERVICES—EVIDENCE.

1. Where, in an action by an architect for services, defendant alleges that the heating apparatus built after plans of plaintiff was defective, which plaintiff denies, the question is for the jury.

2. Where defendant attempts to charge plaintiff, an architect, with liability for the defective work of a plumber, who received a certificate from him that his work was in accordance with the plans, defendant must produce the certificate, or prove its loss, before proving its contents.

3. Whether a payment made to plaintiff was to apply on his account was for the jury.

Appeal from court of common pleas, Lackawanna county; H. M. Seeley, Special Judge. Action by Frederick L. Brown against A. B. Burr to recover for services as an architect. Judgment for defendant, and plaintiff appeals. Affirmed.

The following is the charge of the court:

"This case is one peculiarly for the jury. The questions of law in the case are very few and very simple, and we have but to call your attention to the matters upon which it is necessary for you to pass, in order to reach a conclusion, and then the work will be for you. The plaintiff asserts that in 1888 he entered into a contract with the defendant, by which, for the sum of four hundred and fifty dollars, he was to prepare plans and specifications for a building; that he was not to supervise the construction of this building, but was to stop in from time to time, as he passed along the street,—and says that he did stop in; and that occasionally he was called upon by the defendant for advice with regard to matters connected with the construction of the building.

"Now the first question for you is, what was that contract? The defendant says that the plaintiff was to supervise the construction of the building. Those parties, while apparently testifying in direct conflict, may mean precisely the same thing, depending upon the use which they make of the word 'supervise.' An architect may so undertake to supervise the construction of a building, watching the work in all its details, to see that the work is properly performed, in a good and workmanlike manner, and in accordance with the plans and specifications, so that he makes himself responsible for the correct performance of this work; and that would be one meaning of the word 'supervise.' An architect may agree to occasionally stop, and see that the work is progressing

in accordance with the plans and specifications that have been drawn, keeping a general eye upon the matter; and that may be, to the mind of another person, an undertaking to supervise. Now, aside from this word 'supervise,' which has been used here, the question is, did this plaintiff, as a part of his contract, undertake to watch the construction of this building, see that the work was carefully performed,—performed in a workmanlike manner,—in accordance with the plans and specifications, so that he assumed the responsibility of that kind of watchfulness over this work that would make him responsible for any mistake of the workman, or any bad work in the building? Upon this question of the contract you have the testimony of both the plaintiff and the defendant, and you have heard in detail how they testified with reference to the terms of the contract. You have a right to take into consideration, also, the defendant's testimony that this building was being erected by day's work; that he himself was constantly in attendance upon the building. There was no contractor employed, who might be held responsible,—no one there to be held responsible for the constant progress of the work,—except the defendant himself, who employed the men, had them upon his payroll, and paid them from day to day. That fact you have a right to take into consideration, in determining, as between the two, what was the undertaking of the plaintiff.

"The next question is, what was the compensation to be paid? The plaintiff says that it was four hundred and fifty dollars. The defendant says that the plaintiff asked for four hundred and fifty dollars, and he thought it should be four hundred dollars, and that there was no definite agreement made. That leaves the case for you to determine, as between these parties, what the contract price was. If you find that the contract was simply to furnish the plans and specifications, and to take that general supervision that might be expressed in an agreement, simply from time to time, to stop and see how the work was progressing, or to give advice as advice was called for, and that the plaintiff carried out the terms of the contract,—did what he agreed to do,—then he has a right to recover, and would not be responsible for an imperfection in the work, according to his plans and specifications, that was done by days' labor, under the charge of the defendant. If, on the other hand, the plaintiff undertook, as architect, to see that this work was well performed in its details, and he neglected to do that thing, then he might be responsible for any damages occasioned by such neglect.

"There is another question with regard to the terms of this contract: Did it apply simply to the erection of that building according to the original specifications and drawings, or did it reach further, and bind the plaintiff to prepare the drawings and specifications, and supervise the work of putting in the plumbing

and steam-heating apparatus? The defendant says it did. The plaintiff denies it. The plaintiff says that the way in which he came to have to do with this steam-heating apparatus was that Dr. Burr came to him with a plan that he was disposed to accept for the heating of this building. But the plaintiff says he advised Dr. Burr that the plan was an objectionable one,—it didn't meet his approval,—and said he would rather draw him plans without charge than to have him go on and put in the system that he was disposed to accept. I do not remember that Dr. Burr's attention was called to that upon the stand, or that he contradicts the statement that he had a plan of his own, which he brought first to the plaintiff, and that was disapproved by him. If he did have a plan of his own, that he was disposed to adopt, and brought that plan to the architect, to consult with him about it, then is that fact more consistent with the plaintiff's statement that he had made no agreement with reference to this steam heating, or with the defendant's statement that he had? In other words, if he had agreed to draw the plans, as part of his contract, for four hundred and fifty dollars, or four hundred dollars,—whatever it was,—for the steam heating, would it be likely that, without first consulting him, the defendant would have gone on, and arranged for a separate system? It might be in either case, but the evidence goes simply as bearing in its probabilities upon the question of the original contract to enable you to determine between the parties. Now, I do not understand that any claim is presented here for damages sustained by any failure to carry out the contract; so far as the erection of the building is concerned, that it is all waived. If there ever was any such complaint, it is abandoned here, and they make no claim against the architect by reason of any imperfection in the building itself. The question comes as to damages sustained by bad work or imperfect specifications with reference to the plumbing and the steam heating. Now, if you find that this matter of the plumbing and steam fitting came about as the plaintiff testifies,—as simply a matter of favor, which he was disposed to grant, rather than see what he considered an imperfect system adopted,—he is to be held responsible for just what he agreed to do, not for what he did not agree to do. One thing which perplexes the court somewhat, and may perplex you, is that, while the specifications for the steam heating have been given in evidence, not a word of that has been read to the court or jury. If there was any defect in the pitch of the pipes, or if there was any defect in the size of the pipes, or in the manner in which they were to be laid, we have no means of telling whether that defect was because of imperfect specifications on the part of the plaintiff, or whether it was because the work was not done in accordance with the specifications. It is in evidence.

The difficulty is that we do not know what the evidence is upon that subject, because these specifications have never been read to the court nor to the jury. Was this plaintiff to be held responsible for that work? Was it a part of the original contract? Or was it a subsequent contract by which the work was done gratuitously? The plaintiff is not to be held responsible for the terms of a contract made between the defendant and the men who were to put in this work,—Hunt & Connell,—unless his attention was called to that contract, and he was to be responsible. The contract was between the other parties. They might do what they pleased. They might impose a responsibility upon the architect. But, until he agreed to assume the responsibility, he would not be held responsible. He did, however, certify, at some time, the performance of the work. He testifies that he approved it. What did he certify to? The certificate is in writing,—so testified in the case. The certificate is in writing, signed by the plaintiff, and, if put in evidence, will show just exactly what he certified with regard to that steam-heating apparatus. All that we know about it is the general statement that he approved the work. Did he approve it as conforming to his specifications? Did he approve the work as being correctly done in all its details? He says that he tested it, and that the steam-heating apparatus, at that time, did work properly. Now, if he is to be held responsible in this matter, it must be because, by his certificate, he certified to that which was not so. If he undertook by this certificate to assure the defendant that all of this work was in proper condition, properly constructed, in such a way that it ought to be accepted, he might be held responsible in damages if it was not so, provided it was a part of his contract. On the other hand, if he simply looked over this work to see that it was in conformity with his specifications, and so certified, he would be held responsible just to the extent of that certificate. You must not guess at what that certificate is, gentlemen. It was in the possession of the parties. It was within their power, on the one side or the other, to inform us just what the architect certified to in that written paper; and, if he is to be held responsible in damages by reason of that certificate, it was the duty of the defendant to let us know what it was that he bound himself by in this matter. The fact remains, however,—the only fact in that matter,—that he made some certificate by which the defendant was authorized to go on and pay the contractors for the putting in of this work.

"Now, the next question for you is the amount of payment. You will remember the testimony of Mr. Brown, that he received one hundred dollars early in the progress of the matter, and another hundred dollars later, making a two hundred dollar payment. He could not tell whether it was in cash or checks, part cash and part checks. The de-

fendant comes upon the witness stand, and, in a general way, he says he paid both in checks and money, but he gives no amount that he paid at any time, except as he produces a check here for one hundred and fifty dollars, drawn to the order of the plaintiff, indorsed by him, and upon which he apparently obtained the money. The argument is that this check was at so late a date that it cannot form a part of the payment admitted by the plaintiff. There is some reference to a statement that the certificate was given in August, 1889. The architect says that he received his money before the building was completed. The certificate referred to is a certificate with reference to the steam heating, and not the building. When was this building completed? The question for you is whether, under this testimony,—under the testimony of the plaintiff as to the money that he received,—this one hundred and fifty dollars can be a part of that two hundred dollars, or whether it is not. If you find that it is not a part of the two hundred dollars which he admits receiving, but was paid to him subsequently, that would make three hundred and fifty dollars paid to him. If you find, however, that this one hundred and fifty dollars is only a part of the payment made to him then, then the two hundred dollars is all that would be credited on that account.

"Then the question is, if you are of the opinion, under the evidence, that the architect, by reason of contract and certificates, is to be held responsible for defects in the construction of the steam heating and plumbing, what is the amount of damage done? The defendant alleges that, in the first place, he is entitled to the amount of cash paid Henry Smith for work on boiler,—twenty-five dollars. Mr. Smith testifies it was from twenty to twenty-five dollars paid him for putting in new valves, and cementing under the boiler. Was that a part of the contract? Did the specifications require it, and was the work sufficiently done, according to the undertaking between the parties, without this cementing? Was it simply something that, from the operations of matters afterwards, appeared to be necessary, and that afterwards was done for that reason? Or ought these specifications, under the circumstances, if correctly prepared with due regard to the circumstances, to have provided for just that thing? The cash paid for return valve on boiler, eight dollars: Was the valve placed there in the first place a proper valve, or was the architect negligent in suggesting the valve that was placed there,—what he calls a 'gate valve?' You have the testimony of Mr. Smith—you have the testimony of the other witnesses—with regard to that; the testimony in detail as to what the character of the two valves was. If the architect is to be held responsible at all here, and he provided for an improper valve, he ought to be held responsible for the change of that valve.

Cash paid Foote & Shear for work on steam-heating system, \$105.12: That work was done at different times, beginning with January 29, 1891,—work not done on the 29th of January, but the work was returned to the witness to be charged at that time, I suppose, after completing some particular part of the work. The next work was done September 19, 1891, and the next was done in March, 1892. It is alleged here that the change of the valve was an improper change, that the valve originally placed there was a proper valve, and that the new valve was an improper valve for that place. How much effect that had upon the operation of the radiators,—whether it was a correct change or not,—is for you. How much had it to do with the operation of the radiators? How much had it to do with the necessity of the change of these pipes afterwards? Or were those pipes, running along until March, 1892, nearly three years after the steam-heating apparatus was completed, in the nature of a correction of an original defect, or of repairs because of injuries that may have occurred in the mean time? In other words, the whole question for you is, if he is to be allowed at all damages in this matter, whether this work, for which damage is claimed, became necessary because of the fault of the architect in his certificate or specifications with regard to the original work, or whether they arose from some other cause. It is a matter for you, gentlemen. "To price for damage from overflow, twenty-five dollars." You have this piece of metal here in court. It appears here that one of the discharge pipes for discharging, as I understand it, the drip that comes from the water closet, as the drip collects sometimes on the floor,—a pipe was made to carry that drip out of the way, down into the cellar. It is not the discharge pipe from the water closet, but just for waste water that drips upon the floor, and is guarded against by a lead or metal pan, and then carried out of the way, down into the cellar below. There is no doubt, under the evidence, but that this pipe was stopped, and there was no discharge for that water. Is that the fault of the plaintiff, in this matter, or did it arise in some other way? If it is his fault, and, under his agreement, he was bound to know this thing was wrong, and certified that this work was correct without knowing it, then he would be responsible for this matter for the damages that are said to have been occasioned through the overflow of this water flooding goods in the store below. Now, according to the defendant's statement here, he would make sixty-three dollars due the defendant, in case you find the contract price was four hundred and fifty dollars. That, however, depends upon the defendant's assertion that the three hundred and fifty dollars were paid. If you should find all these items that he charges against the plaintiff here, and find that only two hundred dollars were paid, the result

would be one hundred and fifty dollars difference, and a balance would be due the plaintiff for the difference between sixty-three dollars and one hundred and fifty dollars,—some eighty-six or eighty-seven dollars. You see that all this matter depends upon what you find with regard to these different details, and it is impossible for us to make the computation by which we can assist you in coming to your verdict, excepting in this way: If you find the contract was four hundred and fifty dollars, and the payment two hundred dollars, and that, under the instruction we have given you, the plaintiff is not responsible for any of these damages, then there would be a balance due the plaintiff of two hundred and fifty dollars, upon which he would be entitled to recover interest from the beginning of this suit,—the 4th of February, 1890. If you find that the original consideration was only four hundred dollars, and only two hundred dollars have been paid upon it, and no damages are to be allowed, then the plaintiff would be entitled to recover two hundred dollars, with interest. If you find that the consideration was four hundred and fifty dollars or four hundred dollars, and the payment has been three hundred and fifty dollars, and no damages are to be allowed, he would be entitled to recover that balance, whatever it is, with interest from February, 1890, to the present date. Then, if you find that he is responsible for any of these items of damages that are asserted, that would be deducted from the amount to go to the plaintiff, or, if the balance, as thus discovered by you, was in favor of the defendant, you may, under the pleadings in this case, find for the defendant and certify the amount of damages sustained by him in this matter,—a certain sum.

"The defendant asks us to charge you: (1) That, when one undertakes to act for another, the law imposes upon him the duty of acting with care and prudence, and if he violates this duty he becomes responsible to his employer for damages equal in amount to the damage caused by his delinquency. Answer. This is a mere general statement of the responsibility of an employe with regard to the work to be performed by him, and, as such a general statement, it is correct. (2) If the plaintiff did not perform his appropriate duties, or if he is guilty of negligence, misconduct, or unskillfulness in the business of his employment, he becomes liable for any direct damages his employer may sustain thereby. Answer. By 'appropriate duties' I understand the defendant to mean duties which he has undertaken to perform,—duties that he has agreed to perform; and, so understanding, the point is correct. (3) That the plaintiff is liable for the loss caused by his negligent supervision of the work, to the amount of the damage the defendant has sustained by his malfeasance. Answer. Negligent supervision of work is a failure in the manner and to the extent that he has agreed

to supervise. There is no negligence in not doing what a man has not undertaken to do, and for that reason—understanding the word 'negligence' in that sense—the point is affirmed. (4) That if the plaintiff did not perform his part of the contract, or, from negligence or want of skill, he performed it in such a manner as that the defendant suffered loss, he is entitled to have the amount of that loss deducted from the amount of the plaintiff's claim, even if equal to the full amount of his claim. Answer. That is correct, if he did not perform his contract. It depends upon what the contract was. (5) That the architect who draws the plans and specifications for the owner of the building is, in the absence of an express contract to the contrary, the agent of the owner for the construction of the building, and the architect is liable to the owner for any damage he may have sustained by the architect's negligent supervision of the construction of the building. Answer. We refuse this point. Parties are at liberty to make just such contracts as they please with an architect. It is a question for you whether he agreed to supervise this building, and in what sense he agreed to supervise it, or whether the agreement between the parties was simply for the plans. There is no presumption with reference to this contract, at all. It must depend upon the testimony as to what the contract was.

"Exception noted to the charge of the court, and to the answers of the court to the several points presented, and, at the request of counsel for the plaintiff and for the defendant, bills are sealed."

W. S. Hulslander and A. A. Vosburg, for appellant. Chas. H. Wells, D. W. Connolly, and J. Alton Davis, for appellee.

PER CURIAM. The appellant complains that the charge of the learned judge was misleading. The answers to points presenting the legal questions involved are not complained of, but it is alleged that the charge, as a whole, was calculated to prejudice the case of the defendant. After a careful examination of it, we are not able to reach such a conclusion. The plaintiff sued to recover the unpaid balance due him for work in preparing plans and drawings for a building erected by the defendant. The defense alleged that the plant for heating the building was unsatisfactory, and that, as this had been built after drawings made by the plaintiff, the fault was his, and the loss to the defendant should be set off against his demand. This raised questions of fact that were for the determination of the jury, and were fairly submitted to them. It appeared that the plaintiff had, after the heating works were put in, given to the plumber a certificate to show that the work was finished in accordance with the plans. The defendant sought to make use of this fact to fix the plaintiff with liability for the defective work of the plumber, with-

out putting the certificate in evidence, or proving its loss. The learned judge was right in holding that the certificate itself should be put in evidence, or accounted for, and that the answer of the plaintiff, that he had given a certificate of the general character stated in the question, was not to be used as proof of the contents of the certificate, without some further showing.

It was further alleged by the defendant that he had given to the plaintiff \$150, by check, to apply upon his work, in addition to the \$200 credited to him. Whether this check was part of the \$200 the plaintiff had acknowledged paid to him, or was in addition thereto, was a question of fact,—and it was not error to submit it to the jury, upon the evidence. The assignments are not sustained, and the judgment is affirmed.

(160 Pa. St. 180)

HAYNES et al. v. SYNNOTT.

(Supreme Court of Pennsylvania. March 12, 1894.)

LEASES—COVENANT TO PAY TAXES—ACTION FOR BREACH—PLEADING—SURETYSHIP—RELEASE—DEMAND.

1. Plaintiff leased property in Boston for five years from June 1, 1886, the lessee covenanting to pay the taxes payable on the premises during the term. The lessee paid the taxes for four years only. In an action against the lessee's surety for the taxes assessed May 1, 1891, which plaintiff was obliged to pay, the statement of claim, which set out the lease, alleged that the "lease was executed in Boston, and its covenants were to be performed there, and it was therefore subject to the laws of Massachusetts, under which a tenant who covenanted by his lease to pay the taxes levied and assessed during his term is liable for all taxes levied and assessed during such term." *Held*, that an affidavit of defense alleging that the lessee did not covenant to pay the taxes levied and assessed on the premises, the words which import such covenant having been scored out in the contract and intended to be eliminated, and that the taxes claimed for were not payable for or in respect of the premises during the term, but were taxes payable from the property for the year ending May 1, 1892, covering but one month of the lease, was insufficient, as it denied neither the contract as set out nor the law as stated.

2. The mere giving of time by a lessor to his lessee for paying taxes which he covenants by his lease to pay does not release the lessee's surety.

3. Where a lessee fails to pay taxes as he has covenanted, the lessor, having paid them, may sue the lessee's surety therefor without first making demand on the lessee.

Appeal from court of common pleas, Philadelphia county.

Action by John W. Haynes and others against Thomas W. Synnott on a contract of suretyship on a lease. Judgment for defendant. Plaintiffs appeal. Reversed.

Francis Rawle, for appellants. Joseph M. Pile, for appellee.

FELL; J. The assignment of error in this case is to the refusal of the court to enter judgment for want of a sufficient affidavit of

defense. The plaintiffs leased to Albert G. Smalley a property in Boston, Mass., for the term of five years, commencing June 1, 1886. The lease contained a covenant for the payment of the rent, and "also the taxes and water taxes which may be payable for or in respect of the said premises, or any part thereof, during the said term." The plaintiffs paid the taxes assessed May 1, 1886. The lessee paid for the four years following, but not for the fifth. This action is to recover of the defendant, who was surety on the lease, the taxes assessed May 1, 1891, and paid by the plaintiffs after the expiration of the term.

It is not claimed that the lessee was bound to pay more than five years' taxes. The contention on the part of the plaintiffs is that under the laws of Massachusetts the lessee was not bound to pay the taxes for the first year of his lease, they having been assessed before the commencement of his term, but is bound for the last year's taxes, assessed before its end. In support of this contention, it is averred in the statement that "the said lease was made and executed in Boston, and its covenants were to be performed there, and it was therefore subject to the laws of Massachusetts, under which a tenant who covenanted by his lease to pay the taxes levied and assessed during his term is liable for all taxes levied and assessed during such term. The said Smalley did not pay, and was not bound to pay, the taxes assessed May 1st, 1886." In answer to this averment, it is stated in the affidavit of defense that "the said Albert G. Smalley, lessee, did not covenant to pay to the plaintiffs the taxes levied and assessed on the demised premises, the words which import such covenant having been scored out in the contract, and intended to be eliminated. The taxes now claimed for were not payable for or in respect of the said premises, or any part thereof, during the said term, but were for taxes payable from the property for the year ending May 1st, 1892, covering but one month of the lease." It is not denied that the copy of the lease filed is a true copy, and the court was not informed as to what words were "scored out and intended to be eliminated," but only as to the defendant's understanding of the effect of the erasure of certain words, which are not given. The assertion that the taxes were not payable for or during the term, with the qualification that they were for the year ending May 1, 1892, is not in denial of the plaintiff's statement, but is in entire harmony with it, and leaves untouched the essential averment that, under the facts stated and the written contract and the law, the defendant is liable. The plaintiff's case rests upon the averment of the contract, and of its meaning and effect under the laws of Massachusetts, by which it is to be interpreted. The affidavit denies neither the contract as set out nor the law as stated, and is therefore insufficient.

It is unnecessary to more than refer to the remaining grounds of defense. The mere giving of time to the tenant for the payment of taxes did not release the defendant from his obligations, and, as this is a contract of suretyship, no previous demand of the principal was necessary. The judgment of the court is reversed, and it is now ordered that the record be remitted to the court of common pleas, with directions to enter judgment against the defendant for such sums as to right and justice may belong, unless other legal or equitable cause be shown to the court why such judgment should not be entered.

(160 Pa. St. 463)

CHILTON et ux. v. CITY OF CARBONDALE.

(Supreme Court of Pennsylvania. March 26, 1894.)

DEFECTIVE STREETS—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.

The fact that a person went over a street crossing after having, three weeks before, seen that the flagstone in it, on which she slipped, was slanting, is not conclusive evidence of contributory negligence, though she could have gone over a crossing which she knew was safe.

Appeal from court of common pleas, Lackawanna county.

Action by Joseph Chilton and Mary Chilton, his wife, in right of Mary Chilton, against the city of Carbondale, for personal injuries received by slipping on a street crossing. Judgment for plaintiffs. Defendant appeals. Affirmed.

The charge of the court was as follows:

"Joseph Chilton and Mary, his wife, for the use of the wife, have brought this action of trespass against the city of Carbondale. The action charges the defendant with negligence, and that by reason of that negligence the plaintiff was injured, and the plaintiff seeks to recover damages for the injuries which she alleges to have thus received. You will observe, then, that the basis of the action is negligence. Unless negligence existed on the part of the defendant at the time the plaintiff was injured, and the injury was caused by that negligence, without concurring negligence on her part, no recovery could be had in this case. 'Negligence' has been defined to be the absence of care, according to the circumstances. It is also said to be a breach of duty which one person, whether natural or artificial, owes to another. I prefer that definition as applied to cases of this character, and, unless you find a breach of duty on the part of the defendant, there can be no recovery by the plaintiff in this case. There are specific duties imposed upon municipalities; and the defendant in this case, being a municipality, owed a duty to the plaintiff, and all others who had a right to pass over the public streets of the city of Carbondale, to maintain those streets in a reasonably safe and passable condition.

It was the duty of the defendant to have kept the crossing over Main street, where it is intersected by Eighth avenue, in a reasonably safe condition. Now, municipalities are not insurers of travelers. They are only required to discharge the duty of maintaining the public highways in a reasonably safe condition; and in this case that degree of duty which an insurer would be required to bestow is not imposed on the city of Carbondale.

"The first question for you to consider is, under the circumstances in this case, was the defendant guilty of negligence? The defendant, being an artificial being, could only act through agents, and the query is, did the agent having charge of the streets of the city of Carbondale at the time the plaintiff alleges that she was injured discharge the duty of maintaining the crossing in such a reasonably safe condition as the public had a right to expect? If yes, there your inquiries end. If the plaintiff was not injured because of the negligence of the defendant at that crossing, then the defendant cannot be mulcted in damages by reason of that injury, unfortunate as it may have been. You have a right to inquire, confining your inquiry to the facts as testified to,—the evidence in the case,—what the condition of the crossing was at the time the plaintiff says she passed over it and was injured. You will remember her testimony that the second stone forming the crossing or passageway over Main street was disturbed, or in a slanting position; that it, because of its slanting position and the mud upon it, caused her to slip, and, in endeavoring to recover herself, her foot caught under the third stone (which she also claims was out of place, and raised from some four to six inches), and, by being so caught, and endeavoring to recover herself, she was thrown; and, as she alleges, she received the injuries which she described, and to which the physician testified. If the second flagstone was so displaced as to cause her to slip, and the third flagstone was so raised as to catch her foot and throw her, the condition of both stones—their position—may be considered by you in determining the question whether that crossing was safe at that time or not. Other witnesses have been called who testify about the condition of that crossing. One of the witnesses, I think John Muir, said, about the day or evening before the injury to the plaintiff in this case, he passed over that crossing, and he struck a stone and nearly fell. A Miss Martin testifies to the condition of that crossing, and she said that it was, in her opinion, in a dangerous condition, or words to that effect, for several months; I think she said from four to five months. You will also remember the testimony of Mrs. Kinback, an old lady. She testifies as to how she passed over the crossing, and what care she felt called upon to observe. In that connection, in view of her years, it is right for you to consider whether

the assistance was not required somewhat because of her years, as well, possibly, as her view of the crossing. I do not remember but what other witnesses also testified on behalf of the plaintiff as to the condition of the crossing; but in that connection you are to consider the witnesses called on behalf of the defendant. The testimony of Peter McDonald, who says he was the street commissioner at that time, and while he says his memory is not very clear, the general impression given by his testimony would be, in his opinion, the crossing was not dangerous at that time. Mr. Thomas Gordon is also called, and gives his judgment as to the condition of the crossing. He is followed by John Martin, whose testimony was very positive that the crossing was in a safe condition, or at least not dangerous.

"In determining the condition of the crossing, I say you are to take into consideration the testimony of all the witnesses who have spoken about it. If, from all the testimony in the case, you conclude that the crossing was not negligently maintained, and it was in a reasonably safe condition for the public to use at the time the plaintiff claims to have been injured there, then you need go no further, and must find a verdict for the defendant. If you are satisfied, from all the evidence, that the crossing was not maintained in a reasonably safe condition,—that rather it was negligently maintained; that the defendant was negligent in not keeping it in a proper, safe condition for the use of the public,—then the next thing to inquire into is whether the city of Carbondale had notice of that condition or not. Now, this is a municipality, and, in order to charge a municipality with dereliction of duty, notice of that dereliction must be brought home to it. That notice may be direct, by directly informing the officers officially charged with the duty connected with the matter with which the dereliction is alleged to exist, or it may be by inference. Where a defect exists in a public highway for a reasonable time, so that the authorities having charge of it ought to know of its existence, the law will presume knowledge, or rather the jury may find and presume knowledge on the part of the corporation of the existence of that defect, because the duty—the continuous, existing duty—remains with the corporation to keep the highways in good repair. Then you are to inquire, secondly, if you conclude the public highway at that point was not in a safe condition, whether this condition existed long enough to require the authorities of the city who had charge of the streets to know, or if they ought to have known, of the existence of that defect or dangerous condition. If you find that the condition or obstruction or defect, whatever it may have been, did not exist there such a length of time as to reasonably charge the city with notice of its existence, then your verdict should be for the defendant, notwithstanding the fact that it may have

been in a dangerous or negligent condition. But if you find that the street was negligently maintained, and that the defect or obstruction in the street had existed there such a reasonable length of time that it was the duty of the city authorities to take notice of it, and ought to have known of it, then you are to next and thirdly inquire whether that defect or obstruction in the public street caused the injury to the plaintiff in this case,—whether the injury would have been received without this obstruction or defect. If you find such to have existed. You must be satisfied from the evidence that the obstruction existed, and that that obstruction caused the injury to the plaintiff, before she would be entitled to recover. Furthermore, if you find even the existence of these three things which I have named, you cannot find a verdict for the plaintiff if the evidence satisfies you that the injury she received there was brought about, in any degree, by her own negligence. 'Duty' is a relative term. It is imposed upon all; and although a city may neglect its duty, yet that will not justify a traveler on the public highway in neglecting his or her duty, which is at all times to observe reasonable care in passing along the highways. A person cannot take advantage of the fact of A.'s or B.'s neglect of duty, and deliberately, through negligence himself, go into the danger exposed or caused by such negligence. So that you must not only find the dangerous condition of the street, and the reasonable time in which the city should take notice of its existence, and that dangerous condition caused the injury, but also that from the whole evidence the plaintiff herself did not, in any degree, contribute to this injury. If she did, she cannot recover in this action, no matter whether the street was in a dangerous condition, and the city had notice of it or not.

"If you should find all those questions in favor of the plaintiff, then your next inquiry would be as to what damages, if any, she should receive by reason of the injuries which she alleges she did receive at that time. The rule regulating that question in this case is, that she should be compensated reasonably for the injuries she may have received. That compensation should not be extravagant. On the one hand, the fact that the defendant here is a corporation, which really means the citizens—the taxpayers—of the city of Carbondale, should not lead you into extravagance, and say, 'Because it is a corporation, therefore we will be liberal with the plaintiff.' On the other hand, she is entitled to fair, reasonable compensation for injuries which she may have received, if you find the questions which I have submitted to you in her favor. The law does not fix specifically the measure of compensation for the different elements of damage which are mentioned in this case. You are not to go beyond the evidence in the case in order to seek causes for damages. It

is the duty of the plaintiff, not only to show that she is entitled to damages, but also to show what damages she is entitled to. I do not mean by that to say that the plaintiff is required to show how many dollars and cents she is entitled to by reason of pain and suffering, either mental or physical, or by reason of any physical injury, if she has received such, but she must fairly disclose to you the extent and character of the personal injuries for which she seeks compensation. Then you are, as reasonable, fair men, to take and consider those injuries which she alleges to have sustained, and allow her a fair compensation for them.

"The defendant, through its attorney, has submitted the following points, and requests that you be charged concerning them: '(1) That the knowledge of the plaintiff of the existence of the condition of the crossing for more than three weeks prior to the date of the accident is contributory negligence on her part, and will prevent a recovery by her in this action.' Answer of the court: That point is refused. It brings up, however, an important question for your consideration in this case, and I will deal with that at this time. Bearing on the question of the contributory negligence of the plaintiff, the fact is brought out that she had, three weeks prior to the injury which she claims to have received, actual personal knowledge of the existence of the dangerous condition of this crossing. It is also shown that on the evening, and within an hour of the time she claims to have been injured, she knew of another and safe route over which she might pass to and from her home, including the meat market, the last place she visited. In that connection you are to recall and consider whatever evidence has been adduced in the case touching the question of her knowledge, or want of it, three weeks prior to this injury. Was she justified in presuming that, after the lapse of three weeks, the defect or obstruction at the crossing where she was injured had been removed? It is the duty of municipalities to repair defects in highways. The presumption is that they do their duty, and the presumption would be, in this case, that if such reasonable time elapsed for the municipality to have had notice of the defect, that it did its duty in this respect in repairing this defect or removing the obstruction alleged to have existed at this crossing; and yet, however, I submit to you, for you to find and determine, whether the plaintiff, having knowledge of the existence of this defect for three weeks prior, and for three weeks prior to that time, I submit for you to determine whether she was justified in presuming that the obstruction had been removed, and going over the crossing in the manner that she did. If you find that from her knowledge of the situation there prior to the accident, that she ought to have remembered the dangerous condition of this crossing,—that it would have been reasonable for

her to have done so, and negligence in her not to have done so,—then by reason of that she could not recover in this case. If you find, from all the evidence in the case, that it was but reasonable in her to have presumed that the obstruction or defect which she had known to exist had been corrected or removed, then, the other elements existing, she might, notwithstanding the fact that she had prior knowledge of the existence of this obstruction, recover in this action. '(2) That the fact that the plaintiff knew of the defective crossing, and that there was a safe way by which she could have gone home, and over which she had actually passed on the evening of the accident, and within about one hour of the same, and before the same took place, will prevent a recovery by her in this action.' Answer of the court: That point is refused. '(3) That, if the jury believe that the plaintiff did not observe ordinary care in attempting to cross at Eighth avenue on the night she was injured, she cannot recover in this action.' Answer of the court: That is sound law, and is affirmed. No matter what the condition of the street may have been, it was the duty of the plaintiff to exercise ordinary care in attempting to cross it on the evening of November 22d, 1889, when she was injured. '(4) That if the jury believe the evidence of the defendant's witnesses that the occasion of the displacement of the stones used in the crossing was the work of constructing a sewer on Main street, which work occupied only a reasonable time, and that the accident was not occasioned by failure to protect excavations or embankments made in and about the work of constructing said sewer, and that the crossing was out of order only during such time of construction, and repaired and put in good condition immediately upon the completion of said work, the plaintiff cannot recover in this action.' Answer of the court: That point is affirmed. '(5) That under all the evidence in the case the verdict should be for the defendant.' Answer of the court: That point is refused.

"The plaintiff has also presented requests, which I will now proceed to answer: '(1) The presumption of law is that the officers of the defendant city will do their duty, and a traveler lawfully on their streets has the right to act on that presumption.' Answer of the court: That proposition is affirmed. '(2) If the jury believe that the crossing in question was in a bad and defective condition, and that such condition was open and observable, then the defendant is presumed to have knowledge of such open defect in its streets after a reasonable time has elapsed for its ascertainment and removal.' Answer of the court: That proposition is affirmed. '(3) If the jury believe that the defendant failed to put the street crossing in question in a proper and safe condition after they had knowledge of its defective condition, or after the lapse of a reasonable time in which

to ascertain and remove the defect, such failure is negligence on the part of the defendant; and if they further believe that, by reason of such negligence, the plaintiff was injured while in the exercise of ordinary care upon her part, she is entitled to recover.' Answer of the court: That proposition is affirmed. '(4) If the jury believe that the plaintiff was injured by the negligence of the defendants, she is entitled to recover such damages as will fully compensate her for her injuries; and, if they further believe that the plaintiff's injuries are incurable, she is not only entitled to recover damages up to the time of bringing suit, but she is entitled to recover for all prospective damages which she may afterwards suffer by reason of such incurable injuries.' Answer of the court: That proposition is correct, and is affirmed. '(5) If the jury should find for the plaintiff, they may, and it is proper for them to, consider separately each element or item of damages, and separately determine the amount of each, and the sum total of these amounts would be the proper measure of damage which the plaintiff would be entitled to recover.' Answer of the court: That proposition is affirmed. '(6) If the jury believe that the plaintiff has suffered bodily pain, and that such pain is the result of the injury, they should consider its character and extent, the length of time it has existed in the past, and the length of time it may continue to exist in the future, and, in their sound discretion, allow the plaintiff a reasonable compensation for it.' Answer of the court: That proposition is affirmed. '(7) If the jury believe that the plaintiff suffers mental anguish, and that such mental suffering is the result of the injury, they should consider its character and extent, the length of time it has existed in the past, and the length of time it may continue to exist in the future, and, in their sound discretion, allow the plaintiff a reasonable compensation for it.' Answer of the court: That proposition is affirmed. '(8) If the jury believe that the plaintiff's injuries are incurable and permanent, then they should, in their sound discretion, fully compensate her for such permanent injury.' Answer of the court: That proposition is affirmed.

"You will observe that three elements claimed as a basis of damages are separately treated here; and, while it may be an intelligent way of treating those questions, you are not to be led, by this separation of them, into allowing excessive damages as a whole. While you are to consider the question whether the plaintiff has suffered mentally, as well as bodily, pain, which perhaps, technically, it is difficult to distinguish, because all pain is only recognizable through the intellect,—the brain,—and while you also have the right to consider any bodily injury inflicted upon the plaintiff, and consider all of those as having existed in the past, and whether they may continue to exist, yet, as

I said before, this separate consideration must not lead you into allowing excessive damages. On the other hand, they are proper elements, if the facts exist in the case to justify their consideration, upon which to base an intelligent verdict in the case. Now, you are not to infer, from what I have said relative to the affirmance of the plaintiff's points, that the facts exist. The facts are for you: First, that the defendant was negligent in the maintenance of the street crossing; second, that a reasonable time had elapsed in which notice of the defect in the street should have been taken; thirdly, that this defect or obstruction was the cause of the injury to the plaintiff, and that she was injured by reason of that defect; fourthly, that she did not contribute to the injury herself, and in considering that you have the right to consider whether she had knowledge of the existence of this obstruction, and whether she ought not to have remembered it, and taken another route, which she might have taken, and, if you find that it was reasonable for her to presume that the defect which she admits to you existed had been repaired, then you come to the question of damages.

"Now, gentlemen, take this case, and without reference to the parties especially, further than the facts in the case require you to consider, examine it carefully. It is very important to the taxpayers of the city of Carbondale; the money comes from them, if any money is given the plaintiff in this case. On the other hand, it is very important to this plaintiff. If the testimony of the physician called here is true (and whether it is or not is for you to find), then she has been seriously injured; and, if the opinion of the physicians is correct that these injuries are of a permanent character, then the case becomes the more important for the plaintiff here. So that you have here to deal with an important case; and I ask you to give it conscientious attention, and endeavor to arrive at a just conclusion between the plaintiff and the city of Carbondale. In considering this case you are not to be influenced by any matter you may have heard or possibly read in connection with it out of court. It has been properly suggested by counsel for the defendant, and I call your attention to it. You are simply to confine yourselves to the testimony of the witnesses as you heard it here."

Defendant assigns as error the answers of the court to its first, second, and fifth points.

R. D. Stuart and James E. Burr, for appellant. C. Smith, for appellees.

PER CURIAM. We see no error in this case that requires us to reverse the judgment. The question of the plaintiff's contributory negligence, upon the evidence, was one for the jury. It was submitted in a charge that was both fair and adequate, and the jury has

found that she was not guilty of negligence that contributed in any degree to the injury of which she complains. Whether their conclusion is correct is not for us to consider. The question was for them, and it was properly left to them. The judgment is affirmed.

(160 Pa. St. 473)

STOCKWELL v. WEBSTER.

(Supreme Court of Pennsylvania. March 28, 1894.)

VACATING JUDGMENT BY CONFESSION.

A judgment on a sealed note will be opened on the affidavit of defendant that he has a good defense to the same, though contradicted by the testimony of plaintiff, where there are circumstances corroborating the statement of the defendant.

Appeal from court of common pleas, Lackawanna county; P. P. Smith, Judge.

Action by U. G. Stockwell against M. O. Webster. Judgment entered on a sealed note. Petition by defendant to open the judgment. Granted. Plaintiff appeals. Affirmed.

Defendant gave plaintiff a sealed note under an agreement in writing that if, before the note fell due, he should deliver to plaintiff the Delaware, Lackawanna & Western Railroad Company's agreement to construct at its own cost a certain branch railroad, the note should be void. Defendant in his affidavit to open the judgment alleged that he had furnished an agreement as contracted for, which plaintiff denied.

Charles L. Hawley, for appellant. J. W. Carpenter, for appellee.

PER CURIAM. We concur in the conclusion reached by the court below in this case. The evidence taken upon the rule to show cause raised a question of fact which it was proper to refer to a jury for adjustment. While a judgment should not be opened, as a general rule, upon the oath of the defendant alone, when he is contradicted by the testimony of the plaintiff, yet where there are corroborating circumstances, or circumstances from which inferences may be drawn corroborative of the defendant, it is usual to open the judgment and refer the questions to a jury. The order appealed from is affirmed.

(160 Pa. St. 202)

HALFMAN v. PENNSYLVANIA BOILER INS. CO.

(Supreme Court of Pennsylvania. March 12, 1894.)

ASSUMPSIT—MONEY LOANED TO CORPORATION—INSTRUCTIONS ON EVIDENCE.

1. When there was uncontradicted testimony that money had been paid, but also testimony to show, inferentially, that it had not been paid, though such inference could not fairly have been drawn, in face of the direct testimony, a charge by the judge that payment was conceded was not ground for reversal; his attention not being called to the inaccuracy, and

it being improbable that it influenced the jury.

2. Where a writing was signed by the president of defendant company, acknowledging the receipt from plaintiff for its use of the sum in suit, and the president testified that there was no agreement for repayment, a suggestion by the judge, in his charge, that "perhaps he meant that no time for repayment was set," was not improper, since the paper, on its face, imported an agreement to repay.

3. When plaintiff contended that the sum sued for was paid by him to defendant company as a loan, and not a gift, and there was evidence that plaintiff had made statements of the company's debts which omitted such claim, and plaintiff explained the omission on the ground that he had previously assigned the claim to one for whose use the action was brought, it was proper to call the attention of the jury to the explanation.

Appeal from court of common pleas, Philadelphia county.

Assumpsit by Whildin D. Halfman, to use of Andrew C. Craig, Jr., against the Pennsylvania Boiler Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

John R. Read, Silas W. Pettit, and H. B. Gill, for appellant. J. Willis Martin, for appellee.

FELL, J. This action is brought to recover \$2,000 alleged to have been loaned by the plaintiff to the defendant. The plaintiff offered in evidence a memorandum dated April 14, 1885, signed by Mr. Miller, who was then president of the company, acknowledging the receipt from him of \$2,000 for the use of the company, and testified that this money was loaned by him to the company, and used by it for the payment of debts. He was corroborated by Mr. Miller and by Mr. Anderson, a director, as to the payment of the money, and its use to pay the company's debts. There was no direct denial of the testimony of these witnesses, and their cross-examination was directed to show a want of authority in the president to borrow, and that the money was not used for the purposes of the company. The defendant offered testimony to show that the receipt of this money did not appear on the books of the company, or of the bank in which its account was kept, and that the plaintiff had twice, after April 14, 1885, furnished statements of the indebtedness of the company, upon faith in which his stock had been purchased by those now in interest, and in which this claim did not appear. There was testimony in rebuttal, and the question submitted to the jury was whether the money advanced or paid to the company was a loan or a gift. The exceptions are to the following parts of the charge: (1) "It is conceded upon all sides that the sum of \$2,000 was paid by Mr. Halfman to Mr. Miller, the president of the defendant company; and, as no serious issue upon that point is raised, it may be taken, practically, as an undisputed fact." (2) "The only question in this cause, and which you are to settle upon the

evidence, is whether or not this was a loan or a gift by Mr. Halfman to the defendant company. You have heard the evidence, which is fresh in your minds; and upon it you will render your verdict, either for the plaintiff or for the defendant." (3) "The paper which was given when the money was paid by Mr. Halfman acknowledges the receipt of the money to be used by the company. It states no time for repayment, and Mr. Miller, the president of the company, said no agreement for repayment was made. Perhaps he meant that no time for repayment was set." (4) "The defendant's counsel has interposed evidence here showing that Mr. Halfman has made statements at various times of the debts of the company, and that from those statements he has omitted this claim, contending that there is evidence for you to consider whether or not there was such a claim. Plaintiff explains the absence of it by saying that it was not put among the other claims because he had no control of it; for he says he had assigned this claim to Mr. Craig, who is the person to whom this money will go if a verdict is found for the plaintiff, and not to Mr. Halfman."

It may be said that the testimony before referred to tended to show, inferentially, that no money had been paid, but there was scarcely foundation in fact for such an inference. It could not have been drawn from the testimony, as it would have been in the face of the writing, and of the direct, positive, and uncontradicted statements of three witnesses. This testimony, however, had a direct bearing upon what became the pivotal point of the case, about which the real contention centered. That was whether the payment of money by the plaintiff was for the general business purposes of the company, or a contribution by him, as the largest stockholder, owning a controlling interest, to serve his own purposes, by keeping alive a failing and probably insolvent corporation until he could find a market for his shares. Upon this question there certainly was grave doubt, but the responsibility for its proper decision does not rest with this court. We are concerned only to know that the defendant was deprived of no legal right.

It was not strictly accurate in the learned judge to say that the payment was conceded on all sides, but there was certainly no serious issue upon that point; and, as far as the testimony was concerned, it was practically undisputed. The contention of the plaintiff's counsel, based upon his probably just suspicions of the honesty of the transaction, and the proofs offered at the trial, differed widely. If the attention of the learned judge had at the time been called to the language excepted to, he would doubtless have modified it; and it was due to him, and to the justice of the cause, that, if this was considered material, he should have had the op-

portunity to correct it. If the inaccuracy was not such as to arrest at the time the attention of the learned counsel, it is not at all probable it influenced the verdict in the slightest degree.

What has been said applies to the first and second exceptions. The suggestion of the learned judge as to the agreement to repay contained in the part of the charge covered by the third exception was justified. It took nothing from the jury, and gave no undue bias to the case. The paper, on its face, imported an agreement to repay. In the fourth assignment of error, the attention of the jury was called to the issue which it is complained was taken from them, and it was right that the plaintiff's explanation should be stated. We find no reason for reversing the judgment, and it is affirmed.

(160 Pa. St. 503)

FELTS v. DELAWARE, L. & W. R. CO.
(Supreme Court of Pennsylvania. March 26, 1894.)

REVIEW ON APPEAL—DISCRETION OF COURT—CHANGE OF VENUE.

The decision on a motion for a change of venue will not be reviewed, in the absence of an abuse of discretion.

Appeal from court of common pleas, Lackawanna county.

Action of ejectment by Isaac B. Felts against the Delaware, Lackawanna & Western Railroad Company. Petition by plaintiff for change of venue denied. Plaintiff appeals. Affirmed.

John F. Scragg, E. Merrifield, and A. Ricketts, for appellant. Jessups & Hand and M. I. Corbett, for appellee.

PER CURIAM. We have no doubt about our jurisdiction in cases arising under the laws relating to a change of venue. The question is as to the extent of our supervising powers. A motion for a change of venue is addressed to the judicial discretion of the court in which it is made. If the judge declines to hear it, we can direct him to proceed to a hearing. If he hears and decides it, whether for or against the motion, we cannot supervise the exercise of his discretionary power, unless an abuse of that power is alleged and shown. We may think he was mistaken, but that is not enough. Newlin's Petition, 123 Pa. St. 541, 16 Atl. 737; Runkle v. Com., 97 Pa. St. 328. There is no bill of exceptions to the admission or rejection of evidence in applications to the discretion of a judge. There is no appeal from a judgment rendered in the exercise of a discretionary power, unless it is specifically given by statute. It is not the use, but the abuse, of such a power that gives this court its supervising control in such cases. What we have in this case is a complaint that the learned judge reached a wrong conclusion, and an effort to correct

the alleged mistake by an examination of the case upon its merits here. This, as we have seen, cannot be done. The appeal is for that reason dismissed.

(160 Pa. St. 206)

DEACLE v. DEACLE et al.

(Supreme Court of Pennsylvania. March 12, 1894.)

RETURN OF WRIT—SUFFICIENCY—VALIDITY OF AWARD.

Where service of a writ in ejectment was made by a deputy sheriff on one as agent of defendants, and a return to that effect written by the deputy, but the sheriff refused to accept the return, and, while the writ was still in his hands, substituted a return of nihil habet, an award made under a rule of reference taken out by plaintiff's attorney after seeing the original return in the sheriff's office was properly set aside.

Appeal from court of common pleas, Lackawanna county; Fred W. Gunster, Judge.

Action by ejectment by Joseph Deacle against Arthur G. Deacle and William George Deacle. Judgment for defendants. Plaintiff appeals. Affirmed.

W. S. Hulslander and A. A. Vosburg, for appellant. A. D. Dean and G. B. Davidson, for appellees.

FELL, J. The plaintiff in this case brought an action of ejectment against the defendants, and the deputy sheriff who had the writ was told to serve it on Thomas Deacle as their agent. He made the service as directed, and wrote the return to that effect on the back of the writ. The plaintiff's attorney, having seen the return on the writ when it was in the office of the sheriff or the prothonotary, entered a rule of reference, under which arbitrators were chosen, who made an award. The sheriff, under the advice of his counsel, and before the return day, prepared a new return of nihil habet as to the defendant, and this return was pasted over the return first written. Two rules to show cause were then granted by the court,—one on motion of the defendants to set aside the award of arbitrators, and the other on petition of the plaintiff to reinstate the original return. The first of these rules was made absolute, and the second discharged; and this action of the court is assigned as error.

It is not competent for the sheriff to alter or amend a return which has been made. If the writ in this case bore his return, and was delivered to the prothonotary, his control over it had ended, and any alteration by him without leave of the court was unauthorized and invalid. The question whether there had been an alteration by the sheriff of a return made, or only a refusal by him to accept a return prepared by his deputy, but not actually made, and the substitution by him of a new one in place of it while the writ was still in his hands, was heard by the court of

common pleas on depositions, and decided in favor of the defendants. This question of fact was properly before the court, and the duty and responsibility of deciding it rested there. If there was no service of the writ on the defendants, it follows that all proceedings under the rule of reference were void, and the award of the arbitrators was properly set aside. The judgment is affirmed.

(160 Pa. St. 121)

LENNOX v. BROWER.

(Supreme Court of Pennsylvania. March 12, 1894.)

SALE OF MORTGAGED PREMISES — PAROL AGREEMENT TO PAY MORTGAGE—CONSIDERATION.

1. Act of June 12, 1878 (P. L. 205; Brightly's Purd. Dig. p. 1464), providing that the grantee of real estate subject to incumbrance shall not be personally liable therefor unless he assumes such liability in writing, is not applicable in an action by the grantor for breach of the grantee's agreement to pay such incumbrance, as part of the purchase money.

2. Plaintiff owned three adjoining lots, each subject to a separate ground rent, and all subject to subsequent mortgages. Two lots had been sold for arrears of rent, though title had not been taken under such sale, and judgment for such arrears had been obtained against the third. Plaintiff verbally agreed to sell his interest in consideration of \$1,000 and defendant's agreement to pay all claims against the property, and the \$1,000 was paid. Held, that there was consideration for defendant's agreement, and that plaintiff could recover for defendant's failure to pay the mortgages.

Appeal from court of common pleas, Philadelphia county.

Action by Thomas Lennox, to the use of James Crawford and Sarah Crawford, executors of Samuel Crawford, against Francis M. Brower, for breach of contract. Judgment for defendant. Plaintiff appeals. Reversed.

Ormond Rambo, for appellant. Joseph M. Pile, for appellee.

FELL, J. The plaintiff was the owner of three adjoining lots of ground, each subject to a separate ground rent, and all jointly subject to subsequent mortgages. The lots were so situated as to constitute one property, the dwelling house covering parts of lots 1 and 3. In 1888 lots 1 and 2 were sold by the sheriff under judgments for arrears of ground rent, and judgment had been obtained for ground rent due on lot 3. The plaintiff alleges that at this time, title not having been taken from the sheriff for lots 1 and 2, he entered into a verbal agreement with the defendant to sell him his interest in all the lots for the consideration of \$1,000 and the payment of all claims against the property; that in pursuance of this agreement the defendant paid him \$1,000, and paid the amount of one of the mortgages, but refused to pay the amount of the remaining mortgages. For breach of this contract this action is brought. The case was taken from the jury by a direction to find for the defendant, and this,

and the overruling of offers of testimony, are the errors assigned.

The learned judge of the common pleas based his direction upon the act of June 12, 1878 (P. L. 205; Brightly's *Purd. Dig.* p. 1464), which provides that the grantee of real estate which is subject to ground rents, or bound by mortgage or other incumbrance, shall not be personally liable for the payment of the same unless he shall, by an agreement in writing, have expressly assumed a personal liability therefor; and he assigned the additional reason that the contract was without consideration, and could not have been enforced, even if in writing. It is apparent that in the hurry of the trial the ground of the plaintiff's action was not made clear to the court. This was not a suit by the holder of a mortgage against a grantee who had bought under and subject, and whom this act was meant to protect, or by the holder of a discharged mortgage, who was attempting to hold the grantee liable on his mere promise to pay. The suit was by the grantor for the unpaid balance of the purchase money, and consequently the act of June 12, 1878, had no application; and no question of the validity of the promise to a third party, or the right of such party to enforce an agreement made for his benefit, arose in the case. The plaintiff's right to recover was based upon an alleged promise by the defendant to pay him for his interest in the property \$1,000, and to pay off the mortgages. This is the contract set out in the statement filed, and in support of which the testimony was directed. The plaintiff had an interest to sell. At this time he owned one of the lots on which a part of the dwelling stood, absolutely. Without this lot the others would be of little value. The other two lots had been sold by the sheriff, and purchased by the attorney who had issued the writs, for amounts sufficient only to cover the judgment for arrears of rent and costs, but title had not been taken. He might well assume that by the payment of the amounts due he could still retain the title, or that the sheriff's sale could be set aside. In any event, he had an interest to sell, and fixed his price for it, and the manner of payment. He had both a moral and a business reason for wishing mortgages paid off, as his bonds were outstanding. He was an infirm old man, unaccustomed to business; and the defendant, who was a real-estate agent, knew much more of the matter than he did, as he had already negotiated with the purchaser at the sheriff's sale, and arranged to take title to the properties sold, if he could succeed in buying of the plaintiff. The defendant got what he bought, and in his own way, and, as a net result, obtained title to property which, according to the testimony, was worth \$6,000, subject to the ground rent, by the payment of less than one-third of that sum. However differently this may appear when the defendant is heard, it is sufficient for the present

purpose that the plaintiff, both in the allegations and proofs, presented a case that should have gone to the jury. The judgment is reversed, and a venire de novo awarded.

(160 Pa. St. 196)

REYENTHALER v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. March 12, 1894.)

EVIDENCE IN REBUTTAL—ADMISSIBILITY—OPENING STREET—DAMAGES.

1. Where, in an action for damages for opening a street, plaintiff, on cross-examination, intimated that his buildings within the line of the street had been removed by defendant city, it was competent to introduce testimony in rebuttal.

2. The possibility of future expense to the property by reason of municipal improvement should be considered by witnesses testifying to the difference of value in property before and after a street opening, but such possibility is not an independent claim, and it is proper to caution the jury not to add items of such possible expense to the values testified to.

Appeal from court of common pleas, Philadelphia county; Willson, Judge.

Appeal by the defendant city of Philadelphia from an award of a road jury in favor of the plaintiff, E. G. Reyenthaler. Judgment for defendant. Plaintiff appeals. Affirmed.

Frank T. Lloyd and Martin H. Stutzbach, for appellant. George E. Fill, James Alcorn, and Chas. F. Warwick, for appellee.

FELL, J. This was an appeal from the award of a jury appointed to assess damages caused by the opening of Jackson street.

The first exception is to the admission of testimony on the part of the defendant to show what had become of the buildings which stood within the line of the street. The plaintiff, in his examination in chief, had described the buildings, and said they had been torn down; and, in his cross-examination, had at least intimated that they had been torn down and removed by the city. The testimony complained of was to rebut this. It was in contradiction of statements of the plaintiff made in a cross-examination that was relevant, and was therefore competent.

The second exception is to the instruction to the jury that they were "not to take the possibility of municipal improvement as an argument against the weight of thought or opinion on either side." This instruction was followed by the statement that this possibility was not to be considered as an independent claim; that it entered into the question of the market value of the ground after the street was opened; and that the witnesses must be presumed to have taken it into consideration in reaching a judgment as to the market value of the property. In this there was no error. The witnesses testified, as experts, to the difference in market value before and after the opening of the street.

This is all the light the jury had upon the subject. It was proper for the witnesses to take into consideration every element of advantage and disadvantage. No intelligent opinion could be formed without this, and the learned judge was right in saying that they must be presumed to have done so. It was the privilege of either party to determine by examination or cross-examination whether the possibility of improvement had been taken into consideration by the witnesses, but it was the right of neither to introduce the cost of possible municipal improvement as a separate item, and it would be manifestly unjust that such cost should be added to an amount which the witnesses had stated as their judgment of the loss to the plaintiff by reason of the opening of the street. The instruction complained of is not in conflict with *Railway Co. v. McCloskey*, 110 Pa. St. 436, 1 Atl. 555; *Geissinger v. Heltown Borough*, 133 Pa. St. 522, 19 Atl. 412; *Harris v. Railroad Co.*, 141 Pa. St. 242, 21 Atl. 590; *Dawson v. City of Pittsburgh*, 159 Pa. St. 317, 28 Atl. 171; and other cases in which it has been held that the costs of fencing, grading, paving, etc., are matters proper for consideration in deciding whether the opening of a street has been an injury to property. These are certainly matters proper for the consideration of any one forming an opinion on the subject, whether a juror or a witness; but they are not independent claims, and the instruction in this case was in effect a caution to the jury not to add items of possible future expense to amounts which the witnesses, testifying as experts, had fixed as the measure of damage. The judgment is affirmed.

(160 Pa. St. 527)

JENKS v. FULMER.

(Supreme Court of Pennsylvania. March 26, 1894.)

SALE—STOPPAGE IN TRANSITU.

Before goods sold on credit had reached their destination, the seller, learning that the buyer had become insolvent, notified the carrier that he claimed them, and demanded their immediate return. *Held*, that the fact that an expressman, without any special order from the buyer or consent of the carrier, and without paying freight, took them to the buyer's store, which he found in the hands of the sheriff, whereupon the buyer refused to accept them, and they, at his direction, were taken back to the depot by the expressman, did not constitute a delivery, nor interfere with the seller's right of stoppage in transitu, previously exercised.

Appeal from court of common pleas, Northampton county.

Action by A. B. Jenks against N. A. Fulmer for the price of goods levied on and sold by defendant, as sheriff. Judgment for plaintiff. Defendant appeals. Affirmed.

Aaron Goldsmith, for appellant. J. Davis Brodhead, for appellee.

PER CURIAM. In 1890 plaintiff, a shoe dealer in Boston, sold three boxes of shoes,

on credit, to Isaac Price, a merchant in South Bethlehem, and shipped them there by rail. Before the goods reached their destination, Price failed, confessed judgment, and all his property was levied on by the sheriff, defendant in this case. Plaintiff, upon being informed of this, caused notice to be given to the railroad company that he claimed the goods, and demanded their immediate return. This right of stoppage in transitu was exercised before Price acquired either actual or constructive possession of the goods. Some days after their arrival at the freight depot in South Bethlehem, a local expressman, who had access to the depot, loaded them on his wagon,—without any special order from Price, or consent of the railroad company, and without paying the freight,—and took them to Price's store. There he learned, for the first time, that said store, and all his property, was in the sheriff's hands. The goods were never delivered to Price. He declined to accept them, and, pursuant to his direction, they were taken back to the depot by the expressman. Afterwards, the defendant levied on them at the depot, and, notwithstanding notice of plaintiff's claim, sold them as Price's property, whereupon this suit was brought to recover their value. These facts were practically undisputed, and the learned judge, refusing to affirm defendant's points recited in the first and second specifications, directed a verdict in favor of plaintiff. There was no error in this. The controlling facts necessary to entitle plaintiff to a verdict for the amount of his claim were uncontroverted by any testimony in the case. There was no question of fact upon which it was necessary for the jury to pass. The circumstances under which the goods were taken to Price's store, and returned thence, by his direction, to the depot, did not constitute a delivery to him, nor in any way interfere with plaintiff's right of stoppage in transitu, which had been previously exercised. It follows that there was no error in refusing defendant's points, and directing a verdict in favor of plaintiff. Judgment affirmed.

(160 Pa. St. 479)

DAW, Chief Burgess, et al. v. ENTERPRISE POWDER MANUF'G CO.

(Supreme Court of Pennsylvania. March 26, 1894.)

NUISANCES—INJUNCTION.

The dissolution of a preliminary injunction to restrain the maintenance of a powder magazine will not be disturbed on rule to continue such injunction, when plaintiffs' affidavits as to its dangerous character are positively denied by defendant's affidavits, which also allege that there are others of the same kind in the same borough.

Appeal from court of common pleas, Lackawanna county; F. W. Gunster, Judge.

Proceeding by James Daw and others to enjoin the Enterprise Powder Manufacturing Company from maintaining a building for the

purpose of a powder magazine, and from storing therein powder, dynamite, and other inflammable substances. A preliminary injunction and rule to show cause why it should not be continued was granted. From an order discharging the rule and dissolving the injunction after affidavits were filed on both sides, plaintiffs appeal. Affirmed.

Defendant's affidavits allege that there were other storehouses of the same nature in the same borough. The other facts sufficiently appear in the opinion of the lower court, which is as follows: "The plaintiffs allege that the defendants are engaged in constructing a powder magazine near the settled portion of Dickson City borough, and adjoining the railroad, to be used by the defendants for storing powder, dynamite, nitroglycerine, and other explosives and inflammable substances for the supply of the coal companies of Lackawanna county; and that the defendants intend to use said building within a few days for said purpose, and that such use will endanger the property and lives of those living in the vicinity, as well as the lives of those who are employed at the coal works in the vicinity, or who may travel by there on the boulevard or railroad. That it will greatly depreciate the value of property in the neighborhood, and retard the growth of the borough. The defendants admit that they are constructing a storehouse, or magazine, but deny that they intend to put it to the uses charged in the bill, or that the uses to which they intend to put it will in any manner endanger life or property, or affect the neighborhood unfavorably in any way. It appears from the affidavits of E. P. Kingsbury, F. H. Johnson, and Wm. H. Taylor that no dynamite, nitroglycerine, or other explosive, except blasting powder, is intended to be stored in the building, and that it is to be used only and solely for storing blasting powder; that blasting powder is not a high explosive; that the building is built of stone and iron, and to all intents and purposes fireproof; that the blasting powder to be stored therein is to be packed in cartridges, which in turn are to be packed in iron cases that are fireproof, and which will not be opened while stored in the building; that the powder is made of nitrate of soda, charcoal, and brimstone, and that it cannot be exploded by concussion. Mr. Taylor is the president of the company, and Mr. Kingsbury is the secretary thereof. Mr. Johnson testifies that he has been engaged in the powder business for upwards of 17 years, and that he has never known of an explosion of a magazine for the storage of blasting powder anywhere in the Lackawanna or Wyoming regions. As was said in Wier's Appeal, 74 Pa. St. 230, and repeated in Dillworth's Appeal, 91 Pa. St. 247, the great difficulty in all cases of this character is not in the ascertainment of the true rule of equity, but in the application of that rule to the facts. While it may be easy to draw the line between what is and what is

not a nuisance which equity ought to enjoin, it is by no means so easy to determine whether the circumstances of any particular case ought to place it on one side or the other of that line. It is rare that any number of men will be found to agree upon such a question. This, however, is only a rule to continue a preliminary injunction. The affidavits filed by way of answer are clear, positive, and unequivocal denials of the material allegations of plaintiffs' bill. The officers of the company know best to what uses it is intended to put the structure complained of; and, if their testimony be true,—as I must accept it to be in the absence of evidence to the contrary,—the uses to which they will put the building will be harmless and legitimate. If, on final hearing, the contrary be shown, or if, at any time, the building be put to such a use as will constitute a nuisance, they can still be enjoined. At this stage of the case, in the light of the testimony before me, I see no reason why the defendants should be restrained from completing the building, which is already nearly finished, or from storing blasting powder, of the character, and packed in the manner, described in defendant's affidavits, therein. The rule is discharged, and the injunction heretofore granted is dissolved."

John P. Kelly, Dist. Atty., Joseph O'Brien, and John R. Jones, for appellants. W. W. Watson and James W. Oakford, for appellee.

PER CURIAM. This is an injunction bill. The motion for a preliminary injunction was heard on affidavits, and upon the case as presented to him at the hearing of the motion the learned judge refused it. Upon an examination of the affidavits in relation to the character of the powder to be stored, and the existence of other storehouses of the same kind in the same borough, we are not prepared to say that his action was erroneous. At the final hearing, when all the facts are developed, the question can be more intelligently disposed of than is possible at present. The order is affirmed.

(160 Pa. St. 511)

LINN et al. v. BOROUGH OF CHAMBERSBURG.

(Supreme Court of Pennsylvania. March 26, 1894.)

MUNICIPAL CORPORATIONS—SUPPLYING ELECTRICITY—FEES OF MASTER.

1. An act authorizing municipal corporations to manufacture and supply electricity at reasonable rates to the inhabitants violates no constitutional provision, this being a public service.

2. In the absence of any evidence showing that a master's fee, sanctioned by the court, was excessive, it will not be disturbed.

Appeal from court of common pleas, Franklin county; John Stewart, Judge.

Suit by S. M. Linn and others against the burgess and town council of the borough or

Chambersburg. From a decree for defendant, plaintiffs appeal. Affirmed.

The report of the master, William Alexander, Esq., and the opinion of the court below, were as follows:

"Master's Report.

"Finding of Facts.

"First. It is admitted that all the plaintiffs in this case are taxpayers of the borough of Chambersburg, and that all except Augustus Duncan and Benjamin C. Ross are citizens resident in the said borough.

"Second. The defendant in this proceeding is the burgess and town council of the borough of Chambersburg, a municipal corporation incorporated into a borough by an act of the general assembly of Pennsylvania, passed, and approved the 21st day of March, A. D. 1803, and by the said act of incorporation the limits and boundaries of the said borough were particularly set forth, and it was enacted: 'That from and after the first Monday in May (1803) the burgess and town council duly elected and their successors shall be one body politic and corporate in law, by the name and style of the Burgess and Town Council of the Borough of Chambersburg and shall have perpetual succession. And the said burgess and town council aforesaid and their successors, shall be capable in law, to have, get, receive, hold, and possess goods and chattels, lands and tenements, rents, liberties, jurisdictions, franchises and hereditaments, to them and to their successors in fee simple or otherwise, not exceeding the yearly value of five thousand dollars, and also to give, grant, sell, let and assign, the same lands, tenements, hereditaments and rents, and by the name and style aforesaid, they shall be capable in law to sue and be sued, plead and to be impleaded, in any of the courts of law in this commonwealth, in all manner of actions whatsoever, and to have and use one common seal, and the same from time to time at their will to change and alter.' See section 3. Also: 'That it shall and may be lawful for the town council to meet as often as occasion may require, and enact such by-laws, and make such rules, regulations and ordinances as shall be determined by a majority of them necessary, to promote the peace, good order, benefit and advantage of said borough, particularly by providing for the regulation of the market, streets, alleys and highways therein; they shall have power to assess, apportion and appropriate such taxes as shall be determined by a majority of them necessary for carrying the said rules and ordinances from time to time into complete effect; * * * provided, that no by-law, rule or ordinance of the said corporation shall be repugnant to the constitution or laws of the United States or of this commonwealth. * * * Provided also, that no tax shall be laid in any one year, on the valuation of taxable property exceeding one

cent in the dollar, unless some object of general utility shall be thought necessary, in which case a majority of the freeholders of said borough in writing under their hands, shall approve of and certify the same to the town council, who shall proceed to assess the same accordingly.' See section 6.

"Third. The said borough of Chambersburg has continued to hold and exercise the rights and privileges and perform the duties granted and imposed upon it as a body politic or municipal corporation from the date of its incorporation until the present time, under its original charter and the acts of the general assembly of Pennsylvania since passed in relation thereto.

"Fourth. Since the early part of the year 1890, at the date of the filing of the bill in this case, March 22, 1892, and at the present time, the said borough of Chambersburg owns, controls, and operates an electric light plant for the purpose of providing an ample supply of light for its streets, public buildings, and grounds; and a short time prior to the filing of this bill, to wit, about December 7, 1891, the said borough made some additions to the engine, dynamos, and other machinery about the plant, and since that date it has been supplying a number of the inhabitants of the borough with electricity for the purpose of lighting their stores and places of business, and it has charged and received certain fixed charges and prices for the said supply of electricity and light.

"Fifth. The capacity of the said plant as used and operated for street-lighting purposes, prior to the additions above referred to, was sufficient for the supply of seventy arc lights of 2,000 candle power each, and this entire number of lights was used in lighting the streets and public buildings of the borough.

"Sixth. The additions and improvements made to the plant prior to the filing of the bill in this case, and within a short time thereafter, consisted of the following items: Conversion of the single-cylinder engine into a compound cylinder, and necessary pulleys and shafting, and the erection of a new stack to the boiler, at a cost of \$698; the erection of a commercial circuit, for wires, poles, brackets, insulators, etc., and labor, at a cost of about \$200; the purchase of thirty or forty arc lamps, at a cost of from \$1,200 to \$1,600; the purchase of a fifty arc light dynamo, at a cost of \$2,375. These additions and improvements were made by the borough for the purpose of increasing the capacity of the plant, so as to be able to supply electricity to the inhabitants of the borough for lighting purposes in their stores and dwellings, at fixed charges and prices, and the said borough has been furnishing, and still is supplying, the said citizens with electricity for lighting purposes as aforesaid. Prior to March 22, 1892, seven arc lamps were in use by citizens of the borough, and since that date the number has been in-

creased until at least thirty arc lamps of 2,000 candle power are now in use by sundry citizens of the said borough, and the same are furnished with electricity by the borough at rates and prices fixed by the burgess and town council of the borough of Chambersburg by ordinance."

(Seventh finding sets out the act of assembly of May 20, 1891.)

"Eighth. In accordance with the provisions of section 2 of the said act of May 20, 1891, and in the manner provided by the act of April 20, 1874, and the amendment thereto, passed June 9, 1891, the said borough, on the 7th day of December, 1891, at a regular meeting of the burgess and town council of the said borough, signified its desire, by a majority vote of the said town council, to make an increase of indebtedness of the said borough in the sum of \$10,000 for the purpose of increasing the electric light plant to furnish the citizens with commercial light and electricity, and to submit to the vote of the qualified electors of the borough the question as to the said increase of indebtedness at the election to be held in February, 1892. And the said burgess and town council of the said borough gave notice to the qualified electors of the said borough, by weekly advertisement in three newspapers published in said borough, for thirty days prior to the 16th day of February, 1892, setting forth the action of the said town council, and that an election would be held at the places of holding the municipal elections in said municipality on the 16th day of February, 1892 (Tuesday), between the hours of 7 a. m. and 7 p. m. of said day, for the purpose of obtaining the assent of the electors thereof to such increase of indebtedness; and the said notice contained a statement of the amount of the last assessed valuation of property, the amount of the then existing debt, the amount and percentage of the proposed increase, and the purpose for which the indebtedness was to be increased, the form of the ballot and method of voting, and the particular places for voting in the several wards.

"Ninth. The said election, as specified in the said notice, was duly held on the 16th day of February, 1892, and resulted in favor of the increase of the debt of the said borough in the sum of \$10,000, for the purpose specified in the said notice. The return of the said election was duly certified, and, with a certified copy of the action of councils and the advertisement, it was made a record of the court of quarter sessions of Franklin county, and a certified copy of the record as aforesaid delivered by the clerk of the said court to the corporate authorities, and by them entered upon the minutes of the said corporation.

"Tenth. By virtue of the authority thus conferred upon them, the burgess and town council of the said borough proceeded to increase the indebtedness of the said borough

in the sum of \$10,000 for the purpose of enlarging and extending the electric light plant of the said borough, and passed an ordinance on the 3d day of March, 1892, entitled 'An ordinance relating to the supply of incandescent and arc lighting and electricity, by the borough of Chambersburg, Pa.' This ordinance provides for contracts to be entered into by the borough with each individual citizen desiring the use of electricity for lighting purposes in stores, dwellings, churches, fairs, festivals, and other places, and prescribes the duties of the borough on the one part, and the purchaser or consumer on the other part, and fixes the rates and prices to be charged by the borough for the supply of electricity, by arc and incandescent lights, to these persons and places.

"Eleventh. In furtherance of the design and purpose of the burgess and town council of the borough of Chambersburg to increase the capacity and enlarge the electric light plant of the said borough for the supplying of electricity to its inhabitants for lighting purposes, the said authorities, before the date of the filing of the bill in this case, and after the said election held on the 16th day of February, 1892, by letter, through the chairman of the committee on electric light, invited proposals from the Thomson-Houston Electric Light Company, of Philadelphia, the Westinghouse Electric and Manufacturing Company, of Pittsburgh, and the Edison Electric Light Company, of —, and received proposals or bids from the first two companies for the furnishing of a dynamo for incandescent lighting of a capacity for 650 incandescent lamps, and the necessary appliances to operate the same, and the said borough received an incandescent dynamo of the capacity indicated, with appliances, from the Thomson-Houston Company, but have never consummated the purchase, or put the same in operation, owing to the filing of the bill in this case. The said borough also entered into a contract with the Taylor Engine Company for the purchase of an engine and boilers and necessary appliances, at a cost of \$5,839, for the purpose of supplying additional motive power to meet the increased demand for power in running the commercial lighting. This contract was entered into before the bill in this case was filed, and after February 16, 1892, and without inviting bids for the same or advertising for proposals, but the engine, etc., have never been delivered, on account of the filing of the bill in this case. The said borough, during the same period, advertised for and received bids for the necessary changes in the building and brick stack, but never entered into contract for the same on account of the filing of the bill in this case.

* * * * *

"Fourteenth. The bonds provided for by the action of the burgess and town council of the borough of Chambersburg and the election of February 16, 1892, for the increase

of the indebtedness of the borough in the sum of \$10,000 were never issued by the said municipality, the action in reference thereto being delayed by the filing of the bill in this case.

* * * * *

"Nineteenth. On the 20th day of April, 1892, at the date the burgess and town council of the said borough of Chambersburg provided for the issuing of the bonds of the said borough in the sum of \$10,000 for the purpose of enlarging the electric light plant, the said burgess and town council passed the following resolution: 'Resolved that, in order to provide for the payment of the interest and principal of said bonds, that an annual tax equal to at least eight per centum of the amount of said increased debt be levied and assessed, to be applied exclusively to the payment of the interest and principal of said indebtedness;' and on the 23d day of May, 1892, the said burgess and town council fixed the tax levy for the year commencing June 1, 1892, at four mills on the dollar for borough purposes, and five mills on the dollar for the payment of interest and the liquidation of the principal of bonds.

* * * * *

"Conclusions of Law.

* * * * *

"Second. The act of the general assembly of May 20, 1891, and the action of the burgess and town council of the borough of Chambersburg in pursuance thereof, are not in violation of section 7, art. 9, of the constitution of Pennsylvania, and the said section of the constitution does not, in letter or spirit and meaning, restrain or prohibit the legislation and action above referred to.

"Third. The proposed enlargement of the electric light plant of the borough of Chambersburg, as set forth in the findings of facts, for the purpose of manufacturing and furnishing electricity for lighting purposes to all the inhabitants of said borough who may desire to use the same, at fixed and uniform rates and charges established by ordinance of said borough, the said plant to be owned and operated by the said borough, constitutes a public service, of benefit and convenience to all the inhabitants of the said borough.

"Fourth. The legislature of the state of Pennsylvania has authority to confer the power upon municipalities of manufacturing and distributing electricity for the purpose of furnishing light to their inhabitants for private use, and it has conferred such power upon the borough of Chambersburg by act of May 20, 1891.

* * * * *

"Seventh. The burgess and town council of the borough of Chambersburg have a lawful right to issue the bonds of the borough in the sum of \$10,000 for the purpose of raising money wherewith to erect and enlarge the present electric light plant of the said bor-

ough for the purpose of supplying electricity for commercial purposes.

"Eighth. The said burgess and town council of the borough of Chambersburg have a lawful right to enlarge the electric light plant of the said borough, to issue bonds in the sum of \$10,000 to provide for the expense incurred, and to furnish electricity for lighting purposes for private use; and the plaintiffs are not entitled to any relief against said acts of the said municipality. It is therefore recommended that the bill of the said plaintiffs be dismissed at the cost of the said plaintiffs."

"Opinion and Decree of Court.

"The purpose of this bill is to restrain the borough of Chambersburg from engaging in the manufacture of electricity for the supply and use of its citizens. The effort is made on two distinct grounds: First, that the act of 20th May, 1891, entitled 'An act to authorize any borough now incorporated, or that may hereafter be incorporated, to manufacture electricity for commercial purposes for the use of the inhabitants of said borough, and for this purpose to erect, purchase or condemn electric light plants,' etc., under which the defendants claim to exercise this right, is unconstitutional, and therefore void; second, that the debt proposed to be incurred by the borough, or which it will necessarily incur, for the purpose aforesaid, will increase the indebtedness of the borough to an amount in excess of the constitutional limit of seven per cent. of the assessed valuation of the taxable property. In both contentions the conclusions of the master are adverse to the plaintiffs, and they except thereto. The exceptions which relate to the constitutionality of the act of 20th May, 1891, are overruled. It is sufficient to say, in this connection, that our attention has not been called to any exception or prohibition in the constitution with which the act conflicts, and that we know of none. Nor can the exceptions to the master's conclusions with respect to the indebtedness of the borough be sustained. It is immaterial whether occupations be regarded as taxable property, within the meaning of the constitution, or not, so far as the result here is concerned. Eliminate entirely from the calculation the tax assessed upon occupations, and seven per centum of the assessed valuation of what remains makes a total which exceeds, by several thousand dollars, the debt of the borough at the time referred to. But there is no reason why this tax should be eliminated. Indeed, there is express authority for including it in the calculation. This very point was raised and decided in the case of *Brown's Appeal*, 111 Pa. St. 80, 2 Atl. 77, and it now admits of no controversy.

"We have considered the exceptions to the costs taxed, but are unable to see any good reason why the bill as taxed should not be allowed. The master's work was protracted, and he has given to it careful study and at-

tention. All the exceptions to the report are overruled, and it is now, 27th January, 1893, ordered, adjudged, and decreed that the bill of complaint be dismissed, and that the plaintiffs, S. M. Linn, H. Gehr, Aug. Duncan, Benjamin C. Ross, Frank Lindsay, Isaac Stine, and Tench McDowell, pay all the costs of this proceeding."

O. C. Bowers, for appellants. J. D. Ludwig, for appellee.

PER CURIAM. This bill was brought to restrain the borough of Chambersburg from manufacturing and supplying electricity for the use and benefit of its inhabitants under the provisions of the act of May 20, 1891 (P. L. 90). It is grounded mainly on allegations which, in substance, are (1) that said act is unconstitutional, and (2) that the debt, which would necessarily be incurred by the borough in carrying into effect its proposed undertaking, will increase its indebtedness to an amount in excess of the constitutional limit of 7 per centum of the assessed valuation of taxable property within the corporate limits. As to both of these allegations the learned master's findings of fact and legal conclusions are in defendant's favor. The first five specifications charge error in overruling the several exceptions to the master's conclusions of law recited therein, respectively. For reasons sufficiently stated in the report and in the opinion of the learned president of the common pleas, approving the same, we think there was no error in refusing to sustain either of said exceptions. The burden was on the plaintiffs to prove that the indebtedness of the borough would be necessarily increased to an amount exceeding the constitutional limit, etc. In that they were unsuccessful. While the legislative intention may not be as clearly and happily expressed as it might have been, we fail to discover anything in the provisions of the act that is in conflict with the constitution. The power of the legislature to authorize municipal corporations to supply gas and water for municipal purposes, and for the use and benefit of such of their inhabitants as wish to use and are willing to pay therefor at reasonable rates, has never been seriously questioned. In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied? It is a mistake to assume that municipal corporations should not keep abreast with the progress and improvements of the age.

The subjects of complaint in the remaining specifications are the learned judge's refusal to reduce the master's fee, and the decree dismissing the bill. As to the former, he says: "We are unable to see any good reason

why the bill as taxed should not be allowed. The master's work was protracted, and he has given it careful study and attention." In the absence of any evidence that would justify us in saying that the fee is clearly excessive we must assume that the compensation sanctioned by the court was not unreasonable. The decree dismissing the bill is the logical sequence of the facts and legal conclusions properly drawn therefrom. The questions involved are so well considered and so satisfactorily disposed of by the learned master and court below, that further comment is unnecessary. Decree affirmed, and appeal dismissed, with costs to be paid by appellants.

(160 Pa. St. 532)

HAGY et al. v. POIKE et al.
(Supreme Court of Pennsylvania. March 26, 1894.)

FRAUDULENT JUDGMENT—QUESTION FOR JURY.

Where a judgment by confession is attacked as fraudulent as to other creditors of the judgment debtor, and the evidence merely tends to prove circumstances of suspicion, an issue is properly refused.

Appeal from court of common pleas, Northampton county; W. W. Schuyler, Judge.

Petition by Robert Slimmons & Co. and H. O'Donnell, executor, judgment creditors of Fred A. Poike, to require the sheriff to pay into court the proceeds of the sale of goods sold under executions issued on their judgment and on a judgment by confession in favor of Hagy & Bittner against Fred A. Poike, and for an issue, on the ground that such judgment by confession was fraudulent as to Poike's creditors. From a judgment dismissing the petition and refusing an issue, petitioners appeal. Affirmed.

Wm. C. Shipman and M. Kirkpatrick, for appellants. Orrin Serfass, for appellees.

PER CURIAM. We have carefully considered the evidence bearing on the questions involved in the several specifications. In this case, and are not convinced that the learned judge erred in refusing the issue prayed for by appellants. While there is some testimony tending to prove circumstances of suspicion, there is not sufficient evidence of the alleged fraudulent acts to warrant the court in sending an issue to a jury. Alleged fraud must be established either by direct proof or by clearly proved facts sufficient to warrant a presumption of its existence. It is not enough to charge fraud, and prove, in support thereof, slight circumstances of suspicion only. *Jones v. Lewis*, 148 Pa. St. 234, 23 Atl. 985. To the same effect are *Mead v. Conroe*, 113 Pa. St. 220, 8 Atl. 374, and *Morton v. Weaver*, 99 Pa. St. 47. As a general rule, an issue should never be awarded on evidence so slight and insufficient that, in case a verdict should be rendered thereon in favor of

the petitioner, the trial judge would be bound to set it aside. We cannot, therefore, say there was error in dismissing the petition. Decree affirmed and appeal dismissed, with costs to be paid by Slimmons & Co. et al., appellants.

(160 Pa. St. 506)

IN RE MINTON'S ESTATE.

Appeal of ROUSE et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

BEQUEST OF FUND FOR LIFE — RIGHT TO PART OF PRINCIPAL — EFFECT — DISTRIBUTION OF RESIDUARY ESTATE.

1. The bequest of a fund to a trustee, to invest and pay the interest to a beneficiary during his life, with a right to pay such portion of the principal as might be necessary in case, from sickness or misfortune, the interest should be insufficient, with a limitation over of the principal on his death, is not an absolute gift of the whole fund to the beneficiary.

2. Where certain residuary legatees were omitted from a partial distribution, of which they had no knowledge, it was proper, on a later distribution, to award them enough to make up their proportionate distributive shares of both funds.

Appeal from orphans' court, Monroe county; John B. Storm, Judge.

Appeal by Sarah Rouse and others from a decree of the orphans' court in the matter of the distribution of the fund in the hands of the testamentary trustee of John Minton. Affirmed.

S. S. Shafer and S. Holmes, for appellants. Gearhart & Erdman, for appellees.

GREEN, J. The will of Eve Yetter contains two residuary clauses. One is the clause which gives the fund of \$3,000 bequeathed, to a trustee for John Minton, or the remainder of it left at his death, "to be divided equally, share and share alike, to or among my brothers and sisters, or their lineal heirs;" and the other is the general residuary clause at the end of the will, in these words: "I further order and direct the rest and residue of my worldly goods to be equally divided among my brothers and sisters, or their lineal heirs." The same persons, precisely, take both the remainder of the trust fund and the general residue of the estate, and the identity of their interests prevents any issue arising from the circumstances that the two funds are of separate origin. It is conceded, as it must be, that, the fund for distribution being personalty, the brothers of the half blood, and their descendants, take equally with those of the whole blood, and their descendants.

Some contention is made that the legacy of the trust is to be treated as an absolute gift of the whole fund. But this position is entirely untenable. The legacy is not a

gift of the fund for life, directly to the legatee, with the right to use the same, or to dispose of it, but a legacy expressly to a trustee, who is to invest the same, and pay over the interest to the legatee during his life, with a right in the trustee to pay such portion of the principal as may be necessary in case, from sickness or misfortune, the interest should be insufficient to supply the wants or needs of the cestui que trust. There is no power of appointment or disposition conferred either upon the beneficiary or the trustee, but an express limitation over of the principal of the fund on the death of the beneficiary to other persons specifically named. There is no question that the interest of John Minton was merely a life interest in the income of the fund, and of so much of the principal as might be necessary for his support. The question is directly ruled by the line of cases of which Meyer's Appeal, 49 Pa. St. 111; Eichelberger's Estate, 135 Pa. St. 160, 19 Atl. 1006, 1014; and Dull's Estate, 137 Pa. St. 112, 20 Atl. 418, — are examples. The last of these cases was almost precisely similar to this, as the legatee was to receive only the interest of the fund, but the principal might be used, if necessary for his support.

The only remaining question is whether the relations of the half blood, not having received any part of the first two distributions, may be equalized with those of the whole blood, who took all of those distributions. This question, also, is entirely free from doubt. In Grim's Appeal, 109 Pa. St. 391, 1 Atl. 212, we held that where, on a partial distribution of an intestate's estate, one of the distributees does not appear, and the entire fund for distribution is awarded to those who do appear and make claim, the inequality will be corrected, on a subsequent distribution of other funds belonging to the decedent's estate, by awarding to the one who received nothing on the first distribution enough to make up his proportionate distributive share of both funds; if the second fund is insufficient to make him equal with the distributees of the first fund, the whole of the second fund will be awarded to him. The rule is so manifestly just and equitable that it needs no vindication, and it is not necessary to repeat the reasoning of Mr. Justice Gordon in the opinion delivered by him in the last case. The fact that the appellees, who are of the half blood, were omitted from the former distributions, constitutes no reason why they should not have now what they would certainly have received then, if they had had knowledge of the distributions, and had participated in them. The ruling in Grim's Appeal was repeated in Grim's Estate, 147 Pa. St. 190, 23 Atl. 803. The decree of the court below is affirmed, at the cost of the appellants.

(180 Pa. St. 433)

WILSON et al. v. OTT et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

WILLS — REVOCATION BY BIRTH OF SON — CONSTRUCTION — MORTGAGE FORECLOSURE — PARTIAL FAILURE OF CONSIDERATION.

1. A testator devised land to his daughters for life, with remainder to their children in fee simple, and part of the land was set off to one daughter and her children, all sons. One of her sons died, leaving a widow, to whom he devised all his land, and a posthumous child, who afterwards died, unmarried and without issue. *Held*, that the one-third interest in remainder of the deceased son descended to his posthumous child, subject to the dower of the widow, and that on the death of the posthumous child his interest passed to his father's brothers, as heirs of the blood of the ancestor from whom the estate came.

2. A will in favor of testator's wife was revoked by the birth of a posthumous child.

3. Where a widow was entitled to dower, subject to an outstanding life estate, and, under a mistake of law, shared by the grantees, executed a deed purporting to convey an interest in remainder in fee simple, and took back a mortgage for the purchase price, to be paid on the termination of the life estate, she was entitled to recover such sum as represented the relative value of her dower interest to that of the remainder in fee.

Appeal from court of common pleas, Delaware county.

Scire facias by William F. Wilson and another, as executors of Mary E. Wilson, late Mary E. T. Ott, against Jacob Ott and another. From a judgment for defendants, said executors appeal. Reversed.

O. B. Dickinson, Henry M. Tracy, James M. Beck, and William F. Harrity, for appellants. V. Gilpin Robinson and A. Lewis Smith, for appellees.

WILLIAMS, J. The mortgage on which the writ of scire facias in this case issued was given to secure the purchase money agreed to be paid for a one-third interest in a mill property in Philadelphia. It appears that Dennis Kelley, by his last will and testament, devised certain real estate to his daughters for life, with remainder to their children in fee simple. By proceedings in partition the mill property was set off to one of his daughters, Mary T. Ott, and her children. She had three sons,—Joseph A. C. Ott, Jacob Ott, and Jeremiah J. Ott. In 1867, Joseph A. C. Ott died, leaving to survive him a widow, Mary E. T., and a son, Joseph A., who was born after his death. By his will he devised all his estate absolutely to his widow. His son, Joseph A., died at the age of 10 years, unmarried and without issue, in 1877. In 1879 the surviving brothers of Joseph A. C. Ott bought the interest of their deceased brother in the mill. Their mother, who was still living, held a life interest estate in the property. The question to be settled when they decided to buy was, in whom is the title of Joseph A. C. Ott vested? It seems to have been assumed by all parties that the death of the posthumous

son in the lifetime of the life tenant under the will of Dennis Kelley left the will of Joseph A. C. Ott in full force, so that his widow took a fee simple under it, or that if the birth of his son, after the death of Joseph A. C. Ott, revoked his will, so that the remainder in fee vested in the son, then, upon his death, his mother took as his heir at law. Upon this theory she would be the holder of the fee, whether she took as the devisee of her husband or the heir at law of her son, subject, only, to the life estate of her husband's mother. Counsel was consulted by both parties, the buyers and the seller, and a deed was prepared for execution by the widow of Joseph A. C. Ott, which recited all the facts stated above, and added, as a conclusion drawn from them, these words: "Whereupon the interest in remainder of the said Joseph A. C. Ott, deceased, in said tract of land and premises, became vested in his widow, the above-named Mary E. T. Ott, in fee simple." The purchase money to be paid was \$5,000, which was not to become due until the termination of the life estate by the death of Mary T. Ott, the mother, and was secured by the mortgage now in controversy. When Mary T. Ott died, proceedings were begun for the collection of the mortgage, in accordance with its terms, and the scire facias in this case issued. The defense set up is that it was given under a misapprehension, not of the facts, but of their legal effect, and that for this reason the defendants should be relieved from the payment of it. The defendants say that, as they now understand the law to be, the estate of the minor son of Joseph A. C. Ott, their brother, descended, at his death, upon them as his heirs at law of the blood of the ancestor from whom the estate came, and not upon his mother; and they therefore bought from Mary E. T. Ott what they at the time owned in fee, and gave the mortgage to secure the price of property she did not own, and could not sell to them. This is no doubt true, upon the facts as they are now presented, except that she held an estate in dower which did pass to the purchasers by her deed. Her husband's estate in fee was in remainder after the life estate of his mother. When he died, his will was subject to revocation by the birth of a child, after his decease, capable of taking as his heir at law. This event took place, and as to his real estate he became intestate. His real estate passed to his son, born after his death, subject to the dower interest of his widow under our intestate laws. This interest or estate was postponed, as to its enjoyment, until the termination of the life estate of her husband's mother. It was impossible for the purchasers of the mill to secure a marketable title without acquiring this estate in dower, and it had a value, for the amount of which the defendants ought to pay, whatever may be said about their right to be re-

lieved from the remainder of the mortgage. The judgment must be reversed for this reason, if for no other. The learned judge told the jury that "the grantor had no title, and the purchasers were buying what they already owned." This may be true as to the remainder in fee after the life estate of Mary T. Ott, the mother, but it is not true as to the estate in dower of Mary E. T. Ott, the widow of Joseph A. C. Ott. When the purchase was made, this was an estate outstanding, which would have affected the marketable quality of the title materially. Its value is not to be determined in view of her subsequent death before the termination of the life estate of her husband's mother, but in view of the situation existing at the date of her deed to the defendants. It is also well to say that this is not the case of a "failure of title," in the sense in which those words are ordinarily used when speaking of the right of a disappointed purchaser to defend against the payment of purchase money. The title has not failed. There has been no ouster or eviction from any portion of the mill property. No hostile title has been asserted to it, or any part of it. It is the case of a mistake in the law as to the effect of facts which all parties to the transaction thoroughly understood, and which are fully recited on the face of the conveyance. We do not say that such a mistake will not afford a ground of defense to the mortgage. Under the view taken of the case by the learned judge of the court below, that question is not before us. What we do say is that the plaintiff is, in any event, entitled to recover such a sum as shall fairly represent the relative value of her dower interest to that of the remainder in fee, which passed from her son to the defendants. The judgment is reversed, and a venire facias de novo awarded.

(160 Pa. St. 408)

WHEELER v. REAL-ESTATE TITLE INS. & TRUST CO. OF PHILADELPHIA.

(Supreme Court of Pennsylvania. March 26, 1894.)

INSURANCE—AGAINST LIENS ON REALTY—FUTURE LIENS.

A policy on a mortgage against loss by defects or unmarketableness of the title or mortgage interest, or because of liens or incumbrances charging the same at date of policy, "saving defects" or objections to title "which do or may now exist," including "unmarketability by reason of the possibility of mechanics' liens and municipal liens," but not "actual losses by reason of such liens," insures only against liens the rights to which are already inchoate at the date of the policy.

Appeal from court of common pleas, Philadelphia county; Bregy, Judge.

Action by Susan Farnum Wheeler against the Real-Estate Title Insurance & Trust Company of Philadelphia on a policy of insurance. Judgment for plaintiff. Defendant appeals. Reversed.

v.28A.no.14—54

Emil Rosenberger and John G. Johnson, for appellant. C. Berkeley Taylor, for appellee.

MITCHELL, J. The policy was upon a mortgage, and the covenant in it was to indemnify the holder against "all loss * * * by reason of defects or unmarketableness of the title to the estate or interest insured, * * * or because of liens or incumbrances charging the same at the date of this policy." A building was then in process of erection on the mortgaged premises, and is so set forth in the policy. While it was in progress, and for six months afterwards, the possibility of the filing of mechanics' liens, which would relate back to the commencement of the building, and thus antedate the mortgage, created a twofold danger: First, it was a defect in the title which might make it unmarketable as a first incumbrance, and, if the holder was compelled to sell it, he could only do so at a loss; and, secondly, in case of a sale of the property, the mechanics' liens would have priority in the distribution of the proceeds, and the mortgage might have to bear a deficiency. The covenant already quoted insured against both these losses, but, as the insurer was not willing to undertake the indefinite liability of the first, a clause was added, "saving the defects, liens, or incumbrances excepted in Schedule B." This was clearly a restriction of the liability previously assumed, and was not intended to create any new liability of its own. Turning to Schedule B, we find that it sets out "defects or objections to title, and liens, charges, and incumbrances thereon, which do or may now exist, and against which the company does not agree to insure;" and, first, "unmarketability by reason of the possibility of mechanics' and municipal liens is excepted from insurance." Possibility of liens, to affect marketability, must, of course, be a present possibility. A future possibility of liens can never be escaped in any case, and therefore cannot make a title unmarketable. But "actual losses by reason of such liens * * * are insured against," and "such liens" are those already referred to, those having a present possibility. The meaning of this language does not admit of doubt. The main covenant includes several classes of liabilities. Schedule B excepts one class,—unmarketability by reason of possibility of liens,—but, by an exception to the exception, prevents the exclusion of actual losses by such liens; that is, should a mechanic's lien intervene, the insurer will not indemnify for the loss from the unmarketability of the mortgage thereby caused, but will make good any actual loss, such as the deficiency of the fund to satisfy the mortgage after payment of the lien. The general intent and effect of the whole policy were to insure the mortgage as a valid security both as to title and incumbrances. As to title, all defects were included, except the one of unmarket-

ability by reason of possibility of liens. As to liens or incumbrances, only those were included which come under either—First, the main covenant (those actually charging the property at the date of the policy); or, secondly, under Schedule B, mechanics' or municipal claims "which do or may now exist" at the same date, to wit, inchoate mechanics' liens, which, though not yet in actual existence, may, within six months of the completion of the building, spring up, and acquire an existence as of a date prior to the policy. Not until, by the lapse of time, the danger of such liens should be passed, would the mortgage be secure as a first incumbrance. Before so secure, there was the danger, not only of mechanics', but also of municipal, liens intervening. The latter were therefore classed with the former, and actual loss by reason of either was insured against. But there is no covenant or language indicating any intent to go beyond that limit of time, and to assume a general liability to indemnify against possible future incumbrances, municipal or other. The policy was executed in 1888. The municipal work for which the claims in question were filed was not done till 1891. Such claims were neither a charge on the property at the date of the policy, nor became so within the period provided for in Schedule B. They were not within the policy at all, and created no cause of action under it. Judgment reversed.

(160 Pa. St. 553)

LINCK v. MacMILLAN.

(Supreme Court of Pennsylvania. March 28, 1894.)

RELEASE—CONSIDERATION—POWER OF AGENT.

In an action on a note against the indorser, defendant set up a release by plaintiff on receipt, from the maker, of certain horses in payment. Plaintiff denied the release, and contended that he took the horses only as collateral. *Held*, that it was proper to refuse a charge asked by plaintiff, that if the horses were not the maker's property when he transferred them to plaintiff, and defendant knew it, plaintiff should recover, since the maker might not own the horses, and yet have the power to pledge them.

Appeal from court of common pleas, Lycoming county.

Action by J. H. Linck against Malcolm MacMillan on a promissory note. Judgment for defendant. Plaintiff appeals. Affirmed.

On March 4, 1889, A. P. Sallade, being indebted to defendant, MacMillan, gave him his promissory note, signed, "A. P. Sallade, Agent." MacMillan, being indebted to Linck, indorsed Sallade's note, and gave it to Linck in payment. The note was not met at maturity, was duly protested, and on March 28, 1891, this suit was brought to recover the amount of it. After the maturity of the note, and before this suit was brought, MacMillan had sued Sallade before an alderman of the city of Williamsport, obtained judgment for \$184.29, issued execution, and levied upon

certain horses then in the possession of Sallade. MacMillan claims that while this levy was still in force, he put his judgment against Sallade under the control of Linck, who first continued the sale of the horses levied upon, finally took from Sallade a bill of sale for them, and at the same time released him (MacMillan). This release was the defense relied upon in the present action. Sallade's note was left in the possession of Linck. Linck, admitting that he took a bill of sale for the horses, claims that he entered into this attempt to hold Sallade merely in order to accommodate MacMillan, that the bill of sale was taken by him as security only, and denies that MacMillan was released. The evidence shows that Sallade was in possession of the horses in question as agent of John Group, who afterwards took them outside of Pennsylvania, and sold them. Linck further contends that Sallade being a bailee of the horses, with no authority to sell or pledge them, a bill of sale from him was of no value, and would not support a release. At the time Sallade made the bill of sale in question, the horses were either left in his possession, or immediately returned to him. When they were sold by Group, Linck received no part of the proceeds. Plaintiff, *inter alia*, asked the court to charge: "Third. If the jury believe the horses were not the property of A. P. Sallade at the time of the alleged transfer to the plaintiff, their verdict must be for the plaintiff. Fourth. If the jury believe the horses were not the property of A. P. Sallade at the time of the alleged transfer to the plaintiff, and that the defendant had knowledge thereof, their verdict must be for the plaintiff."

B. S. Bentley and Max L. Mitchell, for appellant. Chas. J. Reilly, for appellee.

PER CURIAM. This case depended on questions of fact which were clearly for the consideration of the jury, and it appears to have been submitted to them with instructions which were warranted by the testimony. The only errors assigned are the learned judge's answers to plaintiff's third and fourth points for charge. In substance, said answers were that the facts of which said points are predicated would not, alone, be sufficient to prevent a recovery, because, although the horses might not be the property of Sallade, yet he might have control of them, and be able to pledge them; and, if the jury were satisfied he had such power, the points would not be good. But if the horses were not the property of Sallade, and plaintiff was imposed on by any misrepresentation, or his want of information was taken advantage of in any way, this would be such a fraud as would prevent the defense set up from being successful. "It all depends upon the power of Sallade to make the transfer." The verdict for defendant necessarily implies a finding by the jury that, as a

matter of fact, Sallade was authorized to make the transfer. That finding of fact was not unwarranted by the testimony. There is nothing in either of the specifications of error that requires a reversal of the judgment. Judgment affirmed.

(160 Pa. St. 480)

WELLS v. BUNNELL.

(Supreme Court of Pennsylvania. March 26, 1894.)

JUDGMENT AGAINST MARRIED WOMAN—DIVESTING RIGHTS OF HUSBAND—FRAUD.

Where land of a married woman was sold at sheriff's sale on a judgment entered on a judgment note given by her for bona fide indebtedness, the inchoate marital rights of her husband in the land were extinguished, though the purchaser at the sale was the assignee of the judgment, and had taken the assignment subject to an agreement to bring the land to sale, and, if he became the purchaser, to pay the amount of the judgment to his assignor and the balance to the wife.

Appeal from court of common pleas, Wyoming county; John A. Sittser, Judge.

Action of ejectment by E. H. Wells against F. O. Bunnell. Judgment for plaintiff. Defendant appeals. Affirmed.

Chas. E. Terry and E. J. Jorden, for appellant. Chas. B. Staples, James W. Platt, and W. E. & C. A. Little, for appellee.

WILLIAMS, J. This is an action of ejectment by a sheriff's vendee to recover possession of a dwelling house and lot sold as the property of Martha H. Bunnell. She makes no defense, but her husband, F. C. Bunnell, who is in possession of the property, defends on the ground that the sheriff's sale, under which the plaintiff claims, was a device to deprive him of his marital rights in the property of his wife. The facts that led up to this suit are as follows: The defendant, F. C. Bunnell, was formerly the owner of the property. He failed in business, and in 1889 made an assignment of all his property, real and personal, for the benefit of his creditors. In 1890, Mrs. Bunnell became the purchaser of this and some other pieces of real estate at assignee's sale. Contemporaneously with this purchase, and corresponding in amount with the price she was to pay to the assignee, she gave to her brother, Smith, president of the First National Bank of Stroudsburg, a judgment note for \$11,630, on which judgment was duly entered in Wyoming county, where the lands were. A few weeks later she gave another judgment note, for about \$7,000, on which the Stroudsburg Bank caused judgment to be entered in Monroe county, where the bank was located. The plaintiff, Wells, became the assignee of so much of these judgments

as amounted to \$13,388.43 under an arrangement that he was to bring the real estate of Mrs. Bunnell to sale by the sheriff, and, if he became the purchaser, make sale of it as opportunity offered, pay to the bank the amount of money represented by the assignment to him, and turn what, if anything might be left, over to Mrs. Bunnell. In pursuance of this arrangement he caused the real estate of Mrs. Bunnell to be sold by the sheriff, and became the purchaser. One of the principal pieces of this real estate is the house and lot for which this suit is brought. It is apparent that it will not be possible for Wells to sell it, in pursuance of his arrangement with the bank, unless he can recover the possession. He holds the title in trust for the payment of \$13,388.43 out of its proceeds to the Stroudsburg Bank, and the interest of Mrs. Martha Bunnell is contingent upon his being able to realize from the property a larger sum of money than he is bound to pay to the bank. Now, assuming, as we must do upon the facts before us, that the judgments held by the bank against Mrs. Bunnell were for a bona fide indebtedness, it is very clear that the bank, or the plaintiff, standing in its place, has a perfect right to collect the debt by the sale of Mrs. Bunnell's real estate. If this should operate to destroy the marital rights of her husband in that real estate, it is because a judicial sale upon a valid judgment passes the title of the defendant therein to the purchaser. Nothing short of the payment of the debt can prevent either the sale or its legal consequences. In a large majority of sheriff's sales of real estate the inchoate interest of a wife or husband is extinguished by the sale, but that affords no reason for staying proceedings, or for resisting the title of the sheriff's vendee after a sale has been made. The law will lay its hand upon a fraudulent scheme to deprive the wife of her dower, or the husband of his estate by the curtesy, and will open or stay proceedings upon a judgment confessed without a full, bona fide consideration, to be used to carry such scheme into effect. But an honest judgment, representing an actual indebtedness, binds the estate of the debtor. A sheriff's sale made upon such a judgment carries the title of the defendant to the purchaser, and extinguishes the interest, present and prospective, of the wife or husband of the defendant. This is conclusive of this case. The bona fides of the judgments given by Mrs. Bunnell to the bank being conceded by the defendant, he is left without any ground upon which to stand, and the learned judge of the court below properly instructed the jury to return a verdict against him. The judgment is affirmed.

(160 Pa. St. 427)

FERGUSON v. LAUTERSTEIN.

(Supreme Court of Pennsylvania. March 28, 1894.)

REPLEVIN BY LESSOR OF CHATTELS—SALE ON EXECUTION AGAINST LESSEE—RIGHTS OF PURCHASER.

Where furniture was let upon a bailment for use, with a privilege to buy upon paying the purchase money, and the lessees did not buy or pay the rent, the lessor had the right of possession, and could maintain replevin against the purchaser of the furniture at an execution sale on a judgment against the lessees.

Appeal from court of common pleas, Schuylkill county; Bechtel, Judge.

Action of replevin by P. J. Ferguson against Isidore Lauterstein. Judgment for plaintiff. Defendant appeals. Affirmed.

The defendant claimed title to the furniture in controversy as purchaser at an execution sale on a judgment against Crinnian Bros., the lessees mentioned in the opinion. The provisions of the lease, which also covered the hotel in which the furniture was situated, so far as they related to the furniture, were as follows: "Also, the party of the first part hereby leases all the household furniture now on the premises and being used, and used in the said Ferguson House, at the yearly rental of six per cent. on four thousand one hundred (\$4,100.00) dollars, with the conditions and privileges attached to the said furniture and household goods now on the premises of the party of the second part having the right and privilege of purchasing the same for four thousand one hundred (\$4,100.00) dollars within the term of five (5) years; it being specially agreed upon that all the said furniture is, and to remain, the absolute property of the said party of the first part, until paid for, when a bill of sale, in due form of law, will be made and executed in pursuance of this agreement."

A. W. Schalck, for appellant. S. G. M. Hollopeter and J. H. Pomeroy, for appellee.

GREEN, J. In the case of Harlan v. Harlan, 15 Pa. St. 507, Mr. Justice Rogers, delivering the opinion, said: "It is well settled, as a general principle, that, in Pennsylvania, replevin lies wherever one man claims goods in the possession of another; and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession." In that case we held that a purchaser at sheriff's sale of a mill property could maintain replevin for a piece of machinery, part of the freehold, but detached therefrom by the former owner, although he had never been in possession, and could only make title to the machinery by proving his title to the land. In *Rowe v. Sharp*, 51 Pa. St. 26, we sustained an action of replevin brought by the owner who had let a pair of billiard tables upon a bailment for use, with a provision for sale in case of the payment of the

price, where the bailee had delivered them to another to indemnify him as surety during the continuance of the bailment. The court below had said: "The mere liability of Rowe as bail, and especially if not injured thereby, would not entitle him to hold the property from Sharp, if the terms of the lease had been violated by Goff; nor would his and Fero's subsequent purchase, with this knowledge of the manner in which the other held it, give them any additional or greater right to hold it from the lessee. If the evidence is credited by the jury, the plaintiff is entitled to recover back his property." This was assigned for error, but we held it was correct, and thus sustained the action, and also the proposition that the violation of the terms of the lease by the lessee gave a right of recovery to the lessor from the grantees of the lessee. This case practically covers the present, because the lease was violated by the lessees, by not paying the rent, and this gave a right of recovery in replevin against the lessees, and consequently against their grantee. In *Crist v. Kleber*, 79 Pa. St. 290, we sustained an action of replevin for a piano which had been leased to one with a privilege to purchase at a designated price. The price was not paid, and the piano was sold for taxes owing by the lessee. The action was brought by the lessor against the purchaser at the tax sale, and a recovery was had, which this court affirmed. In *Miller v. Warden*, 111 Pa. St. 300, 2 Atl. 90, we reaffirmed the doctrine of *Harlan v. Harlan*, saying that "the action of replevin lies in Pennsylvania for the property of one person in possession of another, whether the claimant ever had possession of it or not, provided he has the right of possession." In *Ferguson v. Rafferty*, 128 Pa. St. 337, 18 Atl. 484, we held that upon a sale of certain timber to be cut by the vendee, but the vendor to have the right to hold the logs until the purchase money was paid, the vendor had a qualified title, upon which—the purchase money remaining unpaid—he might maintain replevin for logs removed by the vendee, or one claiming under him. We said: "The defendant claimed title to the whole of the logs under a sheriff's sale of the title of D. L. Ferguson, and D. L. Ferguson's title was derived exclusively from the sale made to him by the plaintiff. The defendant, being a purchaser with notice of the plaintiff's claim of title, is in no better position than D. L. Ferguson would have been if he had been the defendant. * * * It seems to us quite plain that as between himself and D. L. Ferguson, or the defendant with notice, he had the right to the possession for the security of the purchase money, and at least a qualified title to the logs. In such circumstances the authorities are plain that there may be a recovery."

The foregoing cases are quite sufficient to sustain a recovery in the present case. The question of the defendant's notice of Fergu-

son's claim of title before he purchased was submitted to the jury by the court below, and found for the plaintiff. The court further held that the furniture was let to the Crinnian Bros. upon a bailment for use, with a privilege to buy upon paying the purchase money (\$4,100), and that if Crinnian Bros. never did buy, nor pay the rent, the plaintiff had the right of possession, as against Crinnian Bros., and therefore against the defendant, claiming under them. We think this a correct interpretation of the law in Pennsylvania, under our decisions; and as Crinnian Bros. never did buy the furniture, nor pay the rent, the plaintiff had the right to have possession, for the protection of his title, both against them and the defendant, claiming under them. Judgment affirmed.

(160 Pa. St. 483)

PLUMMER v. HILLSIDE COAL & IRON CO. et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

MINES—COAL LEASES—ABANDONMENT.

1. A lease of lands for 100 years (possession to extend only to their use as a coal field), the lessee to have full power and possession to search for and raise coal anywhere thereon, and to enter and carry it away, and full enjoyment of the premises as a coal field, in consideration of a certain cash price and the yearly rent of one dollar, works a severance of estate between the surface and the coal stratum, so that possession of the former is not adverse to the latter.

2. The lessee's failure to pay rent or to search for coal for a number of years is not evidence of his abandonment of the lease.

Appeal from court of common pleas, Lackawanna county; Fred W. Gunster, Judge.

Trespass *q. c.* by Emma A. Plummer against the Hillside Coal & Iron Company and the Lackawanna Coal Company, Limited. Judgment for defendants. Plaintiff appeals. Affirmed.

H. M. Hannah, Alexander Farnham, and S. B. Price, for appellant. Jessups & Hand and Willard, Warren & Knapp, for appellees.

WILLIAMS, J. The learned counsel for the appellant states the point in controversy very fairly and clearly in the opening sentence of his printed argument. He says, "The contention in this case is confined to the effect and subsequent history of the Calendar lease dated the 1st of October 1828." His position is that the lease granted only an incorporeal right to the lessee, to be exercised upon the premises covered by the lease. The appellees, on the other hand, contend that it granted the coal in place, under the land, absolutely. The words of the instrument upon which this question depends may be put together thus: "Samuel Calendar * * * doth lease and to farm let to Thomas Merideth * * * all the land that he now holds, * * * and the

lease is to continue for the term of one hundred years from this day. Possession of the leased premises shall extend only to their use as a coal field. The lessee shall have full power and possession to search for coal anywhere on the leased premises, in any manner he may think proper, to raise the coal, when found, from the beds; to enter and carry away coal; and to sell the same for his own benefit and profit. He may occupy whatever land may be useful or necessary as coal yards, * * * for roads for transporting the coal; and in case it may prove necessary for securing the full enjoyment of the premises aforesaid as a coal field, as aforesaid, then the said Samuel covenants and agrees to execute such further writings as counsel learned in the law may deem proper." The purchase money or price of the coal is fixed at \$200. If the coal proved abundant, and of a given thickness, then another \$100 was to be paid. In addition to this the sum of \$1 per annum was to be paid, as rent. The lessor reserved out of this grant the right, for himself and his heirs, to take coal for their own use, so long as they should reside on the land. This instrument contemplated a sale of the coal under the leased premises at a fixed price, to be increased \$100 if the quantity of coal reached the proportions described in it. The right of removal was to be exercised within 100 years. The fact that the instrument is in the form of a lease is not material, when the character of the transaction is apparent. *Kingsley v. Iron Co.*, 144 Pa. St. 613, 23 Atl. 250; *Montooth v. Gamble*, 123 Pa. St. 240, 16 Atl. 594. A written contract, though not under seal, granting the privilege of digging all the coal or ore on the vendor's land, is equivalent to a conveyance of the title to the coal or ore in fee. *Fairchild v. Furnace Co.*, 128 Pa. St. 485, 18 Atl. 443, 444. Such a conveyance operates to sever the surface from the underlying stratum of coal; and after such severance the continual occupancy of the surface by the vendor is not hostile to the title of the owner of the underlying estate, and will not give title under the statute of limitations. To affect the title of the owner of the coal, there must be an entry upon his estate, and an adverse possession of it. *Armstrong v. Caldwell*, 53 Pa. St. 284. But the contention that a right to mine coal in the land of another is an incorporeal one cannot be successfully maintained. The grant of such a right is a grant of an interest in land. *Hope's Appeal* (Pa. Sup.) 3 Atl. 23. When the grant is, in terms or in effect, a grant of all the coal on the lessor's land, this amounts to a severance of the coal from the surface, and vests a title to the underlying stratum in the grantee. *Sanderson v. City of Scranton*, 105 Pa. St. 469. This underlying estate may be conveyed under the same general rules, as to notice, as to recording, and as to actual possession, as the surface. After

such a severance the possession of the holder of each estate is referable to his title. The owner of the surface can no more extend the effect of his possession of his own estate downward than the owner of the coal stratum can extend his possession upward, so as to give him title to the surface, under the statute of limitations. The owner of the surface can be affected only by the invasion of the surface. The owner of the underlying stratum is not bound to take notice of the invasion of the estates that do not belong to him, but when his own estate is invaded he is bound to take notice. The conclusion thus reached disposes of the title by possession set up by the plaintiff, and of her right to recover in this case.

The appellant cites *Oil Co. v. Fretts*, 152 Pa. St. 451, 25 Atl. 732; *Menish v. Stone*, 152 Pa. St. 457, note, 25 Atl. 732,—and other cases in which oil leases were considered, and the rights of the lessors and lessees defined. A lease granting to the lessee the right to explore for oil, and, in case oil is found in paying quantities on the leased premises, to drill wells and raise the oil, paying an agreed royalty therefor, has been held to convey no interest in the land, beyond the right to enter and explore, unless the search for oil proves successful. If it proves unsuccessful, and the lessee abandons its future prosecution, his rights under the lease are gone. So it might be with a similar lease of lands supposed to contain coal. If the lessee entered, explored the leased premises, and, finding nothing, gave up the search, he would no doubt be held to the same rules, upon the same provisions in the lease, as were applied in the cases cited. The difference in the nature of the two minerals, and the manner of their production, have, however, resulted in considerable differences in the forms of the contracts of leases made use of. When oil is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas, and the fact that a single well may drain a considerable territory, and bring to the surface oil that when in place, in the sand rock, was under the lands of adjoining owners, makes it important for each landowner to test his own land as speedily as possible. Such leases generally require, for this reason, that operations should begin within a fixed number of days or months, and be prosecuted to a successful end, or to abandonment. Coal, on the other hand, is fixed in location. The owner may mine when he pleases, regardless of operations around him. Its amount and probable value can be calculated with a fair degree of business certainty. There is no necessity for haste, nor moving *pari passu* with adjoining owners. The consequence is that coal leases are for a certain fixed term, or for all the coal upon the land leased, as the case may be. The rule of *Oil Co. v. Fretts*, *supra*, is not capable of application to the lease made

by Calendar to Merideth in 1828, for several reasons: First. The Calendar lease is, in effect, a sale of all the coal in the leased premises, and consequently a severance of the surface therefrom. Second. It is for 100 years. All idea of haste in development or operating is excluded by the terms of the instrument, and the time for commencing the work of mining is left to the discretion of the lessee. Third. The consideration of the grant was, not the development of the mineral value of the land, but the price fixed by the agreement, and actually paid to the lessor in money. Upon a careful examination of the several assignments of error, we are all of opinion that the judgment must be affirmed. Judgment will be entered accordingly.

(160 Pa. St. 411)

LANCASTER COUNTY v. CITY OF LANCASTER.

(Supreme Court of Pennsylvania. March 26, 1894.)

STATUTES—CLERICAL ERROR—CORRECTION—OPENING STREETS—DAMAGES—PAYMENT BY COUNTY—ACTION AGAINST CITY—LIMITATIONS.

1. The word "county," the 118th word of Act April 13, 1854 (P. L. 352), § 3, designating the treasury from which damages for opening streets in cities of Lancaster county shall be payable, clearly appearing from the context to be written by mistake for the word "city," will be corrected to read "city." *Lancaster Co. v. Frey*, 18 Atl. 478, 128 Pa. St. 593, reaffirmed.

2. Under Act April 13, 1854 (P. L. 352), making the county of Lancaster primarily liable to property owners for land taken in opening streets, but making such damages payable, as between the county and cities, out of the treasury of the city in which the street is located, when the balance of the account between the city and county for moneys contributed to and drawn from the county treasury for opening streets shall be against the city, the county can sue the city for sums paid while the balance was against the city, though the act does not expressly authorize it.

3. Though the act requires the county to keep such account, the keeping of it is not a condition precedent to the county's right to sue.

4. Act April 13, 1854 (P. L. 352), requiring the county of Lancaster to keep an account with cities of road taxes paid in by them, and of the amounts drawn by them from the county treasury for opening roads, and providing that, while the county shall be primarily liable to the landowner for damages for opening streets, they shall, as between the county and city, be payable from the city treasury when the balance of such account is against the city, contemplates the striking of a balance yearly; and the statute will run against an action by the county for amounts paid when the balance was against the city, as if such account had been kept and such balances struck.

Appeal from court of common pleas, Lebanon county; John B. McPherson, Judge.

Action by the county of Lancaster against the city of Lancaster for sums paid as damages for the opening of streets. Judgment for plaintiff. Defendant appeals. Affirmed.

The opinion of the court below was as follows:

"By section 8 of the act of May 8, 1850 (P. L. 751), it was provided, *inter alia*, that all

damages caused by the laying out of any street or alley in the city of Lancaster should be paid, not by the county, but by the city. This, of course, included damages for injuring or removing buildings as well as for the taking of land. The act of 1854 (P. L. 352), which repealed section 8 of the act of 1850, relieved the city to some extent. It left it liable, as under the act of 1850, for all damages caused by injuring or removing buildings, but allowed it to apply to the payment of damages for land taken a certain proportion of the county tax collected from the taxpayers of the city. This is the substance of the act, although the result just stated is reached by a somewhat roundabout process. The method adopted by the act is this: The county is made primarily liable to the landowner for the damages caused by taking his land, the city continuing to be liable, both first and last, for the damages caused by injuring and removing buildings. In any given year the amount thus advanced by the county (and it is really nothing more than an advance on behalf of the city) is charged against the city, and the city is then credited with the proportion of county tax which its taxpayers have contributed towards opening roads and erecting and repairing bridges in the county. If the difference is in favor of the city, it is entitled to be paid in money (which it may recover by suit if necessary), or to have a credit carried over to the next year; but if the difference is in favor of the county,—that is, if the city has spent in advance a part of its proportion of the county tax for the next year,—then the damages for land taken (as between the county and the city) are no longer to be paid by the county, but the city, until there is again a balance in favor of the city, whereupon these damages are once more to be paid by the county, but (as between the county and the city) only 'to the extent of such balance.' It seems quite clear that this simply amounts to allowing the city to draw back a varying sum each year from the county tax, and to use it in payment for land taken in opening streets. But the landowner is not bound to inquire into the state of the accounts between the county and city, and to look to one or the other as the balance may be found to incline. As between the county and the landowner, the county is made primarily liable to any extent which viewers and juries may determine; but, as between the county and the city, the county is only bound to pay for this particular purpose a varying proportion (but one easily calculated), year by year, of the city's contribution to the county tax. If this proportion is not enough to repay the county its advances to the landowners, one of two things may be done: Either the balance against the city may be carried over for a year, or for several years, in the hope that succeeding credits may restore the equilibrium; or, if the balance is so large that this

would involve a delay the county considers unreasonable, an action may be brought to recover what is due, and a new starting point for the future accounting may be reached. Indeed, there is a third course which the county may adopt if it sees proper: It may sue for any balance in its favor, whether large or small; but ordinarily we presume so strict a settlement would not be insisted upon. In brief, the act makes the county the paymaster for land taken, and requires it to advance to the landowner whatever may be needed for this purpose, whether the city is its debtor or its creditor; but, as between the city and the county, the county is only bound to pay—or, perhaps, to speak more accurately, to pay back—the city's due proportion of the county tax. This proportion the county controls, for it has the money in its own hands. Whatever sum it pays beyond this is really lent to the city,—lent by compulsion of the statute,—and in our opinion may be recovered by suit.

"This view of the act of 1854 is only a restatement in other language of the construction already announced by the supreme court in *Lancaster Co. v. Frey*, 128 Pa. St. 593, 18 Atl. 478, as a few extracts from the opinion will show. On pages 597 and 598, 128 Pa. St., and page 478, 18 Atl., Mr. Justice Clark says: 'It is conceded that by force of the second section of the act of 1854 all sums awarded for damages for the opening of streets in the city of Lancaster are to be paid out of the county treasury, with the exception of such damages as may accrue from the removal of or injury to any house, etc., which are to be separately assessed, and paid out of the city treasury. The second section, as thus construed, is a complete adjustment of the rule of responsibility attaching to the city and the county for the opening of streets within the city. * * * In the third section it is assumed that under the second the county will expend county funds in payment of damages as therein provided, and the policy of the third section is that the city shall not thus withdraw from the county fund more than it contributes to it; that is to say, the city is responsible to the county that the amount thus expended in its behalf shall not exceed the amount contributed by the city to the county funds for opening roads,' etc. He then shows that the 118th word in the third section should be read 'city,' instead of 'county,'—a conclusion which we adopt in the present case, as the question is again raised, and we are asked to pass upon it,—and proceeds to say, on page 599: 'But this obligation of the city was to the county, upon which, by the second section, the primary obligation to pay was imposed.' After explaining why the county must be primarily liable to the landowner, the learned justice declares that the city must repay the county if the latter has been forced to advance too much; 'hence it

was provided that the county commissioners should open an account with the city of Lancaster, showing the amount contributed by the city to the county treasurer towards opening roads, etc., on the one side, and the amount withdrawn from the county treasury for opening streets, etc., in the city on the other side; and, while the balance on that account was against the city, the damages incurred in the opening of streets in the city should be payable out of the treasury of the city,—payable to the county, of course, who is primarily liable to the property holder.' The opinion is summarized in the concluding sentence: 'We are of opinion that the question of the liability of the city in each case can only be raised in a proceeding between the county and the city; that the property holder must resort to the county treasury, and the county must, in a proper case, resort to the city; and, further, that the city, upon payment of any such claim, is reimbursible out of the county treasury, when the balance is in favor of the city, to the extent of such balance.' It will be observed that this construction accords with the rule declared by Mr. Justice Sharswood in *Holl v. Deshler*, 71 Pa. St. 301: 'Every part of a statute should be brought into action, in order to collect from the whole one uniform and consistent sense, if that may be done; or, in other words, the construction must be made upon the entire statute, and not merely upon disjointed parts of it. *Broom*, Leg. Max. 513. "It is the most natural and genuine exposition of a statute," says Lord Coke, "to construe one part of the statute by another part of the same statute, for that best expresseth the meaning of the makers." The same rule is to be found in *Potter's Dwaris on Statutes* (page 144) in this language: 'In the construction of a statute every part of it must be viewed in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning.' And to this construction it is not sufficient to object that the act does not expressly give the county a right to sue, and therefore that no suit of any kind can be maintained; for the act clearly requires the county to advance money on behalf of the city, and, unless it manifestly appeared that the county was restrained from recovering its advances, it seems to us that this necessarily carries with it a right to sue if repayment is refused.

"As to the form of action, we think it may be either assumpsit or a bill in equity. Ordinarily, assumpsit would be an adequate remedy; and in the case before us, at least, we see no need for a resort to equity. All the facts are either agreed upon or not disputed. There are no complex mutual rights to be adjusted, and the only contention is over the proper legal principles to be applied.

It is easy to do complete justice in this proceeding, and it would therefore be most inequitable at the very end of the controversy to turn the parties over to another tribunal, and, merely for the sake of form, compel them to prove again the facts already proved or admitted, and to advance again the same legal propositions. For the same reason, namely, the ability of the court to do complete justice, either in this proceeding or by bill in equity, the remedy by mandamus is not appropriate. This writ lies 'where there is a clear legal right in the relator, a corresponding duty in the defendant, and a want of any other adequate, appropriate, and specific remedy.' *Borough of Easton v. Water Co.*, 97 Pa. St. 580. It is used 'only as a process in the last resort; never where there is a specific remedy.' *Insurance Co. v. Com.*, 92 Pa. St. 77. It was argued, however, that, even if a right of action is given by the statute, the keeping of the account mentioned in section 3 is a condition precedent, and as no such account is shown to have been kept, no recovery can be had in the present suit. Doubtless the act does contemplate the keeping of a formal account, and such an account ought to be kept; but we think the provision is directory merely, and that the failure to keep it will not prevent a recovery. It is not always easy to determine whether a provision is mandatory or only directory, but there are two good rules which are often of much assistance in deciding this question. The first is referred to in *Bladen v. Philadelphia*, 60 Pa. St. 406: 'Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public office or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may, and often have been, construed to be directory.' See, also, *Pittsburg v. Coursin*, 74 Pa. St. 401; *Dewhurst v. City of Allegheny*, 95 Pa. St. 442; *Hershberger v. City of Pittsburgh*, 115 Pa. St. 86, 8 Atl. 381; *Cusick's Election*, 136 Pa. St. 470, 20 Atl. 574; *Potter's Dwar. St.* p. 222, note 29. The other rule is approved in *Norwegian Street*, 81 Pa. St. 353, 354, in the following language: 'There is a class of cases which hold that whether a statute is to be regarded as directory or not is made to depend upon the employment or failure to employ negative words which import that an act should be done in a particular manner or time, and not otherwise.' Perhaps Lord Mansfield's rule in *Rex v. Loxdale*, 1 Burrows, 447, is a better one (and there is the second rule we have in view), that 'whether a statute is mandatory or not depends on whether the thing directed to be done is the essence of the thing required.' Tried by either of these rules, we think it must be said that the direction to keep an account is not a condition precedent either to the county's right to sue or its right to recover, and we may add that in fact no harm has been done by the failure to keep the account,

for we have now before us in orderly detail every item which such an account, if kept year by year, would have shown; and these items have always been readily accessible to either party in the records of the county and of the county offices. We are of the opinion, therefore, that the plaintiff is entitled to recover in this action, but are also of the opinion that the statute of limitations is a valid defense to part of its claim. Taxes are yearly contributions. Almost all public accounts are settled annually, and we think the act contemplates yearly settlements, and the striking of a balance once a twelve-month. If this had been formally done, there could be no doubt that a right of action would have accrued year by year when the balance was struck, and that the statute would now bar recovery, except for six years pending the date of suit. In effect, however, the county has been treated in this action as if the account had actually been kept as required by the act, and we think it may fairly be held to all the consequences which, in that event, would have followed. Moreover, as the balance each year was hardly more—and might, indeed, be nothing more—than a matter of arithmetical calculation, it does not seem unreasonable to consider the balance as formally struck, although the computations were not actually made. And still further,—and perhaps alone of decisive weight,—since the duty of keeping the account was laid upon the county, it can hardly set up its own neglect as a successful answer to the plea of the statute, and thus derive a benefit from its failure to obey the law.”

W. T. Brown, Brown & Hensel, and J. E. Snyder, for appellant. Geo. A. Lane, Co. Sol., W. F. Beyer, and A. F. Hostetter, for appellee.

PER CURIAM. This case depends mainly on the true intent and meaning of the act of April 13, 1854 (P. L. 352), entitled “An act relative to the opening of streets in the city of Lancaster.” That act was properly before us for construction in *Lancaster Co. v. Frey*, 128 Pa. St. 593, 18 Atl. 478; and, after full consideration, it was there held that the word “county,” which is the 118th word in the third section thereof, is a clerical mistake for the word “city,” apparent on the face of the act. In delivering the opinion of the court, our late Brother Clark said: “It is perfectly manifest that the word ‘county,’ the 118th word in the third section, is a mere clerical error in the transcribing of the act. That the damages should be paid out of the treasury of the county, and be reimbursable out of the county treasury, etc., is a manifest misuse of words. No such thing could have been in the mind of the legislature, for the proposition involves an absurdity. The obvious meaning and purpose of the act is plain from the context. It needs no argu-

ment to show that the word ‘county’ was mistakenly written for ‘city,’ and it is a mistake apparent on the face of the act, which may be rectified by the context.” The very able and ingenious argument of learned counsel for defendant on the question of construction, etc., induced us to reconsider the subject, but we are not convinced that the construction given to the act in the case referred to is either erroneous or unwarranted. In his clear and exhaustive opinion on the questions of law reserved the learned judge of the common pleas has not only recognized and acted upon the authority of the case above cited, but he has also so well considered and correctly disposed of all the material questions involved that we deem it unnecessary to add anything to what he has so well said. We find nothing in the record that requires either reversal or modification of the judgment. Judgment affirmed.

(100 Pa. St. 529)

STOFFLET v. STOFFLET.

(Supreme Court of Pennsylvania. March 26, 1894.)

CONTRACT NOT TO COMPETE IN TRADE—DAMAGES.

1. By an agreement dated July 15, 1889, plaintiff agreed to stock his photograph gallery in B., and to teach defendant the business; both to share the profits of the partnership, which was to continue till July, 1890; defendant to be free to withdraw April 1, 1890. The agreement concluded: “Also under the same consideration said T. J. S. [plaintiff] wishing to take charge of the aforesaid gallery the first of April next himself he shall be privileged to do so and the said F. S. [defendant] shall peacefully withdraw to the above agreement well considered not to open opposition gallery in B.” Held, that the last clause contained a covenant by defendant not to open an opposition gallery in B. on the termination of the partnership.

2. Damages for breach of a covenant may be decreed in conjunction with relief by injunction.

3. Where defendant had agreed not to open an opposition photograph gallery in B., and the only proof of damages from breach of the agreement was based on the decrease of the business of plaintiff, whose gallery had been the only one, damages were properly allowed.

Appeal from court of common pleas, Northampton county; W. W. Schuyler, Judge.

Bill in equity by Thomas J. Stofflet against Frank Stofflet for an injunction and other relief. Decree for defendant. Plaintiff appeals. Reversed.

The master's report was as follows:

“The undersigned, appointed master in the above case by order of court dated June 5, 1893, respectfully reports as follows:

“That he was attended by the parties—the plaintiff with his counsel, G. W. Mackey, and the defendant with his counsel, A. C. La Barre—on June 30, 1893, at the office of G. W. Mackey, Bangor, Pa., the time and place agreed upon by the parties, and upon that day, and adjournment thereof, proceeded to take the testimony which is submitted herewith. By agreement of the

parties the testimony was taken through Robert H. Rudolph, stenographer. On July 14, 1893, the matters in dispute were argued at length, and the briefs of counsel left with the master for further consideration. The facts established by the evidence are that Thomas J. Stofflet, the plaintiff, was and is an experienced photographer, owning and operating a photograph gallery in Bangor, Pa. On July 15, 1889, he entered into an agreement with Frank Stofflet, the defendant, to instruct Frank in the trade or business of photography, and to form a partnership with him in the business at Bangor for a limited period. This agreement was in writing, signed by each of the parties, and is as follows, viz.: 'Bangor, Pa., July 15th, 1889. It is agreed that I Thomas J. Stofflet agree to furnish my Star Photo Gallery at Bangor Pa with necessary lenses cameras posing apparatus furniture &c known as photo or ferrotype apparatus, agree to learn Bro Frank so he can run said gallery satisfactory and as soon as Frank is capable he is to take charge of said gallery and run the same alone or at his expences fire fuel and water rent shall be considered expences and each is to pay equal parts therefore also all photo or ferrotype stock such as plates chamicles cards matts holders &c which shall be paid in equal parts each to pay one-half, each to be a half owner of said stock in consideration of the service so faithfully and truly performed as photographer and ferrotypher by Frank Stofflet and the use of gallery apparatus &c so provided by the said T. J. Stofflet in consideration of the same the profits shall be equally divided the said Frank Stofflet to serve for one year under this consideration wch shall end July the 1 1890 if for satisfactory reasons however the said Frank Stofflet shall be privileged to quit first of April 1890 also under the same consideration the said Thos. J. Stofflet wishing to take charge of the afore said gallery the first of April next himself he shall be privileged to do so and the said Frank Stofflet shall peacefully withdraw to the above agreement well considered not to open oposision gallery in Bangor. We set our hand and seal this fifteenth day of July, 1889. Thomas J. Stofflet. [Seal.] Frank Stofflet. [Seal.]' This agreement was written in an account book used by Thomas J. Stofflet to keep accounts of work done for his patrons, and continued in use for that purpose after Frank Stofflet entered the business. It was written by Thomas J. Stofflet in the presence of his brother Frank, and signed by both, and for about three months remained in the photograph gallery, in the joint possession of the plaintiff and defendant, in use as an account book. After that it was in the exclusive control and possession of the defendant, Frank Stofflet, until about January 1, 1890.

"The only disputed fact about this agree-

ment is that the defendant denies that the words 'well considered not to open oposision gallery in Bangor,' 'We set our hand and seal this fifteenth day of July, 1889,' and the seals, were in the agreement when he signed it. The only evidence offered in support of this denial is that of defendant himself. In his direct examination (testimony, pp. 14, 15) he testifies as follows, viz.: 'Q. And this agreement; state whether or not it was the agreement you signed. A. Yes, this is the agreement that I signed, with the exception of a few things in it that were not there when I signed it. Q. What part, for instance?' A. "Well considered not to open oposision gallery in Bangor." Q. Anything else? A. I do not remember of knowing anything about this here: "We set our hand and seals this 15th day of July, 1889." I do not remember anything of the seals there. Q. Now, those parts which you have read, "well considered not to open opposition gallery in Bangor," and "We set our hands and seals this 15th day of July, 1889,"—that part, you say, you have no recollection of being in the agreement? A. No, sir; I have no recollection. And in his cross-examination he testifies. In substance, that he does not remember that the disputed clause was in the agreement when he signed it. The defendant does not anywhere swear positively that the words in dispute were not in the agreement when it was signed by him. The plaintiff testifies on this point (page 4 of testimony) as follows, viz.: 'Q. Whether or not there has been anything added to or changes made to the agreement since it was signed, other than the affidavit at the bottom? A. None. while in my possession. Q. Whether there have been any changes made by anybody else in the agreement? A. None, that I can see.' The appearance of the writing itself shows nothing that would indicate any alterations or interlineations or additions, and the whole agreement appears to have been written at the same time, with the same pen and ink as the signatures and seals. The master, therefore, cannot sustain the denial of the defendant, and finds as a fact that the disputed words were in the agreement when the defendant signed it.

"In pursuance of this agreement. Frank Stofflet entered the photograph gallery of Thomas J. Stofflet, and was instructed by the plaintiff in the business of photography until he was, in the opinion of his instructor, sufficiently proficient in the business to conduct it alone, receiving during this apprenticeship one-half the profits of the business. After about three months, Thomas J. Stofflet went to Muncy, Pa., leaving Frank Stofflet in entire charge of the Bangor photograph gallery and business. About January 1, 1890, or 'just after the holidays,' as the testimony is, Thomas J. Stofflet returned to Bangor, and soon after that Frank Stofflet, by mutual and amicable arrangement.

retired from the Bangor business, taking one-half of the stock, and subsequently receiving one-half the amount of accounts due the firm as they were paid in by various parties. Some time in the early spring of 1890, Frank Stofflet opened a photograph gallery in Stroudsburg, Pa., and from there went to several other towns, and finally opened his gallery in Bangor, some time in the early part of the year 1892, in opposition to Thomas J. Stofflet, and has continued the business there up to the present time. It is this business, conducted by the defendant in Bangor, of which the plaintiff complains. In the bill in equity, filed March 8, 1893, the complainant asks for equitable relief, as follows, viz.: '(1) That Frank Stofflet, the above-named defendant, be restrained by the injunction of this court from engaging in or carrying on the said business of photography in the said borough. (2) That the said Frank Stofflet be required to compensate your orator for any and all damage he may have sustained by reason of the violation of said agreement. (3) Such further and other relief as the nature and circumstances of the case may require, and to your honors shall seem meet.'

"We shall consider these prayers for relief in their order; and first as to the right of the plaintiff to relief by injunction. The agreement in this case, the violation of which is made the basis of this prayer for relief, is one of the class known as 'contracts in restraint of trade.' This class of contracts was formerly not favored in law, and was deemed contrary to public policy, and therefore void; but this rule has been modified until now it is well settled law 'that contracts in restraint of trade are good in law, if reasonable, founded on a valuable consideration, and do not impose general restraint on trade or industry.' 10 Am. & Eng. Enc. Law, pp. 943, 944; Bisp. Eq. § 228, p. 285; 2 High, Inj. § 1167. The learned counsel for the defendant, in his argument before the master, admitted that contracts in restraint of trade, coming within the above-quoted rule, were properly enforced by injunction, but contended that the terms of the agreement in this case were too indefinite, that the clause "well considered not to open opposition gallery in Bangor," was meaningless, and did not bind Frank Stofflet to refrain from carrying on the business of photography in Bangor; that the whole agreement is too vague, ambiguous, indefinite, and uncertain to be enforced in a court of equity; and that the agreement was rendered null and void by the substitution of a verbal agreement entered into about January, 1890, when the parties separated. It is true that the clause in reference to opening an opposition gallery in Bangor is somewhat vague, and might have been more clear and definite. It does not mention who it is that shall not 'open opposition gallery.' But from the reading of the agreement as a

whole, from the position of this clause, immediately after the provision for the separation of the parties, the master can come to but one conclusion, and that is that this clause means that Frank Stofflet contracts not to carry on the business of photographer in the borough of Bangor in opposition to his instructor, Thomas J. Stofflet. In the opinion of the master, the agreement is reasonable. It restrains the defendant from pursuing the business in Bangor only. All the rest of the world is open to him. It is only a reasonable precaution of the plaintiff to protect his established business. The agreement was founded on a valuable consideration, for the plaintiff gave to the defendant valuable instruction in a useful trade, and a half interest in an established business besides; and its meaning seems to be clear, and thoroughly understood by both parties, as appears by the fact that both parties carried out the agreement without misunderstanding or dispute until the defendant encroached on prohibited territory.

"The defendant's counsel also strongly urged that the dissolution of partnership before the time mentioned in the written agreement was a revocation and annulment of the original agreement. The agreement provides that Frank Stofflet shall continue with Thomas J. Stofflet until July 1, 1890. It also provides that Frank may leave April 1, 1890, for satisfactory reasons, and also that Thomas J. may take charge of the business on the same date (April 1, 1890), for satisfactory reasons. Now, by a mutual, amicable arrangement, Frank leaves before this time, and the stock is equally divided between the two, in accordance with the terms of the agreement. There is nothing in this that would abrogate the original agreement, change it, or substitute another for it, except in the one particular of the time when the partnership should cease and determine. The courts of this state have repeatedly held that a proper contract in restraint of trade may be enforced by injunction, and have ever used the remedy where there was no express contract, but only an implied one. In Hall's Appeal, 60 Pa. St. 458, where a party had sold the stock and good will of his business without an express contract not to enter upon the same business within a prescribed territory, the supreme court held that he should be restrained by injunction 'from holding himself out to the public by advertising or otherwise continuing his former business, or as carrying it on at another place.' Justice Sharswood, in McClurg's Appeal, 58 Pa. St. 53, says: 'Contracts restraining the exercise of a trade or profession in particular localities are valid, where there is a fair and reasonable ground for the restriction, as in the case of a sale of the good will of the trade or business, when the vendor covenants not to pursue the same business within certain prescribed limits, is beyond question.' And in Smith's Appeal,

113 Pa. St. 579, 6 Atl. 251, where the contract was 'not to engage in the manufacture of ochre in the county of Lehigh or elsewhere,' it was held that equity could enforce the agreement as to the county of Lehigh. We think the agreement in this case is within the class of contracts referred to in the authorities cited, and that it is a proper case for relief by injunction. We therefore recommend that Frank Stofflet be restrained, by permanent injunction, from carrying on the trade or business of photographer in the borough of Bangor.

"We now come to the question of damages for breach of contract. Can a court of equity decree damages in conjunction with relief by injunction? 'It is a well-settled principle of equity that, having once obtained jurisdiction for one purpose, it may retain it generally for relief. This seems to be the rule, not only when the jurisdiction attaches for discovery in cases of fraud, accident, mistake, and account, but where it attaches for injunction in cases of continuing trespass and waste. In such cases the course is to sustain a bill for the purpose of injunction, connecting it with the account, and not compel the plaintiff to go into a court of law for damages. To prevent multiplicity of suits, the court will decree an account of damages or waste done at the same time with an injunction, and proceed to make a complete decree so as to settle the entire controversy between the parties.' Allison's Appeal, 77 Pa. St. 227. 'Where an injunction is granted, the court will decree an account of the damages suffered as incidental to the main relief. This appears to be the settled rule both in this country and in England.' Bisp. Eq. § 478, p. 525. From these authorities it would appear that this court has the power to grant the second prayer of plaintiff for relief. This being the case, has the plaintiff suffered any damage, and has he offered proper proof of the same? The burden of proof is on the plaintiff to establish damages. The only proof offered on the question of damages is that the defendant has openly and notoriously carried on a photograph gallery in Bangor for more than a year, and that the plaintiff's business decreased in receipts about \$700 during a period of about one year following the defendant's advent in business in Bangor. The plaintiff testified that he estimated his damage at \$500; that he fixed it at this figure because his receipts were about \$700 more the year previous to defendant's coming to Bangor than they were the year following, and deducting \$200 for expenses would leave \$500 profit on that amount of business. This was the only gallery in Bangor. This is the evidence, in substance, on the question of damages. The measure of damages in a case of this kind would seem to be the amount of profits lost. But the proof of amount of loss of profits is a difficult matter, and the master was in considerable doubt whether or not the evi-

dence in this case on the question of damages was competent. In Moore v. Colt, 127 Pa. St. 290, 18 Atl. 8, somewhat similar evidence was offered in proof of loss of profits. There the action was to recover damages for breach of contract in restraint of trade. Moore Bros. agreed not to engage in, or use their influence in opposition to Colt in, the passenger, mail, or express business, in any manner or form. The evidence given as to amount of damages in this case was that one of the defendants acted as manager of an opposition line; that he solicited passengers, etc. The plaintiff had kept a memorandum of the number of passengers carried by the opposition line each day, as near as he could, and testified to that fact, and to the amount that should have been received, according to his rates of fare, etc. In addition to this, the driver of the opposition line testified as to the number of passengers he carried each day, making an estimate as best he could, having kept no account. This was held to be competent evidence. Brewing Co. v. McCann, 118 Pa. St. 314, 12 Atl. 445, was an action for recovery of damages for a breach of contract not to lease a building for the purpose of selling liquors therein. McCann leased from the brewing company premises for the purpose of selling liquors, etc., with the understanding that the adjoining premises, owned by the same company, should not be leased or used for the same purpose. To support his claim for damages, McCann gave a statement of his receipts for some sixty-four weeks prior to the use of adjoining premises for liquor selling, and a statement of his receipts during about the same period after the adjoining premises were used for liquor selling, showing a large decrease in his receipts. The court below submitted this evidence to the jury, with instructions to make an estimate as best they could under the evidence; that the evidence warranted more than nominal damages. This was affirmed by the supreme court, in an opinion by Justice Williams, who says (page 321, 118 Pa. St., and page 445, 12 Atl.), 'The testimony showed the open and continuous sale of liquors. * * * It showed, also, a steady falling off in the custom of McCann's place, amounting to over \$4,000 in the last fifteen months of his lease. While it is true that this testimony does not furnish the data for an exact calculation of the damages sustained by McCann, it is also true that the court would not have been justified in withdrawing it from the jury by an instruction that the plaintiff was entitled only to nominal damages.' The testimony taken in the case in hand is very similar in character to the evidence in the last-cited case. We have the testimony that Frank Stofflet was owner and proprietor of a photograph gallery in Bangor; that he did some business, and was ready to accommodate all comers; and the testimony of plaintiff that he had

suffered a considerable decrease in his business. It is clear to the master that the plaintiff in this case has suffered some damage from the breach of contract by the defendant. The plaintiff's was the only establishment of the kind in Bangor. The opening of a similar establishment by the defendant must necessarily result in a division of the business, to some extent. To how great an extent is uncertain, and can only be estimated with the light of such testimony as is before the master. Taking all the testimony on the subject into consideration, the master finds as a fact that Thomas J. Stofflet, the plaintiff, suffered damages to the amount of one hundred and twenty-five dollars by reason of the violation of the agreement in question by Frank Stofflet, and therefore recommends a decree that Frank Stofflet pay said sum to plaintiff as compensation for such damages.

"Upon these findings of law and fact, the master recommends the following decree to your honors: Decree. Now, to wit, this — day of —, A. D. 1893, this cause having come on to be heard, on bill, answer, and master's report, it is considered, adjudged, and decreed that the defendant, Frank Stofflet, be forever enjoined and restrained from conducting or operating a photograph gallery, or following the trade or business of photography, within the limits of the borough of Bangor, Pa. And it is further ordered and decreed that Frank Stofflet, defendant, pay to Thomas J. Stofflet, plaintiff, the sum of one hundred and twenty-five dollars, as compensation for breach of contract set forth in plaintiff's bill, and that the said defendant, Frank Stofflet, pay the costs of this reference, as well as such further costs as may be legally taxable against him.

"Respectfully submitted, N. D. Chase, Master."

G. W. Mackey and H. A. Mackey, for appellant. A. C. La Barre, for appellee.

STERRETT, C. J. There is no controversy as to the general facts of this case. They are fully presented in the report of the learned master, and need not be repeated. The controlling question is as to the proper construction of the agreement executed by the parties on July 15, 1889. It was construed by the master as containing, in the concluding clause thereof, a covenant on the part of the defendant not to open an opposition gallery in the borough of Bangor. He also found that defendant had broken said covenant, and that by reason thereof plaintiff had sustained damages to the amount of \$125. He therefore recommended a decree restraining defendant from engaging in or carrying on the business of photography in said borough, and ordering him to pay plaintiff the damages aforesaid, and costs. In disposing of the three exceptions to the master's report, the learned president of the common pleas came to a different conclusion,

and substantially held that the phraseology of the contract is of doubtful meaning, and the alleged covenant is too uncertain in its provisions to justify the issuance of an injunction, etc. In his opinion he says: "If we were under a compulsion to have an opinion on the subject, as the master seems to have felt himself to be, we would probably reach the same conclusion reached by him; but we recognize no such compulsion, and even if we did the fact would still remain that the meaning of the language used is doubtful. This is fatal, under all the authorities. The bill must therefore be dismissed." He accordingly sustained the exceptions to the master's report, and dismissed the bill, with costs. Hence, this appeal.

It is not our purpose, nor is it at all necessary, to consider at length the several provisions of the agreement. It is inartificially drawn; evidently, not by a professional hand. In arrangement, grammar, orthography, etc., it is certainly not up to the highest standard of excellence; but, notwithstanding all that, we think the intention of the parties thereto can be fairly and accurately gathered from the language employed by them. The agreement was executed July 15, 1889. On the terms therein stated, the plaintiff, who owned the gallery, and had been engaged in the business of photography for several years, agreed to stock and furnish the same with all necessary appliances for the proper operation thereof, and to teach defendant, free of charge, the art or trade of photography, until he became sufficiently versed in the business to conduct it himself. Both parties were to share in the profits of the joint business, which was to continue until July 1, 1890. If, for satisfactory reasons, defendant wished to withdraw from the partnership arrangement on the 1st of April, 1890, he should have the privilege of doing so. The agreement then concludes thus: "Also under the same consideration said Thos. J. Stofflet wishing to take charge of the afore said gallery the first of April next himself he shall be privileged to do so and the said Frank Stofflet shall peacefully withdraw to the above agreement well considered not to open opposition gallery in Bangor. We set our hand and seal this 15th day of July, 1889. Thomas J. Stofflet. [Seal.] Frank Stofflet. [Seal.]" The clause immediately preceding the last sentence above quoted provided for the withdrawal of the defendant, if for satisfactory reasons he wished to do so. Then follows the provision for plaintiff's resumption of the gallery on the 1st of April, 1890, in case he wished to do so, and the peaceable withdrawal of defendant from the contract relation created by the agreement. While the words, "well considered not to open opposition gallery in Bangor," with which the agreement concludes, are not as well chosen as they might have been, they are manifestly applicable to the defendant alone. In the light of the agreement, as a whole, they ob-

vously mean that after the contract relation ceased, as provided in the agreement, either by the act of one of the parties, or by expiration of time limited, the defendant would not commence and carry on the business of photography in the borough of Bangor in opposition to plaintiff, his instructor. The defendant, recognizing the fact that the words above quoted referred to himself, and could not possibly refer to any one else, undertook to say that they were not in the agreement when it was executed. The master rightly decided that contention against him. It was unsupported by anything save his own testimony, and very feebly by that. Without further comment, we think the agreement in question was rightly construed by the master, and that neither of the exceptions to his report should have been sustained. It therefore follows that the decree dismissing the bill should be reversed, the exceptions to the master's report dismissed, and said report confirmed, all of which is accordingly done; and it is now adjudged and decreed that the defendant, Frank Stofflet, be enjoined from conducting or maintaining a photograph gallery within the limits of the borough of Bangor; that he pay to the plaintiff, Thomas J. Stofflet, the sum of \$125, damages for breach of the contract set forth in the bill; and that he pay the costs, including the costs of this appeal.

(160 Pa. St. 386)

KLAGES v. PHILADELPHIA & R. TERMINAL R. CO.

(Supreme Court of Pennsylvania. March 26, 1894.)

EMINENT DOMAIN—CONDEMNATION OF LAND—COMPENSATION.

Interest cannot be allowed on the value of land from the time it is taken until the rendition of the verdict, though the jury, in fixing the damages, may consider such lapse of time.

Appeal from court of common pleas, Philadelphia county; Pennypacker, Judge.

By agreement of parties, an issue was framed between Sophia Klages, as plaintiff, and the Philadelphia & Reading Terminal Railroad Company, as defendant, to determine the damages to land of plaintiff condemned by defendant. From the judgment, plaintiff appeals. Affirmed.

W. Horace Hepburn, for appellant. Thomas Hart, Jr., for appellee.

WILLIAMS, J. The appellant in this case complains of the answer made by the learned trial judge to her fourth point. This point asked the court to instruct the jury that the plaintiff was entitled to interest upon the value of her property, from the time the defendant company took possession of it down to the time of the rendition of the verdict, as part of her damages. The answer of the learned judge was: "I decline that point. You cannot award interest upon your verdict,

nor upon the damages; but in reaching a conclusion as to the amount of the verdict you may take into consideration the time which has elapsed from the taking, April 24, 1891, down to the present time." This was a clear statement of the rule on this subject, as held in this state. We are aware that in some of our sister states a different rule has been adopted, and that in some others the question is still an unsettled one; but, in Pennsylvania, interest, as such, is not allowed in actions sounding in tort, when the damages sought to be recovered are unliquidated. *Railroad Co. v. Taylor*, 104 Pa. St. 306; *Railroad Co. v. Balthaser*, 126 Pa. St. 1, 17 Atl. 518; *Richards v. Gas Co.*, 130 Pa. St. 37, 18 Atl. 600. The maxim, "stare decisis," is therefore a sufficient answer to the argument of the learned counsel for the appellant in favor of the adoption of a new rule upon the subject. But we are satisfied with the reasons on which our rule rests, no less than with the authority of the cases in which it has been so frequently declared. Interest is demandable in this state either by virtue of an express agreement to pay it or under the authority of some statute that gives it. The present rate of interest was fixed by the act of May 28, 1858. It provides that "the lawful rate of interest for the loan or use of money" shall be 6 per cent. in all cases when the parties shall not have contracted for a less rate. The contract between the parties, if for less than 6 per cent., is recognized as fixing the relative rights and liabilities of the parties; but if the contract is silent as to the rate of interest, or stipulates for a higher rate than 6 per cent., then the law applies, and subjects debtors to a uniform rate for "the loan or use of money." As early as 1700 it was enacted that "judgments shall bear interest at the lawful rate from the day of their rendition till the time of their payment." A verdict did not bear interest till the act of April 6, 1859, no matter how much time might elapse between its return by the jury and the entry of judgment thereon by the court. We have no statutory provision relating to interest upon any other demands than those now enumerated, viz. "the loan or use of money," a verdict for a sum of money, and a judgment. Unliquidated damages do not fall within the meaning of the words "the loan or use of money," and for that reason no interest is demandable upon them. They must be first liquidated by the action of the parties or by a recovery at law. *Plymouth Tp. v. Graver*, 125 Pa. St. 24, 17 Atl. 249; *Emerson v. Schoonmaker*, 135 Pa. St. 437, 19 Atl. 1025. The same rule applies to damages recoverable in condemnation proceedings. The constitution requires corporations exercising the right of eminent domain to make "just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements." The manner of proceeding to adjust the amount of such compensation is provided by

the act of 1849 and its supplements. The corporation making the entry must endeavor, in the first instance, to agree with the owner upon the amount of damages to which he is entitled, and pay the same, or secure the amount to be paid at some time agreed upon. If this effort is successful, the damages are liquidated by the parties. If it is unsuccessful, a bond in a sum sufficient to cover the amount of any probable recovery is tendered. The corporation then enters under the right of eminent domain, regardless of the will of the owner. The court is then applied to for the appointment of viewers, to do for the parties what they were unable to do, viz. to fix the damages which the corporation should pay to the landowner for the injury he has sustained. These damages include the price of the land occupied, and the effect of such occupation upon what remains of the owner's real estate. These are to be ascertained upon a fair computation of the benefits the owner may derive from the location of the railroad that are peculiar to his property, and the disadvantages that may result therefrom. Taking all these things into consideration, the viewers are to determine how much less the property entered upon is worth by reason of such entry than it was worth before. This is not a forced sale of so much land, but the adjustment of an unliquidated claim for the damages suffered in consequence of the exercise of the right of eminent domain by the corporation. *Railroad Co. v. Balthaser*, 126 Pa. St. 1, 17 Atl. 518. It is true that damages are to be estimated as of the date of the entry, because an estimate as of any other date might do injustice to one or the other of the parties; but, until the calculation is actually made, there is no sum that the landowner has a right to demand, or that the corporation could tender. The lapse of time between the exercise of the right of eminent domain and the adjustment of the damages inflicted by it is one of the elements to be taken into consideration in making up the award or verdict. The compensation must be a just one at the time its amount is settled, and what is just between the parties must depend upon the circumstances peculiar to each case. In the case before us the plaintiff received a net income for the property taken, amounting to between 3 and 4 per cent. upon its value. If she should be allowed to recover 6 per cent. upon that value from the time of taking to the time of the verdict, her income from her property would be increased at least 50 per cent. The verdict would not simply give her what she would have received if her property had not been entered upon, but some \$1,500 more. This would give more than would be just to the landowner, and take more than would be just from the corporation. It would be a substitution of the provisions of the statute, fixing the rate of interest, for the judgment of the viewers or the jury, in determining what "just compensation" requires. Inter-

est, as interest, has no place in the computation of damages. The question for a jury in every case is, what sum will make a just compensation to the landowner for the entry and appropriation by the corporation? The land occupied may have been wholly unproductive, and without value except for speculative purposes; it may have been highly productive and valuable; it may have been built upon, and its net income capable of easy ascertainment; the entry may have increased the value of the remainder of the tract more than enough to compensate for what was taken. All these considerations are for the jury, and will help them in the effort to determine what just compensation in any given case requires. It follows that the assignments of error are not sustained, and the judgment is now affirmed.

(160 Pa. St. 399)

COMMONWEALTH ex rel. SAGE v. SAGE.
(Supreme Court of Pennsylvania. March 26, 1894.)

**HABEAS CORPUS—PROCEEDING BY NONRESIDENT—
CONFLICTING JURISDICTION—ORDER—VALIDITY
—CONTEMPT.**

1. Where, on petition by a resident of a foreign state for a writ of habeas corpus to obtain possession of his minor child from his wife, who has custody of it in Pennsylvania, the only issue is the fitness of petitioner to have the custody of the child, the court has no power, without determining such issue, to direct that the child be remanded to the custody of petitioner, and that the mother go to such foreign state to have the issue determined.

2. Where a resident of a foreign state petitions for a writ of habeas corpus to obtain possession of his child, which is in the custody of his wife, who is its mother, in Pennsylvania, and the wife answers by alleging the unfitness of petitioner to have the custody of the child, an order by the court, requiring the wife and a relative with whom she boarded to take the child to such foreign state "for the purpose of having a writ of habeas corpus served on them," if made, is void, and such persons are not guilty of contempt in disobeying it.

Appeal from court of quarter sessions, Philadelphia county.

Petition by the commonwealth of Pennsylvania, on relation of Charles H. Sage, for a writ of habeas corpus to obtain possession of relator's child which was in the custody of his wife, Hettie Sage. From a judgment remanding the child to the custody of relator, respondent appeals. Reversed.

A. Thompson, for appellant. John Weaver, for appellee.

WILLIAMS, J. The writ of habeas corpus in this case seems to have been resorted to as an extradition proceeding, and to have been treated as such throughout. The relator is a resident of New Jersey. His wife, the respondent, and their infant daughter, now about 10 years old, resided with him in that state until their separation, in January, 1893. Each accuses the other of abandonment, and of having brought about the sep-

aration. After four months, the relator, without having contributed anything towards the support of his wife and child meantime, comes into Pennsylvania for the purpose of taking the daughter from her mother by asserting his legal right to her custody under the laws of New Jersey. If he has such legal right, it is his duty to show it in the forum into which he comes; and if there is any reason why that right ought not now to be asserted, the respondent may properly set it up in her return to the writ. If an issue of law or of fact is thus raised, it must be heard and decided in the court out of which the writ issued. If the right asserted is found to exist, and no sufficient reasons are shown for refusing to enforce it, the court will award the custody of the child accordingly, and the relator will be permitted to withdraw it from the jurisdiction of the court making the decree. But if the right alleged is not shown to exist, or if, being shown, it appears on all the evidence to have been parted with by agreement, or forfeited by misconduct, or to be one that for the sake of the child ought not to be enforced, the court will decline to interfere, and the writ will be dismissed, or a decree made formally awarding the custody to the respondent. In this case the writ was made returnable on the 12th day of May. On that day the hearing was continued till the 19th. It was then again continued; but on the following day one of the counsel for the relator came into court with a suggestion, signed by himself, and not sworn to by any one, in which he recited an order made by the learned judge of the court below, requiring the respondent and a relative, with whom she boarded, by the name of Sherman, to take the child, Joyce Sage, into the state of New Jersey "for the purpose of having a writ of habeas corpus served upon them, as all parties being domiciled in New Jersey were subject to the jurisdiction of the courts of New Jersey." He further recited a promise to obey the order so made, and a neglect by the respondent and Sherman to obey the "orders and mandate of this court," and concluded with a prayer for an attachment against both. Without any rule to show cause, or notice to the parties whose liberty was at stake, an attachment was immediately issued, on which an arrest was made, from which the parties were relieved on the 22d day of May by giving bail in the sum of \$1,500 each. The order for the attachment is quite as unique as the petition. It recites that, "It appearing by the record that the respondent, Hettie Sage, and one George W. Sherman, is in contempt, and it also appearing that Charles H. Sage has moved for an attachment against the said Hettie Sage and George W. Sherman for said contempt," and that verbal notice has been given to respondent's counsel that an attachment would be moved for; and upon this basis it directs an attachment to issue;

and that Hettie Sage and George W. Sherman be brought forthwith into court to answer for said contempt. Now, the record does not show that these parties were in contempt, or were even charged with contempt. The petition recites an order upon the respondent to take the child into New Jersey, and submit her right to its custody to the courts of that state, but neither the docket entries nor the files show the existence of such an order. It was never made. The court had no legal right to make it. The respondent would have been guilty of no contempt for disregarding it, if it had been made. The courts can, in a proper case, surrender an alleged criminal to the courts of a sister state for trial, but they cannot compel a resident of Pennsylvania to go into another state, and submit himself to the jurisdiction of its tribunals by an attachment. Whether the order set out in the petition was actually made or not is therefore a matter of no consequence. If it was made, it was a nullity; if it was not made, then there is no foundation for the charge of contempt; so that, in either event, the attachment must be set aside, and all that has been done under it must fall. But a final decree was made on the 14th day of June, 1898, awarding the custody of this child to her father, and the remaining question is whether this decree should stand. The record shows that the respondent made her answer or return to the writ on the same day on which she was relieved from the custody of the sheriff by entering bail. Three days later, which was the 25th day of May, the relator made a formal traverse of the answer. Issues of fact were thus made up for trial and determination by the court below. If the facts stated in the answer were true, the relator was unfit to have the custody of his child; if they were false, he was entitled to such custody. A decree should have rested on a determination of this issue, but the decree before us did not. It set forth the admission by counsel that both parties had been previously domiciled in New Jersey, and that the relator continued to reside there; that no guardian had been appointed for the child; that the relator was, by the laws of the state of New Jersey, the natural guardian; and, "in order that the court may show the consideration due to the law of another state of this Union, and without passing upon the question of the true domicile of the respondent, whether in Pennsylvania or with her husband in New Jersey, and without passing upon the fitness of the petitioner to act as guardian of the child," it directed that the child be remanded to the custody of the petitioner, and that the mother must go into another state to have the question of his fitness considered and determined. We recognize the demands of comity, and our courts should be, as they are, always ready to accede to them; but comity requires of us that

we administer the laws of another state between suitors in our own courts whenever this becomes necessary to the proper administration of justice in the particular case. It does not require us to dismiss the parties with directions to proceed to Maine or California or some other state in which the contract was made, or the parties were domiciled, so that the law of a given state may be administered by the courts of that state, but simply that we shall apply the same rule that the courts of the proper state would apply. This was all the comity required of the court below in this case. The return to the writ of habeas corpus, and the traverse thereof by the relator, raised no question under the law of New Jersey. If they had done so, and the rule in that state differed from ours on the question so raised, the court should have followed the New Jersey rule. But the question raised on the record was one of fact. The validity of the marriage under the laws of New Jersey was not denied. It was not denied that the relator was the father of Joyce Sage, nor that, under the laws of New Jersey, he was her natural guardian. But, conceding all this, the respondent denied that he was a fit person to have the custody of this young girl. This was the only question before the court below, and it was the legal right of the respondent to insist on its decision before her young daughter should be taken from her. If her contention was sustained, then, under the laws of New Jersey, as well as the laws of Pennsylvania, she was entitled to retain the child. *Bennet v. Bennet*, 13 N. J. Eq. 114; *Com. v. Addicks*, 5 Bin. 520; *Com. v. Smith*, 1 Brewst. 547. The legal right of the father must yield to considerations affecting the welfare of the child. The present condition and the future prospects and advantage of the child should be considered; and, where the child is of sufficient intelligence, its preferences and attachments should be consulted before the question of its custody is determined. The decree committing Joyce Sage to the custody of the relator does not rest on a determination of any question that was before the court below, and for that reason it must be reversed at the cost of the relator. The record is remitted, with a direction that the case be heard upon the issue made up by the return to the writ and the formal traverse of the same.

(66 Vt. 163)

BATES v. KEITH.

(Supreme Court of Vermont. Washington.
March 29, 1894.)

MANDAMUS — COMPELLING SCHOOL TREASURER TO TURN OVER BOOKS.

1. Mandamus will not lie to compel a school-district treasurer to turn over to his successor the books and papers of office, where his accounts have not been settled, and there has been no unreasonable delay on his part.

v.28A.no.15—55

2. Nor will it lie to compel him to turn over moneys in his possession as treasurer, where suit therefor, in which he is summoned as trustee, has been brought against the district.

Exceptions from Washington county court.

Petition by Allen Bates for mandamus to compel Lewis Keith to turn over certain books and papers and moneys of an office to which petitioner was elected. Petition dismissed.

The petitionee was at the annual March meeting in the year 1892 elected treasurer of school district No. 13, in the town of Barre, and continued to hold that office until April 17, 1893, when he resigned, and his resignation was accepted. September 5, 1893, at a special meeting held for that purpose, the petitioner was elected treasurer of said district, to fill the vacancy caused by the resignation of the petitionee. October 18, 1893, the petitioner demanded of the petitionee the books, papers, and money belonging to the district, and in the hands of the petitionee. The only books which the petitionee then had were memorandum books, furnished at his own expense, upon which he had kept an account of the moneys received and disbursed by him as treasurer; and the only papers were the orders which he had paid since the last settlement of his account with the auditors of the school district. Some time subsequent to October 18th, the petitionee had filed with the auditors of the district a statement of his account, and placed in their hands the orders paid by him. The petitioner was one of these auditors; and no notice had been given, either by the board or by the petitionee, as to whether his account was satisfactory. In respect to the money which the petitioner claimed, it appeared that there was in the treasury at the time of the petitionee's resignation about \$400; that he had an order, regularly drawn by the prudential committee, in his favor, for \$800; and that he insisted that the amount in the treasury should be applied by him in part payment of this order. The district claimed that he should not so apply it, and had voted in March, 1893, that the moneys in the hands of the treasurer should be distributed pro rata among the taxpayers of the district who had paid their school taxes in the year 1892, and had instructed the treasurer to make such a dividend. The town of Barre also laid claim to these funds in the hands of the treasurer. It was to avoid the complications and litigation which might arise by reason of these conflicting claims that the petitionee resigned his office as aforesaid. Subsequently to such resignation, the town of Barre had begun a suit against school district No. 13, and summoned the petitionee as trustee; said suit being returnable to the March term, 1894, of the Washington county court.

Martin & Slack, for petitioner. Barney & Hoar, J. W. Gordon, and S. C. Shurtieff, for defendant.

START, J. This is a petition for a writ of mandamus. The petitioner was on the 5th day of September, 1893, elected to fill a vacancy in the office of treasurer of school district No. 12, in Barre, caused by the resignation of the petitionee, and on the 18th day of October, 1893, demanded of the petitionee the money, books, and papers in his hands belonging to the district. The money was not delivered, because the district was owing the petitionee several hundred dollars in excess of the money in his hands, for which he held a district order drawn and delivered to him by the prudential committee of the district, and because the town of Barre claimed the money in his hands, and had brought a suit against the district, and summoned him as trustee. The books were memorandum books furnished by the petitionee, on which he had entered moneys received and paid out by him as treasurer. The papers were orders drawn on and paid by him as treasurer. These he did not deliver, because he considered them necessary for his protection in the trustee suit, and settlement of his account as treasurer. After this demand the district auditors notified him to appear before them, and settle his account as treasurer; and he thereupon sent them a statement of his account, and delivered to the chairman of the board the orders paid by him. He is ready and willing to deliver the books and papers, if his account is settled. The petitioner was one of the auditors, and attended the meeting of the board for the purpose of settling the petitionee's account. The petitionee has not been informed by the petitioner, or any other member of the board of auditors, as to whether the account rendered was satisfactory. The petitioner did not thereafter call for the money, books, or papers, and in a few days after the meeting brought this petition.

Mandamus is not a writ of right, but a prerogative writ, which issues only in a proper case, clearly proved to the court. It will not be granted unless the right to have the thing done is clearly established, nor will it be granted unless there is occasion or necessity for its issue. *Sabine v. Rounds*, 50 Vt. 74; *Cook v. Peacham*, Id. 231; *Free Press Ass'n v. Nichols*, 45 Vt. 7. The burden was on the petitioner to show a case authorizing the issuing of the writ, and in our opinion such a case has not been made out. It was the petitionee's duty to settle his account with the auditors. Acts of 1888, No. 9, § 81 (R. L. § 2718). For this purpose, he was entitled to the books and papers for a reasonable time; and the petitioner seems to have understood that such was his right, and to have acquiesced in his keeping them until a settlement could be had. There was no occasion for haste. The district was abolished, except for the purpose of settling its pecuniary affairs. It is clear that the books and papers were of secondary consideration, and that the real controversy was about the money; and, if this had been delivered to

the petitioner, there would have been no trouble about the books and papers. The petitionee is ready and willing to deliver them, if his account has been settled. There has been no unreasonable delay on his part in settling it. He has rendered his account, and delivered the orders to the board, of which the petitioner is a member; and the petitioner has not informed him as to whether the account rendered is satisfactory. From these facts, we think that, so far as the books and papers are concerned, there was no occasion or necessity for bringing a petition for a writ of mandamus. In respect to the money, we hold that, in this proceeding, we cannot decide the questions about which the town and district are at issue, nor can we say that the petitionee is or is not chargeable as trustee in the suit in favor of the town. These questions must be determined in that suit, and until determined, or until the petitionee is discharged from liability in that suit, he has a lawful right to hold the money in question, as against the petitioner. Petition dismissed, with costs.

(86 Vt. 173)

LANGDON v. TEMPLETON.(Supreme Court of Vermont, General Term.
March 16, 1894.)**ADVERSE POSSESSION — CHARACTER AND SUFFICIENCY OF POSSESSION — TRESPASS TO LAND — EQUITY — ESTOPPEL.**

1. A purchaser at a void tax sale, in the absence of a collector's deed, does not obtain color of title.

2. Payment of taxes is not an act of possession, nor does it show possessory title.

3. Where a lot has no definite boundaries marked upon it, actual possession of a part thereof by one having neither title nor color of title gives him no constructive possession of the residue.

4. Where complainant is in actual possession of part of a lot, possession of other parts of the lot by one claiming the whole lot under color of title does not give him constructive possession of the part held by complainant.

5. A failure to exercise any act of ownership over land for 13 years does not necessarily constitute abandonment.

6. Where there is a tortious possession of land not amounting to disseisin, the constructive possession as between the tortfeasor and the party having the legal title continues in him who has the right; but the tortfeasor may maintain trespass against a stranger who disturbs his possession, and the stranger cannot plead that the tortfeasor's possession was the possession of the true owner.

7. In equity, the fact that complainant violated a statute against forcible entry by taking possession of an entire lot does not, on the maxim that he who comes into equity must come with clean hands, deprive him of the equitable right to part of the lot growing out of prior possession.

8. A collector by listing lands for taxation to another is not estopped to subsequently claim title in himself.

Appeal in chancery, Washington county; Ross, Chancellor.

Bill by James R. Langdon against Horatio Templeton. Decree for orator, and defendant appeals. Reversed.

For prior report, see 61 Vt. 119, 17 Atl. 839.

The controversy was in reference to lot 52 of the second division of lands in the town of Worcester, embracing about 300 acres. The orator alleged that in 1824 this land was sold for taxes, and was bid off by Charles Buckley and James H. Langdon at such sale; that the lands were not redeemed; that the sale and all proceedings connected therewith were regular and valid, and that the said Charles Buckley and James H. Langdon thereby became entitled to receive from the collector a valid deed to said lot, but whether they ever did receive such deed the orator could not say; that by various conveyances the title of the said Charles Buckley and James H. Langdon had passed to the orator, and that the said Buckley and Langdon first, and the orator subsequently, had paid taxes upon said land, claiming to be the owner, from the time of said tax sale down to the time of the bringing of the bill; that said lands were uninclosed timber lands, and that the orator had entered upon the same long before the defendant had attempted to take possession thereof; that the defendant, Templeton, having no interest whatever in said land, procured from one William H. Kellogg, who had no legal or equitable title to the same, a quitclaim deed of the premises, purporting to have been executed December 17, 1885, under which he claimed title to said lands; that the orator had entered into a contract with one Clogston with reference to said land, for the cutting of wood and timber upon the same, and that, in virtue of said contract, Clogston had begun to cut upon the premises; that Templeton had brought several suits against said Clogston for the cutting and conversion of the timber upon said premises, which suits were then pending. The orator prayed that Templeton might be restrained from setting up his title to the premises and from prosecuting the aforesaid suits. The defendant demurred upon the ground that the orator had a complete remedy at law. This demurrer was sustained in the court below, but was reversed in the supreme court, and the cause remanded for further proceedings. 61 Vt. 119, 17 Atl. 839. Thereupon the cause was referred to a special master, who reported that the collector who made the tax sale in 1824 gave no bond as required by law, and that no deed was ever executed by said collector to the said Buckley and Langdon. The master further reported that no possession was ever taken by the purchasers at said tax sale until 1872, when the orator, who had then become the owner of the title acquired under said tax sale, being advised that his title thereunder was defective, and for the purpose of taking possession of said lot to perfect his title, entered upon about 10 acres of said lot, and cut off from 30,000 to 50,000 feet of timber, and that from then down to 1885 the orator made no other or further entry upon said lands; that in 1885 the defendant, Templeton, procured a

quitclaim deed of said lot 52 from one Kellogg, his nephew, who had no title whatever to said lot, and recorded the same on the 17th day of December; that subsequently he entered upon said lot, and began the cutting of logs and timber, and that thereupon one Clogston, acting by the direction of the orator, who knew that Templeton was in possession claiming under said quitclaim deed, went in the nighttime, and surreptitiously drew away said logs and timber; that afterwards said defendant went upon the premises, and continued to cut logs and wood, whereupon Clogston, still acting under the direction of the orator, procured a great number of men, and drove off the defendant by force, and has continued in such forcible possession ever since; that thereupon said defendant began the suits referred to in the orator's bill, and was proceeding with the prosecution of the same when enjoined by the bringing of this bill. The master further reported that the defendant, Templeton, was familiar with the state of the title to this lot; that he knew that the orator claimed to own it in virtue of a tax sale, and had paid taxes on it for many years as the owner, and that the defendant himself, as lister for the town of Worcester at the quinquennial valuation of 1870, had set this, with others, to the orator; and that later, in 1881 and 1882, when the defendant was again the lister of said town of Worcester, the orator had directed the lister, by letter, to set to him the lot in dispute, and that he would pay the taxes on the same; and that the lands were so listed.

Joseph A. Wing, Geo. W. Wing, and S. C. Shurtleff, for appellant. Dillingham, Huse & Howland, for appellee.

ROWELL, J. When this case was here on demurrer to the bill (61 Vt. 119, 17 Atl. 839) it was held that, in the circumstances alleged, the bill was maintainable as a bill of peace, for that the tax sale of the lot in 1824, as the proceedings therein were set out in the bill, conferred an equitable title on the purchasers thereat, under whom the orator claims, and gave them the right to call in the legal title, and for that the orator, being in possession, could bring no action at law against the defendant, who it did not appear had disturbed his possession, but who it did appear was making claim and had brought suits against the orator's tenant, but not such as would necessarily settle whether the defendant had title or not. But now the case is materially changed from that made by the bill, for by the finding of the master it appears that said tax sale was void, and therefore it did not confer even an equitable title on the purchasers thereat; much less did it give them a right to call in the legal title, for no legal title was thereby ever inchoated. Nor did it give color of title. That would have to come from the collector's

deed, which was never given. *Wing v. Hall*, 47 Vt. 182, 216.

The orator and those under whom he claims paid taxes on the lot from 1824 to 1886, and claimed to own it. But the payment of taxes is not an act of possession, and does not tend to show a possessory title. *Reed v. Field*, 15 Vt. 672; *Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302. Neither the orator nor those under whom he claims ever had color of title to the lot. The orator does not claim title by adverse possession; and as the tax sale was not effective to confer title, which is the only source from which he ever claimed to have derived title, he is left to stand on possessory title only, if any he has.

Now, concerning possession, the only allegations of the bill are that said lot is timber land, and has never been inclosed, and that the orator cut timber on it long before the defendant laid claim to it, which cutting was the only use the orator had any occasion to make of it; and that in 1885 one Clogston went into possession of it, and has since remained in possession, cutting timber therefrom and manufacturing it into lumber, under a contract with the orator by which he is bound to maintain for Clogston the right thus to possess and to cut timber. As to the allegation of cutting before the defendant laid claim, the finding is that neither the orator nor those under whom he claims ever did anything on the lot till late in the fall of 1872, when the orator, acting under the advice of counsel, who told him that his title was bad, and to go into possession, entered on about 10 acres of the southeast corner of the lot, and that fall and winter cut thereon from 30,000 to 50,000 feet of lumber. As to the allegation of Clogston's possession, the finding is that on December 21, 1885, the defendant, knowing of the orator's claimed rights to the lot, and what he had done upon and concerning it, finding the lot vacant and no one in possession, entered thereon under his deed of December 17, 1885, from Kellogg, which had been recorded, and continued there, cutting wood and timber, till the 8th day of January, 1886, when the orator, knowing from the record of the Kellogg deed, entered upon the lot in the nighttime, through Clogston, and drew away and converted to his own use the wood and timber there remaining that the defendant had cut; and, further, that in January, 1887, the defendant, with his men, again began to cut wood and timber on the lot; and that thereupon Clogston, acting for and under the direction of the orator, who knew that the defendant was in peaceable possession under his deed from Kellogg, raised a force of men, and therewith went to the lot, whereupon the defendant and his men, to prevent violence, left the lot, and Clogston and his force entered in behalf of the orator, who has ever since retained possession by force, and cut off and converted

to his own use more than a million feet of timber. This is all the possession the orator is shown to have ever had. It not appearing that the lot had definite boundaries marked upon the land, and the orator having neither title nor color of title thereto, his actual possession of the 10 acres thereof, though taken claiming the whole lot, gave him no constructive possession of the residue. So, prior to the defendant's entry on December 21, 1885, the orator never had possession, actual or constructive, of any part of the lot except said 10 acres. He cannot, therefore, on the ground of possessory title, have relief against the defendant in respect to any other part of the lot. It does not appear that the defendant has ever entered upon said 10 acres or any part thereof; and if his deed from Kellogg, under which he entered, gave him color of title to the whole lot, as he claims and the orator denies, his actual possession thereunder of other parts of the lot, though he claimed the whole, gave him no constructive possession of said 10 acres, if the orator was then in the actual adverse possession thereof. *Stevens v. Hollister*, 18 Vt. 294; *Bellis v. Bellis*, 122 Mass. 414; *Ellicott v. Pearl*, 10 Pet. 443. To be sure, the masters say that, when the defendant entered, he found the lot vacant and no one in possession; but in view of the fact that the lot had been listed to the orator, and he had continued to pay taxes on it ever after his entry on the 10 acres in the fall of 1872, we do not construe this finding to mean that the orator had abandoned all possession he had ever had of the lot, but only that he was not then in the actual occupancy of any part of it. Any other construction, we think, would be unwarrantable, in the circumstances. The fact that the orator had done no act upon the lot for nearly 13 years next before the defendant's entry does not of itself, and as matter of law, constitute an abandonment of the possession he had formerly had. Whether a prior possession has been abandoned or not is a question of fact, to be determined from the circumstances of the case. *Patchin v. Stroud*, 28 Vt. 394. There being, then, no finding of abandonment by the orator, we think it must be held, in view of the character of the land, that, at the time the defendant entered, the orator still had possession of said 10 acres.

But it is claimed that this possession was not such as would ripen into title against the owner, and therefore is not good against the defendant, a mere stranger, standing in no confidential relation to the orator. But we think that the possession, being under a claim of right, contained all the other elements of adverse possession, and would ripen into title as against the owner in the requisite time. But it is not necessary that it should be of this character in order to be good against the defendant; for a possession may be good against one man, and not good against another. If there is a tortious possession, not

amounting to a disseisin, the constructive possession, as between the tortfeasor and the party having the legal title, is considered as continuing in him who has the right; but the tortfeasor may nevertheless maintain trespass against a stranger who disturbs his possession, and the stranger cannot defend by saying that the tortfeasor's possession was the possession of the true owner. *Slater v. Rawson*, 6 Metc. (Mass.) 439. Cf. *Anstin v. Bailey*, 37 Vt. 219; *Perkins v. Blood*, 36 Vt. 273; *McGrady v. Miller*, 14 Vt. 123. "He that hath possession of land, though it be by disseisin, hath right against all men but against him that hath right." Doct. & Stud. c. 9. So, in the Roman law, when one had legal possession of a thing, by which was meant physical apprehension with intent to hold as owner, he was protected in his possession against all who had not a better right, and the praetor granted him an interdict for the purpose of protecting him. Sand. Just. Inst. lib. 2, tit. 6.

Now, in respect of relief in regard to said 10 acres, the orator stands much as he stood when the case was here before in respect of relief in regard to the whole lot; and, as the law of the case was then settled, he seems to be entitled to relief as to that part of the lot, unless, as claimed by the defendant, he is disentitled thereto by reason of the forcible manner in which he took and retained possession of the lot as aforesaid, which, it is claimed, was a violation of the statute against forcible entry and detainer, and made the possession thus taken unlawful, even though the orator had a right of entry, which is denied. This claim is based upon the maxim that he who comes into equity must come with clean hands. But this maxim, salutary in principle and broad in application as it is, has its limits; and in the administration of equitable relief in particular controversies it is confined to misconduct in regard to the matter in litigation that has in some measure affected the equitable relations of the parties in respect thereto, and the equitable rights asserted by the orator. 1 Pom. Eq. Jur. § 399. It is said in *Meyer v. Yesser*, 32 Ind. 294, that fraud without injury is never available as a defense in equity. Turning to the case, it does not appear, as we have said, that the defendant ever entered upon said 10 acres, so it does not appear that he was driven therefrom by the orator's forcible entry, if such it is to be regarded, and such entry in no way affects the equitable relations that existed between the orator and the defendant in respect of said 10 acres before such entry was made, nor the equitable rights of the orator growing out of his prior possession thereof, on which rights alone relief is here granted. The maxim, therefore, is not applicable.

It is contended that the defendant is estopped from claiming the lot because of what he did about listing it to the orator, and because he knew about the orator's acts upon and

concerning it, and his claim of title to it; but this contention cannot be maintained, for no element of estoppel is disclosed by the case.

The views expressed render it unnecessary to consider any other question discussed at the bar. Decree reversed, and cause remanded, with directions to enter a decree for the orator making the injunction perpetual as to the 10 acres and as to the suits at law, as far as they relate thereto. Let the question of costs below be there determined.

(66 Vt. 91)

RUDD v. RUDD.

(Supreme Court of Vermont. Bennington. March, 1894.)

DIVORCE—CONDONATION—DEFENSES.

1. Condonation of cruel treatment is not established by evidence that, after an assault on her, petitioner remained in the same house with her husband for a week; it being shown that she did not forgive him, that he made no promise of future kind treatment, that there was no resumption of marital relations, and that she avoided him as much as possible.

2. It is no defense, to an action by a wife for divorce for cruel treatment, that after a final separation from her husband she formed the intention to enter on an adulterous connection, as such intention is not a statutory ground for divorce.

Exceptions from Bennington county court; Munson, Judge.

Petition by Ella J. Rudd against Merritt F. Rudd for divorce. The petition was dismissed, and petitioner excepts. Reversed, and petition granted.

The following facts were found: "The testimony of the petitioner tended to show that her husband had been an intemperate man during all their married life, and had been a frequent visitor of liquor saloons, and was often away from home until late at night, sometimes remaining all night; that in 1889 he choked her, without cause, until she was nearly senseless; that on one occasion in the winter of 1890 he returned home late at night in a state of intoxication, and assaulted her with a heavy shoe or rubber while she was in bed; that on one occasion during the same winter, under similar circumstances, he struck her with his hands, without cause or provocation; and that on the 15th day of June, 1890, he assaulted her with a bamboo cane, and bruised and blackened her face and other parts of her person. The petitioner testified that this was without cause or provocation, and, as there was no evidence to the contrary, we find the fact to be so. On the following day the wife made complaint against her husband to the town grand juror of Bennington for assault, and a warrant was therefore issued and placed in the officer's hands, which was duly served, and the petitioner was duly arraigned thereupon, and pleaded guilty thereto, whereupon final judgment of guilty was passed against him, and he was sentenced to pay a fine of five dollars and costs, which he paid. Petitioner further tes-

tified that, while these proceedings were pending, the petitionee returned late one night in a state of intoxication, and threatened her life if she did not withdraw the complaint. From said 15th day of June until the day of final separation, which was on the 23d day of the same June, the wife avoided the presence of her husband as far as possible, sometimes remained in hiding until he had returned at night, and then went to her own bed by stealth, and continued this conduct until the day of final separation, as aforesaid. There was no evidence that the parties occupied the same sleeping room, or became reconciled in any manner, after the 15th day of June, 1890. One ground of defense was that the petitioner had herself violated the marriage contract by committing adultery with one Rounds, who had for some time boarded in the petitionee's family, and the petitionee's evidence tended to show that the petitioner had, for some months before the separation, entertained an affection for Rounds, and been guilty of indiscreet and questionable conduct in connection with Rounds, not known to the petitionee. On the day of separation, and shortly before the petitioner left the house, the petitionee found in a place of concealment an undelivered letter addressed to Rounds, indicating an adulterous disposition and purpose, the discovery of which was at once made known to the wife. The court failed to find the fact of adultery established, but did find that on the day of final separation, and at the time of leaving, the petitioner had a formed intention to enter upon an adulterous connection with Rounds if circumstances favored; but the court found acts of cruel and brutal treatment to have been committed by the husband, when in a state of intoxication, before the petitioner formed this adulterous intention. The court found the claim of intolerable severity fully established, and considered the petitioner entitled to a divorce on that ground, unless the fact of the petitioner's remaining at the petitionee's house from the 15th day of June to the 23d day of June, 1890, under the circumstances stated, amounted to a condonation, or unless the adulterous intention, existing as above stated, constituted such misconduct on the part of the petitioner as would disentitle her to a bill as a matter of law."

C. H. Darling, for petitioner. Sheldon & Cushman and Batchelder & Bates, for respondent.

TYLER, J. This case was defended in the court below upon two grounds: First, that the cause had been condoned; second, that the petitioner had herself violated the marriage contract.

The exceptions present no element of condonation. There was no forgiveness by the petitioner, no promise of future kind treatment by the petitionee, and no resumption of

marital relations after the assault of June 15, 1890, was committed. On the contrary, the petitioner avoided the petitionee as much as possible, some of the time hiding from him, though remaining in the house with him until the final separation, which was on June 23, 1890. *Langdon v. Langdon*, 25 Vt. 678.

The wife's misconduct is not a bar to her right to a bill of divorce. Dereliction by the petitioner, to constitute a complete bar in recrimination, must itself amount to a statutory cause of divorce. 2 Bish. Mar. & Div. § 38, and cases cited.

Judgment reversed, and bill granted.

TAFT, J., dissents.

(65 Vt. 101)

BODWELL et al. v. BODWELL et al.

(Supreme Court of Vermont. Orleans. March 5, 1894.)

SPECIFIC PERFORMANCE — POSTNUPTIAL CONTRACT — CUSTODY OF CHILDREN.

When a wife has agreed with her husband to live apart from him, and relinquish all interest in his property, in consideration, inter alia, of the custody of their son, but the husband steals and detains him from her, and, in suing for divorce, prays for his custody, the guardians of the minor children have no standing to enforce her contract against the widow.

Appeal from Orleans county court; Taft, Judge.

Bill by M. A. Bodwell, guardian, and another, against Ida A. Bodwell and others, for specific performance. Decree for orators. Defendant named appeals. Reversed.

The defendant Ida A. Bodwell was the wife of the intestate, E. B. Bodwell; and so, being husband and wife, these parties, on February 2, 1891, executed the following written agreement: "Articles of agreement made and concluded this 2d day of February, A. D. 1891, by and between Ida A. Bodwell, of Barton, in the county of Orleans, of the one part, and E. B. Bodwell, being the husband of said Ida A., of the other part, witnesseth: The said Ida A. Bodwell, for the consideration hereinafter mentioned, hath agreed, and doth hereby covenant, promise, and agree, that she will sign a deed of the place where they now live, in Barton village; that she will leave her husband, the said E. B. Bodwell, and hereafter live separate and apart from him, and that she will never trouble him again; that she will relinquish all right, title, and interest in and to his property and estate, and will never hereafter make any claim upon said E. B. Bodwell, or his heirs or assigns, for any part of his property or estate; that she will never hereafter claim any support from him, or contract any debts upon his account. And the said E. B. Bodwell, in consideration thereof, hath agreed, and doth hereby covenant, promise, and agree, that he will pay

said Ida A. Bodwell, his wife, the sum of three hundred dollars, in money, and let her have certain articles of household furniture to be agreed upon between the parties, her own clothing, Burleigh W. Bodwell, her son by said E. B. Bodwell. And, in case she should fail to properly provide and care for said Burleigh W. Bodwell, the said E. B. Bodwell has the right to take charge of him, and provide for him." In pursuance of this agreement, E. B. Bodwell paid the defendant the sum mentioned, and she took the boy, Burleigh, left the house of the said E. B., and maintained herself, without expense to him, down to the time of his death. Some little time after their separation, E. B. Bodwell, by stealth, and against the will of the defendant, took possession of the boy, Burleigh, and kept possession of him afterwards. The master found that up to that time the defendant had properly cared for and maintained him.

E. A. Cook and J. W. Redmond, for appellant. F. W. Baldwin and W. W. Miles, for appellees.

ROSS, C. J. This is a bill brought by the guardians of the minor children of E. B. Bodwell, deceased, praying to have Ida A. Bodwell, the widow of the deceased, compelled, specifically, to perform a postnuptial agreement entered into by her, while covert, with the deceased, in regard to living separate and apart from the deceased, and relinquishing "all right, title, and interest in and to his property and estate." The orators, as the representatives of the minor children, stand upon the rights of E. B. Bodwell, as they existed at the time of his decease. Without attempting to determine whether the contract is such that equity would specifically enforce it under any circumstances, or whether it is fair and just in its provisions for the defendant, or whether its proper construction would debar the defendant of homestead and dower, and other provisions of the statute for her benefit, in his estate, it is elementary that "he who seeks equity must do equity," or that a party to a contract, or those standing on his rights, to entitle himself to a specific performance of the provisions of the contract which are to be performed for his benefit, must affirmatively establish that he has faithfully kept and performed, or is ready and willing to keep and perform, all the provisions of the contract resting upon him to perform, for the benefit of the other party. The deceased had not kept and performed one of the essential provisions of the contract which rested upon him to perform. By the contract, the defendant Ida A. Bodwell was given the care and custody of their minor son, Burleigh W., so long as she should properly provide and care for him. The master has found that she did properly provide and care for him, and that the deceased did

not regard this provision of the contract, but, very soon after it was entered into, against her wish, stealthily took the son from her, and not only detained him from her so long as he lived, but in the mean time brought a bill of divorce against her, and therein prayed to be given the custody of the son. He put her to the trouble and expense of defending herself, not only from the charges in the libel, but also from the obtaining a decree for the custody of the son. Under these circumstances, E. B. Bodwell, at the time of his decease, did not stand in such relations to the contract that he could call upon a court of equity to enforce it specifically in his favor. Neither do the orators, who stand on his rights. Decree reversed, and cause remanded, with a mandate to the court of chancery to dismiss the bill, with costs to the defendant in this court.

(66 Vt. 197)

SLAYTON v. SMILIE, Clerk.

(Supreme Court of Vermont. Washington. March 5, 1894.)

SCIRE FACIAS—EXECUTION ON NEW JUDGMENT.

1. R. L. § 1443, providing that in scire facias to revive or enforce execution the court shall, unless for cause shown, give judgment for plaintiff for the amount of the original judgment with interest, and costs on the scire facias, requires a new judgment which merges the original judgment, and is the judgment to be described in the execution.

2. The award in an original judgment of the right to a close jail execution does not authorize the clerk to issue such an execution on a scire facias judgment.

Mandamus on relation of Fred A. Slayton to M. E. Smilie, clerk of court. Petition dismissed.

T. R. Gordon, for petitioner. M. E. Smilie, in pro. per.

ROSS, C. J. The relator, at the September term of Washington county court, 1891, recovered judgment against Alonzo Redway in an action of trover for \$13.81 damages and \$31.83 costs. The court adjudged that the action arose from the willful act or neglect of the defendant, and awarded the plaintiff the right to take out a close jail execution against Redway. No execution was ever taken out. At the September term of the same court, 1893, more than a year and a day from the rendition of the judgment having elapsed, and no execution having been taken out, the relator brought scire facias on the original judgment in the form prescribed by the statute. This form was prescribed in 1787, and adapted to common-law scire facias, where only an execution was desired and awarded on the original judgment. Such proceeding is only ancillary to the original judgment. State Treasurer v. Foster, 7 Vt. 52. Its office is to secure the right to take execution on the original judgment, and to

remove the bar of that right, raised by a year and a day having elapsed since the last execution was taken. On the writ as thus limited at common law no damages could be awarded; not even interest could be added to the damages and costs recovered in the original action. It was doubtful if the costs of the *scire facias* could be awarded. *Hall v. Hall*, 8 Vt. 156. The execution awarded and taken under the *scire facias* judgment described the original judgment, and issued only for the damages and costs of that judgment, and the costs of the *scire facias* proceeding if allowable. Soon after the last-named decision, which was rendered in a case tried in 1836, R. L. § 1443, was enacted, in 1842. This changed the character of the judgment to be rendered on *scire facias* proceedings of this kind. It reads: "In actions of *scire facias* commenced to revive or enforce the execution of a judgment, the court shall, unless cause is shown to the contrary, render judgment in favor of the plaintiff for the amount of the original judgment with interest and costs on the *scire facias*." By this act the court is required to render a new judgment for damages and costs, and the execution is for the enforcement of the new judgment. The new judgment is not, as in *scire facias* at common law, that the plaintiff may have execution on the original judgment, but that he is to have and recover a different amount of damages, an amount ascertained by adding the costs to the damages in the original suit, and deducting therefrom what has been paid or satisfied, if anything, and computing interest on the sum thus found from the rendition of the original judgment. This was so done in the *scire facias* suit under consideration. The relator was allowed to take such judgment therein as he was legally entitled to. He took a judgment thus made up, in which the damages are \$50.66 and costs, \$12.70. This judgment merged the judgment in the original suit. No execution on the original judgment describing the damages and costs therein recovered would authorize or justify the officer in collecting the damages and costs recovered in the suit of *scire facias*. Much less would it do so if a part payment or satisfaction of the original judgment had intervened. The execution must follow and correctly describe the judgment. The execution which the clerk was authorized to issue must describe a judgment rendered at the September term, 1893, for \$50.66 damages and \$12.70 costs, and not a judgment rendered at the September term, 1891, for \$13.81 damages and \$31.83 costs. Under this section of the statute, *scire facias* in this class of that form of action has been changed from an ancillary to an independent action, as held in *Howard v. Randall*, 58 Vt. 564, 5 Atl. 403. The clerk was not authorized to issue a close jail execution to enforce the judgment rendered on the *scire facias*. Petition dismissed, without costs, as per stipulation.

MILTIMORE et al. v. BOTTOM et al.

(Supreme Court of Vermont. Bennington.
March 5, 1894.)

ACTION ON REPLEVIN BOND — EVIDENCE — JUDGMENT — SCRETT — INTEREST ON FULL PENALTY OF BOND — TRIAL BY COURT — WHAT CONSTITUTES — REMITTITUR — WHEN REFUSED.

1. In an action on a replevin bond it appeared that defendant company agreed to allow plaintiffs to manufacture certain Bochum tires into car wheels; that afterwards such company replevied the tires, and gave the bond in suit; and that defendants in the replevin suit had judgment for the return of the tires and for one cent damages and costs. *Held*, that evidence was admissible to show the cost to plaintiffs of the same kind of tires as those replevied; or, in case such tires could not be obtained, to show the damages plaintiffs had sustained by what they had done towards carrying out the contract before they were replevied.

2. There was evidence that it was difficult to obtain such tires; that the expenses would be more than the penalty of the bond; that plaintiff had procured much material required to make the tires into car wheels before they were replevied; and that the loss on such material, and the sum expended, was much more than the penalty of the bond. At the close of the evidence defendants waived their right to go to the jury on any question raised. *Held*, that plaintiffs' damages by reason of the refusal of such company to return the tires were equal to the penalty of the bond.

3. A judgment for the penalty of the bond and interest thereon from the date of the judgment in the replevin suit was erroneous as to the surety on the bond.

4. Where the parties waive their right to go to the jury, they make the trial one by the court.

5. Where the trial is by the court, and on reversal the only error found is the unlawful allowance of interest, the supreme court will render such judgment as should have been rendered below.

Exceptions from Bennington county court; Thompson, Judge.

Action by George Miltimore and others against George R. Bottom and the Chicago Tire & Spring Company, on a replevin bond given by defendant company in an action of replevin by it against plaintiffs. There was a judgment for plaintiffs, and defendants except. Reversed and rendered.

At the close of the testimony the court inquired of both parties whether any question was made by the evidence upon which either of them wished to go to the jury, and, upon being informed that there was not, directed a verdict for the plaintiffs for the full penalty of the bond, with interest thereon from the date of the judgment in the replevin suit for a return of the property and costs.

Batchelder & Barber, for plaintiffs. F. G. Swinington, for defendants.

ROSS, C. J. By contract of January 12, 1885, the defendant Chicago Tire & Spring Company agreed to allow the plaintiffs to manufacture the 202 New York Bochum tires owned by it, then in the possession of the plaintiffs, into car wheels, to be disposed of according to the terms of the contract. June

1, 1888, the Chicago Tire & Spring Company, by an action of replevin, took from the plaintiffs these tires, and gave the required replevin bond. That suit resulted in a judgment for the plaintiffs for the return of the tires, one cent damages, and their costs. The bond was conditioned for the payment of such damages and costs as the defendants in the replevin suit, plaintiffs in this suit, might recover in the replevin suit; and that the Chicago Tire & Spring Company should return the tires replevied, if such should be the final judgment in the replevin suit. The defendant Bottom is the surety on the replevin bond. This is a suit against him and his principal on that bond. The damages for the wrongful taking and detention of the tires by the replevin writ from the plaintiffs were assessable, and were assessed at one cent in that suit. No other damages for such taking and detention are assessable in this suit upon the bond. But the damages for the failure of the Chicago Tire & Spring Company to return the tires as ordered in the judgment in the replevin suit were not assessable in the replevin suit. The failure to obey the order of that judgment for the return of the tires could not occur until after the rendition of the judgment for their return. Hence, in this suit upon the bond given in the replevin suit, it was legitimate for these plaintiffs to have ascertained the damages which they sustained by the failure to return the tires, as ordered by the judgment in the replevin suit. Such damages could be shown by evidence tending to show the amount which it would cost them to supply the same kind and size of tires, or, in case such tires could not be obtained, the plaintiffs could show the damages they had sustained by what they had done, before the replevin suit was brought, towards carrying out the contract of January 12, 1885. Hence evidence on both these points was properly received by the county court. That evidence tended to show that the tires replevied were of a peculiar make and size; that it would be difficult, if not impossible, now to obtain them; and, if possible, the expense would be more than the penalty of the bond. It also tended to show that the plaintiffs, before the replevin suit was brought, had in good faith supplied themselves with a large part of the material required to manufacture the tires into car wheels, as required by the contract of January 12, 1885; that, owing to the peculiar construction of the car wheels called for by that contract, the material so procured was of little value for any other purpose; and that the loss on this material, and the amount they had expended on it and the tires preparatory to manufacturing the required car wheels, were also much more than the penalty of the bond. At the close of the evidence the defendants waived their right to go to the jury on any question raised. They thereby submitted to the court to ascertain

and determine the right of the plaintiffs to recover damages, and the amount of such damages. The evidence fully justified the county court in finding that the damages sustained by the plaintiffs by the refusal to return the tires as ordered by the judgment in the replevin suit were equal to or greater than the penalty of the bond in suit. There was, therefore, no error in such determination. But the county court, against the exception of the defendants, rendered judgment against them, not only for the penalty of the bond, but for interest on the sum named as penalty from the time the plaintiffs obtained judgment in the replevin suit for return of the tires. Whether this judgment is correct against the principal in the bond, the Chicago Tire & Spring Company, we do not consider nor determine. Such judgment, so far as it included interest, was erroneous against defendant Bottom, the surety in the bond. *Mattocks v. Bellamy*, 8 Vt. 463; *Glover v. McGaffey*, 56 Vt. 294; *Sturges v. Knapp*, 33 Vt. 486. For this error the judgment must be reversed. When the trial is by jury, and the judgment of the county court is reversed, it has been the nearly universal rule to remand the case, although the determination and judgment in this court are such as apparently to be determinative of the rights of the parties and of the judgment which must eventually be rendered. *Moore v. Campbell*, 36 Vt. 361. This rule is based on the ground that on a retrial the same facts might not be established, the verdict having been vacated by the error causing the reversal. The defendants' counsel contends that this practice should prevail in this case. By waiving their right to go to the jury the parties in effect made this a trial by the court. In such trials the usual rule has been that when the case, on reversal in this court, has been so left that this court could clearly determine the judgment which the county court should have rendered, for this court to render such judgment. Especially has this been so held recently, when the only error was the unlawful allowance of interest. *Taylor v. Coolidge*, 64 Vt. 506, 24 Atl. 656; *Ballard v. Burton*, 64 Vt. 388, 24 Atl. 769. Judgment reversed. Judgment for the plaintiffs for the penalty of the bond, with costs in the county court, less the defendants' costs in this court.

(66 Vt. 191)

THOMPSON et al. v. TRYON et al.

(Supreme Court of Vermont. Chittenden.
March 8, 1894.)

CONSTRUCTION OF DEED—VESTED REMAINDER.

Under a deed of a house and lot in trust, to allow the grantor's daughter and her husband to occupy and use it during their lives, keeping it in repair as a home for them and their children, and, after the death of said daughter and husband, to sell, and pay the proceeds to their children, the children of said daughter and husband take a vested remainder.

Appeal in chancery, Chittenden county; Tyler, Chancellor.

Bill by Georgianna Thompson and others against Joseph Tryon and others for the appointment of a trustee, and the execution of the trust. Decree that the trust property should be distributed per stirpes among the surviving children and the issue of those deceased. The defendants appeal. Affirmed.

In 1833 Joseph Harrington conveyed a house and lot to H. H. Harrington, in trust for his daughter Mary Tryon and her husband, Jeremiah, by deed which declared the trust as follows: "To have and to hold the same, with all the privileges and appurtenances thereto and thereof belonging, to him, the said Hiram H. Harrington, his heirs and assigns, upon the special trust and confidence, and for no other purpose whatsoever; that is to say, that the said Hiram Henry Harrington, his heirs and assigns, shall at all times allow the said Jeremiah Tryon, and Mary, his wife, during their natural lives, and the life of the survivor of them, to occupy, use, and enjoy, all and singular, the said premises, keeping the same in repair as a home for themselves and their children; and after the decease of the said Jeremiah, and Mary, his said wife, that the said Hiram Henry Harrington shall sell and dispose of said premises, and pay the proceeds, after deducting costs and charges, to the children of the said Jeremiah by his said wife, Mary, in such way and manner that my said daughter Mary may at all times be certain of a home for herself and children, and that the creditors of the said Jeremiah, if any, shall not have it in their power to extend the same in satisfaction of their said claims. And I do hereby authorize and empower the said Hiram H. Harrington, if he thinks it expedient, to let the same premises to others, and to appropriate the rents and profits for the use and benefit of the said Tryon and his wife, as their means require, in lieu of the occupancy, or to sell and dispose of said premises if the interest of said parties require, and to invest the avails in other real estate for the purposes aforesaid, and in all things to manage said estate for the best interests of the said Jeremiah and his wife and their said children, hereby intending to include any children they now have, or may have." Jeremiah deceased in 1872, and Mary in 1892. They had five children, four of whom were living at the time the deed was executed, and one of whom was born afterwards. Of these five children, three had deceased before the death of their mother, Mary. This bill was brought by the issue of these three children against the two surviving children for the appointment of a trustee in place of H. H. Harrington, who had also deceased, and the execution of the trust. The defendants joined in the prayer for the appointment of the trustee, but denied that the orators had any interest in the trust fund.

W. H. Bliss and E. R. Hard, for appellants.
A. V. Spaulding and W. L. Burnap, for appellees.

TAFT, J. Joseph Harrington, on the 18th day of January, 1833, conveyed to his son Hiram a lot, with a dwelling house and out-buildings thereon, upon the special trust to allow Mary Tryon, a daughter of said Joseph, with her husband, Jeremiah, during their lives and the life of the survivor of them, to use, occupy, and enjoy the premises as a home for themselves and their children, in such way and manner that said Mary might at all times be certain of a home for herself and children. The trustee was given power to sell, and invest the proceeds in other real estate for the purposes aforesaid. The children mentioned in the deed were those in being, four in number, and one after born. The grantor directed that after the death of Mary and Jeremiah the trustee should sell the premises, and pay the proceeds to the children. Mary survived Jeremiah, and died leaving two children, and issue of three other children. A trustee appointed in the place of Hiram, deceased, has sold the premises; and the question is to whom the proceeds shall be paid,—to the children living at the death of Mary, or to them and the issue of the deceased children, per stirpes. This depends upon the nature of the estate taken by the children under the deed. The legal estate was in the trustee, but the entire equitable estate was in the parents and children. The latter were beneficiaries under the deed, and took, jointly with their parents, an equitable estate in the premises, and under our statute (R. L. § 1917) became tenants in common therein. By the terms of the deed the children had an interest in the real estate during the lives of their parents, and the survivor of them. Their interest attached to the land, and they had a right therein. In this respect the case differs from *Gilbert v. Richards*, 7 Vt. 203; *Sparhawk v. Buell*, 9 Vt. 41; *Decamp v. Hall*, 42 Vt. 483,—cases cited by defendants' solicitors. In the latter cases the bequests were of personal property, in neither of which did the devisees take any interest, legal or equitable, in real estate; and the court thought a joint tenancy was intended by the testator in each case. The case at bar is analogous to *Gilkey v. Shepard*, 51 Vt. 546, in which a life estate in land was given to the mother, with remainder to the children. It was held that the latter took vested estates in common. The law favors vested, rather than contingent, estates. In the case under consideration the children took an equitable interest in the land; and, although the grantor directed its sale after the death of the parents, this direction, no doubt, was for the reason that under the circumstances a more practicable distribution could be effected in that manner than by leaving the ownership of the property in the five

families, as it is apparent that it could not be used by the children jointly, if they all, as they might have, had families. Until the death of Mary and Jeremiah, the children had a right of occupancy jointly with them, which constituted an equitable interest in the land. The grantor undoubtedly thought that, after the necessities for a home-
stead for the family had ceased, a sale and distribution of the proceeds was the wisest way of dividing the property among the children; and there is nothing in the grant indicating an intention of excluding the issue of any of his children. It is argued by the defendants that if one of the children died the father would inherit the child's interest, and such share of the estate might be taken by his creditors, and that this, certainly, was not the intent of the grantor. It is doubtful if, by the acquisition of any such rights by a creditor of Jeremiah, possession could have been taken as against the trust deed. If so, and all the children died, and Jeremiah inherited their interest, if that could be taken by his creditors, as against the trust deed, the purposes of the trust would be wholly defeated. This could not be permitted, under the terms of the grant. If the estate did not vest in the children at the time of the grant, then, if one of them died, leaving children, the latter would have no right in the premises, and would be turned adrift. This could not have been the intent of the grantor. We think it more in accord with that intent that the estate vested at the time of the grant, rather than at a future period. If the children took no interest in the property until it was converted into money, the cases cited above would be more applicable, and the argument for the defendants more forcible, in favor of their claims. Construing the deed as we do, the direction to convert the land into money for the purpose of distribution did not change the nature of the interest which the children acquired in it, in its inception. The estate of the children vested at the time of the grant, and the issue of the deceased children, however remote, take in lieu of their parents. Decree affirmed, and cause remanded.

(66 Vt. 187)

STEARNS v. STEARNS.

(Supreme Court of Vermont. General Term. March 5, 1894.)

DIVORCE—WILLFUL REFUSAL TO SUPPORT WIFE—
ANTENUPTIAL CONTRACT—WHEN A BAR TO ALIMONY.

Where the court granting a divorce to the wife has unrestricted power to grant her alimony (R. L. § 2381), an antenuptial contract, whereby each party relinquishes all rights to the property then owned or afterwards to be acquired by the other, and which provides that at the death of either party his or her property shall descend to the heirs thereof, does not bar the wife of alimony on obtaining a divorce for the willful refusal of the husband to support her. Taft, J., dissenting.

Exceptions from Windsor county court; Thompson, Judge.

Petition by Elizabeth M. Stearns against Benjamin F. Stearns for a divorce on the ground of willful refusal to support. Petitioner was granted a divorce and \$1,000 permanent alimony. To the allowance of alimony defendant excepted on the ground that it was barred by the antenuptial contract of the parties. Exception overruled.

Gilbert A. Davis and Frank H. Clark, for petitioner. W. E. Johnson, for defendant.

ROSS, O. J. In the antenuptial contract the petitioner, in consideration of the marriage and of the covenant of the petitionee that he would forego and relinquish all rights to any property which she then had or might acquire during the marriage, also covenanted to relinquish all rights to the property which he then had or might acquire, and that she should be forever barred and estopped from having, or claiming to have, any right, title, or interest therein. The contract was made binding upon their respective heirs and legal representatives. It was declared to be the essence of the contract that at the death of either party all property of every kind of which such party should die seised should descend to the legal heirs and representatives, the same as though the marriage had not taken place, without any claim or right therein of the survivor. The question is whether this contract bars the petitioner of alimony on obtaining a divorce for the willful refusal of the petitionee to support her. A majority of the court think it does not. The statute gives the court, on granting a divorce to the wife, unrestricted power to grant her alimony, or an allowance from the property of the defaulting husband. R. L. § 2381. Alimony means sustenance or support. It is apparent that such allowance is given for the support to which she was entitled by the marriage, and which she has been compelled to forego and been deprived of through his default in failing to perform the marriage contract and covenant. R. L. § 2383; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *Foster v. Foster*, 56 Vt. 540; *Noyes v. Hubbard*, 64 Vt. 302, 23 Atl. 727. From these decisions it is also apparent that permanent alimony is given for damages sustained by reason of the failure of the husband to keep and observe his marriage contract, and perform the duties thereby imposed upon him towards his wife, especially the duty of supporting her, in sickness and in health, until the contract is dissolved by the death of one of the parties to it. Now, the antenuptial contract did not contemplate a divorce, or a dissolution of the marital contract through the fault of the husband. It contemplated the performance of that contract until dissolved by the death of one of the parties to it; that the petitionee would discharge his duty by supporting the petitioner until such

a dissolution. By it the petitioner did not debar herself of her marital right to such support. The antenuptial contract contemplated, and took effect upon, the consummation of the marriage, which imposed upon the petitionee the duty of supporting the petitioner until the contract of marriage came to an end by the removal of one of the parties by death. The contract, which took effect only upon the consummation of the marriage, cannot bar the petitioner from pecuniary damages awarded for the failure of the petitionee to keep and perform that contract and discharge the duties imposed upon him by it. It did not relate to nor touch upon the subject of his duty to support her, nor upon her right to be supported. It has been adjudged that on a divorce a mensa et thoro an antenuptial contract, like the one in this case, does not bar the wife from permanent alimony. *Logan v. Logan*, 2 B. Mon. 149. No more can it in a divorce a vinculo matrimonii. Whether the divorce is of the former or latter character, the antenuptial contract proceeds upon the supposition that the marriage is to be consummated, and it is the marriage which imposes the duty upon the husband to support the wife. That duty is, by the contract, presumed to remain until removed by death. The contract is, in neither case, to take the place of his duty to support, but presumes that duty to exist and to be performed to the termination of the life of one of the parties. Judgment affirmed.

TAFT, J., dissents.

(66 Vt. 121)

PIKE et al. v. McMULLIN.

(Supreme Court of Vermont. Orleans. March 7, 1894.)

ARREST IN CIVIL CASES—AFFIDAVIT—OBJECTIONS.

1. A *capias* cannot be issued in an action on contract, on an affidavit of defendant's intention to abscond, and secretion of property (R. L. §§ 1477, 1478), filed 60 days before.

2. The objection that the justice had no jurisdiction to issue the writ as a *capias* is not waived by consent to a continuance.

Exceptions from Orleans county court; Taft, Judge.

Assumpsit by Pike Bros. against N. McMullin. Dismissal refused. Defendant excepts. Reversed.

It appeared from the record of the justice that the case was twice continued,—once by agreement of parties, and once by the court,—and that after those two continuances the defendant moved to dismiss, for that the writ improperly issued as a *capias*.

J. W. Erwin and Dickerman & Young, for plaintiffs. A. D. Bates, for defendant.

START, J. The plaintiffs' attorney, on the 15th day of March, 1892, filed with the justice an affidavit in which he made oath that he had good reason to believe, and did

believe, that the defendant was about to abscond or remove from this state, and had secreted about his person, or elsewhere, money or other property to an amount exceeding \$20, or sufficient to satisfy the demand in the suit. On the 14th day of May, 1892, the justice with whom the affidavit was so filed issued a writ against the body of the defendant, and on the 25th day of May, 1892, the same was served by arresting his body. R. L. § 1477, as amended by No. 47 of the Acts of 1890, in general terms prohibits the arrest and imprisonment of a debtor in actions founded on contract. By R. L. § 1478, this section is qualified so as to authorize the issue of a writ, as a *capias*, when the plaintiff, his agent or attorney, files with the authority issuing the writ an affidavit stating that he has good reason to believe, and does believe, that the defendant is about to abscond or remove from this state, and has secreted property to an amount exceeding \$20, or sufficient to satisfy the demand upon which he is to be arrested. The affidavit filed in this case was *prima facie* evidence of the fact that, 60 days before the writ issued, the defendant was about to abscond or remove from this state, and that he had secreted about his person, or elsewhere, money or other property to an amount exceeding \$20, or sufficient to satisfy the demand in suit; but it was not evidence of the fact that, at the time of the issuing of the writ, he was about to abscond or remove from this state, and had money or other property to an amount exceeding \$20, or sufficient to satisfy the demand in suit. It is clear that the affidavit must show the intent and circumstances of the defendant at the time of the issuing of the writ. His intentions and circumstances in the past are immaterial. The fact that the defendant was, at some time prior to the issuing of the writ, about to abscond or remove from the state, and had money or other property to an amount exceeding \$20, or sufficient to satisfy the demand in suit, did not authorize the issuing of the writ as a *capias*. His intention to abscond or remove from the state may have been abandoned, and his money expended, long before the issuing of the writ. To subject a debtor to arrest in an action founded on contract, it must appear from the affidavit that he is about to abscond or remove, and has property to an amount exceeding \$20, or sufficient to satisfy the demand in suit, at the time the writ issues. These facts cannot be made to appear from an affidavit made and filed 60 days before the issuing of the writ. It will not be presumed from the fact that the defendant was about to abscond or remove from the state 60 days before the issuing of the writ that he was about to do so at the time the writ issued. It will not be presumed from the fact that he then had \$20 in money or other property that he had it at the time the writ issued. The justice issuing the writ in this

case was informed in respect to the intention and circumstances of the defendant 60 days before the writ issued, but he was not informed, in the manner provided by the statute, of his intention and circumstances at the time he issued the writ; and the writ issued as a *capias* without authority.

The plaintiff claims that the defendant waived the objection now urged by not objecting at the first opportunity. An objection that the court has no jurisdiction may be made at any time. It is not dilatory matter, which is waived if not objected to at the first opportunity. *French v. Holt*, 57 Vt. 187. The justice did not have jurisdiction to issue the writ as a *capias* without an affidavit first filed, and jurisdiction of the process was essential to the jurisdiction of the parties and the subject-matter. It has been held that, when a writ issues as a *capias* in actions founded on contract, without an affidavit first filed, or if an insufficient affidavit is filed, the writ, so far as it purports to authorize the arrest of the body of the defendant, is void. *Aiken v. Richardson*, 15 Vt. 500; *Muzzy v. Howard*, 42 Vt. 28. Judgment reversed, motion to dismiss sustained, and cause dismissed, with costs.

(66 Vt. 125)

COLLINS v. RICHARDSON.

(Supreme Court of Vermont. Windsor. March 7, 1894.)

CONTINUANCE—DISCRETION OF TRIAL COURT.

Under Rev. Laws, § 1126, authorizing the court, on application of plaintiff in a trustee suit, to continue the original suit on terms, it is within the discretion of the court to continue the other suit on terms to be thereafter determined.

Exceptions from Windsor county court; Munson, Judge.

Assumpsit by Lyman O. Collins against Orlando L. Richardson. One Whitcomb sued plaintiff, and summoned defendant as trustee. The referee found a sum due the plaintiff, and thereupon one Whitcomb sued the plaintiff, and summoned the defendant as trustee. At the May term—that being the term at which the referee's report was filed—Whitcomb entered, and asked that the suit be continued pending his own trustee suit. The plaintiff claimed that, inasmuch as Whitcomb's suit had not yet been entered in court, the court had no right, as a matter of law, to continue his suit. The court held otherwise, and the plaintiff excepted. Affirmed.

Norman Paul, for plaintiff. W. E. Johnson, for Whitcomb.

START, J. John L. Whitcomb brought a suit against the plaintiff, and summoned the defendant as trustee. At the June term, 1893, Whitcomb appeared, as is provided in Rev. Laws, § 1126, and moved that this cause be continued to await the termination of his

trustee suit. The court below had authority to continue the cause on the application of the plaintiff in the trustee suit, on reasonable terms. Rev. Laws, § 1126. The court continued the cause on terms thereafter to be determined. This was a proper exercise of its discretion, and its decision in this respect cannot be revised in this court. The order of continuance is affirmed, and cause remanded.

(66 Vt. 89)

BADGER v. WHITCOMB et al.

(Supreme Court of Vermont. Washington. March 7, 1894.)

SALE—RIGHTS OF BUYER—INSPECTION.

Plaintiff, having taken in trade boards as of a certain grade, but never inspected them, offered them to defendants for a fixed price. He made no representations as to their quality, but told defendants to look themselves. Defendants took them without inspecting them. *Held*, that they could not rescind for defect of quality.

Exceptions from Washington county court; Rowell, Judge.

Assumpsit by W. M. Badger against Whitcomb Bros. Judgment for plaintiff. Defendants except. Exceptions overruled.

The referee's report was as follows: "The defendants are partners. In July, 1891, the plaintiff and defendant W. H. Whitcomb met, and had negotiations looking to the sale by plaintiff to defendants of about 8,000 feet of clapboards then owned by plaintiff at Barre, and stored upon the premises of one Nye, on Main street, opposite the dwelling of the plaintiff. Plaintiff asked \$6 per M., but in the course of the negotiations lowered his price to \$5 per M. Defendant told plaintiff that, if they were good No. 2 boards, they would answer defendants' purpose. Plaintiff requested defendant to inspect the boards for himself; that he (plaintiff) bought them for No. 2 boards, and as such offered them for sale. Defendant said that he did not care to look at the boards, he knew nothing about clapboards, and that he would consult his partner, and let plaintiff know whether they would take the boards or not. July 30th plaintiff and said defendant again met, and defendant told plaintiff that, if the boards were good No. 2 boards, they were cheap enough, and that defendants would take them. Plaintiff replied, 'Look at the boards for yourself,' and insisted that defendant should examine the boards; saying that he bought the boards for No. 2, and supposed that was what they were. On the next day defendants sent a team and drew away 3,840 feet of the boards, and on the following day drew them back, and tendered them to the plaintiff, claiming they were not what they bought; and plaintiff refused to receive and forbade the teamster to unload them on his premises, whereupon the teamster drew the boards to the premises of a neighbor and unloaded them, of which the plaintiff had

knowledge, and knew that defendants claimed there was no sale of the boards, for the reason that they were not of the quality defendants claimed to have purchased, and that defendants would not pay for them. The plaintiff made no representations whatever to defendants in relation to the quality of these boards. He obtained them in the way of trade from one Densmore for No. 2 clapboards, had never inspected them himself, and believed them to be merchantable boards of that grade. Clapboard manufacturers put up their boards in four grades, sorting the boards into these several grades as they come from the saw. The boards are then tied into bundles of about 60 feet each, and the outside board is marked to indicate the grade of boards contained in the bundle. Whether the grade is in fact what is marked can only be ascertained by opening the bundles. These boards were marked No. 2, which is the lowest grade and poorest quality put upon the market, and, when used in siding buildings, is subject to considerable waste. When defendants got this 3,840 feet of the boards to the building where they intended to use them, their mechanic opened three or four of the bundles, and it was ascertained that about one-third of the boards in these bundles so opened were broken, 'shaky,' and otherwise so defective that clapboard manufacturers ordinarily would not have put them into even this low grade, and should have been thrown aside at the mill as waste, the remainder of the boards being good, merchantable, No. 2 clapboards. Plaintiff claims to recover for the 3,840 feet of boards taken by defendants as above set forth. If he is entitled to recover, his damages are \$21.67; interest computed to the first day of term."

Martin & Slack, for plaintiff. W. A. & O. B. Boyce, for defendants.

START, J. The plaintiff made no representations to the defendants in relation to the quality of the boards in question, but told them to look at the boards for themselves, and insisted that they should examine them. The plaintiff obtained the boards by way of trade for No. 2 clapboards, which he had never inspected, and believed to be merchantable boards of that grade. The defendants took the boards without inspecting them, and the sale was thereby perfected. Nothing further remained to be done, and the title passed to the defendants, and they could not afterwards return the boards, and rescind the contract, because some of them were not good, merchantable, No. 2 clapboards. They had an opportunity to examine them; they were requested to do so. Nothing was said by the plaintiff to lead them to believe that an examination was not necessary, or to induce them not to make an examination. By inspecting the boards, the defendants could have discovered all that they discovered after

they took them. They elected to take them without examining them, and they must pay the contract price. Judgment affirmed.

(66 Vt. 123.)

BUCHANAN v. TOWN OF BARRE.

(Supreme Court of Vermont. Washington. March 10, 1894.)

TOWNS—LIABILITY FOR DEFECTIVE SIDEWALK.

Where there is no statutory liability on a town for negligence in the care of sidewalks, one who, while going to the town hall, which had been rented for other than public purposes, is injured by a defect in the walk in front of it, cannot recover.

Exceptions from Washington county court; Taft, Judge.

Action on the case for personal injuries by George W. Buchanan against the town of Barre. The court directed a verdict for defendant, and plaintiff excepts. Affirmed.

Geo. W. Wing and John G. Wing, for plaintiff. John W. Gordon and Barney & Hoar, for defendant.

TYLER, J. Action on the case to recover for injuries alleged to have been received by the plaintiff near the entrance to the town hall in the defendant town. The plaintiff's evidence tended to show that he slipped and fell, and was injured, upon the sidewalk within the limits of the village of Barre, at a point two to four feet from the steps of the town hall or opera house, in consequence of the slippery condition of the sidewalk. To entitle the plaintiff to recover under the law of negligence, it must appear that the defendant owed him a duty in respect to the safe condition of the street at that point, and failed to perform that duty. By sections 5, 6, Act No. 190, Laws 1886, the village of Barre assumed all duties and responsibilities in respect to the streets of the village, and the town was relieved therefrom. If there was negligence in respect to the care of the sidewalk, it was on the part of the village. But there was no statutory liability upon either corporation, they being liable by the statute only for damages arising from the insufficiency of bridges, culverts, and sluices. The plaintiff contends that as the defendant owned the opera house, and rented it on this occasion for other than public purposes, namely, to an opera company, and received rent for its use, it owed a common-law duty to the plaintiff and others who were invited to the opera house to have the approaches to it reasonably safe. It is a general rule that towns and other quasi corporations are not liable for any neglect or corporate duty unless an action is given therefor by statute. This is for the reason that they are governmental in their character,—political subdivisions formed for the purpose of aiding in carrying on the government of the country. Dill. Mun. Corp. § 963; Mower v. Inhabitants of Leicester, 9 Mass.

247; *State v. Burlington*, 36 Vt. 521. A city or town is not liable to a private citizen for an injury caused by any defect or want of repair of a city or town hall, or other public building erected and used solely for municipal purposes; but where a city or town does not devote such building exclusively to those purposes, but lets it for its own advantage and emolument by receiving rents or otherwise, the city or town is liable, while it is so let, in the same manner that a private person would be liable. *Oliver v. Worcester*, 102 Mass. 489; *Hill v. Boston*, 122 Mass. 344; *Worden v. New Bedford*, 131 Mass. 23. The rule applies only to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate consent, and exclusively for public purposes. *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541. The cases make a clear distinction between the responsibilities of towns for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and those done for their immediate profit or advantage as a corporation, though inuring ultimately to the public benefit. *Oliver v. Worcester*; note to *Perry v. Worcester*, 66 Am. Dec. 434; *Moffitt v. City of Asheville*, 103 N. C. 237, 9 S. E. 695; *Howard v. City of Worcester*, 153 Mass. 426, 27 N. E. 11. Applying the rule for which the plaintiff contends,—that the defendant town stood in the case like a private individual; that, having rented the opera house on this occasion for the purpose shown by the evidence, it was legally bound to provide a reasonably safe approach to the building for persons going to and from it,—what was the measure of its liability? If a private person had been the owner of the opera house, he would have been under a legal obligation, to all persons visiting it on this occasion, to have had the building and its entrances and approaches, which were under his control, reasonably safe for their proper use. If there had been a space between the sidewalk and the building, owned and controlled by him, over which visitors had to pass in going to and from the building, he would have owed them the duty of having it in a reasonably safe condition for their passage over it; but over the sidewalk, which was a part of the public street, such private individual would have had no control, and in respect to its condition would have owed visitors no duty, and consequently would have been under no liability for its defects. Wherever there is a clear space between the street and any private building to which the public are invited, owned by the owners of the building, and used as an approach to it, such owners are responsible for its reasonably safe condition. If, on the other hand, the space is a part of the public street which it is the duty of the village, town, or city to maintain, the owners of the building are not liable for defects in the approach unless there is an ordinance which imposes upon them a

duty to keep the approach in repair. In the absence of a duty there is no liability. The defendant has made no point as to the length of time the slippery condition of the sidewalk had existed, and we have not considered it. Judgment affirmed. All concur.

(66 Vt. 183)

TOWN OF UNDERHILL v. TOWN OF JERICHO.

(Supreme Court of Vermont. General Term. March 5, 1894.)

APPEAL—REHEARING.

Where an appeal has been considered, judgment entered, and cause remanded, the supreme court has exhausted its jurisdiction, and cannot, on motion to have the cause reheard, recall it from the trial court.

Petition by the town of Underhill to the supreme court to correct a judgment entered by it in a cause in which petitioner was defendant and the town of Jericho plaintiff. Petition dismissed.

The case (64 Vt. 362, 24 Atl. 251) was first brought before a justice of the peace, and came, upon appeal, into the county court. There the defendant pleaded that the justice had no jurisdiction, for that he was a resident of one of the towns interested in the event of the suit, and that the suit should therefore abate. The plaintiff traversed this plea, and a trial was had by the court upon the issue thus formed. Upon the facts found by the court, the defendant was given judgment for its costs in county court. The plaintiff excepted, and the supreme court, at its January term, 1892, reversed this judgment, held that the plea in abatement was insufficient, gave judgment in chief for the plaintiff, and remanded the cause to the county court for the assessment of damages. The petitioner claims that the judgment of the supreme court ought not to have been in chief, but that the cause should have been remanded with instructions to allow the defendant to plead over; and the purpose of the proceeding is to obtain such a correction of that judgment.

S. C. Shurtleff, for petitioner. M. H. Alexander and Seneca Haselton, for defendant.

ROSS, C. J. This is a petition preferred to the supreme court for the county of Chittenden at its January term, 1893, setting forth that the town of Jericho had a cause pending against the petitioner in the supreme court of that county at its January term, 1892, which was heard; that the cause had not been heard upon its merits in the county court; that the supreme court reversed the judgment of the county court, and rendered judgment in chief against the petitioner, thereby depriving the petitioner of the right to a trial upon the merits of the cause; that the judgment so rendered was an error or oversight, and upon proper hearing the court would allow the petitioner to

plead over and try the cause upon its merits, inasmuch as the plea it had entered, and on which the court had passed, was a plea to the jurisdiction, and not a plea in abatement. The petitioner prays that the cause may be brought forward upon the docket, and the mandate corrected or changed so as to give the petitioner the right to try the case in the county court upon its merits. The mandate or judgment order remitted the cause to the county court for the assessment of damages. 64 Vt. 306, 24 Atl. 251. The argument of the counsel of the petitioner has been directed mostly to endeavoring to show that this court erroneously gave judgment in chief in favor of Jericho on its plea. But before this court can reach that question it must determine whether it is, or on this proceeding can be, brought before it for determination. The cause came to this court on exceptions, which are legally equivalent to a writ of error. It was fully and regularly heard. The court then took a recess, and, on reconvening, the opinion of the court was read, and the judge having the case inquired of the counsel what they claimed the judgment should be,—whether in chief, as was rendered, or reversing and remanding the cause for the petitioner to plead to it on its merits. The counsel for the town of Jericho claimed that it was entitled to a judgment in chief. The court held the case to consider the point raised. Neither the counsel for the petitioner nor for Jericho furnished the court with any authorities upon the point inquired about. After examination and consideration, the judgment ordered was entered, and the cause remitted to the county court, where the case is now pending. Hence this court has not the case within its control to bring forward upon its docket. The true cause was regularly before this court at the January term, 1892. It was duly heard and considered. The judgment order was not procured by any concealment, misrepresentation, or misinformation. It was in no sense an inadvertence. It was regularly entered, and the cause regularly remanded to the county court. The petition, in legal effect, is a motion to have the cause brought forward and reheard, and reaches only what rests in the records of this court. The state has no statute relating to the subject. The result is, the petition does not lay hold of the original cause, nor bring it within the reach of this court. When this court received the full and true bill of exceptions from the county court, it had the case in hand for consideration. It gave the cause thus before it due hearing and consideration, without being led into any inadvertence by concealment, misrepresentation, or default by any one, or of any kind. It disposed of and regularly remanded the case to the county court. It thereby exhausted its jurisdiction thereof, and has no power upon this petition, certainly, and probably none without the aid of legislation, to recall the case from the

county court, where it is now pending. Such is the reason of the premises, and such the decisions in regard to the jurisdiction of an appellate court or court of error over cases once regularly before it, heard, considered, determined, and remanded, in due course, to the trial court. In such a case the appellate court or court of error has exhausted its jurisdiction over the cause, although an error of judgment on the part of the court may have intervened. If its judgment order was not upon the case, as shown by the records of the trial court, or if the court of error failed to acquire jurisdiction of one of the parties through neglect to notify him as required by law, or if the judgment order issued erroneously through the misprision of its clerk, or if it issued by inadvertence, by reason of concealment, fraud, misrepresentation, misinformation, or other default, so that the jurisdiction of the court of error has not been exercised upon the real cause or in due course, and the remittitur does not represent the true judgment of the court of error properly and orderly obtained, the cause, notwithstanding the erroneous remittitur received by the trial court, is still in the appellate court or court of error, and its jurisdiction thereon has not been exhausted. *Legg v. Overbagh*, 4 Wend. 188, 21 Am. Dec. 115, and note reviewing the cases; *Lovett v. State (Fla.)* 11 South. 176. On the facts of this case, this court, at its January term, 1892, fully, fairly, and orderly exercised and exhausted its jurisdiction over the cause, and cannot now, on this petition at least, lay hold of and recall it. Whether, therefore, the decision is erroneous, and, if erroneous, whether, under the circumstances, this court could or ought to correct it, is not before us for consideration. These points, although fully presented in the petitioner's brief, we have not considered. Petition dismissed, with costs.

TAFT, J., interested, did not sit. START, J., doubting.

(66 Vt. 114)

BEEDÉ v. FRASER et al.

(Supreme Court of Vermont. Orange. March 10, 1894.)

GENERAL ASSUMPSIT—WHEN MAINTAINABLE.

Where partners agree, under seal, to dissolve, and that one of them shall have all the debts due the firm, he may maintain general assumpsit against the others for a debt due from them to the firm.

Exceptions from Orange county court; Thompson, Judge.

General assumpsit by F. A. Beede against Fraser & Co. Judgment for plaintiff, and defendants except. Affirmed.

Martin & Slack, for plaintiff. J. W. Gordon and E. W. Bisbee, for defendants.

TYLER, J. The court below found the following facts: Prior to October 15, 1891, the

plaintiff and one George were copartners, under the firm name of George & Beede, in the business of quarrying and selling granite, at Barre, and the defendants, as copartners under the firm name of P. B. Fraser & Co., were engaged in manufacturing granite into monuments, etc. The former partnership was dissolved about September 1, 1891. Prior to that time, it had sold and delivered to the defendants a quantity of granite, for which the defendants owed George & Beede; and the debt, by the contract of dissolution, became the property of Beede. The defendants were so notified before this suit was brought, and thereupon promised to pay the plaintiff the amount of said debt, and afterwards did pay him \$50, leaving a balance due of \$4.62. October 15, 1891, the plaintiff and the defendants entered into copartnership under the firm name of Beede & Co.; and that firm carried on the business of quarrying and selling granite, and prior to December 4, 1891, sold the defendants granite to the amount of \$90, which was due from the defendants to Beede & Co. on that date, when the firm of Beede & Co. was dissolved. The firm of Fraser & Co., composed of Fraser and Smith, owed the \$90 to the other firm, which was composed of Beede, Fraser, and Smith. The plaintiff was not a member of the defendant firm. The court found that as a part of this contract of dissolution the plaintiff became the owner of all debts due to Beede & Co., and that concurrently with the making of the contract the defendants promised the plaintiff to pay him the demand of \$90, but it certifies that these facts were found solely from Paper A, which is as follows: "This is to certify that the copartnership heretofore existing by and between F. A. Beede, P. B. Fraser, and G. W. Smith, all of Barre, in the county of Washington, and state of Vermont, under the firm name and style of Beede & Company, is hereby dissolved by mutual agreement. And it is further agreed by and between said Beede, Fraser, and Smith that the said F. A. Beede is to, and hereby agrees to, assume and pay all of the debts of the said firm, and to have and collect all of the debts due and owing said firm. Witness our hands and seals, and dated at said Barre this fourth day of December, 1891. F. A. Beede. [L. S.] P. B. Fraser. [L. S.] G. W. Smith. [L. S.]"

Before the dissolution the defendants owned the demand jointly with the plaintiff, and Beede & Co. could not have maintained an action upon it against the defendants, because Fraser and Smith would have been both plaintiffs and defendants, and "no one can be interested as a party on both sides of the record." Where two companies are composed in part of the same individuals, no action at law can be maintained by one against the other. *Green v. Chapman*, 27 Vt. 236, citing *Malnwarig v. Newman*, 2 Bos. & P. 120, and *Bosanquet v. Wray*, 6 Taunt. 597; *Dacey, Parties*, rule 22. It is a general rule that all the partners must join as plaintiffs in an ac-

tion at law to enforce a partnership claim, whether the action is brought before or after the dissolution of the partnership. Therefore, two partners cannot maintain a suit against a third to recover for goods charged to him on the partnership books, although by the contract of dissolution the two were to have all the debts due the firm, there being no promise by him to pay the other partners. *Judd v. Wilson*, 6 Vt. 185. One partner cannot recover of another an unliquidated and unsettled balance of a partnership business. *Spear v. Newell*, 13 Vt. 288. But when, on the dissolution, one retained a portion of the partnership assets sufficient to pay a particular partnership debt, and agreed with his copartner to pay it, and the copartner was afterwards obliged to pay it, it was held that he could recover in assumpsit the amount so paid. *Hicks v. Cottrill*, 25 Vt. 80. As a rule, assumpsit will not lie by one partner against his copartner, in respect to any matter connected with the partnership transactions, or which would involve the consideration of their partnership dealing. Yet one may sustain an action against his copartner on an express contract or covenant to do, or omit any particular act not involving any question as to the general accounts. And when the parties, by an express agreement, separate a distinct matter from the partnership dealing, and one expressly agrees to pay the other a specified sum for that matter, assumpsit will lie on the agreement, though the matter arose from the partnership dealing. *Collamer v. Foster*, 26 Vt. 754. "It is quite clear," says *T. Parsons on Partnership* (section 190), "that certain particular and distinct transactions may be separated from the affairs or business of the partnership, by the agreement of the parties. Then, those persons who are concerned in this separated matter are not as partners to each other, although in all other business relations they remain partners." Where partners agree to divide a partnership debt, and the debtor assents to it, and promises one of the partners to pay him his moiety, such partner may maintain an action for his moiety against the debtor. 1 *Lindl. Partn.* 265, citing *Blair v. Snover*, 10 N. J. Law, 153. After a dissolution, and a balance has been struck and agreed upon by the partners, one may maintain assumpsit against the other to recover his balance upon an implied promise. *Spear v. Newell*, 13 Vt. 292; *Warren v. Wheelock*, 21 Vt. 323; *Gibson v. Moore*, 6 N. H. 547; *Wilby v. Phinney*, 15 Mass. 121; *Wheeler v. Wheeler*, 111 Mass. 247. Assumpsit lies where, after dissolution and settlement, one partner received more than was his due. *Bond v. Hays*, 12 Mass. 34; *Clark v. Dibble*, 16 Wend. 601.

The defendants contend that the evidence of a promise is, in the express terms of Paper A, "to have and collect all debts due and owing the firm," and that, the paper being under seal, no action at law but cove-

nant will lie. But the paper contains no express promise. Before the contract was executed, the debt belonged to the plaintiff and defendants. By the contract the interest of the partners therein was separated, and the demand became the sole property of the plaintiff. Its covenants are that the partnership should be dissolved; that the plaintiff should pay the debts owed by the firm, and have the debts owing to it. Of these covenants the paper was proper evidence. The promise to pay the \$90 arises by implication of law from the fact of the assignment by the firm of all the debts to the plaintiff, with the right to collect them. The case is distinguishable from *McKay v. Darling*, 65 Vt. 639, 27 Atl. 324, where the plaintiff sued to recover for services in sawing and drawing lumber, and for damages occasioned by defendant's failure to furnish slabs pursuant to an agreement under seal. In that case, and in the other cases cited by defendants' counsel on this point, it was held that assumpsit would not lie where the damages claimed were caused directly by a breach of covenant. In the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 17, it is said that where the special contract remains open, unperformed, and there has been no fault or omission on the part of the defendant, indebitatus assumpsit will not lie. But if it has been wholly executed on the part of the plaintiff, and the time of payment on the other side is passed, a suit may be brought on the special contract, or a general assumpsit may be maintained. See cases there cited. In *Moulton v. Trask*, 9 Metc. (Mass.) 577, Shaw, C. J., said: "When a special contract is open and unexecuted, and the plaintiff proceeds for a breach of it, he must declare specially, and set it out, and aver a breach; and indebitatus assumpsit will not lie. But when a contract is at an end, either by its own original terms, or by the subsequent consent of the parties, or by the unjustifiable act of the defendant, and nothing remains but to pay money, indebitatus assumpsit will lie, although the debt accrued under a special contract; and such special contract may be proper and necessary evidence in support of the action." *Canada v. Canada*, 6 Cush. 15; 2 Greenl. Ev. § 104. In *Bank v. Patterson*, 7 Cranch, 209, Judge Story said: "It was undoubtedly true that a security under seal extinguishes a simple contract debt, because it is of a higher nature. But this effect never has been attributed to a sealed instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation." This subject is lucidly discussed in the notes to *Cutter v. Powell*, 2 Smith, Lead. Cas. 61, as follows: "The confusion and obscurity which exist in the books in relation to this matter of special and general assumpsits have arisen from an erroneous impression that when there has been a special contract, and the plaintiff

brings general assumpsit, the special contract of the defendant is in some degree, or to some extent, the ground of the plaintiff's recovery. This impression arises from an error as to the legal nature and ground of general assumpsit, which rests only on a legal liability springing out of a consideration received; and the difficulty clears away if it is kept always in mind that in no case in which general assumpsit is brought, though there may have been a special agreement, does the plaintiff legally ground his claim at all upon the special agreement or promise, nor derive any right from it, nor make it any part of his case. He proceeds exclusively upon the implied legal engagement or obligation of the defendant to pay the value of services ordered or received by him. In special assumpsit the express promise of the defendant is an integral, essential part of the plaintiff's right and of his declaration, because it fixes the measure of damages to which he is entitled. But in general assumpsit he claims, not the conventional, but the legal, measure of damages belonging to the consideration which he proves, and that is the actual value of the consideration; and the promise or express contract can have no weight in the proceeding, except as evidence of the fact of consideration, or of its value. Whenever, therefore, the plaintiff brings general assumpsit, he grounds his claim, not upon the special contract; but the rule of law is that, if the defendant can show that there has been a special contract in relation to the matter, he will defeat the plaintiff's general assumpsit, for the law will not imply a promise where there has been an express one. That is to say, where there has been a conventional measure of damages, fore-settled by mutual agreement, the plaintiff shall not cut loose from it, and claim the legal measure of damages." In this case no covenant in Paper A was broken. It contained no promise by the defendants to pay the \$90 to the plaintiff. The plaintiff's right of action arises by implication from the fact of the assignment of the demand to him, and not from an express promise to pay it. Upon this ground, general assumpsit is maintainable. Judgment affirmed. All concur.

(66 Vt. 95)

HUGHES v. ALLEN et al.

(Supreme Court of Vermont. Rutland. March 7, 1894.)

DOWER IN FIRM PROPERTY.

Where persons forming a partnership to conduct a quarry agree that on its dissolution the freehold interest of the partners in the quarry shall not be brought into the accounts and valuations, nor sold, but the shares therein shall remain vested in the partners, their heirs and assigns, on the death of a partner the quarry is to be treated as real estate, and not as personalty, for the purpose of fixing his widow's rights therein.

Exceptions from Rutland county court; Ross, Chief Judge.

Petition by Katie E. Hughes, the widow of H. G. Hughes, that the interest of her husband in certain copartnership real estate be treated as personal property in the distribution of his estate. From an order of the probate court dismissing the petition, petitioner excepts.

J. C. Baker, for petitioner. H. A. Harman, for the estate.

TYLER, J. It appears by the agreed statement, upon which the case is submitted, that prior to December 10, 1878, Hugh G. Hughes, the husband of the petitioner, owned in severalty the slate quarry, land, and buildings in question, situated in Poultney, and that on that day he conveyed an undivided fourth part thereof to one Roberts, with whom, on February 27, 1879, he entered into a contract of copartnership in the business of manufacturing slate, and selling the same in this country and in London, Eng., which copartnership continued until the decease of Hughes, which occurred March 6, 1884. At the time of his decease he owned other real and personal property in no way connected with the copartnership. The petitioner and her coadministrator, Allen, under license from the probate court, in June, 1884, sold the remaining three-fourths interest in the quarry, etc., to Roberts, for the sum of \$10,000, which was eventually realized. The home place of the intestate, which was the only other real estate he owned, was also sold under license, and the avails were divided between the petitioner and the guardian of the minor children. The widow of Hughes petitioned the probate court that the copartnership real estate might be treated as personal property, and that she might have her distributive share therein under the rule of law applicable to the distribution of personal estate. The defendants contended that the petitioner had only a dower interest in the partnership realty. The claim of the petitioner is that land held for partnership purposes is to be regarded in law as personal property, not only in respect to creditors of the firm and surviving partners, but also in respect to the widow of the deceased partner. The question is one upon which there has been much discussion and a contrariety of opinions. Some of the American cases to which the petitioner's counsel has referred us do not fully support the rule in England. In *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, Mr. Justice Field remarks that real property owned by a partnership and purchased with partnership funds is, for the purpose of settling the debts of the partnership and distributing its effects, treated in equity as personal property. In that case the heirs at law of Mrs. Allen brought a bill to enforce a trust in relation

ed was made in her favor in her lifetime for a partnership. It was found that a trust was not in fact created, so the real question at issue here was not involved in the decision of that case. In *Mallory v. Russell*, 71 Iowa, 63, 32 N. W. 102, the contract of partnership for the purchase and sale of real estate provided that such real estate should be conveyed to and by a certain person as trustee, and contemplated a conversion of all lands into cash before a settlement of the partnership, and not a division of any lands between the partners. It was held that lands so purchased were to be regarded as personal property of the firm, and that the wife of a partner had no dower interest in them. In *Rice v. Barnard*, 20 Vt. 479, Judge Redfield used the expression: "No sound reason now occurs to us why real estate belonging to copartnership funds should not follow the same law of distribution in a court of chancery which is applied to personal property." But the question in that case was only in relation to the priority of partnership over private creditors in the distribution of partnership assets. In *Lindley on Partnership* (5th Ed. 343) it is stated as the general rule in England that if a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money, and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real, estate. But the author admits that the authorities on this subject are not uniform. Story, Partn. § 95, note, gives a list of American cases which sustain the claim made by the petitioner in this case, but it is conceded that the weight of authorities sustains the contrary doctrine. The various works upon partnership and upon equity jurisprudence wherein this subject is treated, as well as numerous decisions of courts, concur in this: that equity converts real estate held for partnership purposes into personalty, so far as may be necessary to settle all the equities between the firm and its creditors and between the partners themselves. Eminent authorities go further, and say that this rule also prevails as between the representatives of the partners. Story, Eq. Jur. § 674; 3 Kent, Comm. 39; Hosmer, C. J., in *Sigourney v. Munn*, 7 Conn. 11; *Lindl. Partn.*, supra. In the notes to *Lindley* the editor says that the English rule so carefully stated by the author and sustained by the strong current of authorities in that country does not obtain in the United States beyond the necessity of considering realty as personalty in winding up the partnership affairs; that the balance, not required for the settlement of the liabilities of the partnership, goes to the representatives of the deceased partner by devise or inheritance; that the widow

takes dower in her husband's share of the residue. Cases from Massachusetts, New York, New Jersey, Pennsylvania, and several other states are cited. *Smith v. Jackson*, 2 Edw. Ch. 28, is referred to as a leading case on this subject. In *Buchan v. Sumner*, 2 Barb. Ch. 165, Walworth, Ch., reviews the English and American cases, and declares the law to be in this country that, though a court of equity considers and treats real property as a part of the stock of the firm, it leaves the legal title undisturbed, except so far as is necessary to protect the equitable rights of the several members of the firm therein. In *Tillinghast v. Champlin*, 4 R. I. 173, and in *Shearer v. Shearer*, 98 Mass. 107, substantially the same doctrine is held. To the same effect is the opinion of Sharwood, J., in *Foster's Appeal*, 74 Pa. St. 391; 1 Washb. Real Prop. *159. In the well-considered case of *Lenow v. Fones*, 48 Ark. 561, 4 S. W. 56, Cockrill, C. J., says that the contrary doctrine was invented for the convenience and accommodation of trade, and upon the theory that when partners put land into a commercial firm it must be taken that they intend it to be treated as personalty, since commerce concerns itself with personal property alone; that, having evinced a design to treat the lands as personalty by putting them into the partnership stock, the conversion into personalty is presumed to continue for all purposes, unless the contrary intention is in some way shown. He declares that the stronger tendency in this country is to limit the doctrine of equitable conversion strictly to the purposes which demand its operation; that, when the partnership is closed, and all rights of creditors and partners settled, the realty should resume its natural character for those having no relation to the partnership, whether it was purchased by individual partners and placed in the common fund, or by them jointly, and paid for with partnership funds. There is no occasion to presume an intention by the partners to change the course of descent. When there is an agreement between the partners for a conversion and sale of the lands after the partnership affairs are closed, and for a distribution of the proceeds, equity regards the lands as personal property, not only for partnership purposes, but for distribution, upon the principle that what the parties have directed to be done shall be taken as already done. In this case the partners, by their contract of copartnership, agreed "that upon the dissolution of said partnership from any cause whatever the freehold estate and interest of the said partners respectively in the said quarry shall not be brought into such accounts and valuations, nor shall the same be sold, but the same shares and interest in the said quarry shall continue to belong to and remain vested in the said partners, their heirs and assigns, in the shares and proportions in which they shall then respectively be entitled to the

same." This would seem to take the case out of the terms even of the English rule. The views above expressed are not intended to affect the petitioner's right of dower in the partnership property. Judgment affirmed.

(68 Vt. 110)

ROBINSON v. WINCH.

(Supreme Court of Vermont. General Term.
March 7, 1894.)

LAYING OUT HIGHWAY—VALIDITY OF PROCEEDINGS—COLLATERAL ATTACK.

1. Want of notice of a hearing by the board of selectmen as to the necessity of a highway is waived by one's appearance at the hearing.

2. In trespass quare clausum against a selectman for entering on land to lay out a highway, plaintiff cannot complain that his land damages were not assessed.

3. The description in proceedings to lay out a highway is sufficient if, by following the courses and distances indicated, its location can be ascertained.

4. The failure of the selectmen in laying out a highway to give notice to the owner to remove his buildings, fences, timber, and trees, as required by Gen. St. 1802, c. 24, § 26, does not affect the validity of their acts.

5. A highway may be laid out connecting with a prescriptive way over the land of another.

Exceptions from Washington county court; Taft, Judge.

Trespass quare clausum by J. S. Robinson against C. M. Winch. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Geo. W. Wing, for plaintiff. John W. Gordon and Barney & Hoar, for defendant.

START, J. The defendant, as one of the board of selectmen of the town of Barre, entered upon the plaintiff's land for the purpose of laying out a highway. The selectmen laid out a highway over the plaintiff's land, and the defendant subsequently entered upon the land over which the highway was laid, and built the highway. It does not affirmatively appear that the selectmen notified the plaintiff of the time when or the place where they would hear him upon the question of whether the public good or convenience of individuals required such highway; but it does appear from the record that they heard "all parties interested, as the law requires." The plaintiff was an interested party, and it sufficiently appears from the record that he was heard upon this question, and it does not appear that he made any objection on account of the insufficiency of the notice. By thus appearing and being heard, he waived any objection he might have taken on account of the insufficiency or want of notice. *Brock v. Barnet*, 57 Vt. 172.

It does not appear from the record that the plaintiff was heard upon the assessment of his land damages, or that he was notified of

the time and place of hearing claims for damages. For this omission of the selectmen the plaintiff cannot attack their doings in this collateral manner. *State v. Vernon*, 25 Vt. 244; *Haynes v. Lassell*, 29 Vt. 157. He has his remedy under R. L. § 2932. In *Slicer v. Hyde Park*, 55 Vt. 481, it is held that a mortgagee of land, over which a highway is laid out without notice to him, has, under this section, ample remedy for the enforcement of his rights.

It is claimed that the record of the laying out of the highway is defective, in that no permanent monuments are established at either end. The highway commences at the northerly end of the highway, or pent road, leading past the dwelling house of J. S. Robinson at a point near where there was formerly a starch factory, the pent road being described in volume 2, p. 216, of the Town Records of Barre. The point of commencement is thus fixed with sufficient certainty, and by following the courses and distances indicated in the record to the land of Henry Upton the other terminus is ascertained with certainty. The court below found the survey and record sufficient, and we think there is not such uncertainty in the records in this respect as ought to render the doings of the selectmen void. *Kidder v. Jennison*, 21 Vt. 108.

The omission of the selectmen to fix a time in which the plaintiff should remove his wood, fences, etc., as is provided in R. L. § 2926, did not affect the validity of their acts in laying out the highway. *Kidder v. Jennison*, supra.

The selectmen did not make and file in the town clerk's office a certificate that the highway was open for travel until after this suit was brought. The claimed trespasses were committed by going upon the plaintiff's land for the purpose of laying out the highway and building the same, and these acts necessarily preceded the making and filing of the certificate. The selectmen could not properly make this certificate until the highway was worked and ready for travel. R. L. § 2929; *Patchin v. Doolittle*, 3 Vt. 457. It does not appear that the highway was worked and ready for travel, so that the selectmen could have filed their certificate earlier than they did; and we cannot say that the certificate was not seasonably filed.

It is objected that this is not a public highway, because it does not connect with a public way. The highway connects with Henry Upton's prescriptive way over the plaintiff's land, and appears to have been laid out for Upton's benefit. The case of *Brock v. Barnett*, supra, is sufficient authority for holding that the highway thus laid out is a public way. In that case the highway was laid out for the special benefit of one Carrick, and stopped at his farm line, 54 rods from his farm buildings; and it was held to be a public way. Judgment affirmed.

(66 Vt. 106)

LEONARD v. VILLAGE OF RUTLAND. (Supreme Court of Vermont. Rutland. March 7, 1894.)

DEPRIVATION OF WATER RIGHTS—DAMAGES—EVIDENCE.

1. Laws 1882, No. 204, §§ 39, 42, empowered the village of Rutland, in order to increase its water supply, to appropriate such water courses as were necessary within certain limits, and provided for the payment of damages to persons injured by such appropriation. *Held*, that the measure of damages for the taking of water from a stream which supplied power for plaintiff's mill was the value of the right to the amount of water that could be taken through the pipe the village put in for that purpose, and not what actually was being taken at the time of the recovery.

2. In an action against a village for the appropriation of water which supplied power for plaintiff's mill, it is proper to show the cost of steam power required to replace the water power lost by defendant's diversion of the water.

Exceptions from Rutland county court; Tyler, Judge.

Petition by Willard C. Leonard for the assessment of damages for the taking of water by the village of Rutland. Judgment pro forma for defendant, and petitioner excepts. Exceptions sustained.

Prior to 1891 the village of Rutland had derived its water supply for the most part from the Mendon branch of East creek, in the town of Rutland. This supply had become insufficient, and, for the purpose of increasing it, in the summer of 1891 the village constructed a reservoir, into which it conducted the water from the aforesaid Mendon branch by means of a canal, and from which it carried it by means of a main, diminishing from 24 inches to 12 inches in diameter, into a distributing reservoir near the village. The petitioner was the owner of mills, operated by water power, situated upon East creek below the point where the water was thus taken out, and his alleged damages were that he was deprived of the use of the water for the operation of his mills. The reservoir and canal were so constructed that what water did not run through the main returned to the stream above the petitioner's mills. The commissioners found that the petitioner was thus damaged: that, if the village took all the water which could run through its main, his damages would amount to \$2,500; but that the village was not then using this amount of water, and in all probability would not in the future; and that upon this basis the damages were \$2,000.

Geo. B. Lawrence, for petitioner. J. C. Baker and C. H. Joyce, for defendant.

TYLER, J. This is a petition brought to recover damages under the charter of the village of Rutland for the taking of water from a stream upon which the petitioner's mills are situated.

Section 39 of No. 204, Laws 1882, is as fol-

lows: "The village of Rutland in its corporate capacity is hereby authorized and empowered to increase, enlarge and improve its water sources, water rights and aqueducts, with a view of providing an increased supply of pure water for public and private uses in said village; and for that purpose it may take and hold, by purchase or otherwise, such ponds, springs, streams, water courses, and the waters thereof, within the limits of the towns of Rutland, Chittenden and Mendon, in the county of Rutland, in this state, and such lands under and around the same as may be necessary for the purposes aforesaid." The only reasonable construction of the above section is that the village was authorized to take ponds, streams, water sources, and their waters, or such portions of their waters as might be necessary, etc. Section 42 provides that the village shall be liable to pay all damages that shall be sustained by persons in their property by such taking of water. The petitioner did not own the water of the stream in the sense that he might have owned the land around a spring. The specific water as it flowed along was not his property. His property in the stream consisted of a right to use its power for the propelling of his mills as it passed along in its natural current. It was a property that he had a right to compensation for when the water was diverted from its natural course for public purposes, the same as if a spring of water, and the land around it, had been taken in the exercise of the right of eminent domain. There can be no doubt that it was the design of the legislature in enacting this section to recognize this kind of property, and to provide compensation when water is taken in which persons have a right of use. It is found that in December, 1891, the defendant, by its trustees, constructed a new reservoir, and conducted a portion of the water of the stream to it by means of a canal, and that water was conveyed through a main pipe from the reservoir to the village. For this diversion of the water of the stream the petitioner claims damages.

The defendant's counsel contend that there was a taking of this stream by the defendant in 1882, or soon after the passage of the act, and that no further compensation can be required for the taking in question. But it is not found that the entire stream was ever taken by the defendant. It does appear that the quantity of water which had been taken prior to 1891 was sufficient until that time, when, by the growth of the village, it became insufficient, and this additional pipe was put in. No question of riparian ownership is presented by the report. In December, 1891, the defendant took, within the meaning of the statute, a certain quantity of water from the stream, and deprived the petitioner of its use, which use was his property. The only question is, how much

was he damaged by such taking? The commissioners have made an alternative finding on this subject. The measure of his damages is the value of the right taken by the defendant. The right is to draw as much water as will flow through the main pipe from the reservoir. The exercise of that right will deprive the petitioner of the use of that quantity of water at his mills. The defendant may not draw water to the full capacity of its main pipe for some time to come. It may never do so constantly. When it does not, a part of the water will flow from the reservoir back into the stream, and the petitioner will have the use of it. Upon this basis, the petitioners' damages would be constantly varying. If the damages are to be measured by the amount of water which the defendant now draws from the reservoir, and the petitioner is awarded the smaller sum named in the report, and the defendant (now the city of Rutland) should hereafter require water to the full capacity of its pipe, the petitioner would be without remedy for the additional loss of water. He can have but one recovery. The damages must be for the future and prospective, as well as the immediate, loss of the use of the water. *Bailey v. Woburn*, 126 Mass. 416, and cases cited, are full authorities on this point, if authorities are required to support so plain a proposition.

There was no error in permitting the petitioner to show the cost of steam power to replace the power lost by a diversion of the water. It tended to show the value of the water power, and might properly be considered. The pro forma judgment is reversed, and judgment for the petitioner for the larger sum named in the report.

(79 Md. 112)

HINKLEMAN et al. v. FEY.

FEY v. HINKLEMAN et al.

(Court of Appeals of Maryland. March 14, 1894.)

INSOLVENCY—PREFERENTIAL MORTGAGE—PRESENT LOAN.

Under Act 1890, c. 364, prohibiting preferences by merchants, etc., insolvent or contemplating insolvency, saving liens for money bona fide loaned and paid at the time, it is not enough to avoid a mortgage that the mortgagor was insolvent, if the mortgagee acted in good faith, and presently paid him the whole sum secured.

Appeal from circuit court, Allegany county.

Petition by Hinkleman, Jackson & Co. against John T. Fey, praying adjudication of insolvency against said Fey, and annulment of a mortgage. The decree granted the first prayer, but denied the second. Both parties appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, ROBERTS, and BOYD, JJ.

J. W. S. Cochrane and Ferdinand Williams, for plaintiffs. De Warren H. Reynolds, for defendant.

BOYD, J. The petition of the appellants was filed in the circuit court for Allegany county on October 17, 1893, alleging that the appellee, John T. Fey, was a merchant in Allegany county; that, although indebted in large sums of money, which he was unable to pay, and being insolvent, and in contemplation of insolvency, he executed a mortgage on October 9, 1893, to Robert R. Henderson, on his real and personal property for the sum of \$3,000; that said mortgage contains and works an unlawful preference, and was made with the intent to hinder and defraud the creditors of said Fey, especially the petitioners, and that the mortgage and preference therein contained were unlawful, fraudulent, and void. The petition then charges that said Fey has committed an act of insolvency, contrary to the laws of Maryland, prays that he may be adjudicated an insolvent, and that the mortgage may be set aside, and declared null and void. Robert R. Henderson and John T. Fey filed separate answers to the petition, both of which denied that Fey was insolvent, that the mortgage worked any unlawful preference, or that it was made with intent to hinder and defraud the creditors of Fey. They alleged that the mortgage was given to secure the sum of \$3,000 bona fide and actually loaned and paid to Fey by Henderson at the time of the execution of the mortgage. The case was tried before the court, a jury trial having been waived. The court adjudicated Fey an insolvent, but adjudged the mortgage of Henderson to be bona fide, within the meaning of the law, declared it a valid lien, and directed the trustees appointed to hold the property subject to the operation of the mortgage. The appeal of Fey from the order adjudging him an insolvent having been dismissed by him, the sole question to be disposed of is whether the mortgage is valid under the insolvent laws of this state. The only witness examined at the trial of the case was Mr. Henderson. He testified that Fey told him he wanted to borrow the money to pay debts with; that he gave him a statement, showing that he had assets valued at \$14,200, and that his liabilities were \$6,150; that Fey "said he must raise thirteen hundred dollars to return to the city money which he owed it as its treasurer, and that, if he could get three thousand dollars altogether, he could pay that, and divide the balance among such other obligations as were pressing in such a way as to obtain entire relief until he could collect his book accounts, and out of them and out of his business pay all his obligations of every kind." Henderson further testified that the money was loaned to Fey in good faith; that he paid him the \$3,000; that Fey owed him nothing at the time the loan was made; that he did not represent any of the

creditors of Fey, and that none of the money loaned was paid to him (Henderson) for any purpose whatever. In short, the uncontradicted evidence shows that it was an actual bona fide loan in the ordinary course of business. There is no evidence whatever to show any intent or attempt on the part of Henderson to hinder, delay, or defraud the creditors of Fey, or any of them, or to assist him in any way to give an undue preference to any of his creditors. Nor does it show that Henderson knew that Fey was insolvent, or in contemplation of insolvency, but, on the contrary, he testified that he loaned the money in the belief that Fey would be able to pay all his debts in full. The act of 1890 (chapter 364) amended section 14 of article 47 of the Code of Public General Laws, which prohibits preferences by merchants and others therein named, being insolvent or in contemplation of insolvency, save certain wages and salaries mentioned, by adding the following proviso: "That nothing in this section shall apply so as to set aside or render invalid the lien of any such judgment, mortgage or other conveyance executed by the debtor, for money bona fide loaned or paid at the time of the creation of such judgments, mortgage or conveyance, but such shall remain a valid and subsisting lien, although the debtor may be proceeded against or may apply for the benefit under this act." That act was passed for the purpose of removing all doubt about the validity of a security given by a person of any of the classes named to secure a bona fide loan made at the time. It is an important provision, as a merchant, banker, or other person mentioned might otherwise be unable to borrow money to enable him to meet pressing demands, and thereby avert financial disaster. Of course, if it were shown to a court by satisfactory evidence that the lender of the money was colluding with an insolvent debtor, or with one or more of his creditors, to give the latter some preference prohibited by law, the loan would not be bona fide within the meaning of the statute, and the court would not hesitate to set aside such a transaction. But there is nothing in the evidence in this case to sustain a charge or claim of that kind, and the order of the court below declaring the mortgage to Robert R. Henderson a valid and subsisting lien must be affirmed. Order affirmed, with costs.

(79 Md. 9)

HARDY v. HARDY et al.

(Court of Appeals of Maryland. March 13, 1894.)

SERVICE OF SON—IMPLIED PROMISE TO PAY—LIMITATIONS—ACKNOWLEDGMENT OF DEBT.

1. Where a father, who has need of help on his farm, induces a son, after he has attained majority, to work thereon, and the son remained for years, rendering continuous and valuable services, a promise to pay the reasonable value thereof may be implied.

2. An action is taken out of the statute by an acknowledgment of debt, which, though general in terms, sufficiently points to the particular indebtedness.

Appeal from circuit court, Montgomery county, in equity.

Suit by Thomas O. Hardy against William Cephas Hardy and others. Decree for defendants. Complainant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, FOWLER, McSHERRY, PAGE, BOYD, and ROBERTS, JJ.

H. W. Talbott, Tho. Anderson, and W. Veirs Bonic, for appellant. Jas. B. Henderson, for appellees.

ROBERTS, J. It appears from the testimony in this cause that John Hardy, Montgomery county, departed this life on the 13th of April, 1888, intestate, possessed of personal estate, of inconsiderable value, and seised of valuable real estate, situate in said county, and in the District of Columbia. He left surviving him the following children, his only heirs at law: Thomas O. Hardy, William Cephas Hardy, Joseph F. Hardy, Mary D. Hardy, and Elizabeth H. Smith, wife of Angus W. Smith. Letters of administration on the personal estate of the intestate were, by the orphans' court of said county, granted to the appellant, who administered the trust. After he had qualified as administrator, the appellant presented to the orphans' court a claim against the estate of his father, the intestate, for 30 years' services rendered him on the farm, upon which they both lived during the period of such service, and for \$30 cash loaned, amounting in the aggregate to the sum of \$4,530. This account was objected to, and never passed upon by the orphans' court; but it does not certainly appear from the testimony what disposition, if any, was made of it. But, in any event, it is wholly immaterial, for it is quite clear that the personal estate is wholly insufficient to discharge so large a claim, and scarcely sufficient to pay the expenses of administration, and the other claims owing by the intestate at the time of his death, and the personal estate having been finally settled by the appellant without paying any part of his claim.

The controversy before us arises out of the bill of complaint filed on the 31st of July, 1889, by the appellant, against all the other children and heirs at law of John Hardy, for the purpose of subjecting the real estate situate in said county, of which said intestate died seised, to the payment of appellant's claim for services in working on farm, etc., amounting to the sum of \$4,504.17, and for cash loaned September, 1886, the sum of \$30, aggregating the sum of \$4,534.17, and alleging the insufficiency of the personal estate to pay the just debt due and owing by the intestate at the time of his death. A new claim is exhibited with the bill, the items of which are somewhat differently stated from the claim filed in the orphans' court,

but the difference between the two is quite immaterial. William Cephas Hardy was the only heir who answered the bill, denying the indebtedness of his father to the appellant in any sum, and setting up the bar of the statute of limitations against a recovery by the plaintiff. The appellant's sister Elizabeth H. Smith, and her husband, have answered the bill, admitting the allegations therein contained, and consenting to a decree for the sale of real estate as therein prayed. The other defendants, Joseph F. Hardy and wife, and Mary D. Hardy, were summoned, but failed to appear; and the bill, as to them, was taken pro confesso. Then follows the taking of testimony, which resulted in a record of more than 160 printed pages, and certainly twice the size it should have been. Such a record in a case like this serves no good purpose, but compels an unnecessary expenditure of time and money. Hence arises, in great measure, the complaint about the costs which parties are required to pay in this court. The testimony which the record contains is undoubtedly very conflicting, and somewhat confusing; but we have gone through its entire length, and given it thorough examination and careful consideration. It is contended on behalf of the defendant William O. Hardy, who alone contests the claim, that the complainant can only recover by showing an express or implied understanding existing between him and his father that the work and labor which he alleges to have performed for his father were to be charged for, and to be met by payment, and that there is no evidence in the cause showing such an agreement.

The first inquiry which naturally arises here is one of primary importance, and that is, did the appellant render the services for which he now claims payment? The testimony of his two sisters and his brother Frank—all testifying against their own interest, and being persons who were more familiar with the daily life of their father, and better acquainted with the occurrences and circumstances existing at the home farm of the intestate than any one else called to testify in this cause—assert that the appellant rendered valuable services to his father, in working on the farm, and that his claim is a just one, and ought to be paid. Even William Cephas Hardy, who disputes the appellant's claim, in answer to the eleventh interrogatory in chief, which reads, "In 1863, when you say this money was paid to Thomas O. Hardy, and you also state that your father owed it to him, state, if you can, for what your father owed him that money?" answered, "He owed it to him for his services, and gave it to him, I suppose, for that." The claim is for services rendered between September 6, 1855, and April 15, 1888. We then have the admission of the contesting defendant that in 1863 the intestate did owe the appellant for services, and paid him the sum of \$1,000. Therefore, if it be true—and we think the tes-

timony clearly establishes the fact—that the appellant worked, with intermissions varying as to time, for his father's farm from 1855 to 1863, the year in which Cephas Hardy says his father paid appellant the sum of \$1,000 for services which he had rendered, it would be but a reasonable inference that if after the appellant left him, in 1863, and shortly thereafter, at his father's request, he returned, and continued to perform service of like character with that which he had rendered prior to the year 1863, the service was not gratuitous, but was rendered with the implied understanding that a charge was to be made, and proper compensation was to follow. It is a fact well established by the testimony that the appellant did a great deal more labor, and improved the place more, than any of the other children; and it also appears that on various occasions he made arrangements with his other sons to pay them for work and labor to be performed by them on the farm, and agreed upon the amount of the compensation; and time and again has the intestate promised to pay the appellant for his services, commending him in the highest terms for what he had done, and promising him that he should be compensated. Within a few weeks of his death, when the shadows were lengthening in his life, when he was about to die intestate, when he knew that he had made no provision for a faithful son, he then said that he should be paid for his labor. We have found no difficulty in ascertaining from a decided preponderance of the proof that the appellant has performed, during the period named, important services to this father.

The next question which we must now consider is one that, in most cases of this character, presents some difficulty. It is but natural that children, after they have attained their majority, should oftentimes find the homes of their childhood a refuge in ill health; and often, after misfortune has overtaken them, recollections of home and its surroundings become too strong to resist. When such is the case, while they may assist in the performance of duties connected with the home, yet, if such duties are discharged without an express or implied understanding that they are to be charged for, and met by payment, there can be, and there should be, no recovery. To maintain a different rule could not fail to result in unworthy strife, vicious litigation, and dishonest schemes. But, upon the other hand, if a father who is engaged in an occupation requiring help and assistance, and in consequence of bad habits, or bad temper, or from any other cause, is unable to obtain the same, or if, from any other reason, he induces a son, after he has attained his majority, to remain at home, to discharge continuous labor, and valuable service, would it be in accordance with well-recognized principles of justice and fair dealing that the best part of his life should be thus occupied, and yet he receive no

compensation? There can be no valid reason why contracts of this character should not be just as binding between father and son as between other parties, save only that greater particularity is required in establishing the same. But care should always be observed lest undue importance be permitted to attach to the relationship existing between the parties; otherwise, great injustice may be done. This court has heretofore, in *Bantz v. Bantz*, 52 Md. 693, and in other cases, been called upon to examine the law applicable to cases of this character, and has determined the same in such manner as to leave no doubt as to the doctrine which should control in this case. In *Bantz's Case* this court held: "That if, under all the circumstances of the case, the services were of such a character as to lead to a reasonable belief that it was the understanding of the parties that pecuniary compensation should be made for them, then they might find an implied promise and quantum meruit." The cases of *Lee v. Lee*, 6 Gill & J. 316, and *Stockett v. Jones*, 10 Gill & J. 276, proceed upon the same principle. In order to justify a claim for services being allowed against a decedent, there must have been a design, at the time of the rendition, to charge, and an expectation on the part of the recipient to pay, for the services. The services must have been of such character, and rendered under such circumstances, as to fairly imply an understanding of payment, and a promise to pay. There must have been an express or implied understanding between the parties that a charge for the services was to be made, and to be met by payment.

In this case, after careful consideration of all the evidence, we have found no difficulty in reaching the conclusion that there is ample proof to justify the finding of an implied understanding between the father and the son that the services rendered were to be charged for, and met by payment. There is certainly great force in the fact that all the defendants, save one, have testified in this cause against their own interests, maintaining that the appellant performed the services for which he is seeking compensation, that his claim is just and right, and that he is entitled to a reasonable compensation for his work and labor. We think the testimony demonstrates that the charge which the appellant has made cannot be fairly considered to be unreasonable or excessive. The charge of \$30 for money loaned is also clearly established. But, from a careful consideration of all the proof, we do not think the appellant ought to be allowed interest. There are statements in the testimony which show that the intestate, from time to time, paid the appellant small sums of money, for which no credit has been given; and, in consequence of the claim having been allowed to continue so long without an accounting or settlement, we think no interest should be allowed. We do not think the

testimony of Cephas Hardy sufficient to establish a credit against the plaintiff's claim, because of the direct denial of other witnesses, who were, according to his recollection, present at the time of the payment and conversation; otherwise, his admission as to the understanding between the appellant and his father, made against interest, will prevail.

The plea of limitations interposed in this cause cannot prevail, for the reason that the acknowledgments of the intestate, made within three years of the filing of the bill, are explicit and direct. He has repeatedly acknowledged his indebtedness to the appellant, and promised to pay the same; and while these acknowledgments may have been very general in terms, yet, when they sufficiently point to the particular indebtedness, they will be deemed adequate to remove the bar of the statute. The principle is well settled in this state that when a debt is admitted to be due the law raises, by implication, a promise to pay it. It is therefore immaterial whether the promise be made in express terms, or be deduced from an acknowledgment, as a legal implication. In either case the effect is the removal of the bar of the statute, and the restoration of the remedy upon the original demand. *Ellicott v. Nichols*, 7 Gill, 96; *Guy v. Tams*, 6 Gill, 82; *Peterson's Ex'rs v. Ellicott*, 9 Md. 52; *Shipley v. Shilling*, 66 Md. 563, 8 Atl. 355.

We think the claim of the appellant should have been allowed, but, for the reasons stated, without interest. It follows from what we have said that the decree passed by the court below should be reversed, and the cause remanded for further proceedings in accordance with this opinion. Decree reversed, and cause remanded. Costs to be paid out of the proceeds of sales.

(79 Md. 18)

JOHNSON v. SAFE-DEPOSIT & TRUST CO. OF BALTIMORE et al.

(Court of Appeals of Maryland. March 13, 1894.)

WILLS—CONSTRUCTION.

Testator gave the residue of his property to trustees in fee to hold "for the uses hereinafter mentioned," or sell the same and hold the proceeds for the "same uses;" "that is to say, that until they shall sell the same they shall hold and pay the rents * * * thereof equally to and for" the use of certain of his daughters. *Held* that, as the equitable estate of the daughters was equal in duration to the trustees' legal estate, and as the devise of the rents to them carried an absolute equitable interest, it also vested in them an absolute equitable interest in the proceeds of the property after sale.

Appeal from circuit court of Baltimore city; J. Usher Dennis, Judge.

Bill by the Safe-Deposit & Trust Company of Baltimore, trustee under the will of Reverdy Johnson, deceased, for a construction of the will. From a decree deciding the interests of the devisees, Louis E. Johnson, a devisee, appeals. Affirmed.

Argued before ROBINSON, C. J., and BRISCOE, BRYAN, ROBERTS, BOYD, and McSHERRY, JJ.

Thos. Hughes, for appellant. Charles Marshall, C. J. M. Gwinn, Reverdy Johnson, and Charles G. Kerr, for appellees.

McSHERRY, J. We have before us for construction the will of the late Mr. Reverdy Johnson, who in his day was one of the ablest and most distinguished lawyers of this country. The will was dictated, but not penned by him, because his failing eyesight prevented him from writing it with his own hand. He was perfectly familiar with the rules of law relating to testamentary dispositions, thoroughly master of the legal principles governing the interpretation of wills, and fully acquainted with the value and significance of the words and phrases which he employed to express his wishes and intentions. Notwithstanding this, we are met by the startling contention on the part of the appellant that a proper construction of the whole instrument leads to a partial intestacy as to the proceeds of the sale of certain real estate referred to in the fifth clause of the will. That Mr. Johnson did not intend to die intestate as to any of his property, or as to the proceeds of the sale of any of it, is too obvious, we think, to admit of even a momentary doubt. The mere fact of his having made a will furnishes in itself a strong presumption that he had no such intention. And when the whole context of the will discloses by all its interdependent and harmonious provisions an entirely opposite design, courts will, or ought to, "struggle against an intestacy which can only arise as the result of a forced and unnatural construction." *Booth v. Booth*, 4 Ves. 403. Bearing in mind the cardinal rule that the testator's intention as gathered from the four corners of the instrument must prevail, and must be given full effect unless that intention violates some settled legal principle, and recognizing the established doctrine that when the residue is given every presumption is to be made that no intestacy was designed (*Phillipps v. Chamberlaine*, 4 Ves. 51), we find no difficulty in reaching the conclusion that the position assumed by the appellant is wholly untenable. When Mr. Johnson died he was a widower, and he left surviving him four sons and seven daughters. By the first clause of his will he gave in fee simple to his son Bowle Johnson a farm in Alleghany county. By the second clause he gave to his son Edward C., in fee simple, a dwelling house and 50 acres of land contiguous thereto. By the third clause he gave to his daughter Mrs. Guinn, in fee simple, a cottage and 40 acres of land adjacent thereto. Both of these devises were carved out of the testator's farm, situated in Baltimore county. By the fourth clause he gave the rest and remainder of his

said farm to trustees, in trust to cause the same to be divided into five parts of equal value, and to convey in fee simple one of such parts to each of his five daughters, Mrs. Morris, Mrs. Daingerfield, Mrs. Ridgley, Mrs. Lewis, and Mrs. Kerr. The fifth clause, which is the one that gives rise to the pending controversy, will be quoted later on. By the sixth, seventh, and ninth clauses he directed his trustees, out of the proceeds of the sales of any portion of the real estate mentioned in the fifth clause, to invest several sums of money for the purposes specified by him, but they need not now be alluded to. After bequeathing certain portraits and a watch to his son Reverdy, he declared in the eleventh clause: "I do not give my said son anything more than is contained in this will, because he has an estate amply sufficient for all his wants." By the tenth clause he directed his trustees to have a copy of his portrait for his daughter Mrs. Travers, who, being amply provided for by her husband, was not made a devisee or legatee under the will. The property devised by the fifth clause consisted of a house and lot on the corner of Fayette and Calvert streets in Baltimore City, and an unproductive lot at Locust Point. The Anne Arundel property mentioned in this clause had been sold by the testator many years before. Some 15 years after the death of Mr. Johnson the Fayette street property was acquired by the mayor and city council of Baltimore for the purpose of widening that street, and the amount of damages or purchase money awarded to the trustees was fixed at \$160,041.66, which sum was paid over to the Safe-Deposit & Trust Company, which had in the mean time, at the request and upon the petition of Messrs. Reverdy Johnson and Charles G. Kerr, the surviving trustees under the will, been appointed trustee in their place and stead. Out of this sum of money the Safe-Deposit & Trust Company, as trustee, after deducting some expenses, paid off certain liens on the Fayette street property, leaving in its hands the sum of about \$130,000. After an investment of so much of the amounts bequeathed by the sixth, seventh, and ninth clauses as had not already been paid out by the former trustees, there will remain the sum of one hundred and odd thousand dollars, which the appellant claims has not been disposed of by the testator, and as to which it is insisted he died intestate. Whether this be so or not is the leading question in the case, and its solution depends upon the meaning of the fifth clause, viewed as an integral part of, and taken in connection with the scheme of, the whole instrument. The fifth clause is in these words: "I devise all the rest and residue of my real and personal estate in the city of Baltimore and in Anne Arundel county, except as hereinafter provided, to my said trustees, in fee simple, in trust that they

may hold the same to and for the uses hereinafter mentioned, or sell the same, or any part thereof, and hold the proceeds thereof to and for the same uses; that is to say, that until they shall sell the same they shall hold and pay the rents and profits thereof equally to and for the use and benefit of my said daughters, Mary Morris, Eliza Daingerfield, Camilla Ridgley, Emily Lewis, and Ella Kerr, free from the debts or obligations of their respective husbands." It is obvious from this language that the equitable estate vested under this clause in the daughters named as cestuis que trustent is coextensive with the fee-simple estate in the realty and the absolute estate in the personalty and the like estate in the proceeds of the sale of realty and personalty vested in the trustees. 3 Jarm. Wills, 28; *Challenger v. Shepherd*, 8 Term R. 597; *Moore v. Cleghorn*, 10 Beav. 423; *Yarrow v. Knightly*, 8 Ch. Div. 736; *Knight v. Selby*, 3 Man. & G. 92. But, apart from this, the devise of the rents and profits to the daughters was sufficient to vest in them an equitable fee in the rest and residue, and also an absolute equitable estate in the proceeds of the sale of that rest and residue, as tenants in common, for such was the manifest intention of the testator; and there is neither a limitation over nor an expression of any kind to denote a contrary or a different purpose. 2 Jarm. Wills, 403, and notes; *Watkins v. Weston*, 32 Beav. 238; *Cooke v. Husbands*, 11 Md. 492; *Cassilly v. Meyer*, 4 Md. 1; *Drusadow v. Wilde*, 63 Pa. St. 170.

Now, this clause directs the trustees to hold the rest and residue of the whole real and personal estate in Baltimore, except certain bequests, to which no reference need be made, to and for the uses thereafter mentioned; and it further explicitly directs them to hold the proceeds of the sale thereof to and for the same uses; that is to say, to and for the identical uses declared in the same clause in respect of the rest and residue of the real and personal estate before a sale thereof. But they are directed to hold and pay the rents and profits of the rest and residue of the real and personal estate in Baltimore before a sale equally to and for the use and benefit of the daughters, and, as the trustees are to hold the proceeds of a sale to and for the same uses, they must necessarily hold them to and for the use and benefit of the same daughters, precisely as they held the property itself before a sale. Consequently, as the equitable estate of the daughters was equal in duration to the legal estate of the trustees, and as the devise of the rents and profits to the daughters carried an absolute equitable interest, it also operated to vest in the daughters an absolute equitable interest in the proceeds after a sale, because in no other way could the proceeds of a sale be held, as the clause explicitly declared they should be, to and for the same uses as the rest and residue

of the real and personal estate was directed to be held. In fact, therefore, the testator declared in express, unambiguous, and apt words that the proceeds of the sale of any part of the rest and residue devised by the fifth clause should be held to and for the same uses to and for which he directed the rest and residue to be held before a sale thereof; that is, to and for the use and benefit of the daughters, free from the debts or obligations of their respective husbands. Hence there was no failure or omission to dispose of such proceeds, and of course there is no intestacy as to them, but, on the contrary, a clear and complete disposition of them to the trustees to and for the use and benefit of the daughters. Any other conclusion would do open violence to the testator's language, and would utterly frustrate his purposes. This conclusion is made even more apparent, if that be possible, when subsequent clauses of the will are considered. We have already alluded to the provisions of the tenth and eleventh clauses, in the first of which the testator declares that he makes no devise to Mrs. Travers, because she is amply provided for by her husband; and in the second of which he says he does not give his son Reverdy anything more than the portraits and watch, because that son has an estate amply sufficient for all his wants. These clauses clearly indicate that the testator did not intend this daughter and this son to have any more of his estate than he had specified, and therefore that he did not contemplate such a contingency as a partial intestacy. But the ninth clause is even more emphatic and significant. It declares: "Whereas, I have hitherto advanced considerable amounts in money to my son Louis E. Johnson, and have had the entire support and maintenance of his four children, aforesaid, and also provided for them by this will, I do not think it just and proper to give him an equal share of my estate with his brothers and sisters. I do nevertheless direct my said trustees to invest eight thousand dollars of the proceeds of the sale of my real estate aforesaid in state of Maryland or city of Baltimore stock, and to pay over the interest which may from time to time accrue on such investments to my said son." Here, then, is the most unequivocal manifestation of an intention that the appellant should have no other part or portion of the testator's estate, and consequently an absolute exclusion of the hypothesis that he did not design by the language which he employed in the fifth clause to dispose of the whole of the proceeds of sales of the rest and residue of his real and personal property in Baltimore. It is impossible for language to make his intention to dispose of the proceeds more evident. If this postulate that he did not design to die intestate or partially intestate be accepted, then there is no escape from the conclusion that he intended by the fifth clause to make the same dis-

position of the proceeds of sale that he confessedly made of the rest and residue of the real and personal estate in Baltimore before a sale thereof by the trustees; and, if this was his intention, the language he used was technically accurate to express it. This view seems to us to be decisive of the case, and dispenses with the necessity for further discussion.

Without pausing to state the other subjects covered by the decree below, because they were either not controverted in this court, or else are disposed of by what has already been said in this opinion, we need only observe that we fully concur in the results reached by the learned judge of the circuit court, and in all particulars we will affirm the decree appealed from, with costs. Decree affirmed, with costs.

(79 Md. 187)

VALENTINE v. SEISS.

(Court of Appeals of Maryland. March 14, 1894.)

VENDOR AND PURCHASER — UNRECORDED DEED — SUBSEQUENT CREDITORS — BONA FIDE PURCHASER — EVIDENCE.

1. In a proceeding by a purchaser at sheriff's sale to set aside a conveyance to defendant which was not recorded until after such sale, evidence that a witness talked with plaintiff about the sale of the land to defendant, who was in possession, before the sheriff's sale; that defendant's purchase was commonly known and the general talk in the neighborhood; that he had made valuable improvements on the land; and that public notice was given at the trustee's sale that he claimed an interest in it, — showed sufficient facts to put him on inquiry as to defendant's title.

2. An unrecorded contract for the sale of land, made in good faith for a valuable consideration, takes precedence of the general lien of a subsequent judgment.

Appeal from circuit court, Frederick county, in equity; John A. Lynch, Judge.

Bill by John F. Valentine against Daniel L. Seiss, Jr., for the partition and sale of land, and to set aside a conveyance thereof to defendant. From an order vacating the trustee's sale, and dismissing the bill, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and MC-SHERRY, BRYAN, PAGE, ROBERTS, BOYD, and BRISCOE, JJ.

Robert Biggs, for appellant. Frank L. Stoner, for appellee.

BRISCOE, J. The appeal is taken in this case from a decree setting aside a sale of land made by a trustee appointed by the circuit court for Frederick county, and from an order dismissing a supplemental bill filed in the same case. An agreed statement of facts is incorporated in the record, and forms a part of the testimony of the case. It appears that on the 10th of June, 1889, Frederick C. O. Seiss, Barbara Ann V. Heagey, and Mary A. E. Dotterer were owners in fee and tenants in common of certain lands sit-

uate in Frederick county, Md. On the 10th of June, 1889, Mary A. E. Dotterer, widow, by a deed or release conveyed to Daniel L. Seiss, Jr., all her right, title, and interest in said land in consideration of the sum of \$1,000, which was paid, and the purchaser put into possession. The deed is signed by the grantor in the presence of a witness, but is not acknowledged before an officer authorized to take acknowledgment of deeds, and was not recorded until the 14th day of March, 1893. Some time in July, 1890, the appellant obtained a judgment against Mary A. E. Dotterer for the sum of \$95.79 on a claim contracted subsequent to the date of the alleged conveyance to Seiss, which judgment was duly recorded among the magistrates' judgments in the clerk's office of the circuit court for Frederick county. Shortly afterwards, on the 29th of June, 1892, a fieri facias was issued on this judgment, and the interest of Mary A. E. Dotterer was sold at sheriff's sale to the appellant, Valentine, and conveyed to him by a duly executed and recorded deed dated the 12th of August, 1892. Subsequently, on the 31st of August, 1892, a bill was filed by the plaintiff for a sale of the whole property, and a decree was obtained against the defendants for its sale, on the ground that it was not susceptible of partition without loss and injury to the parties interested; and on the 21st of April, 1893, the property was purchased at this sale by the appellant in the case. There are three objections filed to the ratification of the sale: First, because the plaintiff acquired no title to the land under the sheriff's sale and deed; second, because Mrs. Dotterer had no interest in the land at the time of the rendition of the judgment against her, she having sold her interest to Daniel L. Seiss, Jr.; third, because of inadequacy of price. There was a supplemental bill filed on the 26th of June, 1893, by the appellant against the defendants in the original bill and Daniel L. Seiss, Jr., asking to have the conveyance from Mrs. Dotterer to Daniel Seiss, Jr., vacated and annulled as a cloud upon his title; and it is alleged in this bill that the purchaser had no notice or knowledge of the paper purporting to be a deed until after the property had been purchased at the trustee's sale. It was ordered that all further proceedings in the case be postponed until a decree was obtained on said supplemental bill; and this appeal is from the order vacating the sale made by the trustee, and dismissing the supplemental bill.

The main question, then, upon this state of case, is, what interest or title to this land did the purchaser take at the sheriff's sale on August 12, 1892? And this depends upon the validity of the contract of sale of the 10th of June, 1889. The general principle that a contract which creates a specific lien on real property has a superior equity to the general lien of a subsequent judgment has long since been settled by a number of de-

cisions and by this court. In the case of *Hampson v. Edelen*, 2 Har. & J. 64, it was held "that a contract for the purchase of land, bona fide made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. A judgment obtained by a third person against the vendor mesne making the contract and payment of the money, cannot defeat the equitable interest thus acquired, nor is it a lien on the land to affect the right of such cestui que trust." This doctrine has been followed by numerous decisions of this court, which we think are decisive of the case now under consideration. *Alexander v. Ghiselin*, 5 Gill 138; *Johnston v. Canby*, 29 Md. 211; *Dyson v. Simmons*, 43 Md. 217; *Hartsock v. Russell*, 52 Md. 625. In *Dyson v. Simmons*, 48 Md. 215, the decisions both in England and in this state are reviewed, and the court says that a judgment, being but a general lien, must be subordinated to the superior equity of a prior specific lien created by a defective mortgage or conveyance. Judgments create liens only because the land is made liable by statute to be seized and sold on execution. The general principle is that if a party has power to charge certain lands, and agrees to charge them, in equity he has actually charged them, and a court of equity will enforce the charge. And the fact that judgments have been subsequently recovered against the party agreeing to convey or charge the land will in no manner defeat the right to have the agreement executed. It will not affect any bona fide conveyance made for value before that time, for it only attaches upon that which is then, or afterwards becomes, the property of the debtor. The judgment creditor stands in the place of his debtor, and he can only take the property of his debtor subject to the equitable charges to which it was justly liable in the hands of the debtor at the time of the rendition of the judgment, except in those cases where the principle may have been modified by express statute. The facts of the case now under consideration bring it within the ruling of these cases. By the contract of sale of June 10, 1889, Mrs. Dotterer, the judgment debtor, conveyed to Daniel L. Seiss, Jr., all her interest in the land in dispute. The contract price of \$1,000 was paid in cash. The purchaser went into possession of the property, and afterwards made improvements thereon. The debt for which the judgment was rendered was not contracted until after the sale, and the judgment was not rendered until July 10, 1892. Manifestly, Mrs. Dotterer had no interest in the land at the date of the judgment, and, as a purchaser at a sheriff's sale under a f. fa. acquires only the title held by the judgment debtor at the time the judgment was rendered, the title of Daniel L. Seiss, Jr., the purchaser, under his contract of sale,

was not defeated by the sale of the sheriff on the 12th of August, 1892. But, independent of the application of the doctrine just referred to, we think that the appellant had such notice of the prior equitable title of the purchaser, Daniel L. Seiss, Jr., as was sufficient to put him upon inquiry. The witness Frederick C. O. Seiss testified that he was positive that the plaintiff had personal knowledge of the sale before August 12, 1892 (the date of the sheriff's sale); that he had talked with him about the sale at the plaintiff's mill, which was situate in the neighborhood, and only about three miles from the property. There was also testimony that the purchase by Seiss was commonly known throughout the neighborhood, and "was the general talk thereabouts." He not only took possession of this property, but, as we have said, he made valuable improvements thereon. On the day of the trustee's sale, notice was publicly given that Daniel L. Seiss, Jr., claimed an interest in the property. The plaintiff was present, and had notice thereof. The facts in the case were sufficient to put the plaintiff upon inquiry, and he failed to exercise that diligence which the law requires in like cases. We therefore agree with the circuit court below "that the whole equitable title and interest in the land in question was in Daniel L. Seiss, Jr., at the date of the judgment, and at the time of the sale by the sheriff." The order of the court vacating the trustee's sale, and dismissing the plaintiff's supplemental bill, will be affirmed. Order affirmed.

(79 Md. 55)

CHERBONNIER et al. v. GOODWIN.
BLANDIN et al. v. SAME. EM-
ORY v. SAME.

(Court of Appeals of Maryland. March 13,
1894.)

WILLS—VESTED REMAINDERS—EQUITY—LACHES—
REHEARING.

1. Testatrix left a sum in trust, the income to be used towards the support of her son E. during his life, free from E.'s control or indebtedness; after his death, to be divided among the children which E. might thereafter have, or, should he die childless, to be divided among certain grandchildren of testatrix. E. had two children thereafter, of whom one died before E. *Held*, that the legacy never vested in him, and after E.'s death the whole went to the surviving child.

2. Where the trustee of a life estate in money dies before the life tenant, and his estate is being administered in chancery, the legatee of the remainder may sue the estate in chancery.

3. The trustee of a life estate in money died before the life tenant, but his estate was amply solvent, and was being settled in chancery. The legatee of the remainder filed her first petition eight years after her right accrued. Her second, filed 12 years later, as substitute for the former, alleged the loss from the court files of certain needful papers, for which she had from time to time asked leave to file substitutes; that such papers had disappeared, had been searched for, and could not be found. *Held*, that she was not guilty of laches.

4. Judgment having been rendered more than 30 days (and so deemed enrolled, under Code, art. 16, §§ 164, 166), the court granted a rehearing, on which two rearguments were had, and no objection raised. *Held*, that such silence waived the objection, and precluded review in the court of appeals.

Appeal from circuit court, Baltimore county, in equity; David Fowler and James D. Watters, Judges.

Suit by Eliza J. Goodwin against the estate of Caleb D. Goodwin to enforce a trust. Decree for complainant. Edward G. Cherbonnier and others, Mary C. C. and John J. Blandin, and D. Hopper Emory, trustee, appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, PAGE, ROBERTS, BOYD, and BRISCOE, JJ.

S. D. Schmucker, Geo. Whitelock, and R. R. Boardman, for appellants. D. G. McIntosh and John I. Yellott, for appellee.

BRISCOE, J. There are three appeals in this case, each by different persons, but they are from the same order, and involve the same questions. We shall consider them as one appeal.

The first question arising on the appeal depends for its decision upon a proper construction of the following clause of the will of Milcah Goodwin, who died in the year 1829. The testatrix gave unto her son "Caleb D. Goodwin the sum of fifteen hundred dollars in trust, to put out the same at interest, or invest the same in ground rents or stock or other funds, as he shall see fit, and the interest and dividends arising therefrom to be by him expended and appropriated towards the maintenance and support of my son Edward Goodwin during his natural life; the same to be under the sole direction and control of my son Caleb D. Goodwin, to be by him expended for the purpose aforesaid, as to him shall seem fit, and to be in no wise subject to any claim, transfer, or assignment of the said Edward Goodwin, or liable for his present debts or any future debts which he may contract. And, from and after the death of the said Edward Goodwin, then I will and direct that the said fifteen hundred dollars be equally divided among all the children which said Edward Goodwin may hereafter have; and, in case the said Edward Goodwin should die without leaving such child or children, the said fifteen hundred dollars shall be equally divided between my grandchildren, William Henry Goodwin, Charles Edward Goodwin, and Frances Colgate Goodwin, and the survivors of them." It is admitted that Edward Goodwin had two children born after the execution of his mother's will, to wit, the appellee, Eliza J. Goodwin, and one other child, Alexander, who died in the lifetime of its father. And it is insisted upon behalf of the appellants that upon the death of Alexander his share of the legacy devolved upon

his legal representatives, and went in course of distribution to his father; in other words, that there was a vested remainder under the will in the afterborn children of Edward Goodwin, so that Alexander's interest was not dependent upon his surviving his father. But in this view we cannot concur. There can be no doubt as to the general rule that the law favors the earliest vesting of estates, wherever it can be done consistently with the intention of the testator. It is well settled that in the construction of wills "the intention of the testator is the object of ascertainment in every case," and if that can be ascertained it is to be obeyed, unless it contravenes some settled and fixed rule of law or of construction. The testator has the right to fix the period of vesting to suit his wishes. He can postpone the period, and make the vesting depend upon a contingency; and if he does, with reasonable certainty, the estate will not vest until the happening of this contingency. And whether the testator intended to give a vested estate, or to make it depend upon a future contingency, depends in a great measure upon the language and phraseology of the will itself. This doctrine is fully laid down and applied in the recent cases of *Bailey v. Love*, 67 Md. 598, 11 Atl. 280; *Larmour v. Rich*, 71 Md. 384, 18 Atl. 702, and cases there cited. These cases are decisive of the question raised here. The remainder, therefore, never vested in Alexander, the son of Edward Goodwin, because he died in the lifetime of his father, before the period fixed by the testatrix for the remainders to vest. The words "from and after" the death of Edward Goodwin, in connection with the limitation over to the grandchildren of the testatrix, clearly indicate that it was the intention of the testatrix to postpone the vesting of the legacy until after the death of Edward Goodwin. The appellee, then, having been born after the execution of the will, and having survived the life tenant, Edward, is clearly entitled to the whole legacy.

We come now to the remaining questions in the case.

First, whether Caleb D. Goodwin, executor and trustee under the will, ever received the sum of \$1,500 in trust; and, if he did so receive it, whether the petitioner can now claim it, and have it paid to her out of his estate, which is being administered in a court of equity. At the first hearing of the petition of the appellee, the circuit court for Baltimore county dismissed her petition on the ground of the failure of proof to trace the fund into the hands of the present trustee, and to identify it as a part of the trust estate of Caleb D. Goodwin. Subsequently, however, the order dismissing the petition was suspended, and a rehearing granted. There can be no question that a suit in chancery can be maintained for a legacy, even in cases where a bond has been given to pay debts and legacies. Code, art. 16, §§ 81, 82. Ca-

leb Goodwin died in 1855, and the claim of the petitioner—the appellee in this case—did not arise until after the death of Edward, the life tenant, in 1864; and, as his estate was being administered in a court of equity, it seems clear to us that her proper remedy was in that court. Whether, then, Caleb D. Goodwin received this legacy as trustee is a question of fact, and depends for its decision upon the proof in the case. Additional testimony was offered at the rehearing of the case, consisting of copies of the first, second, third, and fourth administration account of Milcah Goodwin's estate; and these accounts, beyond doubt, show that he charged himself, as trustee, with this legacy.

But it is contended upon the part of the appellants, assuming the correctness of the position of the appellee upon the points which we have passed upon, that the laches of the appellee are fatal to her right to recover. It appears that Caleb D. Goodwin died in the year 1855, and Edward Goodwin in the year 1864. The first petition claiming the fund was not filed until the year 1872. The trust fund, however, was at that time in the hands of Caleb Goodwin, trustee, and his estate was large, and sufficient to pay all his debts. The petition was answered by the trustee of Caleb's estate, but there was no denial of the validity of her claim. This delay, we think, has been sufficiently explained, for the following reasons, which we adopt, in the language of the circuit court for Baltimore county: "Thereupon followed a succession of losses of papers, without the fault of the petitioner. From time to time she applied to the court for permission to supply the missing papers by substituting others in their places, until some time in 1884, when she filed another petition, alleging that the said substituted papers, petitions, and proceedings had disappeared from the files of the court, and that her counsel, after diligent search and inquiry, had been unable to find them, or procure any account of the same, and praying that her petition then filed in 1884 might be substituted for her former petition. Without alluding to other facts, what we have said is sufficient to show that the petitioner has met very great difficulties in the prosecution of her claim, and that, if much time has elapsed, the petitioner was not responsible for the delay; certainly, not for all of it, nor for so much of it as would justify us in saying that, under all the circumstances of this case, she has been guilty of laches."

The remaining question brings up for review the action of the circuit court in granting a rehearing after the final order of August 3, 1886, dismissing the petition. This order was passed on the 8th of September, 1888,—more than 30 days after the filing of the final order dismissing the original petition,—and it is urged that this action of the court in granting a rehearing was void, because in violation of sections 164 and 166 of article 16 of the Code, which provides that

all final decrees and orders in the nature of final decrees shall be considered as enrolled from and after the expiration of 30 days from the date of the same, the day of the date inclusive, and that the proper proceeding on the part of the petitioner was by a bill of review, and not for a rehearing, of the case. But the question raised by this motion does not appear from the record to have been tried and decided by the court below, but is raised for the first time in this court. By the ninth section of article 5 of the Code, it is provided that in no case shall the court of appeals decide any point or question which does not plainly appear by the record to have been tried and decided by the court below, unless it appears from the record that an objection thereto for such defect was taken at the trial. As the question is here presented, we are restrained by the statute from considering it. *Thorne v. Fox*, 67 Md. 75, 8 Atl. 667. Besides this, it is well settled that a party may either expressly or impliedly waive a right or advantage which he might have enforced in proper time and manner, and we think this principle applies with peculiar force to this case. The motion was not made until on the 8th of August, 1893,—the same day that the appeals to this court were prayed,—and this motion was not passed on by, or ever brought to the attention of, the court below. The case was reargued, orally and upon notes, after additional testimony had been taken and filed without objection by either side, and at that time no objection was interposed to the rehearing or the reargument. The case, again, upon the request of the court, was reargued, a second time, upon notes filed by counsel on both sides, and no such question was raised. Assuming, then, that there was error or irregularity in granting the order for a rehearing, we think that, under the circumstances of this case, there was a waiver on the part of the appellants, and they are precluded from raising that objection in this court. Finding no error, we shall affirm the order appealed from, and it is so ordered. Order affirmed, with costs.

(79 Md. 49)

DIRICKSON v. SHOWELL.

(Court of Appeals of Maryland. March 18, 1894.)

ATTACHMENT AFTER TWO NON ESTS — PROCEDURE — LIQUIDATED CLAIM.

1. On the issue of an attachment, under Code, art. 9, § 24, after two non ests, the order of the judge takes the place of and renders unnecessary the magistrate's warrant required by the general attachment law.

2. Since the amount of damages allowable for breach of a contract to sell a note at less than its face value is presumptively the difference between such face value and the agreed price, a claim based on such breach is not one for unliquidated damages, for which an attachment, by Code, art. 9, § 43, cannot issue without the giving of a bond.

Appeal from circuit court, Worcester county.

Action by James C. Dirickson against Lemuel Showell. From an order quashing an attachment issued on plaintiff's prayer therefor, he appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, MCSHERRY, FOWLER, PAGE, and BOYD, JJ.

W. S. Wilson and C. D. Collins, for appellant. W. T. Dickerson, for appellee.

MCSHERRY, J. James C. Dirickson sued Lemuel Showell, Jr., in the circuit court for Worcester county to recover the sum of \$240.66. The claim arose in this way: Showell owned and held a promissory note made by A. D. Massey and wife for the payment of the sum of \$2,000, with interest from May, 1890, which note he contracted to sell and deliver to Dirickson for the sum of \$1,850, but, though the stipulated price was tendered to him, he subsequently refused to deliver the note as he had agreed to do. The difference between the face value of the note, with interest added, and the sum of \$1,850, is the amount claimed by Dirickson. The summons issued for the defendant was returned non est, and was renewed to each of the four succeeding terms of court, but each time was likewise returned by the sheriff non est. Thereupon the plaintiff presented to each one of the judges of the circuit court the claim sued on, duly verified by affidavit, and accompanied by evidence of the several returns of non est, and made application for an attachment against the lands, tenements, goods and chattels, and rights and credits of the defendant, under section 24, art. 9, of the Code. The attachment was ordered, and was subsequently issued, and under it certain lands and tenements of the defendant were attached. A motion to quash the attachment was then filed. The motion prevailed, and the attachment was quashed. From that judgment this appeal was taken. The reasons assigned for the motion to quash were: First, because there was no sufficient affidavit; second, because the voucher annexed to the affidavit was insufficient; third, because the attachment was not founded on a warrant issued by a justice of the peace; fourth, because no sufficient short note was filed; fifth, because the claim was for unliquidated damages; and, sixth, for other reasons apparent on the face of the papers.

It will be observed that this is not an attachment founded upon a warrant, though many of the principles and much of the procedure governing such attachments are applicable to attachments issued under section 24, art. 9, of the Code, above referred to. That section provides that "when two summonses have been returned non est against the defendant in any of the courts of law of this state, the plaintiff, upon proof of his claim as hereinbefore required, shall be entitled to an attachment, and the judge of the court where such action is pending shall order such attachment to issue, and the same proceedings shall be thereupon had as in attach-

ments issued against absconding debtors." This court has held that the plain meaning of this section is that, when an action is pending in any court of law, which the court in exercise of its general jurisdiction has the power to try and decide, provided jurisdiction over the person of the defendant be obtained by service of the summons upon him, and in such a case there are two returns of non est to two successive writs of summons, then the judge is authorized to regard such returns as evidence that the defendant is a nonresident or absconding debtor; and, if the plaintiff's cause of action be such as would entitle him to an attachment on warrant, the judge is authorized and directed to order the attachment to issue, provided the plaintiff produces before him the same proof of his claim that he would be required to produce before the magistrate in order to obtain his warrant to the clerk of the proper court to issue an attachment. When the attachment is thus ordered by the judge it is subject to the same conditions, and the same proceedings must be had upon it as if it were an attachment on warrant, with the single exception that the order of the judge supersedes and takes the place of the warrant of the magistrate. *Randle v. Mellen*, 67 Md. 189, 8 Atl. 573. It is obvious, therefore, that the third reason set forth in the motion to quash is untenable. As to the first reason, nothing more need be said than that the affidavit is in strict and literal compliance with section 4, art. 9, of the Code. At the time the attachment was issued a declaration containing the money counts and a special count on the contract heretofore stated were filed. This is an abundant answer to the objection that no sufficient short note was filed.

The second and fifth reasons may be considered together. If the claim is really one for unliquidated damages, then the attachment was properly quashed, not because an attachment cannot be issued for the recovery of such damages, but because no bond was given by the plaintiff as required by section 43, art. 9, of the Code. But is this a claim for unliquidated damages, where the measure or standard of the damages is not fixed by the contract itself? If the contract itself fixes the amount due, or affords by its terms a certain measure for ascertaining that amount, an attachment will lie if the necessary jurisdictional facts appear; and the test is whether the contract furnishes a standard by which the amount of the indebtedness or damages may be determined with sufficient certainty to permit the plaintiff to verify his claim by affidavit. *Wilson v. Wilson*, 8 Gill, 192; *Fisher v. Consequa*, 2 Wash. C. C. 382, Fed. Cas. No. 4,816; *Warwick v. Chase*, 23 Md. 154; *McAllister v. Eichengreen*, 34 Md. 54; *Williams v. Jones*, 38 Md. 555; *Insurance Co.*

v. 28A.no.15—57

v. Andrews, 66 Md. 371, 7 Atl. 693. Now, the contract here declared on is no less certain as to the standard by which the damages resulting from a breach of it are to be ascertained than is an agreement for the sale of goods where no price has been stipulated 8 Gill, supra. The thing purchased by the plaintiff and sold by the defendant was a promissory note for the payment of \$2,000. The note was an undertaking by the makers to pay that much money, and prima facie it was worth that much. The amount of it, with accrued interest, was certain and definite, and the obvious damage growing out of a refusal to deliver it according to the contract was the difference between the sum due on it and the price agreed to be accepted for it, unless the note was in reality either worthless or of no greater value than the price at which it was sold, and this was purely matter of defense in mitigation of damages, and was not an element affecting the legal measure or standard of damages as furnished by the contract. 66 Md., 7 Atl., supra. The fact that less than is claimed in an attachment may ultimately be recovered in no manner serves to show that the amount which is claimed is unliquidated damages, because a plaintiff in an attachment proceeding is entitled to a judgment, even though he recovers a less sum than that stated in his affidavit, if the amount of the verdict be within the court's jurisdiction. *Dawson v. Brown*, 12 Gill & J. 60; *Lee v. Tinges*, 7 Md. 215; *Hough v. Kugler*, 36 Md. 195. And, though the defendant may contest the demand made upon him, or may show that no damage has in fact been sustained by the plaintiff, that does not affect the question whether the contract supplies the plaintiff a measure of damages to which he can make affidavit. The standard furnished by the contract may be perfectly certain and intelligible, and may enable the plaintiff to make oath to the amount he claims, yet a less amount may, upon the evidence, be assessed by the jury; but the mere possibility that this result may happen does not make the damages which have been claimed upon the institution of the proceedings unliquidated damages. We are of opinion, therefore, that there was nothing to support the second and fifth reasons assigned as grounds for quashing the attachment. We may further add in this connection that the account or voucher, though somewhat inartificially drawn, was sufficient. No other objections have been suggested under the sixth reason. It follows from what we have said that the circuit court erred in quashing the attachment, and its judgment will therefore be reversed, and the cause will be remanded, that a trial may be had. Judgment reversed, and cause remanded, that a trial may be had.

(79 Md. 36)

BURNETT v. BEALMEAR.

(Court of Appeals of Maryland. March 13, 1894.)

DISTRAINT BY LANDLORD—BONA FIDE PURCHASER—FORM OF PRATERS—REPLEVIN—DAMAGES.

1. A trustee for the benefit of creditors is not a bona fide purchaser, within Code, art. 53, § 18, allowing a landlord to follow, under a distraint for rent, property removed from the premises, provided it has not been sold to a bona fide purchaser.

2. Distraint proceedings will not be held defective by reason of the words "Received payment," followed by the landlord's name, at the end of the account, where his affidavit states that this rent is due and unpaid, and the warrant states that the rent is due as per such account, and there was an agreement of counsel that it was due and unpaid.

3. Where a prayer for the direction of a verdict under several papers does not direct the attention of the court to the particular circumstance supposed to require such a verdict, its decision is not subject to review, under Code, art. 5, § 9, declaring that the court of appeals shall not decide a point which does not clearly appear to have been decided below.

4. In replevin, the goods being delivered to plaintiff, he is entitled, on obtaining a verdict, only to damages for the wrongful taking, and costs.

Appeal from court of common pleas.

Action by William T. Burnett, trustee, against Samuel Bealmear. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, PAGE, BOYD, and ROBERTS, JJ.

C. J. Bonaparte, for appellant. N. R. Gill & Son, E. N. Rich, and Wm. S. Bryan, Jr., for appellee.

ROBERTS, J. William T. Burnett, trustee, brought an action of replevin against Samuel Bealmear and Charles H. Shipley. Bealmear avowed, as landlord, for a month's rent, due on the 31st day of December, 1892; and Shipley made cognizance, as bailiff, that he took the goods and chattels under lawful and regular distraint. The plaintiff pleaded two pleas, separately, to the avowry and to the cognizance; and the defenses arose under demurrer to the first plea, and under issue to the second. Both being decided against the plaintiff, he appealed to this court.

On the face of the pleadings, the facts admitted by the demurrers are as follows: Bealmear leased certain premises in the city of Baltimore to Franke for five years from and after the 1st of May, 1892. About the 29th of December of the same year, Franke made a deed to Burnett of all his property, for the benefit of his creditors, and between that day and the 31st of December removed from the rented premises the goods and chattels in question, knowing that a month's rent was about to become due. On the said 31st of December, a month's rent became due; and thereupon Bealmear, the landlord, caused the goods and chattels to be seized under a distraint warrant for the payment of rent.

The question was whether they were liable to be so seized.

The statute (Code, art. 53, § 18) gives the landlord the right to follow, seize, and sell, under a distraint for rent, any property which has been removed from the rented premises within 60 days prior or subsequent to the time when the rent became due, provided it has not been sold to a bona fide purchaser without notice, or taken in execution. It is well settled that a trustee for the benefit of creditors is not a bona fide purchaser, and that he succeeds only to the rights of the assignor, and takes the property subject to all claims against him. *Ratcliffe v. Sangston*, 18 Md. 391; *Tyler v. Abergh*, 65 Md. 18, 3 Atl. 904; *G. Ober & Sons Co. v. Keating* (Md.; filed March 14, 1893) 26 Atl. 501. The removal was in pursuance of the authority given by the deed of trust executed by the tenant, and this deed could not give the assignee or trustee any greater rights than the tenant had. In *Galther v. Stockbridge*, 67 Md. 228, 9 Atl. 632, and 10 Atl. 309, a receiver appointed by a court of equity took possession of the goods, and sold them, by order of the court. His possession was lawful, and his sale under the order of the court conveyed a good title, as against the landlord and everybody else. A purchaser, under such circumstances, occupies a very different position from a trustee for the benefit of creditors.

The plaintiff's second plea to the avowry and cognizance stated that the landlord did not cause regular distraint proceedings to be prepared, and that the goods and chattels were not taken under a lawful and regular distraint. The distraint papers are set forth in the record (the account, the affidavit, the warrant, etc.), and it was admitted that the month's rent claimed was due, and remained unpaid.

It was contended in argument that the distraint proceedings were defective because these words are written under the account: "Received payment. Samuel Bealmear." The affidavit made by Bealmear, attached to this account, states that this very rent is wholly due, and in arrear; the warrant to the bailiff, authorizing him to distraint, states that the month's rent was due "as per annexed account" (being the account to which were appended the words, "Received payment. Samuel Bealmear"); and finally there was an agreement of counsel that this rent was due, and that it still remained unpaid. Under these circumstances, it clearly appears that the words in question are the result of a clerical misprision. The court is bound to ascertain the true meaning of the paper, even in direct opposition to the terms employed. This question was fully considered and decided in *Farrell v. City of Baltimore*, 75 Md. 493, 23 Atl. 1096, and it is not necessary to repeat what was said in that case. No other objection has been urged against the validity of the distraint papers.

The plaintiff offered two prayers, both of which were rejected. The first was as follows: "The execution of the deed of assignment from Gerhard F. Franke to the plaintiff, and of the several distraint papers, and the sending and receipt of the two letters read in evidence, being all admitted, and also the fact that on January 3, 1893, one month's rent (\$166.66) was due, the plaintiff prays the court to rule that, under the issues joined in the cause, the avowant cannot sustain his avowry, and the verdict and judgment must be for the plaintiff, for the return of the property replevied, at its appraised value, and at least nominal damages." The second prayer was in the same words, except that it referred to the cognizance, instead of the avowry. We have intimated our opinion that the distraint papers were correct, and therefore both of these prayers were properly rejected. But we do not wish to be considered as approving of the manner in which these prayers are drawn. The act of 1825, c. 117 (codified in article 5, § 9, of the Code), declares that: "In no case shall the court of appeals decide any point or question which does not plainly appear by the record to have been tried and decided by the court below." No specific point or question is presented by these prayers. The sufficiency of the account was argued at the bar, but in the prayers the court is not asked to decide any question concerning it. The deed of assignment, the distraint papers, the receipt of two letters, and the admitted indebtedness for rent, are mentioned in these prayers, and thereupon the court is asked to direct a verdict for the plaintiff; but its attention was not directed to the particular circumstance which was supposed to require such a verdict. Consistently with the language of the prayers, the potent fact might be either the deed of assignment, or any one of the distraint papers, or all of them combined, or the two letters. It cannot be said, in the language of the statute, that the point or question plainly appears by the record to have been tried and decided by the court below.

There is another serious objection to these prayers. They demand a "verdict and judgment for the plaintiff, for the return of the property replevied, at its appraised value, and at least nominal damages." As the property had been delivered to the plaintiff, it would have been an error to give him a verdict for its appraised value, even if the appraisal was conclusive evidence, as it was not. The proper verdict for the plaintiff, when he is entitled to it, is merely for damages for the detention of the goods. This may be seen by examining the approved precedents. 1 Evans, Harr. 508. It is said in Hoskins v. Robins, 2 Wms. Saunders, pt. 2, p. 320, note 1: "The plaintiff obtains a verdict. He is only entitled to damages for the wrongful taking and costs, but not to the value of the goods taken, as he is in trespass, for they were delivered to him when re-

plevied." *Seldner v. Smith*, 40 Md. 602, cited for the plaintiff, was an action on a replevin bond, brought by the defendant, who had obtained a verdict in the replevin suit. We think that the judgment must be affirmed. Judgment affirmed.

(79 Md. 41)

MANNING v. SHRIVER.

(Court of Appeals of Maryland. March 13, 1894.)

PLEDGE — THE CONTRACT — CONSTRUCTION — AUTHORITY TO SELL — PURCHASE BY PLEDGEE — GOOD FAITH — VALIDITY.

1. A maker of a note pledged certain shares of stock and a life insurance policy, and agreed to maintain on demand 10 per cent. margin collateral security, "and on the nonperformance of this promise, or any part of it, I authorize S., agent, to sell the collateral," etc. *Held*, that the authority to sell related to the failure to pay the note as well as the failure to maintain such margin, and that a sale for nonpayment was not a conversion of the collaterals.

2. The payee sent the pledged stock to brokers to be sold, with instructions not to sell for less than \$7.50 per share,—about the amount due on the note. No bids were made, and it was bought in for the payee at \$1 per share. The maker of the note was insolvent, and the stock had no market value. Though the contract authorized a sale without notice to the pledgor, he was notified of the sale. *Held*, that it did not appear that there was bad faith on the part of the payee, whereby the stock sold for less than its market value.

3. Where a pledgee is an agent or trustee, and is authorized by the pledgor to purchase the pledge in his own right in case of sale, a purchase by the pledgee in his own right is valid as between him and the pledgor.

Appeal from superior court of Baltimore city.

Action by Christopher C. Shriver, agent, against Joseph T. Manning, on a note, in which defendant pleaded a conversion of collaterals by plaintiff in discount of plaintiff's claim, and asked judgment for an excess claimed to be due him. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and McSHERRY, FOWLER, BRISCOE, and PAGE, JJ.

Frank Woods, for appellant. John T. Mason, Charles S. Hayden, and E. H. Gans, for appellee.

ROBINSON, C. J. The plaintiff loaned to the defendant \$2,500, for the payment of which he gave the following promissory note, and upon which this suit is brought: "\$2,500. Baltimore, August 21st, 1891. One year after date I promise to pay to C. C. Shriver, agent, or order, at the bank cor. Lexington and Charles streets, Baltimore, twenty-five hundred dollars, with interest at (6) six per centum per annum, for value received, having pledged with him as collateral security for this note, or for any other liability due to him, or to become due, or that may be hereafter contracted, four hundred and fifty shares (450) of the Loomis

Improved Filter Company stock, also policy for \$10,000 in the Mutual Life Insurance Company of New York, No. 309,319; and I agree to maintain on demand ten per cent. (10) margin collateral security during the continuance of this note, and on the nonperformance of this promise, or any part of it, I authorize C. C. Shriver, agent, to sell the collateral security at any broker's board, or at public or private sale, at his option, without advertisement or notice to me, and with the right on his part to become purchaser thereof at such sale or sales freed and discharged of any equity of redemption; and I further authorize C. C. Shriver, agent, to use and transfer or hypothecate the same, they being required, on payment or tender at maturity of the amount loaned, to return an equal amount of said securities, and not the specific securities pledged. Jos. T. Manning." The note not being paid at maturity, the plaintiff sent for the defendant, and demanded its payment, and this the latter told him it was impossible for him to do. The plaintiff then asked him to get some of his relatives to take up the note, and this he said he could not do. The plaintiff then offered to surrender to him the note, provided he would transfer the 450 shares of stock to the plaintiff, and this the defendant refused to do. Thereupon the plaintiff notified the defendant that he would sell the stock the next morning at the stock board, and that he must protect himself. The plaintiff sent the stock to Messrs. Brown & Loundes, to sell, with instructions that if any one bid for it, not to let it sell for less than \$7.50 per share, which would be about the amount due on the note. The stock was offered at sale on the board, and, there being no bid for it, Mr. Clabaugh bought it in for the plaintiff at one dollar per share. The policy of life insurance had a cash value of \$447, as ascertained from the agent of the company, and the plaintiff bought the policy for that amount, and gave the defendant credit for the same. The defendant admits that this was the full value of the policy, and that he claimed no damage for its alleged conversion. The contention, however, is that the plaintiff had no power or authority to sell the stock pledged as collateral security, and that the sale by him was a conversion of the stock to his own use, for which the defendant has the right to recoup in damages. The only authority, it is argued, to sell the stock was upon the failure of the defendant to maintain on demand 10 per cent. margin collateral security during the running of the note. The contract, it is said, contains two distinct promises,—one to pay the note at maturity, and the other to maintain the 10 per cent. margin,—and on the nonperformance of this promise, or any part of it, the parties meant the nonperformance on the part of the defendant to put up the margin of 10 per cent., and not the nonperformance of the promise to pay the note at maturity.

This, it seems to us, is drawing very fine sight on the terms of this contract. Grammatically speaking, it may be that the language ought to have been "on the nonperformance of these promises," or either of them, or "of this contract, or any part of it." Construing, however, the entire contract, and not this isolated phrase, it is clear, we think, that is what the parties meant. The same rule of construction which applies to all other contracts applies equally to the one now before us, namely, that it is to be construed according to its sense and meaning as ascertained, in the first place, from the language used, and which is to be understood in its plain, ordinary, and popular sense, unless it has, in respect to the subject-matter, acquired a peculiar sense, distinct from the popular sense, or unless it plainly appears that the parties to the contract understood it in some other special and peculiar sense. We are now dealing with a promissory note, to secure the payment of which at maturity the defendant pledges certain collateral securities, and, in addition thereto, he agrees to maintain on demand a margin of 10 per cent. So there is not only a promise to pay the note when due, but also a promise to keep up a certain margin, and when the parties say that upon "the nonperformance of this promise, or any part of it," the payee is authorized to sell the pledge, they mean upon the nonperformance of either the promise to pay the note at maturity or the nonperformance of the agreement to keep up the margin when so demanded. We cannot suppose for a moment that the collateral security was pledged merely as a security for the maintenance of the margin. On the contrary, when the plaintiff, upon the failure to pay the note at maturity, told the defendant that he would sell the stock the next day at the stock board, the defendant replied, "Mr. Shriver, you have a perfect right to do that, and I can't object to your doing so;" thus showing plainly how the parties themselves understood the contract.

Then, again, it is argued that the money loaned to the defendant was money belonging to Miss Semmes, and that the note was made payable to the plaintiff as agent, and it was as agent that he was authorized to sell and buy the stock; and, thus holding a fiduciary relation to the parties, the plaintiff could not buy at his own sale. We fully agree with the counsel for the defendant as to the general rule of law relied on in support of this contention. We agree that one being a trustee, executor, or agent, or in any other like fiduciary relation, will not be allowed to purchase property sold by him in that character. The rule is one of general application, and the reason of the rule is that one will not be permitted to purchase an interest where he has a duty to perform inconsistent with the character of purchaser. We agree, too, that both upon reason and authority the relation of pledgor and pledgee

comes within the operation of this rule. This we said in *Insurance Co. v. Dalrymple*, 25 Md. 242. But it is equally well settled that this rule does not apply where the pledgor expressly authorizes the pledgee not only to sell the pledge, but to purchase it in his own right. This, too, we said, by implication at least, in the *Dalrymple Case*, Id. 269, and it is fully sustained by direct decisions in other cases. The purchase by a pledgee in such cases is exempted from the operation of the general rule upon the same ground that a mortgagee will be allowed to buy at his own sale if the mortgagor so agrees. In this case it will be observed that the plaintiff was authorized to sell as agent, but at the same time he was authorized to buy in his own right. The money loaned belonged, it is true, to Miss Semmes, but the loan was made without her knowledge or authority, and for the security of which the plaintiff was himself individually responsible to her. He had no authority to buy the stock for her, but it was bought in his own name, and for himself; and the right to buy it was one conferred upon him by the pledgor. Whether this right and the purchase under it is, as between Miss Semmes and himself, affected or qualified in any manner by the relation in which he stood to her, is a question not properly before us in this case. We are now dealing with the case as between the plaintiff and defendant, and, so dealing with it, the validity of the sale of stock is in no manner affected by the relation in which the plaintiff stood to the defendant. Then, again, it is said there was a want of good faith on the part of the plaintiff in making the sale, in consequence of which the stock did not sell for its fair market value. The only ground relied on in support of this contention is the fact that plaintiff instructed the brokers not to let the stock sell for less than \$7.50, if there should be any bids up to that amount by other persons, and with this instruction the stock was sold to the plaintiff at \$1 per share, there being no other bid. There was nothing, however, unfair about the sale in this respect. The defendant himself, the maker of the note, was utterly insolvent, and the only security for its payment was the collateral security pledged by him; and, this being the case, the plaintiff did not mean that any one else should buy the collaterals, unless they bid enough to cover his claim,—that is, a sum sufficient to pay the note. He did not mean to say that the stock was in fact worth \$7.50 a share, nor did he mean to say that he would pay that sum for it in the hands of others. As a matter of fact the stock had no value whatever on the day it was sold. There was not a single bid for it, except the bid made for the plaintiff. The defendant, in his testimony, says the company was in the most "penniless condition; creditors were pushing us; we did not even have money enough

to pay the cartage of the castings on arriving here from the station to the shop; we had no money to pay mechanics; we had no money to pay any one, nor had we any way to get it." So, being in this condition, the company, on the 29th August, three days after the sale of the stock on the stock board, sold its entire assets for \$5,000, a sum barely sufficient to pay its debts, leaving nothing whatever for the shareholders. The plaintiff was authorized to sell without notice at any broker's board or at public or private sale. He did, however, sell the stock at the stock board, and after notice to the defendant. The sale was, it seems to us, fairly conducted; and if the stock did not bring more than a dollar a share it was because it had not in fact any market value. The plaintiff was therefore entitled to recover the balance due on the note, after crediting the same with the sale of the stock and the cash value of the life policy. There was no error, therefore, in granting the plaintiff's prayers, and in refusing the prayers offered by the defendant. Judgment affirmed.

(78 Md. 601)

CAMPBELL & ZELL CO. v. ROEDIGER.

(Court of Appeals of Maryland. March 13, 1894.)

INJURY TO EMPLOYE — LIABILITY OF MASTER — INCOMPETENT FOREMAN — DANGEROUS MACHINERY.

An employé of defendant was called from his regular work to assist about a derrick, the chain of which was lowered by a handle attached to cogwheels. After lowering the chain some distance by the handle, he was told by the foreman to take off the handle, and turn one of the wheels with his hands. While so turning the wheel, another workman was ordered by the foreman to pull the chain, which he did, thus throwing plaintiff's hand between the wheels so as to injure him. Plaintiff had never before assisted at a derrick, had not observed their workings, and was not warned of the danger of turning the wheel with his hands. The foreman was a hard drinker, as defendant's superintendent knew, and he had been drinking that morning. *Held*, that the court properly refused to give a peremptory instruction for defendant.

Appeal from superior court of Baltimore city.

Action by John L. Roediger, an infant, by his father and next friend, Frederick Roediger, against the Campbell & Zell Company, for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BOYD, and BRISCOE, JJ.

Geo. R. Willis, for appellant. Jos. P. Merriam, for appellee.

ROBINSON, C. J. This is, it seems to us, a plain case. The plaintiff, about 18 years of age, was employed by the defendant company in its machine shop and foundry as a common laborer, "to clean the yard, and to carry things, and straighten up matters" gen-

erally about the premises. On the morning of the accident he had been employed in helping to put sections of steam boilers upon an open railroad car for shipment, and which were raised from the ground by means of a derrick. Later in the day he was directed by Powell, the foreman of the laborers, to assist in working another derrick, then being operated on another part of the premises. This derrick consisted of a mast and jib, and the chain was raised and lowered by means of a handle, which was attached to a small wheel, the cogs of which fitted in between the cogs of a larger wheel, and the chain wound around what is called a "drum." Powell, who was standing on the platform above the plaintiff, told the latter to take hold of the handle, and help lower the chain, and after three or four revolutions Powell directed him to take off the handle, and to turn the big wheel with his hands; and while he was thus turning the big wheel, Zellor, a fellow workman, by the direction of Powell, caught hold of the chain, and by a sudden jerk threw the plaintiff's hand off the wheel, causing it to be caught between the gear wheel and big wheel, in consequence of which it was badly injured. The proof shows that the turning of the big wheel with the hands was an irregular way of lowering the chain, and was attended with more or less danger, and that the probable effect of a sudden jerk of the chain was to throw one's hand off the spoke of the big wheel, and cause it to be caught between the two wheels, just as the plaintiff's hand was caught. The plaintiff had never before assisted in working a derrick, nor had he observed the working of one, nor was he warned of the danger in turning the big wheel with his hands. Powell, the foreman, it appears had been drinking on the morning of the accident, and was in fact an habitual hard drinker, sometimes getting drunk, and his intemperate habits were known to McCoy, the defendant's superintendent.

Upon this evidence the defendant asked the court to instruct the jury: (1) That there was no evidence legally sufficient to entitle the plaintiff to recover; (2) that there was no evidence of negligence on the part of the defendant; (3) that the evidence shows the accident was the direct result of the want of ordinary care and prudence on the part of the plaintiff and his fellow workmen, and the plaintiff was not, therefore, entitled to recover. These instructions the court refused, but instructed the jury, at the request of the defendant, that if they should find that the plaintiff was of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and had reasonable notice of the dangerous nature of the services he was performing, and that the injury occurred through no fault or negligence on the part of the defendant, then their verdict must be for the defendant. And the court of its own motion further instructed

the jury that if they should find that the plaintiff was employed by the defendant as a laborer, and that a certain Powell was defendant's foreman of laborers, and that the plaintiff was injured while working the crane referred to under the orders of Powell, then the plaintiff is not entitled to recover, unless they shall further find that such work was dangerous, and such as the plaintiff was not employed to perform, and that the plaintiff was not aware of the dangerous character of such work, and that the same was not apparent; and shall also further find that the said Powell was not sufficiently competent and skillful to act as foreman of the laborers in working the derrick referred to, and that the accident to the plaintiff occurred because of said Powell's want of competency and skill; and shall also find that the defendant knew that said Powell was incompetent and unskillful as a foreman of laborers, and retained him in his employment, notwithstanding such knowledge. So, to entitle the plaintiff to recover under this instruction, the jury was obliged to find, in the first place, that he was exposed to a danger not incident to his employment, and one not apparent; and, in the next place, that the injury occurred by reason of the incompetency of Powell, the foreman of the laborers, and that his incompetency was known to the defendant. The defendant has not, it seems to us, any ground on which to object to this instruction. There was evidence to show that Powell was a person of intemperate habits, and that his habits were known to the defendant's superintendent, and that with such knowledge he was retained by the defendant in its service. There was evidence to show that Powell had been drinking on the morning of the accident, and that he exposed the plaintiff to a danger not incident to his employment, and one not apparent to a young and inexperienced person. In fact there was evidence tending to show that the injury was caused by the negligence of Powell, and without any negligence on the part of the plaintiff; and, such being the case, there was no error in refusing the defendant's instruction, nor in the instruction granted by the court. Judgment affirmed.

(18 R. I. 450)

CARROLL v. WILLIAMS.

(Supreme Court of Rhode Island. Jan. 4, 1894.)

DOCUMENTARY EVIDENCE—ADMISSIBILITY—ACTION FOR COSTS—ASSUMPSIT.

1. In a suit to recover costs from one who indorsed a writ as surety for such costs, the papers in the suit in which the costs were incurred are not inadmissible because one of the defendants, other than plaintiff in the suit against the surety, was not named in the declaration.

2. Assumpsit will properly lie to recover costs from one who became surety therefor by indorsing the writ in the suit in which the costs were incurred, as provided by Pub. St. c. 206, § 25.

Assumpsit by William A. Carroll against Zalmon T. Williams. Judgment for plaintiff. Defendant petitions for new trial. Denied.

Charles H. Page and Franklin P. Owen, for plaintiff. Marquis D. L. Mowry, for defendant.

MATTESON, C. J. This is an action on the case to recover from the defendant the costs of suit, for which a judgment was rendered by the court of common pleas at its December term, 1889, in favor of the plaintiff in an action of trespass brought by one Cassius C. Brown against the plaintiff and others. In that action, Brown was required to give surety for the defendants' costs. The defendant in this suit became surety, in compliance with order of the court, by indorsing his name on the writ, in accordance with Pub. St. R. I. c. 206, §§ 25, 26. The present suit was brought originally in the district court for the eighth judicial district, in which judgment was rendered for the plaintiff, and was taken by appeal to the court of common pleas. In the latter court, jury trial being waived, it was heard by the court, and judgment rendered for the plaintiff for \$75.60 debt and costs. The defendant thereupon filed this petition for a new trial, alleging erroneous rulings by the court below, and that the judgment is against the evidence. At the hearing in the court of common pleas, the plaintiff offered in evidence the original papers in the suit of Brown v. Carroll and others, referred to above. The defendant objected to their admissibility on the ground that there was a variance between the description of the suit in the declaration and the suit as shown by the papers. The court overruled the objection, and admitted the papers. To this action of the court, the defendant excepted.

The variance between the declaration and the papers admitted consisted of a misdescription of the suit of Brown v. Carroll and others in the declaration, in that the name of one of the defendants to that suit—not, however, that of the plaintiff in this suit—had been omitted, apparently inadvertently, by the draughtsman. It is to be borne in mind that the present suit is not founded on the judgment in Brown v. Carroll and others, but that the papers in that suit were introduced merely as evidence of the proceedings recited in the declaration by which the liability of the defendant in the present suit arose. We do not think, therefore, that the omission of the name of one of the several defendants—a mere clerical error, the description being in other respects sufficient to satisfy the court as to the identity of the judgment with that set out in the declaration—was such a variance as to preclude the court from admitting it in evidence.

At the conclusion of the plaintiff's testimony in the court below, the defendant moved that the plaintiff be nonsuited, and

also in arrest of judgment, on the grounds: (1) That the action was misconceived; that the plaintiff should have proceeded by a writ of *scire facias*, instead of suing in assumpsit. (2) That the only remedy against an indorser of a writ as a surety for costs, unless the statute provides a different remedy, is by writ of *scire facias*. The court overruled the motions, and defendant excepted. The defendant contends that the foundation of the present suit is the judgment in the former suit, and hence that it is an action on a specialty, and, being such, that an action of assumpsit will not lie. If the action is to be regarded as an action on a specialty, the defendant's point is, doubtless, well taken; but we do not think it is to be so regarded. It is based, not on the judgment, which was a judgment merely between Brown and the plaintiff, to which the defendant was not a party, but on the undertaking of the defendant, which undertaking was merely collateral to the suit of Brown v. Carroll. This undertaking was to pay the costs, if any, which the defendants in that suit should lawfully recover against the plaintiff therein.

Nor do we think, as the defendant still further contends, that the action is to be regarded as an action on the statute (Pub. St. R. I. c. 206, § 26), and therefore as an action on a specialty, since the liability of the defendant is by virtue of his undertaking, and not by virtue of the statute. His liability might as well have been entered into by a stipulation signed by him, or by a bond executed by him, as in the mode provided by the statute. The statute has merely provided a more convenient method by which the surety may enter into the liability, but it does not create the liability. The liability arises by the act of the surety himself. Inasmuch, therefore, as the action is not founded on a specialty, and the liability of the defendant was not created by an instrument under seal, we do not think the action was misconceived, but we do not think that an action of assumpsit will lie.

The defendant, in support of his contention that the only remedy against the indorser of a writ as surety for costs, unless the statute provides a different remedy, is by a writ of *scire facias*, cites several cases from the Reports of Maine and Massachusetts which support his position. *Merrill v. Walker*, 24 Me. 237; *Reid v. Blaney*, 2 Greenl. 128; *How v. Codman*, 4 Greenl. 79; *Ruggles v. Ives*, 6 Mass. 494; *Talbot v. Whiting*, 10 Mass. 359; *Miller v. Washburn*, 11 Mass. 411. The courts of the former state, having followed the rule adopted in the latter, appear to have adhered to it merely for the sake of uniformity until the statute (Rev. St. Me. 1840, c. 114, § 18) provided that suits against such indorsers should be by special action on the case. *Mellen, C. J.*, in *How v. Codman*, *supra*, remarks: "We do not say that an action on the case would not be as convenient and correct a remedy as the remedy by *scire facias*; but

there can be no advantage in changing a long-established course of proceeding, which relates merely to the remedy, and has no connection with the right." The reasons on which the rule is based are that the relation of the indorser of a writ is analogous to that of ball,—the latter being to secure the plaintiff in case of avoidance by the defendant, and the former to secure the defendant in case of avoidance by the plaintiff; that the cause of action in each arises from matter of record, and that in both the cause is but an incident to a principal cause of action already determined, the proceedings in which are matters of record; and, therefore, that a judicial writ, like *scire facias*, is the appropriate proceeding to complete the remedy growing out of the original action. *Merrill v. Walker*, 24 Me. 237, 240. In this state the question is a new one, and we are therefore free to decide it unembarrassed by precedent. It seems to us that the fallacy of the reasoning in the cases referred to is in treating the liability of the indorser of a writ as an incident to the principal cause of action, and therefore binding on the indorser as a matter of record. The liability strikes us as collateral to the original suit, rather than as collateral to the cause of action in that suit. On what principle can it be held that the indorser of a writ is precluded by the judgment against the defendant in that suit from having that judgment revised and corrected, if the taxation of costs, as against the defendant, on which the judgment was based, be illegal or erroneous? He is not a party to the suit, but a mere surety. Not being a party, he has had no opportunity to be heard in relation to the taxation. If the liability is to be regarded as a mere incident of the principal cause of action, would it not follow that the judgment against the defendant would also be binding on the indorser, so as to preclude him from contesting the taxation of costs on which it was based? Again, it seems to us that the liability of the indorser is in no sense a matter of record, except that it is entered into, by virtue of the statute, by the indorsement of the writ, which is a part of the record in the suit. It is not a matter of record in the sense that it is a liability, the amount of which is fixed by the party entering into it, like a recognizance, or which has been adjudicated by a court in the course of proceedings before it, for the establishment of which nothing is necessary but the production of the instrument or judgment. Again, the liability is one, as we have already shown, which may as well be entered into by a stipulation or bond entirely outside of the record as by the indorsement of the writ. If so created, no one would claim that the liability was a matter of record. We are of the opinion that an action of *assumpsit* is an appropriate proceeding against the indorser of a writ to recover the costs for which he has thus become liable.

The defendant, at the argument of this pe-

tion, took the point that the action was not brought within a year from the entry of the judgment in the case of *Brown v. Carroll*, as required by Pub. St. R. I. c. 206, § 28. The record does not show that this point was taken in the court below; but, if it was, it is untenable, for the judgment in favor of the plaintiff was entered in that suit on December 3, 1889, and the writ in the present suit was served on December 1, 1890. Defendant's petition for a new trial denied and dismissed, with costs.

(52 N. J. M. 1)

LEE v. GREEN.

(Court of Chancery of New Jersey. March 12, 1894.)

CLAIM AGAINST INSOLVENT COMPANY — LACHES — NEGLIGENCE OF ATTORNEY.

1. W. subscribed for \$2,000,000 of railroad bonds from a construction company, to be paid for in installments, upon call; bonds to be delivered upon payment in full. Petitioner agreed with W. to take \$125,000 of the bonds from him upon same terms. He paid W. one call, of 10 per cent., but neither he nor W. paid any of the remaining 90 per cent. The construction company becoming insolvent, defendant was appointed receiver. The bonds constituted the principal asset, and were sold by the receiver. *Held*, that no contractual relation existed between petitioner and the construction company, and a claim by him for the 10 per cent. installment paid by him to W. was properly disallowed by the receiver.

2. A delay for eight years in appealing from a receiver's disallowance of a claim, notwithstanding repeated notices of an order limiting appeals, is a bar to any relief.

3. A client is bound by his attorney's neglect to make prompt application for relief.

Application by Arnold Lee for leave to appeal from receiver's disallowance of claim. Application denied.

David A. Storer, for petitioner. John P. Stockton, Atty. Gen., for receiver.

McGILL, Ch. The North River Construction Company, a corporation of this state, was adjudged by this court, in January, 1894, to be insolvent; and, in pursuance of the statute, Ashbel Green was appointed its receiver. On the 11th of March, in the same year, the chancellor ordered that all creditors of the company should present their claims to the receiver within four months from that date, proving the same to the receiver's satisfaction, and, in default of such presentation and proof, should be barred from participating in any dividends from the assets of the company, and prescribed the notice which should be given of the order. The notice was duly given. On the 7th of September, 1895,—nearly 14 months after the time limited for the presentation of claims had expired,—the petitioner, Arnold Lee, presented a demand for \$12,500, with interest from July 1, 1881, characterizing it "money paid and advanced by me to the North River Construction Company." The receiver was

not able to trace such an indebtedness of the company upon its books, and he therefore immediately returned Mr. Lee's paper, with the written objections that it was not presented within due time, and that its form did not sufficiently apprise him of its merits. He also notified Mr. Lee that the claim was disputed and rejected by him to the end that appeal might be taken to the chancellor. On the 20th of July, 1888, the chancellor made a further order that all persons who had presented to the receiver claims which the receiver had disallowed should prosecute any appeal they might desire to take, and bring the same to hearing, before the first Monday in December of that year. Notice of this order was given to the attorney of Mr. Lee in August, and to Mr. Lee himself in September, of the same year. No action was taken by Mr. Lee until December, 1891, when he called upon the receiver with reference to the claim, and was then explicitly informed as to the nature and effect of the orders and notices which have been above referred to. Thereafter, Mr. Lee did nothing until the latter part of September, 1893, when, as the receiver was about to make final distribution of the remnant of the assets of the company then in his hands among its stockholders, he caused a new attorney to serve a notification that he (Lee) intended to prosecute his claim, and that any distribution which would strip the receiver of funds to meet his recovery would be made at the receiver's peril. Later, in October, 1893, the present petition was presented to the chancellor. The receiver has answered it, and the application of Mr. Lee is now heard upon the petition, answer, affidavits filed on each side, and the record in the insolvency matter.

The answer exhibits the further facts that Arnold Lee & Co., a partnership of which the petitioner is a member, was the owner of 600 shares of the capital stock of the North River Construction Company, and, as such stockholder, was known to, and recognized by, the receiver. To this firm, as one of his cestui que trust, the receiver, from time to time, sent reports of his progress in the administration of his trust. On the 12th of January, 1885, and the 11th of January, 1886, he sent reports which referred to the order to limit the presentation of claims of creditors. On March 15, 1886, he sent a report which specially states that he rejected the claim of Arnold Lee, and that no action upon the rejection had been taken by Mr. Lee. On June 3, 1888, he reported that he intended to ask the chancellor to limit the time within which creditors should appeal from his disallowance of their claims, and in a report dated December 6, 1888, the order to limit appeals was copied at length. It further is made to appear that the North River Construction Company was organized for the purpose of constructing the New York, West Shore & Buf-

falo Railway Company from Weehawken, in this state, to the city of Buffalo, a distance of 425 miles, for which it was to be paid by the capital stock and bonds of that company; that its failure was caused by the depreciation of the market value of those securities; that at the time of its failure it had 200,350 shares of the capital stock of the railway company, and also first mortgage bonds of that company of the par value of \$10,000,000 and demand notes of the company for \$600,000, all of which went to the receiver, and constituted the principal part of the assets in his hands; that in June, 1884, a suit was commenced to foreclose the first mortgage upon the railway company's property, which threatened the destruction of the principal assets of the construction company; that in the emergency the receiver applied to the court in which the foreclosure suit was pending, and obtained leave to intervene, and then interposed technical defenses for the purpose of gaining delay; that during such delay, to reconcile all interests, and gain the active assistance, good will, and co-operation of the stockholders of the construction company, by securing for them the probability of a partial payment for their stock, he, in June, 1885, called a meeting of the larger creditors of the construction company, and represented to them the situation of affairs, and the advantage which would ensue from a compromise of their claims to an amount which would admit of a dividend out of the assets to the stockholders; that the result of such overture was that practically all the creditors agreed to accept one-half of their claims in full satisfaction of them; that later, in July of the same year, the banking house of Drexel, Morgan & Co., of New York city, proposed to the holders of the first mortgage bonds of the railway company a scheme by which, upon a sale of the railway to the New York Central & Hudson River Railroad Company, 50 cents upon the dollar of their holdings would be paid; that the receiver of the construction company became a party in the negotiation which followed this proposal, and, with the co-operation of both creditors and stockholders of that company, effected a sale of the assets in his hands for \$6,000,000, par value, of first mortgage bonds of the then newly-organized West Shore Railroad Company, which bonds were guaranteed by the New York Central & Hudson River Railroad Company, and sold for a fraction less than par, and he was enabled, from the proceeds of his sale of those bonds, to pay the creditors of the construction company the full amount they had agreed to accept in satisfaction of their claims, and also pay the stockholders upwards of 31 per cent. of the par value of their stock; that, among other stockholders, he paid the firm Arnold Lee & Co. 31 per cent. of the par value of their 600 shares of stock, to wit, \$18,600; and that, in absence

of the compromise with the creditors, Arnold Lee & Co. would not have been paid 5 per cent., to wit, \$3,000, on their stock. It further is made to appear that after Arnold Lee & Co. had been paid this dividend upon their stock, and the assets in the receiver's hands had been so far distributed that he retained only sufficient moneys to answer some unsettled contingent liabilities, they sold their interest in the stock standing in their name, and thereafter, when the receiver had adjusted those contingent liabilities, and was about to make final distribution of what remained in his hands, and not till then, Mr. Lee, who had slept upon his claim for more than eight years, made the present application.

The claim itself now appears to rest upon this state of facts: It became necessary for the construction company, in order to prosecute its contract to build the New York, West Shore & Buffalo Railway Company's road, to sell securities with which the railway company paid it, and, to accomplish such sale, it opened a subscription agreement which bound its subscribers to pay the construction company par and accrued interest for the amounts of the bonds set opposite their respective names, upon the following, among other, terms and conditions: "Second. Ten per cent. shall be paid upon call to C. F. Woerishoffer, treasurer of the North River Construction Company, for which installment receipts, in due form, shall be given, and thereafter not more than ten per cent. shall be called at any one time. At least ten days' notice shall be given of any call, subsequent to the first call. Default in the payment of any installment called, as herein provided, shall entitle the company, at its option, to forfeit the subscription and all installments previously paid. Third. Each subscriber, upon the payment of the entire amount subscribed by him, shall, in addition to the bonds, be entitled to fifty per cent. of the par value of his subscription, in certificates representing the full-paid capital stock of said railway company." "Fifth. After forty per cent. has been called in and paid, such subscriber may elect to surrender all his installment receipts, except one, and receive therefor thirty per cent. in said bonds; and he shall be entitled to receive bonds for each subsequent payment upon the surrender of the installment receipts, and upon payment in full of his subscription he shall be entitled to the certificates provided for under section third. Sixth. The bonds subscribed for under this agreement will be deposited with the United States Trust Company for delivery to the subscribers hereto, under the terms hereinabove named, upon a surrender of their installment receipts. Interest at five per cent. per annum will be allowed on all installments paid, and will be adjusted as the bonds are delivered."

The firm of Woerishoffer & Co., of which

Charles F. Woerishoffer, the treasurer of the construction company, was a member, became a subscriber for \$2,000,000 of the bonds, and with that firm Mr. Lee agreed that he would buy \$125,000 of the bonds they were to have, to be paid for upon their calls of 10 per cent., as provided in the subscription agreement. In pursuance of his agreement, on the 1st of July, 1881, he paid Woerishoffer & Co. \$12,500,—the first 10 per cent. called for,—and they delivered to him four receipts, which the construction company had given to them, one for \$500, two for \$1,000 each, and one for \$10,000, numbered, respectively, 310, 341, 342, and 420, each of which was indorsed "Woerishoffer & Co.," and, except in amounts and numbers, was identical with the others, in this language: "No. 310. The North River Construction Company. 20 Nassau Street, Room 9, New York, July 1, 1881. Received of Woerishoffer & Co. five hundred dollars, being payment of first installment of 10 per cent., due July 1st, 1881, on \$5,000 of 5 per cent. mortgage gold bonds, due in 1931, of the New York, West Shore and Buffalo Railway Company, subscribed for by them, as per subscription agreement dated June, 1881. Interest will be allowed hereon, at the rate of five per cent. per annum, from date hereof to day of issue of bonds. This receipt must be surrendered to the construction company previous to delivery of the bonds. \$500. J. E. Worcester, Assistant Treasurer, North River Construction Company." Mr. Lee thereafter failed to respond to calls made upon him by Woerishoffer & Co. for additional payments, and Woerishoffer & Co., in turn, failed to respond to calls upon them by the construction company for the portion of their subscription which the receipts they delivered to Mr. Lee represented, and the construction company thereupon proceeded to forfeit that part of the subscription of Woerishoffer & Co. Mr. Lee does not pretend to have dealt with the construction company, and does not show that the construction company had any knowledge of his dealings with Woerishoffer & Co. His transaction, as he states it in his petition and affidavit, was with Woerishoffer & Co. alone, concerning a portion of the bonds which that firm had engaged to buy from the construction company. He states that he knew nothing of the terms of the agreement of bond subscription between Woerishoffer & Co. and the construction company. If it were material that he should be held to knowledge of that agreement, the receipts which Woerishoffer & Co. delivered to him appear to have distinctly notified him of its existence, and to have put him upon inquiry concerning it. His \$12,500 was paid to Woerishoffer & Co., and the terms in which the receipts are couched show that the money of Woerishoffer & Co. went to the construction company. Mr. Lee did not pay

any money to the construction company. It is true, Charles F. Woerishoffer was the treasurer of the construction company, but I fail to perceive that that fact changes the situation. Mr. Lee distinctly states that his purpose was to buy from Woerishoffer & Co. a portion of the bonds subscribed for by them. His dealing with them, acceptance of receipts made out to them, and complete ignorance of the construction company's subscription agreement, make it plain that he had no purpose to contract with the construction company. Nor does he appear to have confused Charles F. Woerishoffer, treasurer, with Woerishoffer & Co. He appears to have fully comprehended the bargain that he made, and the precise situation of the contracting parties. In view of this condition of affairs it is not surprising that Mr. Lee failed to apprise the receiver as to the particulars of his claim at its presentation, but chose rather to generalize it as for money paid and advanced.

The mere statement of the facts which underlie this application must determine it. It is apparent at a glance that the claim is without validity. No contractual relation whatever existed between Mr. Lee and the construction company. The construction company did not have his money. His dealings were wholly with Woerishoffer & Co., and his payment was to that firm. But if Mr. Lee's claim possessed merit, I am of opinion that his pertinacious disregard of the chancellor's orders and the receiver's notices has worked a forfeiture of all right to the court's indulgence. It would establish a pernicious and troublesome precedent, in the administration of the affairs of insolvent corporations, to grant his application. This is not the case of a creditor, who, for want of actual notice, or through misapprehension, has lost the opportunity to present his claim, and comes, before final distribution, and asks for relief from the bar of the court's order, but the case of one whose attention has been repeatedly called to his right and duty, and, who, with careless indifference, or designed deliberation, has ignored every effort of the court, and its proper officer, to induce him to establish his claim. It is the case of one who has so withheld his claim as to engender suspicion that he had a purpose to gain some advantage in so doing. I am not unmindful that Mr. Lee attributes his tardy application to a former attorney. Such a defense will not serve him. He is responsible for his attorney's negligence. *Wakeman v. Duchess of Rutland*, 3 Ves. 233; *Dillett v. Kemble*, 25 N. J. Eq. 66; *Mott v. Shreve*, Id. 438. And, if that were not so, I think the mere fact that he, an intelligent principal, has suffered his attorney to delay the prosecution of his claim for \$12,500 and interest, for eight years, is enough to conclusively establish his own culpable negligence. I will deny the application, with costs.

(52 N. J. E. 522)

HALL v. OTTERSON et al.

(Court of Chancery of New Jersey. March 20, 1894.)

WIFE'S SEPARATE PROPERTY — DEED OF TRUST — KNOWLEDGE OF EFFECT — SUIT TO SET ASIDE — LIMITATIONS — ACQUIESCENCE AND LACHES.

1. Where a wife and her husband, who was a lawyer, execute a deed of trust of her separate property by which he acquires an advantage, the burden is on him to show that she thoroughly understood its effect, and where it does not appear that she had independent advice, and the deed was complicated, and a cursory reading of it would disclose the scheme of the will to be that if neither wife nor husband disposed of the property by will it should go to her heirs at law, and such reading would not give the unprofessional mind an idea that, by the words "or the survivor of them" in the power of revocation, it gave the husband power on her death to have the fee vested in him and diverted from her heirs, and, when a power of revocation in said deed was limited in its exercise to the joint action of husband and wife, the inference is that the deed was executed by the wife without thoroughly understanding its effect, and under a mistake, and it will not be allowed to stand against her heirs, both she and her husband having died without disposing of it by will, and he having after her death revoked the trusts and had the fee vested in him.

2. A suit to set aside a deed of trust by reason of mistake, being purely of equitable cognizance, is not affected by the statute of limitations.

3. A suit by the heir of a married woman to set aside a deed of trust of her separate property by reason of a mistake therein, which gave the husband power after her death to have the fee vested in him and diverted from her heirs, is not barred by acquiescence and laches, except as to such part of the property as he sold, where the husband was entitled to the possession of the property for life by the curtesy, and the heir lived with and trusted the husband, and he told her that his wife had given him the property, and promised her that, if she outlived him, she would see that he had done her no wrong, and she brought the suit three months after his death.

Suit by Sarah M. Hall against Andrew Otterson and others to set aside a deed of trust.

Barker Gummere and William M. Gummere, for complainant. Peter V. Voorhees and Frank T. Lloyd, for defendants.

On Bill, Answer, Replication, and Proofs in Open Court.

GREEN, V. O. Samuel Haines, late of the county of Burlington in this state, who departed this life about the year 1835, was seised in his lifetime and at his death of a considerable estate, including the lands and premises in controversy in this suit, being a farm at Moorestown, N. J. He left, him surviving, his widow, since deceased, and two daughters, Rebecca B. and Sarah M., his only children and heirs at law. Sarah M. Haines, on or about the 9th of June, 1849, conveyed all her undivided one-half part in the premises in controversy to one John M. Kaighn, his heirs and assigns, in trust, among other things, to convey all or any part thereof whenever the said Sarah M. Haines, whether feme covert or feme sole,

should in a specified manner direct. Sarah M. Haines, on or about the 27th day of June, 1849, intermarried with one Samuel W. Hall, and on August 31, 1852, together with her husband, conveyed all her equal undivided one-half part of the premises to her sister, Rebecca B. Haines, and afterwards, on or about the 5th of December, 1857, John M. Kaighn, trustee as aforesaid, by direction of the said Sarah M. Haines granted, ratified, and confirmed the aforesaid conveyance of the said undivided half in and to the said Rebecca B. Haines, who, by reason of the said conveyances and her inheritance from her father, became the sole owner in fee of the premises. On or about the 1st of October, 1856, Rebecca B. Haines intermarried with one James Otterson, Jr., and on March 2, 1858, a child was born of the marriage; it lived only 27 days. James Otterson, Jr., was a lawyer of prominence in Philadelphia, and, as the evidence shows, was intrusted by his wife with the entire management of her property and affairs. February 25, 1858,—that is, six days before the birth of the child,—Otterson and his wife, for a nominal consideration, executed a deed conveying the premises in controversy, being a farm at Moorestown, N. J., to James E. Gowen on various trusts.

Mrs. Otterson had considerable other property, real and personal, and I do not think the provisions of the trust deed, other than the clause claimed to contain a power of revocation, are justly open to severe criticism as unreasonable or improvident. It is true that by them the husband acquired control of the wife's estate during his life, but that is no more than would be expected from a loving and devoted wife to an affectionate and attentive husband. By the insertion, however, in the clause referred to of the words "or survivor of them," he was enabled to defeat what I think appears to have been the intention of his wife; namely, that the property should, in the event which has happened, descend to those in whose behalf this suit is brought. After the trust as to the property during the lives of both husband and wife, there follow provisions, stripped of their technical phraseology, substantially that the wife, at any time during her life, might appoint to whom all or any part of the premises should go after her decease and the decease of her husband; that, if she should not by will so appoint, then he, at any time during his natural life, might by will dispose of the premises to whomsoever he might choose, and, if neither of them should dispose of the premises by will, then the trustee should hold the farm for the right heirs at law of Rebecca, and by good conveyance convey the premises to the said right heirs of Rebecca in fee, in such shares and proportions as the said heirs would have been entitled to had Rebecca died intestate. Then follows the clause providing for the revocation of the uses and trusts declared in the deed, and for

reconveyance, but which revocation could only be made by James Otterson, Jr., and Rebecca jointly during their lives, and by the survivor of them, with the proviso that Otterson, in the event of his surviving his wife, was not to have power to defeat any testamentary devise or appointment which Rebecca might make in her lifetime. Mrs. Otterson died March 10, 1863, intestate, leaving her husband, but no issue, her surviving, and the complainant, Sarah M. Hall, her only sister and sole heir at law. James Otterson, Jr., the husband, took possession of the farm and continued to occupy it until his death, September 24, 1890. The deed of trust was not recorded until January 22, 1864, six years after its date, and one year after Mrs. Otterson's death. Between the time of Mrs. Otterson's death and the record of the deed, Gowen, the trustee, on Otterson's revocation of the trust and demand therefor, made a deed in fee of the premises to James Otterson, Jr., and on February 16, 1885, Gowen died. The deed from Gowen to Otterson was also recorded January 22, 1864. Otterson in his lifetime conveyed several portions of the property to various individuals, many of whom erected buildings on the parcels so conveyed. On Otterson's death a paper was found, signed by him, but not in the presence of witnesses, so as to be effectual as a will under the statute, by which he attempted to devise the farm in question to the children of the complainant. In consequence of its defective execution, he died intestate as to the real estate, leaving no issue, but several brothers and sisters, his only heirs at law, who thereupon took possession of the property, and afterwards, by deed dated November 13, 1890, conveyed the premises to Charles H. Otterson in trust; which deed, it seems to be admitted, was made for convenience in making title to the lands. Sarah M. Hall, the complainant and sole heir at law of Rebecca B. Otterson, brought an action of ejectment three months after Otterson's death, and on the 10th of January, 1891, filed the bill in this cause to set aside the deed of trust. Otterson died insolvent, so much so that the value of this land is necessary to pay his debts, and the contest in the case is therefore practically between the complainant, as the heir at law of Mrs. Otterson, and the creditors of James Otterson, Jr. The deed in question was made prior to the birth of the child and subsequent to the married woman's act of 1852. Nixon, Dig. (4th Ed.) 547.

This deed was a voluntary conveyance on the part of Mrs. Otterson. She had inherited the property in question from her father, who died in 1835, when she was three years of age. She held it, and the rents, issues, and profits thereof, after her marriage in 1856, under the act of 1852, "as her sole and separate property, as if she was a single female." At the time of the conveyance attacked, her husband had no present estate

in her lands. He was not tenant by the curtesy intiate, not only because the act of 1862 prevented his acquisition of that estate (*Porch v. Fries*, 18 N. J. Eq. 204), but also because no issue of the marriage had yet been born alive, nor for the same reason had he "obtained an inchoate right which, on his wife's death, he surviving, would bloom into a freehold" (*Insurance Co. v. Barraciff*, 45 N. J. Law, 543, 550). In *Shurmur v. Sedgwick*, 24 Ch. Div. 597, Vice Chancellor Bacon held that the relinquishment of a possible estate by the curtesy did not render a deed of settlement not voluntary, and void as against a mortgagee, under 27 Eliz. c. 4, § 1. *Speakman v. Tatem*, 48 N. J. Eq. 136, 21 Atl. 406, affirmed on appeal, 50 N. J. Eq. 484, 27 Atl. 636, recognizes that the husband has some inherent marital rights in his wife's estate, which are not defined, which he may relinquish in a deed of settlement, of sufficient moment to give him the right to hold the trustee to the discharge of his duty. But in this case any such interests were not given up by Mr. Ottersen, who by the terms of the trusts secured for his life every right in his wife's property which he could possibly have exercised over it as her husband. The rule of equity that "he who bargains, in a matter of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence" (*Gibson v. Jeyes*, 6 Ves. 266), applies with peculiar force to a transaction by which a husband secures from his wife a portion of her estate. The most dominant of all relations is that of the husband over the wife. There are, of course, exceptional cases when the will of the woman may control. The relation is so close, the trust of the wife so absolute, her dependence so entire, it may be, her fear so abject, while the domination of the husband is so complete, his influence so insidious yet so controlling, that equity regards all such transactions with a jealous care, and subjects them to the severest scrutiny. The greater the affection, the more submissive the dependence; the stronger the trust, the more liable is the wife to be subject to the control of the husband, and the more vigilant should the court be in protecting the weak. *Farmer v. Farmer*, 39 N. J. Eq. 211, 216; *May, Fraud. Conv.* (Text Book Series) 483; *Black v. Black*, 30 N. J. Eq. 215, 219; *Boyd v. De La Montagnie*, 73 N. Y. 502; *Weeks v. Haas*, 3 Watts & S. 520; *Campbell's Appeal*, 80 Pa. St. 298; *Darlington's Appeal*, 86 Pa. St. 512; *McRae v. Battle*, 69 N. C. 98; *Witbeck v. Witbeck*, 25 Mich. 439; *Smyley v. Reese*, 53 Ala. 89; *Shaffer v. Kugler* (Mo. Sup.) 17 S. W. 698. Chief Justice Gibson says, in *Watson v. Mercer*, 6 Serg. & R. 49, with reference to transfers obtained from the wife for the purpose of vesting the estate in the husband: "What honest mind would feel regret that, in the hurry of accomplishment, some circumstance, merely formal, was omitted by

which the wife and her family were rescued from his rapacity?" This deed was executed at a critical period of Mrs. Ottersen's life. She was in extremely delicate health; it was doubtful if she could survive the peril of her approaching confinement. She was a refined lady, unacquainted with business, relying for its care first on her agents and then on her husband, who, after their marriage, became her agent, and was intrusted by her with the entire management of her estate, and exclusively of the property in question; in short, she was most dependent on and devoted to him and his interests, her affection for and attention to him were marked, as was her anxiety to please him. He was a prominent lawyer; so was the selected trustee, who was the husband's intimate friend; and so was also the officer who took the acknowledgment. So far as the evidence shows, this inexperienced lady was surrounded by these gentlemen, of whose legal ability she must have been aware, in one of whom she reposed the most implicit confidence, she being without any competent independent adviser. It is a case in which the court should be alert to require the observance of all technical rules applicable.

In all transactions between persons occupying relations, whether legal, natural, or conventional in their origin, in which confidence is naturally inspired, is presumed, or, in fact, reasonably exists, the burden of proof is thrown upon the person in whom confidence is reposed, and who has acquired an advantage, to show affirmatively, not only that no deception was practiced therein, no undue influence used, and that all was fair, open, and voluntary, but that it was well understood. *Mott v. Mott*, 49 N. J. Eq. 192, 22 Atl. 997; *Gibson v. Jeyes*, supra; *Hoghton v. Hoghton*, 15 Beav. 278; *Simeon v. Wilson*, 3 Edw. Ch. 36; *Coutts v. Acworth*, L. R. 8 Eq. 558; *Boyd v. De La Montagnie*, supra; *Darlington's Appeal*, supra; *Huguenin v. Baseley*, 2 White & T. Lead. Cas. Eq. (Text Book Series) 597, notes. It is essential to the maintenance of a deed of gift that the donor comprehends the full force and effect of his acts; as Sir George Jessel puts it, "thoroughly understands what he is about" (*Dutton v. Thompson*, 23 Ch. Div. 278, 281), or, in the words of Lord Eldon in *Huguenin v. Baseley*, 14 Ves. 273, "with that knowledge of all their effect, nature, and consequences which the defendants and the attorney were bound by their duty to communicate to her before she was suffered to execute them." See, also, *Mulock v. Mulock*, 31 N. J. Eq. 594, 602. It is to establish this thorough understanding that the burden of proof is thrown on the donee in cases of gifts between persons standing in fiduciary relations.

The state, in its careful protection of the rights of married women in the transfer of their real estate, requires by statute that a public officer shall make known to her the contents of the instrument, and take her ac-

knowledge, when she is separate and apart from her husband, that her execution thereof is her voluntary act and deed, freely done, and without any fear, threats, or compulsion of her husband. This law is to secure to her, through an officer, knowledge of the contents of the paper, and an opportunity, when not in the actual presence of her husband, of exercising her own will and purpose. The certificate of the officer in compliance with the statute completes the formality, and makes it a legal conveyance. It is evidence that the contents of the deed have been made known to the wife, and that she has acknowledged that its execution is free and voluntary. Yet, while it may be true that the deed has been read to her, she may be as far from thoroughly understanding the effect of the act as she may be unconscious of the dominant influence of her husband's will inducing her action. While, in the case of an ordinary transfer of title, it may be safely assumed that any man or woman of intelligence would entirely comprehend the effect of a deed whose contents have been made known to them, that presumption cannot, I think, be indulged in with reference to a deed of trust, with its complicated provisions. Something more than having the contents made known would be required in order that a man or woman of ordinary information should fully understand the force and effect of such a deed, drawn in the technical verbiage of the professional conveyancer. *Hoghton v. Hoghton*, supra. It is to secure this thorough understanding that courts of equity require, in cases of this kind, except those involving mere trifling gifts, that the donor shall have independent advice. Sir G. J. Turner, L. J., in *Rhodes v. Bate*, 1 Ch. App. 252, at 257, says: "I take it to be a well-established principle of this court that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle. *Kekewich, J.*, in *Allcard v. Skinner*, 36 Ch. Div. 145, at 158, says: "Where the paramount influence presumably exists, it (the law) casts on the possessor of such influence the burthen of proving that the gift was free, and it holds an essential part of that proof to be that the donor had 'competent, independent advice;' " and *Lindley, L. J.*, at 181: "In this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made." See, also, *Prideaux v. Lonsdale*, 1 De Gex, J. & S. 433;

Savery v. King, 5 H. L. Cas. 627; *In re Garnett*, 31 Ch. Div. 1; *Dolliver v. Dolliver* (Cal.) 30 Pac. 4; *Leech v. Farr*, cited in 13 Am. Law Reg. (N. S.) 350. Not only does it not appear that Mrs. Otterson had independent advice to explain the effect of the deed, but I think the present condition of affairs, considered in the light of the provisions of the deed of trust, demonstrates that Mrs. Otterson did not thoroughly understand it. It is undoubtedly true that, in construing an instrument, it is to be assumed that the parties intended its terms in the sense established by the courts in their interpretation, but, in ascertaining whether the parties really understood the terms of the instrument, we have a right to judge from its plain provisions whether one or more of its possible effects was intended. No question is raised as to the validity, under the trusts, of the conveyance from James E. Gowen, the trustee, to James Otterson, Jr., by which the fee was vested in him, and diverted from the heirs at law of Mrs. Otterson. I think a cursory reading of the trusts would never have given the unprofessional mind the idea that any such power was given. The scheme such examination would disclose to such person is that during the lives of James and Rebecca they may jointly do what they wish with the property, even to the revocation of the trusts; that Rebecca might at any time during her life appoint to whom all or any part of the premises should go after the death of herself and husband; that, in the event of her failure to so appoint, James, he surviving her, at any time during his life might by will dispose of the premises to whomsoever he might choose; that, if neither James nor Rebecca did dispose thereof by will, then the trustee should hold for the right heirs of Rebecca, to whom the premises should be conveyed. It is clear from these provisions that she intended to secure to herself the right to appoint by will the persons to whom she wished the property ultimately to go, and, if she failed so to do, that her husband by will might do the same, and, in the event of their both dying intestate, or without making such appointment, the premises should go to her heirs at law. She died without a will. He made an unfinished attempt to leave one. The event contemplated, by which the heirs were to have acquired the estate, happened, but the insertion of the words "or the survivor of them" in the clause of revocation nullified this clearly-expressed intention, and tends to divert the property to the creditors of the husband.

The effect of the absence of a power of revocation in a voluntary conveyance has been the subject of much fluctuation of opinion. Chancellor McGill in *Van Houten v. Van Winkle*, 46 N. J. Eq. 380, at 385, 20 Atl. 34, thus states the present condition of the law: "As to such an instrument, the authorities appear to hold that where the intent to make

it irrevocable does not appear, and no motive for an irrevocable settlement is shown, the absence of the power of revocation is *prima facie* evidence of mistake." *Garnsey v. Mundy*, 24 N. J. Eq. 243; same case, with note, 13 Am. Law Reg. (N. S.) 345. The deed in question did contain a certain power of revocation, but it could only be exercised by Mrs. Otterson, in the lifetime of her husband, by his joint co-operation. She was the donor and he was the beneficiary in this deed. Is the reservation of a power, to be jointly exercised by the donor and donee, such a power of revocation as is contemplated by the authorities? I do not think it is. Lord Eldon in *Huguenin v. Baseley*, 14 Ves., at 296, referring to a decision of Lord Hardwicke, says: "There was in that deed a power of revocation, but it was a power to revoke in presence of three persons, who perhaps never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered strong evidence that the parties did not understand the transaction, whence arose a strong inference of an undue purpose." In this case the reservation of the power of revocation to the donor, to be exercised only jointly with the donee, cannot certainly be considered as reserving to her the right to revoke the deed. The absence of such power under the above statement of the law, then, is *prima facie* evidence of mistake, unless the intent appears to make it irrevocable. So far from this being the case, the insertion of the clause demonstrates that it was the intention to make it revocable, and no motive for an irrevocable settlement is shown. The evidence shows that this deed by which Mr. Otterson, the agent, secured to himself the opportunity to control and dispose of the property, subject to the single contingency of Mrs. Otterson's power of appointment by will, was entirely voluntary on her part, and that it was made at a time when she was completely under his influence. So far as appears, it was executed by her without any information as to its contents and effect other than what the perfunctory duty of the acknowledging officer required, and without the benefit of independent advice. It would seem from her intention, as gathered from its provisions, that she did not fully understand its force and effect, and it is to be presumed that it was executed under a mistake, as it is without power of revocation reserved, so far as she individually was concerned, although it, on its face, develops the intention that it should be revocable. All these conclusions unite in the result that this deed cannot stand in a court of equity.

It was, however, made in 1858, and Mrs. Otterson died in 1863, and the bill was not filed until 1891,—28 years after the execution of the deed; and the defendants set up the statute of limitations, and also claim that the complainant, by delay, has lost any right she might otherwise have to attack the conveyances; and, further, that by her inaction,

with the knowledge that James Otterson, Jr., was exercising acts of ownership by the sale and conveyance of portions of the estate, and its improvement by the purchasers, she has so far given her acquiescence to the original transaction that she cannot now dissent therefrom in a court of equity. The sections of the statute of limitations which the defendants rely on are 16 and 17. Revision, p. 597. The first limits entry on lands to 20 years next after the right of entry accrued; the other limits the bringing of any real, possessory, ancestral, or other action for lands to the same period after the right or title thereto or the cause of such action accrues. The latter relates to actions for the recovery of lands, and necessarily involves the possession thereof. The time limited therein cannot commence to run until the right of entry has accrued. Time, under either section, does not run against a remainder-man until the death of the tenant for life. This was held in *Pinckney v. Burrage*, 81 N. J. Law, 21, with reference to the 30-years section of the statute. Revision, p. 598, pt. 24. James Otterson, Jr., after the death of his wife, was entitled to the possession of these premises for life as tenant by the curtesy, irrespective of the conveyances. His possession was as referable to the one right as the other. While he lived, therefore, Mrs. Hall had neither the right of entry nor of possession. Until his death, in 1890, she could not maintain a suit at law for the recovery of the land, and the statute has not, therefore, run against her at law. *Duke of Leeds v. Amherst*, 2 Phil. Ch. 117; *Kirwan v. Kennedy*, 3 Ir. R. Eq. 472; *Thompson v. Simpson*, 1 Dru. & War. 459. The principle is also recognized by Turner, L. J., in *Association v. Siddal*, 3 De Gex, F. & J. 58, 72, saying: "A cestui que trust whose interest is reversionary is not bound to assert his title until it comes into possession."

The present is a suit purely of equitable cognizance. It is founded on that branch of equity jurisdiction which relieves against mistake. As to its subject-matter she would be remediless at law. The case does not fall within the principle that equity applies the bar of the statute to cases where there is both a legal and equitable remedy for the same cause of action. *Kane v. Bloodgood*, 7 Johns. Ch. 90, 118; *Smith v. Wood*, 42 N. J. Eq. 569, 7 Atl. 881; *Kirkpatrick v. McElroy*, 41 N. J. Eq. 555, 7 Atl. 647; 13 Am. & Eng. Enc. Law, tit. "Limitation of Actions," p. 675, and notes. This defense must rest, therefore, solely on the application of those rules relating to acquiescence and laches, which the court has always recognized, altogether outside of and independent of the statute of limitations. They are the fruit of the maxim that "equity aids the vigilant, not those who slumber on their rights." The chancellor has forcibly stated the rule, its reason, and the consequences attendant on its disregard, in *Van Houten v. Van Winkle*,

supra. The defenses of laches and acquiescence are cognate, but not correlative. They both spring from the cardinal rule that "he who seeks equity must do equity." "Acquiescence" however, properly speaking, relates to inaction during the performance of an act. "Laches" relates to delay after the act is done. Lord Cottenham, in *Duke of Leeds v. Amherst*, 2 Phil. Ch. 117, says of the use of the term "acquiescence:" "If a party having a right stands by and sees another dealing with property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word 'acquiescence.'" And thus it is that in such a case an equitable estoppel is raised. Acquiescence here might properly be applied, in favor of purchasers, to the inaction of the complainant while James Otterson, Jr., was selling portions of the property, and those purchasers were spending money in its improvement. "But," says Thesiger, L. J., in *De Bussche v. Alt*, 8 Ch. Div. 286-314, "when once the act is completed, without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action has then vested in him which at all events, as a general rule, cannot be divested without accord and satisfaction or release under seal. Mere submission to the injuries for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although, under the name of 'laches,' it may afford a ground for refusing relief under some peculiar circumstances." "Now, the doctrine of laches in courts of equity," says Sir Barnes Peacock, in *Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, at 293, "is not an arbitrary or technical doctrine. When it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or when, by his conduct and neglect, he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay, of course, not amounting to a bar by any statute of limitation, the validity of that defense must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay, and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In the adjustment of these scales of justice, it is a controlling consideration whether

the delay has been without valid excuse; not an excuse in law, but one which would have led a person reasonably to act as the party charged with laches has. A person cannot be deprived of his remedy in equity on the ground of laches, unless it appears that he had knowledge of his rights. As one cannot acquiesce in the performance of an act of which he is ignorant, so one cannot be said to neglect the prosecution of a remedy when he has no knowledge that his rights have been invaded, excepting, always, that his want of knowledge is not the result of his own culpable negligence. It is not a little difficult to determine what knowledge is necessary to place the party in the position of negligently delaying his action. The chancellor, in *Van Houten v. Van Winkle*, supra, says: "After he has been informed of facts and circumstances which apprise him of the wrong." The court, in *O'Neill v. Hamill*, Beat. 618, says: "Of her being fully apprised of her rights." In *Petroleum Co. v. Hurd*, supra, it is described as "sufficient knowledge of the fact constituting the title to relief." That it must be something more than knowledge of the mere facts which have transpired, or papers which may have been executed, is shown by *In re Garnett*, 31 Ch. Div. 1, which was an action brought by two ladies who had themselves executed releases to their aunt. This was done in 1859. The aunt died in 1879. The action was not commenced until 1883 to set aside the releases. The act attacked was the act of themselves, and of course they were not ignorant of it. Cotton, L. J., says (page 10): "But here, on the evidence, these ladies never knew, until after the death of their aunt, that they had any rights which they were giving up,—any rights beyond those which were stated on the face of that deed, in respect of which they had received those sums." In *Savery v. King*, 5 H. L. Cas. 666, the father had a life estate in certain lands, with remainder to his sons in tail male. He was indebted to S., his solicitor, more than £9,000, which was secured by policies of insurance on his life. In 1835 it was arranged between the father, the solicitor, and the eldest son, who had only just come of age, and who was living with his father, that a disentailing deed should be executed, and that the father and son should then execute a mortgage for £10,000, with a power of sale; the difference in the amount of the former incumbrances and mortgage being made up by further advances; there being also a reduction in the rate of interest, and the policies of insurance being assigned to the elder son for his use. The son had no other advice than from his father's solicitor, who was also mortgagee. The father afterwards borrowed more money from the solicitor, repayment of which was secured by charges on the estate, executed by both father and son. With part of that money other property was purchased for the son.

The original property was afterwards put up for sale, to discharge all the incumbrances, and was bought in, and ultimately purchased, by the solicitor, who was the mortgagee. The bill to set aside these transactions was not filed until 1847,—14 years after the disentailing deed was made. It will be noted that in this case the son, who was the plaintiff, participated in the execution of the papers which he sought to set aside, and must therefore have had knowledge of the facts. Cranworth, L. C., at 666 says, on the question as to the plaintiff being barred by lapse of time: "His bill was filed in March, 1847. That was about twelve years after the date of the mortgage, and eight or nine years after the sale. I cannot think that this delay makes any difference in the case. There is no reason whatever to suppose that Richard [the son] was guilty of any unreasonable delay, or indeed of any delay at all after he had become aware of his right to question the validity of the mortgage; and in those circumstances, even if the delay had been much greater than it was, there would have been nothing to impugn his title to relief. Savery, the solicitor, must be considered substantially to have represented to Richard that the mortgage was valid, and so, consequently, that the sale was binding on him. He cannot, therefore, complain that Richard acted on his representations till, after the lapse of several years, he discovered it to be erroneous." We have here stated, as an excuse for delay, that the complainant has been misled by the defendant. See, also, *Buckingham v. Ludlum*, 87 N. J. Eq. 137-148.

Mrs. Hall says that she first heard that her sister, Mrs. Otterson, had executed this deed of conveyance, after her death; that Mr. Otterson then told her that her sister had given him the farm; and that he immediately went on, and said: "Whoever shall outlive me will see that I have never done you or your children any injustice." She was at the time a member of the Otterson family, making her home with them when her sister died, and continuing to live there for some time thereafter. The same diligence is not required between members of the same family as between strangers. *Laver v. Fielder*, 9 Jur. (N. S.) 190. After Mrs. Hall's husband's death, Otterson became her legal adviser, attended to her business, and continued not only on terms of friendship, but of confidence, during his life. She had every reason to, and did, put entire trust and reliance in him and his representations, and there is no reason to think, from the facts as they appear, that her confidence was misplaced. The unwitnessed will, dated May 20, 1887,—24 years after his wife's death,—demonstrated, I think, that he really intended to carry out Mrs. Otterson's purpose that this property

should go to the children of the complainant. But it is urged that she had constructive, if not actual, notice from the record of the transfer of the Ottersons to Gowen, and from Gowen to Mr. Otterson. The deed of trust, however, was not put upon record until January, 1864,—6 years after its date, and nearly one year after Mrs. Otterson's death, and contemporaneous with the conveyance from Gowen, trustee, to Otterson. It does not appear definitely when the statement that his wife had given him the property was made by Otterson to Mrs. Hall, but the fair construction of the evidence is that it was soon after her sister's death. But I do not think she was negligent in failing to make an examination of the record. Not only is it probable that, at the time it was put on record, she was acting under the promises of Otterson, but, if she had any knowledge whatever of legal rights, she knew that, independent of the deed, Otterson was entitled, as tenant by the curtesy, to continue in possession of the property. These defendants stand in Otterson's shoes. They cannot urge, as a bar to the complainant's right of action, a delay in commencing suit, if it has been occasioned by the acts or representations of him under whom they claim. They come into court and insist that it is inequitable that the complainant should, after a delay of many years, prosecute her claim; but, if he whom they represent has been the cause of this procrastination, this appeal to the equitable denial of this court does not lie in their mouths. With his announcement to Mrs. Hall that her sister had given him the farm, he makes her the promise that puts her vigilance to sleep, and it is in consequence of his representations that she has remained inactive; and herein this case differs from *Wilkinson v. Sherman*, 45 N. J. Eq. 413, 18 Atl. 228. It is said that it would be inequitable to permit this suit to be maintained, because, during the complainant's delay in bringing it, witnesses have died and testimony has been lost. But it appears to me that Mr. Otterson has been himself guilty of laches in this regard. He, being a lawyer of distinction, must be assumed to have known that the law cast upon him the burden of proof hereinbefore indicated. It was within his power, by suit, to have perpetuated the testimony necessary to establish the deed as a valid gift, as well as within hers either to have perpetuated the testimony necessary, or to have brought suit to annul it; and he cannot invoke her delay in that regard as a bar to her action because, during the interval, he has been deprived of testimony lost to him by his own neglect. I am of opinion that these conveyances, so far as they relate to property not conveyed by James Otterson, Jr., in his lifetime, should be set aside.

(160 Pa. St. 377)

BALLMAN v. HERON et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

MECHANIC'S LIEN—COVENANT OF CONTRACTOR—RIGHT OF SUBCONTRACTOR.

Where a contractor covenants that no lien shall be filed, a subcontractor cannot have a lien, though the contractor is part owner of the property, if the contract is in good faith, and not to mislead and defraud; but if the contractor is the sole owner of the property, and the person with whom he contracts holds the property in her name merely as his trustee, the covenant against liens is of no effect.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Action by William Ballman, to use of John Lucas, against Isabella Heron, as owner, and Patrick Heron, as contractor, to enforce a mechanic's lien. Judgment for plaintiff. Defendants appeal. Reversed.

A. E. Stockwell, for appellants. William H. Burnett and John Sparhawk, Jr., for appellee.

WILLIAMS, J. The mechanic's lien in this case was filed on the 13th day of January, 1892, against Annie Heron, Isabella Heron, and Patrick Heron, owners, and Patrick Heron, contractor. In February, 1893, the record was amended by consent, by striking out the names of Annie Heron and Patrick Heron as owners, leaving the defendants to stand as Isabella Heron, owner, and Patrick Heron, contractor. At the trial, an agreement in writing was placed upon the files, setting forth that Isabella Heron became the owner in fee of the land on which the row of houses was built, on the 5th day of March, 1891, by deed from Annie Heron; that she was the owner when the writ of scire facias issued; and that Patrick Heron was the contractor for the erection of the houses. The agreement further stipulated "that this admission may be given in evidence on the trial of the above case, as proof of the facts above stated." It was used, as we understand, by the plaintiff in making out a case in chief. The defendants replied by a denial of the plaintiff's claim for extra work, and by putting in evidence the contract between Isabella Heron, the owner, and Patrick Heron, the contractor, which expressly stipulated that no lien should be entered for the work or materials necessary for the erection of the houses. To escape from this stipulation, the claimant made an attack upon the contract, alleging that Patrick Heron was, in whole or part, the owner of the lots; that Isabella Heron held the title as a trustee for her brother, so that Patrick Heron was in fact contracting with himself; and that the whole arrangement was a device to defraud subcontractors and material men. If the facts were found by the jury to be as thus alleged, the contract was without effect, and presented no obstacle to a recovery by the claimant. On the other hand, if Isabella Heron was the

owner of the lots, and Patrick Heron was only a contractor for the erection of the houses, then the contract was valid, and the subcontractor would be bound by its terms. This question of the relation of Patrick Heron to the title, the court below submitted to the jury as the important question of fact on which their verdict should depend, telling them, if Patrick Heron was an owner, in part or in whole, of the lots on which he contracted to build the houses, the covenant not to enter a lien was not binding upon him or upon the claimant, but, if he was not an owner, then his contract with the owner bound him and the subcontractors under him. This was a correct instruction upon the effect of a finding that Isabella Heron held the title merely as a trustee. But it is subject to criticism in so far as it holds that the ownership of a part interest in the land necessarily invalidates the contract. We see no reason why one tenant in common may not contract in good faith with his cotenants for the erection of buildings upon the land held in common, nor why a waiver of the right to file a mechanic's lien in such a contract should not be sustained. If the contract is not made in good faith, but is entered into for the purpose of misleading, and so defrauding, subcontractors and material men, it should be held invalid because of the fraud, but not necessarily because the builder has a fractional interest in the lots on which he has contracted with the other owners to build. If Isabella Heron was a mere trustee, then Patrick was contracting with himself. He was both owner and contractor. But if Isabella Heron was an owner, whether of one-half or of nine-tenths of the lots, and her brother was a contractor in good faith with her as such part owner and holder of the title, we see no reason why the contract should not be upheld and enforced. Its validity should in that case turn on the intention of the parties. If it was intended to serve a fraudulent purpose, it would be invalid. If it was an honest effort between tenants in common to improve the common property, it ought to stand.

There is also an apparent contradiction upon the record which we think should be noticed. The learned judge told the jury that, if Isabella Heron was the owner of the lots, their verdict should be in her favor. This was clearly right. The defendants, however, presented to the court a series of points, four in number, in which the reasons for holding a subcontractor bound by the waiver of the contractor were presented in their order. In the first of these the court was asked to say that when a contractor covenants, in express terms, not to file a lien for his labor and materials employed in the work he has contracted to do, he is bound by his covenant, and cannot sustain a lien filed in disregard of it. The second point asked the further instruction that the right of the subcontractor to file a lien is derived through, and is de-

pendent on, that of the contractor, so that if the contractor is unable, by reason of his contract, to file a lien in any given case, the subcontractor is for the same reason unable to sustain a lien in the same case. The third and fourth points presented the propositions contained in the first and second, as applicable to the facts, as the defendants assumed the jury might find them to be. These points were severally refused without explanation. He might well have said to the jury that these questions were not in the case if they found Isabella Heron was not the owner of the lots; but, if they found her to be the owner, then these questions were in the case, and the general rule as stated in the first and second points was the rule by which they were to be governed. The direction in the general charge to find for the defendants, if satisfied of the ownership of Isabella Heron, involved, and was affirmation of, the doctrine of these points, and we do not understand why these points themselves were negatived. This whole subject of the position of a subcontractor has been so frequently considered in the last four years that it cannot be necessary to enter upon any general discussion of it. The general rule is that the parties to a contract make their own bargains, and, if unwilling to trust to the personal integrity or pecuniary responsibility of those with whom they deal, require them to give security for their faithful performance of that which they undertake to do. In the case of contracts to build, the legislature has undertaken to provide security for one party to the contract by subjecting the property of the other to a statutory lien in advance of any judgment fixing the amount due. The owner of the building is left to protect himself by action on the contract, but the mechanic or material man is taken care of by the statute. The contract to build is the basis on which the lien is made to rest. The lien itself is an additional remedy—a statutory security—for the price of work done, or materials furnished, under the contract. This is class legislation. It is a paternal interference between parties for the protection of one, at the cost and inconvenience of the other. It assumes the inability of certain persons to protect themselves, and the consequent duty of the state to intervene in their behalf. We are not questioning the wisdom of such legislation as applicable to mechanics and material men. That is a legislative question with which we have nothing to do. Our question is with the extent to which such legislation can override the actual contract entered into between owner and contractor. The law gives to debtors a right to retain personal property to the amount of \$300, exempt from levy and sale for debts. It protects their real estate from sale if it will rent for enough so that within seven years the rent will pay the liens. But the privileges thus conferred may be waived, and are often waived, in business

transactions. So the privilege of securing an unpaid bill for work or materials by the entry of a mechanic's lien may be waived by him on whom the legislature has conferred it; and there is no reason for supporting the waiver of the privileges of a debtor that will not apply with equal force to the waiver by a prospective creditor. The rule is now settled in this state that a contractor who has waived the right to enter a mechanic's lien by a stipulation in writing is bound by such agreement, as well as by any other agreement he may make. A mechanic's lien filed in violation of such agreement is invalid, and will not be sustained. But if the contractor can relieve himself from the effect of his contract by simply subletting all the work and the furnishing of all the materials, and so confer on the persons with whom he deals the right he has surrendered and covenanted not to exercise, he is provided with an open way to the repudiation of his contract and the perpetration of fraud upon his employer, against which it is practically impossible to provide. The only just rule to hold on this subject is the logical one that one who acquires rights under the contract, or by reason of the contract, of another, acquires no greater rights than were possessed by that person under whom the claim was acquired. *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632; *Murphy v. Morton*, 139 Pa. St. 347, 20 Atl. 1049; *Evans v. Grogan*, 153 Pa. St. 121, 25 Atl. 804; *Nice v. Walker*, 153 Pa. St. 123, 25 Atl. 1065. The answers to the points were inconsistent with the general charge, and at variance with the decisions of this court in the cases cited, and many others. For the reasons given, this judgment must be reversed, and a venire facias de novo awarded.

(160 Pa. St. 441)

IN RE PYOTT'S ESTATE.

Appeal of HOWARD.

(Supreme Court of Pennsylvania. March 26, 1894.)

EXECUTORS — CLAIMS — WHEN PAID FROM LAND SPECIFICALLY DEVISED—CONVERSION—INHERITANCE TAX.

1. Testator directed that his just debts and funeral expenses be paid out of his personal estate, which was insufficient for the purpose, and made no other provision for such debts, but devised certain real estate specifically, with residue to his wife, who was one of the executors, and to her heirs and assigns. She sold such residue, and the proceeds were sufficient to pay testator's debts. *Held*, that creditors of the estate who stood by and allowed the accounts of the executors to be settled without presenting their claims, and the proceeds of the residuary real estate to be used for other purposes than the payment of debts, could not have their debts paid from funds arising from the sale of lands specifically devised.

2. Where an executrix sells land devised to her as residuary devisee, which is sufficient to pay the debts of the estate, and appropriates the proceeds to her own use, she is not entitled to

payment of a claim held by her against the estate out of land specifically devised.

3. Where land is devised to one for life, with remainder to her heirs, and is sold by order of the orphans' court, and the proceeds placed in the hands of a trustee under directions in the will, the proceeds are personalty.

4. Where the will provides that the sale shall only be made in the event the life tenant deems it to her advantage, and on her petition, there is no conversion of the land into personalty until the sale is made in accordance with the directions in the will.

Appeal from orphans' court, Delaware county.

Petition by Henry C. Howard, trustee, to make sale of certain real estate of Reese Pyott, deceased, for the appointment of an auditor to make distribution. From a decree affirming the report of the auditor the trustee appeals. Affirmed.

The auditor's report is as follows:

"The undersigned auditor, to whom the annexed order of court in the estate of Reese Pyott, deceased, is directed, respectfully makes report: That in pursuance of said order, after due and legal advertisement of the meeting, he met the parties interested, for the purposes of his appointment, at his office in the borough of Media, on the 9th day of November, 1892, and afterwards by adjournment, at the same place, on November 23, December 2 and 8, 1892, and on January 5 and February 2, 1893. The following named parties appeared before the auditor: Henry C. Howard, the trustee to make sale of the real estate of Reese Pyott, deceased, and also executor of the will of Eliza F. Pyott, deceased, the widow of said Reese Pyott, with his attorney, Garrett E. Smedley, Esq.; Edward H. Hall, Esq., attorney for J. Jones Leedom; W. Roger Fronefield, Esq., attorney for Frank R. De Haven, Frank D. Ketcham, William Ketcham, Mary Carmichael, Samuel Ketcham, and Sarah P. Davis; Samuel J. Taylor, Esq., attorney for Abraham R. De Haven, Margaretta S. De Haven Heald, and Ada M. De Haven Walker; John M. Broomall, Esq., attorney for Susanna Pyott, the mother of James Pyott, a nephew of said Reese Pyott, and also for James Pyott on his exemption claim; Edward A. Price, Esq., attorney for A. Scott & Son, a claimant on the fund. The amount for distribution—\$9,602.30—being the proceeds of sale of real estate of deceased, sold by H. C. Howard, trustee, pursuant to the directions of the will of said Reese Pyott, with the consent of the widow, and under the decree of the said orphans' court. The account of said trustee showing said balance was filed May 13, 1884, and was duly confirmed July 14, 1884; Eliza F. Pyott, the widow of the testator, being entitled to receive the income from said sum during her lifetime. Eliza F. Pyott died May 7, 1892, testate. The real estate of James Pyott was sold by the trustee on January 29, 1883, and confirmed February 12, 1883. Reese Pyott died March

16, 1876, without leaving issue, but left a widow, the said Eliza F. Pyott, now dead, as before stated. Reese Pyott made his last will and testament, bearing date February 6, 1873, and which was duly proven in the register of wills' office at Media, in said Delaware county, on April 28, 1876, wherein and whereby he bequeathed and devised as follows, after first directing all his just debts and funeral expenses to be paid: 'Item: All the rest, residue, and remainder of my personal estate I give and bequeath to my wife, Eliza Pyott, absolutely. Item: I give, devise, and bequeath to my said wife, Eliza, all that certain messuage and tract of land upon which I now live in the said township of Marple, bounded by lands of James Lewis, Sarah Fawkes, Eber Lewis, and others, containing sixty acres of land, more or less, to have and to hold the same to her for and during the term of her natural life; and in case she shall at any time deem it to her advantage that the same, or any part thereof, shall be sold, and the proceeds invested for her benefit, I hereby authorize the sale of the same by a trustee to be appointed by the orphans' court of said county of Delaware, upon her petition, either in whole or in part, as she may request; said sale to be upon such terms, and with such security for the proper appropriation of the proceeds, as may be fixed by said court; and the proceeds of such sale I direct shall be legally invested by said trustee, after deducting all costs and charges, and the income thereof regularly paid half-yearly to my said wife, Eliza, for and during her life. Upon the death of my said wife I give, devise, and bequeath the said tract of land, with the appurtenances, or the proceeds thereof in case the same or any part thereof shall have been sold, to my heirs at law living at that time, their heirs and assigns forever, in such proportions and for such estates as they would have been entitled to the same in case of my having died intestate. Item: All the rest and residue of my estate, real, personal, or mixed, of which I may die possessed, I give, devise, and bequeath to my said wife, Eliza, her heirs and assigns forever. Lastly: I name and appoint my said wife, Eliza Pyott, and Henry C. Howard, attorney at law, executors of this, my last will.' Letters testamentary were duly granted by said register of wills to said Eliza Pyott and Henry C. Howard. The next of kin and heirs at law of the said Reese Pyott, the testator, were as follows: (1) A brother, George Pyott, who died before Reese Pyott, leaving to survive him a widow, Susan Pyott, who is still living, and four children, namely, James, William H., Henry, and Lizzie Pyott, who are all still living. (2) A sister, Elizabeth Pyott De Haven, who died before Reese Pyott, leaving three children, namely, a son, Edwin A. De Haven, who died before Reese Pyott, leaving one child living,—Ada M. De

Haven Walker; also another son, Eugene P. De Haven, who died intestate since Reese Pyott's death, and without administration, leaving no widow, his wife having been divorced from him, but leaving two children, namely, Abraham Rhodes De Haven and Margaretta S. Heald; also another, the third son, Frank R. De Haven. Said Edward A. De Haven and Eugene P. De Haven died before the widow, Eliza F. Pyott. (3) A sister, Mary Pyott, who died since Reese Pyott's death, in the city of Philadelphia, intestate, unmarried, and without issue; and Charles Norris, 1925 Spruce street, is her administrator. She died before the widow, Eliza F. Pyott. (4) A sister, Sarah Pyott Davis, who lives in the state of Iowa. (5) A sister, Rose Ann Pyott Ketcham, who died in the city of Chicago, Ill., since Reese Pyott's death. She left four children, namely, James P. Ketcham,—who since died in Chicago, Ill., leaving to survive him a widow, Agnes Ketcham, and one child, Frank D. Ketcham,—William Ketcham, Mary E. Carmichael, and Samuel Ketcham. Said Rose A. P. Ketcham and James P. Ketcham died before the widow, Eliza F. Pyott. By the evidence the impression is given that James P. Ketcham made a will, by which will he gave his estate to his widow and son; but this is uncertain. The divorce of Kate De Haven from Eugene De Haven was had in common pleas No. 3, Philadelphia, on December 7, 1885, and was from the bonds of matrimony.

"Henry C. Howard, the trustee to make sale of the real estate, makes claim for a counsel fee of \$150, for services since the filing of his account, and rendered in the settlement of the estate. The register of wills of Delaware county also makes claim for collateral tax on any distributive shares to next of kin or heirs at law. A claim is made by J. Jones Leedom, through his attorney, Edward H. Hall, Esq., for an award from the fund of \$1,500, with interest from April 1, 1878. This claim is made on a bond of James Pyott and Reese Pyott to J. Jones Leedom for \$1,500, dated March 30, 1872, and with the allegation that interest was paid to April 1, 1878, and that no part of principal has been paid, and claim for the full amount is made against the estate of Reese Pyott. The bond is payable in one year from the date thereof. Objection is made to the payment of this bond out of the fund by other parties interested on the ground that the bond is more than twenty years old, and there is nothing on it to show that Reese Pyott ever paid any interest or anything whatever on his part, or in any way acknowledged the indebtedness on the bond; and on the further ground that no action has ever been taken upon the bond to enforce payment, and that Reese Pyott has been dead some sixteen years, and his estate was settled sixteen years ago, and no

claim was made at that time for either principal or interest. To sustain this claim Mr. Hall calls a witness, James Pyott, one of the signers of the bond, and one of the legatees and devisees under the will of Reese Pyott. The attorneys for the other parties object to the competency of this witness as being a party to the bond and interested. If this witness is competent, he shows that William P. Hibberd, one of the witnesses to the bond, and whose signature he proves, is dead. He also proves the signature of Reese Pyott to the bond, and that the principal of the bond was to go to him, the said James Pyott, and that he got the money, and that Reese Pyott was security on the bond, and that no part of the principal of the bond has been paid by James Pyott. He also shows that interest was last paid on the bond by him in 1878, as near as he can tell. Mr. Hall also called J. Jones Leedom, the obligee in the bond. The competency of this witness was also objected to by the attorneys for the other parties, for the reason that the witness is a party to the claims on the bond against the estate of Reese Pyott, who is dead. If Mr. Leedom is a competent witness, he shows that no part of the bond has been paid to him since the death of Reese Pyott. The bond was offered in evidence by Mr. Hall, and objected to by the counsel for the other parties. This bond, held by J. Jones Leedom, does not appear to have had judgment entered on it, and no previous claim appears to have been made on it against the estate of Reese Pyott, and his executors were not called on to raise funds from the sale of real estate to pay debts in the more than sixteen years that have elapsed since Reese Pyott's death to the first meeting before the auditor. By the will of Reese Pyott it will be seen that he directed his just debts and funeral expenses to be paid by his executors out of his personal estate, and he then gives the remainder of personal estate to his wife, Eliza Pyott, absolutely. The testator does not provide for the payment of his debts from any other source. The wording of the will shows that it was evidently in his mind that the personal estate would pay all his debts and funeral expenses. Without going into the question as to whether the presumption of payment has arisen against this bond by reason of its being over twenty years old, and treating it as a just debt of the testator, we will examine the question whether it should be paid out of this fund. Then, as said by Mr. Justice Paxson in the opinion delivered in *Mason's Appeal*, 89 Pa. St. 404, this is not a question of equities, or the marshaling of assets, nor a question of election by creditors between funds, but it is a matter of the payment of debts in the manner prescribed by law. Until the personal estate—the primary fund for the payment of debts—is exhausted, or shown to be insuffi-

cient, the law will not permit the administrator or executor, unless so directed by the will, to sell the real estate for the payment of debts, and then only so much thereof as may be necessary to make up the deficiency of the personal estate. In this case before us, the personal estate was exhausted, and shown to be insufficient by the executors' account filed, which shows a balance due the executors of \$1,074.81. Such being the case, and it being a fact that the testator left several tracts of land of a value more than sufficient to pay all the balance of debts left unpaid after the exhausting of the personal estate, let us see from what source the law would require these debts to be paid. In *Hoover v. Hoover*, 5 Pa. St. 356, in opinion by Justice Bell, we find the law laid down that the established order of the application of the several funds liable to the payment of debts is: (1) The general personal estate not expressly or by implication exempted; (2) lands expressly devised to pay debts; (3) estates descended to the heirs; (4) devised lands charged with the payment of debts generally, whether devised in terms general or specific (every devise of land being in its nature specific); (5) general pecuniary legacies pro rata; (6) specific legacies pro rata; (7) real estate devised, whether in terms general or specific. See, also, *Estate of Jones*, 7 Phila. 495.

"As what has been said in regard to the fund from which debts are to be paid applies also to the claim of Henry C. Howard, executor of Eliza F. Pyott, we will now take up the consideration of that claim, also as facts given under it apply also to both claims, and they may therefore be considered together. Garrett E. Smedley, Esq., as counsel for Henry C. Howard, executor of the last will and testament of Eliza F. Pyott, deceased, presents a claim against the fund for \$1,074.81, being the balance shown by the account of Eliza F. Pyott and Henry C. Howard, executors of the last will and testament of Reese Pyott, deceased, as due said Eliza Pyott, one of the executors, for moneys advanced by her to pay debts of Reese Pyott's estate. By the testimony of Henry C. Howard, who was called as a witness, it was shown that the estate of Reese Pyott was indebted to the guardian of the minor children of Dr. Moore, deceased, in the sum of \$1,368.65, which is also shown by the executors' account in the estate of the said Reese Pyott; he, the said Reese Pyott, having been the former guardian of said children, and upon the settlement of his account as guardian by his executors that balance appeared as due from him to said minors. A part of the balance, to wit, the sum of \$1,074.81, was paid by said Eliza F. Pyott, as one of the executors of said Reese Pyott, out of her own fund, the personal estate having been exhausted, and leaving that much of the debts to be made up in some way. She then claimed a credit

for it in her executor's account; that the amount was not paid or taken from the funds at the time Mr. Howard filed his account as trustee, and there is no personal estate of Reese Pyott to pay the said balance claimed by said Eliza F. Pyott. Mr. Smedley further offers in evidence a bond executed by Eliza F. Pyott and Henry C. Howard, executors of the last will and testament of Reese Pyott, to Eliza F. Pyott, for \$1,074.81, and bearing date the 2d day of March, 1881. Mr. Howard, on cross-examination, shows that no action was ever taken on the bond, and no suit ever commenced for the collection of the claim, and no proceedings ever had on the bond for its collection; that no application was ever made to the orphans' court by the trustee for leave to pay to the executors of the widow the amount due upon this bond; that the said Eliza F. Pyott never made a formal demand of her coexecutor for the payment of the bond, but that she was informed by Mr. Howard that she would have a claim against the real estate of Reese Pyott when it came to be distributed, and that is why the bond was drawn up and executed, as an evidence of the debt. This was done when their account as executors was settled. The real estate of Reese Pyott had not been sold at the time when his executors filed their account. Mr. Howard further shows that at the time of Reese Pyott's death he was possessed of the following real estate: A farm, on which he lived, in the township of Marple, containing about sixty acres, which was subsequently sold to Alexander Johnson; also another piece of property, in the same township, of about ten acres, which was afterwards sold to Jacob Green; also a property called the 'Drove Property,' situate on the West Chester road, at the corner of the road crossing the West Chester road from the Springfield road, containing about forty-three acres, which was sold to Mrs. Emily Long for about \$6,500. The funds for distribution before the auditor are the proceeds of sale of the sixty acres in Marple township. The deed for the Drove property was made March 20, 1878. The ten acres sold to Jacob Green were sold for \$1,742.42, on March 28, 1883, and the sixty acres were sold under order of court, as before stated. Eliza F. Pyott sold these properties and made the deeds for them as owner thereof, and the purchase money was received by her, except that which was required to pay incumbrances. She claimed title to the land under the will of Reese Pyott, and as his devisee. The claim was made under the third item in the will. The executors of Reese Pyott filed their account on March 22, 1881. When Mrs. Pyott sold the piece of ground, in 1878, for \$6,500, there was \$500 paid to her in cash of the purchase money, and she took a mortgage for \$3,400, the property being taken subject to a prior mortgage of \$2,600. This \$3,400 has since been paid. The only reason given

why Mrs. Pyott did not reimburse the executors from the proceeds of the sale of the real estate is that she thought she had already paid more than her portion of the debt by the payment of the mortgage on the land she took, and that the balance should stand as a claim against the real estate in which she had a life estate. Mrs. Long afterwards sold the Drove property for \$7,000. When Mrs. Long bought the property she gave as a cash consideration a lot worth \$500, and the balance of the purchase money was secured on the property. It will thus be seen that from the sales of real estate one of the executors, Eliza F. Pyott, had in her hands the proceeds amounting to \$5,642, a fund more than sufficient to pay all the balance of debts, and a fund arising from the residue of real estate of testator. The will of Reese Pyott shows that, after disposing of his personal estate by requiring the debts and funeral expenses to be first paid out of it, and the residue, if any, to go to his said wife, the testator devised to his wife, Eliza Pyott, the messuage and tract of sixty acres of land in Marple township (which was sold by H. C. Howard, trustee, under order of court, as aforesaid), to hold to her for life, and with authority to sell by a trustee to be appointed by the orphans' court of Delaware county, upon her petition; the sale to be upon such terms and with such security for the proper appropriation of the proceeds as may be fixed by said court; and the proceeds of such sale he directs shall be invested by said trustee, and the income thereof to be regularly paid half-yearly to his said wife, Eliza, for her life; and upon her death he devises and bequeaths the said tract of land and the appurtenances, or the proceeds thereof in case the same or any part thereof shall have been sold, to his heirs at law living at that time, their heirs and assigns forever, in such proportion and for such estates as they would have been entitled to the same in case of his having died intestate. The testator then devises and bequeaths all the rest and residue of his estate, real, personal, or mixed, of which he may die possessed, to his said wife, Eliza, her heirs and assigns forever. The sixty acres from which this fund arises was not sold for the payment of debts, but was sold by order of court under direction of the will, on the petition of the widow, Eliza F. Pyott, the proceeds to be invested for her benefit for life, and at her death the principal to be divided, in accordance with the directions in the will, among the heirs at law of the testator living at that time, and their heirs and assigns. The devise of these sixty acres was a specific devise; in this instance the first-class assets having been exhausted without fully satisfying the debts, and the testator not expressly devising any lands for their payment, nor charging any of his land for the payment of debts generally; and in Pennsylvania all the lands of decedent, whether descending or devised by law, are charged

with the payment of the debts of the decedent. The devisee taking the residue of real estate certainly takes it subject to the payment of the debts which were not paid and satisfied by the personal estate, and the residue of real estate must certainly be taken to pay the debts before the land specifically devised. As has been shown, the residue real estate was amply sufficient to pay these debts, and sufficient funds were obtained from the sale of this residue real estate by the said Eliza F. Pyott, the devisee thereof, as well as one of the executors, to pay them; and this she should have been required to do. In the opinion of the auditor, the claimant J. Jones Leedom could not sit quietly by and allow the funds of the residue real estate to be used for other purposes than the payment of his debt, and then be permitted to come in on the funds arising from the real estate specifically devised. This also applies with stronger force to the claim of H. C. Howard, executor of Eliza F. Pyott, for the \$1,074.81 expended by her as the executor of Reese Pyott in the payment of his debts as shown by the executors' account. She took the residue of the real estate which should have been applied to the payment of his debts, and appropriated it to her own use, selling it as the owner thereof under the devise in the will to her, receiving the funds from such sales, and paying herself back therefrom fully for the moneys that she had expended as executor in the payment of Reese Pyott's debts. Therefore she can have no further claim upon his estate. These claims are therefore not allowed by the auditor. The claim of H. C. Howard, trustee, for \$150 for counsel fees, is not objected to by any of the parties, and is allowed.

"Under the finding of the auditor this fund would be distributed to the parties named in the second item in the will, the heirs at law of the testator living at the time of death of the said Eliza F. Pyott, as hereinbefore named, their heirs and assigns, in the proportions designated in said will, excepting the share of any of said heirs which may be assigned or attached, and these shares are to be distributed to those legally entitled thereto; but all the shares are subject to collateral inheritance tax. The auditor is of opinion that sale of the sixty acres under order of court and the direction in the will converted the proceeds of sale into personalty, and that the fund is to be distributed as personalty. In this case the widow invoked the process of the court to enforce the execution of the positive direction in the will to sell by a trustee to be appointed by the court, and the proceeds of sale pass under the will as money. See *Roland v. Miller*, 100 Pa. St. 51. The share of William H. Pyott is claimed by Henry C. Howard, surviving executor of Reese Pyott, under an attachment execution, No. 43 December term, 1884, issued upon the judgment entered in the court of common pleas of Delaware county May 1, 1877, being

No. 263, March term, 1877, wherein Reese Pyott is plaintiff and William H. Pyott, defendant. Debt, \$2,200, with costs and interest. No question is raised against this judgment or the attachment before the auditor. The claim of A. Scott & Son against the share of James Pyott is made on attachment execution of A. Scott & Son against James Pyott, defendant, and Henry C. Howard, trustee, to make sale of real estate of Reese Pyott, deceased, garnishee, issued December 3, 1884, from the court of common pleas of Delaware county, on judgment in the said court against James Pyott, entered January 29, 1881, for \$1,200, in Judgment Docket O, p. 216. On January 21, 1881, James Pyott and wife executed a deed of assignment to Jesse C. Dickey and R. H. Hodgson for the benefit of the creditors of the said James Pyott, which deed was duly recorded in the proper office in Chester county on January 21, 1881, in Miscellaneous Deed Book No. 13, p. 248, etc., and the trust having been accepted by the said assignees on the same date. This deed of assignment conveyed all the real estate, and all the goods, chattels, rights, credits, and property of every kind, whether real, personal, or mixed, of the said assignors. This deed of assignment was afterwards recorded in Delaware county, on December 9, 1881, in Deed Book C, No. 5, p. 564, etc. As the deed of assignment antedated the judgment of A. Scott & Son, and the said attachment was issued before the death of Eliza F. Pyott, the widow, the A. Scott & Son attachment claim cannot be allowed. The claim of Henry C. Howard, executor of Eliza F. Pyott, deceased, against the share of James Pyott on attachment execution of Eliza Pyott against James Pyott, defendant, and Henry C. Howard, trustee, to make sale of the real estate of Reese Pyott, deceased, issued October 29, 1884, from the common pleas of Delaware county, on judgment in the said court against said James Pyott, entered October 29, 1884, is not allowed for the same reason given in the attachment claim of A. Scott & Son. James Pyott claims \$300 exemption, to be allowed him from his share. This he could not be allowed, as he assigned his share in Reese Pyott's estate for the benefit of creditors by his deed of assignment made January 21, 1881, long after Reese Pyott's death, who died March 16, 1876; and the records of Chester county show that James Pyott received his \$300 exemption from said assigned estate, the inventory for which was filed on February 19, 1881. R. H. Hodgson, the surviving assignee of James Pyott, under said deed of assignment, per E. H. Hall, Esq., for Samuel D. Ramsey, Esq., attorney for said assignee, claims the share of said James Pyott under the deed of assignment, and, as no other claim has preference, it must be allowed. The share of Henry Pyott, a son of George Pyott, who was a brother of the testator, is assigned to Wil-

liam Hoyt & Company, of Rochester, Monroe county, New York, by written assignment dated May 16, 1893, duly acknowledged the same day. Distribution is accordingly made as follows:

Amount of funds in hands of trustee for distribution.....	\$9,002 30
Costs of Audit to be Deducted.	
Clerk of court, on order...	\$ 4 25
Register and clerk, for copy of will and of account...	2 50
Clerk, for recording report	13 50
Advertising of auditor's appointment and meeting in the Del. Co. Democrat..	2 25
Adv. appointment and meeting in the Weekly Reporter	2 10
H. Williamson, stenographer's fees for taking testimony, per agreement of counsel	10 00
Auditor's fees for six days' service in the taking of testimony and hearing argument....	\$60 00
For making up report.....	50 00
	<hr/> 110 00
	<hr/> 144 60
Balance of fund.....	\$9,457 70
To H. C. Howard, trustee for counsel fees.....	150 00
	<hr/>
Balance for distribution among devisees in accordance with the directions of the will and the intestate laws of the commonwealth.....	\$9,307 70
To collateral inheritance tax allowed register on above balance.....	465 38
	<hr/> \$8,842 32

Table of Distribution.

To R. H. Hodgson, surviving assignee for the benefit of creditors of James Pyott,—1-16.....	\$ 552 64½
To Wm. Hoyt & Co., assignee of Henry Pyott,—1-16.....	552 64½
To H. C. Howard, executor of Reese Pyott, for share of William H. Pyott,—1-16.....	552 64½
To Lizzie Pyott,—1-16.....	552 64½
To Ada M. De Haven Walker,—1-12	736 86
To Abraham R. De Haven,—1-24	368 43
To Margaretta S. Heald,—1-24...	368 43
To Frank R. De Haven,—1-12...	736 96
To Sarah Pyott Davis,—¼.....	2,210 58
To Frank R. Ketcham,—1-16.....	552 64½
To William Ketcham,—1-16.....	552 64½
To Samuel Ketcham,—1-16.....	552 64½
To Mary E. Carmichael,—1-16....	552 64½
	<hr/> \$8,842 32

"The undersigned auditor further makes report that the annexed exceptions to his first report were duly filed before him, and that the same had been heard before the auditor, on the 26th day of September, 1893, and duly considered by him; but the auditor sees no reason for changing his report, excepting in the following respect: In his first report the fund was treated as personalty by a conversion, but the question as to how and when the conversion was had was not passed upon, and, as this may become an important question in this distribution, it is proper that

the auditor should give his opinion on this subject. It will be seen that under the wording of the will the testator only intended a sale should be made of the real estate in the event of his wife deeming it to be to her advantage that the same, or any part thereof, shall be sold, and that then the sale is to be made by a trustee to be appointed by the orphans' court, upon her petition. Thus it will be seen that there was not an absolute direction to sell, and that the sale could only take place in the event of the wife consenting to it, and presenting a petition to the court for the appointment of a trustee. In the opinion of the auditor there was, therefore, no conversion of the land into money by the will, even in equity, and no such conversion could be considered as having taken place until such consent on the part of the wife had been given by her petition to the orphans' court for the appointment of a trustee to make sale, and the sale made under the order of the orphans' court really worked the conversion. In *Henry v. McCloskey*, 9 Watts, 145, it is decided that if the direction by the testator in his will to sell his real estate be not absolute, but qualified,—such as where there is a direction in the will to sell the real estate upon the widow agreeing to it in her lifetime,—and if it shall appear from the words of the will that the testator only intended that the sale should be made in event of his wife consenting to it, and not otherwise, a conversion of it into money would not, even in equity, be considered as having taken place, until such consent on her part had been given. In *Peterson's Appeal*, 88 Pa. St. 397, it is held, where a discretionary power of sale is given by the will to trustees, no conversion of realty into personalty will take place until a sale is actually made. To work a conversion the direction to sell must be positive, irrespective of contingencies and independent of discretion. See, also, *Estate of Machemer*, 140 Pa. St. 544, 21 Atl. 441; *Mellon v. Reed*, 123 Pa. St. 14, 15 Atl. 906; *Stoner v. Zimmerman*, 21 Pa. St. 394."

Garrett E. Smedley, for appellant. Samuel J. Taylor and W. Rogers Fronefield, for appellees.

PER CURIAM. The facts of this case, as well as the questions of law arising thereon, are clearly and satisfactorily presented in the report of the learned auditor, and need not be restated. His schedule of distribution, to which alone the exceptions were directed, was adopted by the orphans' court, and forms the basis of the decree from which this appeal was taken. We have fully considered the questions involved in the several specifications of error, and find nothing in either of them that requires reversal or modification of the decree. Decree affirmed, and appeal dismissed, with costs, to be paid by appellant.

(160 Pa. St. 441)

In re PYOTT'S ESTATE. (No. 233.)

Appeal of LEEDOM.

(Supreme Court of Pennsylvania. March 26, 1894.)

Appeal from orphans' court, Delaware county. Petition by Henry C. Howard, trustee, to make sale of certain real estate of Reese Pyott, deceased, for the appointment of an auditor to make distribution. From a decree affirming the report of the auditor, J. Jones Leedom appeals. Affirmed.

E. H. Hall, for appellant. Samuel J. Taylor and W. Rogers Fronefield, for appellees.

PER CURIAM. This case was argued with Howard's Appeal, from same decree (No. 222 of this term), 28 Atl. 915. We have fully considered the questions presented by the specifications, and are not convinced that there was any error in adopting the schedule of distribution recommended by the learned auditor. For reasons given in his report, we think the decree founded thereon should be affirmed. Decree affirmed, and appeal dismissed, with costs, to be paid by appellant.

(160 Pa. St. 538)

LONDON v. BROWN et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

DEED—DELIVERY—ESCROW—SCIRE FACIAS.

1. When a deed placed in escrow, to be delivered when the grantee has paid certain liens on the land conveyed, is, after the grantor's death, obtained by the grantee, without payment of the liens, and by him recorded, the grantee's title is voidable by proof of the facts rebutting the presumption of delivery, but not void.

2. The grantee's title in such case does not relate back to the time when the deed was made.

3. Where land has been aliened subject to a judgment lien, only the terre-tenant's signature to an amicable scire facias is needed to continue the lien on the land, without joinder or consent of defendant or his representatives.

4. Though the scire facias must correctly recite the original judgment, irregularities not misleading will not avoid it; and where defendant has suffered a default thereon, and execution has issued, no mere junior creditor can object.

Appeal from court of common pleas, Bradford county.

In the matter of the distribution of the fund arising on executions in the case of George Landon against James B. Brown, executor of the will of A. R. Brown, deceased, and George Brown, terre-tenant. From the decree in accordance with the auditor's report, N. N. Betts, cashier, appeals. Affirmed.

The auditor found the following facts: "The fund for distribution is \$2,535, raised by sheriff's sale of lands formerly of A. R. Brown, late of the township of Herrick, in the county of Bradford, as follows: \$2,275 of said fund was raised by sale of certain lands mentioned in the will of the said A. R. Brown, deceased, as the Jones and Orshalt farms, and the balance of \$260 was raised by the sale of about 15 acres of the Bolles farm named therein. A. R. Brown died testate on or about November 25, 1883, hav-

ing made on January 18, 1883, his last will and testament, and on May 14, 1883, a codicil thereto. In said will the decedent appointed as his executors John J. Anderson, George Brown, and James B. Brown; and after the death of the said A. R. Brown, to wit, on February 6, 1884, George Brown, one of the within-named executors, produced said will before Hon. James H. Webb, then register of wills of Bradford county, and the same was duly proved by J. J. Anderson and George Landon, the subscribing witnesses thereto. It is admitted by the claimants before the auditor that said witnesses were actually sworn by said register, but that, by mistake or omission, he did not sign the jurat, but that said will was filed and indorsed by said register as admitted to probate on February 6, 1884. It is also admitted that the neglect of said register to sign the jurat was not discovered until the month of November, 1891, when said will was again probated before Charles M. Hall, then register of wills of said county. At the time of the filing of said will, to wit, on February 6, 1884, no letters testamentary were granted, but it appears from the testimony of George Brown before the auditor that he acted in the capacity of executor of his father's estate to some extent, by paying the funeral expenses of the decedent, although no letters were issued to him. When said will was probated before Charles M. Hall, register, on November 28, 1891, the said George Brown declined to take out letters upon said estate, and said letters were duly issued to James B. Brown, one of the executors named in said will. A. R. Brown, prior to his death, conveyed to his son, George Brown, by deed dated April 6, 1881, and acknowledged February 16, 1882, the Bolles farm, of 118 acres and 32 perches, from the sale of about 15 acres of which \$260 of the fund for distribution was realized; said deed being recorded on February 23, 1884, in Bradford County Deed Book, vol. 155, p. 493, etc. A. R. Brown also executed a deed dated April 6, 1881, and acknowledged February 16, 1882, conveying to his son, George Brown, what was known as the Jones and Orshalt farms, from the sale of which \$2,275 of the fund for distribution was raised. This deed was recorded March 28, 1885, in Bradford County Deed Book, vol. 160, p. 479, etc. In the opinion of the auditor there is a sufficiency of evidence to rebut the presumption of the delivery of this deed, and to warrant the finding that same was deposited with the wife of the grantor, Mary Brown, to be delivered to the grantee, George Brown, upon his performing certain conditions. In the last will and testament of the said A. R. Brown we find the following: 'All my honest debts, liabilities, whatsoever nature they may be, shall be paid by my son, George Brown, according to an arrangement heretofore made, as follows, to wit: I having heretofore made unto him a deed of the

Bolles farm, the Jones farm, and Orshalt farm, for which he, the said George Brown, shall satisfy all honest claims that may come against me or unsettled matters before the first day of April, A. D. 1882. When all those matters are adjusted and satisfied, then a certain deed of the Jones and Orshalt farm shall be given up to him.' In the codicil attached thereto as follows: 'My son, George Brown, is not to have possession of the Orshalt farm mentioned above until all debts, demands, and unsettled matters against me are fully adjusted and canceled by him. When this is done, the deed for the Jones and Orshalt lands shall be delivered to him by my wife, with whom said deed is deposited.' It is evident that the payment of the debts of the said A. R. Brown was made a condition precedent to the delivery of the deed for the Jones and Orshalt farms, and this condition was never performed by the said George Brown, or at least only partly performed, as the so-called 'Landon judgments' were not paid. George Brown, however, on or about March 28, 1885, obtained possession of said deed (in what manner the evidence presented before the auditor does not show), and had the same recorded as aforesaid, on March 28, 1885. One of the judgments in favor of George Landon was originally entered April 24, 1877, by Julia C. Stiles, plaintiff, against Cyrus Avery and A. R. Brown, to No. 1,357 May term, 1877, in the court of common pleas of Bradford county, and was assigned to George Landon, by an assignment filed February 2, 1880. This judgment was revived by an amicable scire facias filed April 12, 1882, against A. R. Brown and George Brown, terre-tenant, to No. 659 May term, 1882. An amicable scire facias to revive this judgment, and continue the lien thereof, was filed March 18, 1887, against George Brown, terre-tenant and executor of A. R. Brown, deceased, to No. 407 May term, 1887. A scire facias to revive this judgment was issued February 25, 1892, against George Brown, terre-tenant, and George Brown, executor of A. R. Brown, deceased, to No. 246 May term, 1892, and was returned served by the sheriff, February 27, 1892, on George Brown, terre-tenant, and George Brown, executor of A. R. Brown, deceased. A scire facias to revive judgment and continue lien 'et quare executionem non,' of No. 659 May term, 1882, was also issued January 13, 1892, against James B. Brown, executor of A. R. Brown, deceased, and George Brown, T. T., to No. 314 February term, 1892, and was returned served by the sheriff, January 15, 1892, on James B. Brown, executor of A. R. Brown, and on George Brown, terre-tenant, January 29, 1892. On April 5, 1892, judgment was entered in favor of plaintiff, and against James B. Brown, executor of A. R. Brown, deceased, and George Brown, T. T., for \$1,070, with interest from April 5, 1892. The other judgment in favor of George Landon was originally entered June 29, 1877, by

him as plaintiff, against A. R. Brown and George Brown, to No. 650 September term, 1877. This judgment was revived by amicable scire facias filed April 12, 1882, against A. R. Brown and George Brown, to No. 660 May term, 1882. An amicable scire facias to revive this judgment, and continue the lien thereof, was filed March 18, 1887, against George Brown and George Brown, T. T., and executor of A. R. Brown, deceased, to No. 408 May term, 1887. A scire facias to revive this judgment was issued February 25, 1892, against George Brown, George Brown, terre-tenant, and George Brown, executor of A. R. Brown, deceased, to No. 247 May term, 1892, and was returned served by the sheriff, February 27, 1892, on George Brown, George Brown, terre-tenant, and George Brown, executor of A. R. Brown, deceased. A scire facias to revive judgment and continue lien 'et quare executionem non' of No. 660 May term, 1882, was also issued January 13, 1892, against James B. Brown, executor of A. R. Brown, deceased, George Brown and George Brown, T. T., to No. 315 February term, 1892, and was returned served by the sheriff, January 15, 1892, on James B. Brown, executor of A. R. Brown, and on George Brown, terre-tenant, January 29, 1892. On April 5, 1892, judgment was entered in favor of plaintiff, and against James B. Brown, executor of A. R. Brown, deceased, George Brown, and George Brown, terre-tenant, for \$1,170.40, with interest from April 5, 1892. The judgment in favor of the First National Bank, which is presented to be the first paid out of the fund, was entered to No. 277 December term, 1891, on October 10, 1891, to the use of N. N. Betts, cashier, against George Brown and B. L. Smith, and the note upon which judgment is entered is dated December 21, 1889, and is a collateral note for \$16,000, given as security for 'any or all of the present or future indebtedness of either of us to the First National Bank of Towanda, as makers or indorsers of notes or drafts held by it, or for any advances made to us or either of us by overdrafts on our accounts or otherwise.'"

The auditor's conclusions of law were as follows:

"The auditor has already found that George Brown acquired a good title to the Bolles farm by deed delivered, and as found it is from the sale of a part of this farm that \$260 of the fund for distribution was raised. There is also little or no dispute as to the facts in relation to the alleged delivery of the deed of the Jones and Orshalt farms, from the sale of which the balance of the fund was realized; but the question raised seems to be whether these facts are such as would constitute a good delivery of the deed. The auditor has found that this deed was delivered to Mrs. Mary Brown, to be delivered to George Brown upon his performing a condition set forth in the will of the grantor. This deed is absolute upon its face, but the

will refers to the deed in such a manner as to make it in some sense a part of the will, and is to be taken in connection with the will to get at the purpose of the grantor. It has been held in a number of cases that where the future delivery of a deed was merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently; but where the future delivery depends upon the payment of money, or the performance of some other condition, it will be deemed an escrow. To make the delivery conditional, it is not necessary that any express words should be used at the time; the conclusion is to be drawn from all the circumstances. *Smith, Cont. 9*. The essence of delivery seems to be the intention of the parties, and, in the opinion of the auditor, there is no doubt but that A. R. Brown intended to make the payment of his debts a condition precedent to the delivery of this deed. It is true that the recording of the deed by the grantee is evidence from which delivery may be presumed; but, if the will of the grantor and the evidence of George Brown are to be considered, this presumption is rebutted and destroyed. If it were the case of bona fide purchasers, stronger evidence might be required to rebut the presumption of delivery, but there is nothing of the kind in this case, and it is not even claimed by the creditors of George Brown that they advanced money to him on the faith of his title to the Jones and Orshalt farms. This deed, then, as deposited with Mrs. Mary Brown, was an escrow, to be delivered upon the performance of the condition set forth in the will of the grantor, and the performance of this condition was necessary to make the instrument operative, and vest a complete title in George Brown. In *Blight v. Schenck*, 10 Pa. St. 285, it was held: 'A deed delivered to an agent as an escrow, and by him delivered to the grantee, contrary to the condition, passes a title voidable only.' It seems, therefore, that by the delivery or obtaining possession of the deed to the Jones and Orshalt farms by George Brown, without performing the condition, he acquired, at the most, but a voidable title to the lands described therein.

"It is contended, moreover, that the title George Brown acquired in these farms became vested in him at the time of the original delivery; that is, that the deed took effect by relation back to the time of depositing it as an escrow. Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party at that time, but this rule does not apply when justice requires a resort to fiction. The relation back to the first delivery, so as to give the deed effect from that time, is allowed in cases of necessity, to avoid injury to the operation of the deed from events

happening between the first and second delivery. 4 Kent, Comm. 454. Thus, it was held in *Levengood v. Bailey*, 1 Woodw. Dec. 275: 'In general, when an instrument is delivered as an escrow to a third person, to be delivered to the grantee on a future event, it is not the deed of the grantor until the second delivery; but this rule is subject to exception "founded," it is said, "on necessity, ut res valeat."' In the authorities cited to sustain this point (*Stephens v. Rinehart*, 72 Pa. St. 434; 2 Whart. Cont. 53, etc.), there seem to have been no objections on legal grounds to the effectiveness of the deed, as the contingency upon which the deed was to be delivered was the death of the grantor; and that happening, and the deeds being delivered accordingly, it was held to be a good delivery, and to relate back to the time of first depositing in escrow. The auditor cannot see the necessity for applying the exception to the general rule to the case in hand. It is true that A. R. Brown died before the delivery of the deed, but this seems to be the only similarity to the cases cited, as the condition upon which Mrs. Brown was to deliver this deed was not performed. Although it hardly seems to be material as to the matter of distribution of the fund, it cannot be said that such a delivery would relate back so as to vest what title George Brown may have acquired in the Jones and Orshalt farms in him at the time of the depositing of the deed with Mrs. Brown.

"The principal question, however, from which the delivery of this deed seems to have incidentally arisen, is, was it necessary to revive the Landon judgments in order to preserve their lien against the lands sold, and, if so, were they so revived as to retain their priority of lien as against George Brown's junior judgment creditors? * * * The title George Brown acquired in these lands was from the deeds. It would therefore seem necessary for the Landon judgments to be revived. The auditor has found that the title George Brown acquired by the delivery of the deed to the Jones and Orshalt farms was a voidable one, but no proceedings have been instituted to set the deed aside; and the said deed, being duly recorded on March 28, 1885, was constructive notice to George Landon, the plaintiff in the judgments, that George Brown was the owner of the lands, and, therefore, that the judgments should be revived against him in order to preserve their lien. But have they not been so kept revived against George Brown? As has been seen, the original judgments were revived by amicable scire facias to No. 659 May term, 1882, and No. 660 May term, 1882, during the lifetime of A. R. Brown, and it is from the revivals of these judgments that the contention arises. The records of the common pleas show that within five years from the entry

of these judgments, viz. on March 18, 1887, an amicable scire facias to revive judgment No. 659 May term, 1882, was filed; and, A. R. Brown having in the mean time died, this revival, No. 407 May term, 1887, was signed 'George Brown, T. T., and executor of A. R. Brown, deceased.' 'If George Brown had simply signed this amicable scire facias as terre-tenant, it would have been sufficient to have revived the judgment against this land, of which he was the alienee.' In *Sames' Appeal*, 26 Pa. St. 184, it was held: 'Where land upon which a judgment is a lien has been aliened by the defendant, an amicable revival of that judgment, by the terre-tenant, by an agreement to which the defendant is not a party, will continue the lien of such judgment on the land.' The court, in the opinion, said: 'If the defendant be not a necessary party to the scire facias, still less is he necessary to the amicable revival. Purchasers from the terre-tenant or subsequent incumbrancers have nothing to complain of, for the record is notice to them that his land is bound by the judgment.'

"The records also show that on March 18, 1887, an amicable scire facias to revive judgment No. 660 May term, 1882, was filed and entered to No. 408 May term, 1887, signed by the plaintiff, George Brown, George Brown, T. T., and executor of A. R. Brown, deceased. Under the same ruling this would also continue the lien of the judgment sought to be revived as against George Brown. But this judgment would not only operate as a judgment *de teris*, but also as a personal judgment against him, as he is one of the defendants in the original judgment, and signs the revival in person, and also as terre-tenant. In *Edward's Appeal*, 68 Pa. St. 89, affirmed in *Beshler's Estate*, 129 Pa. St. 208, 18 Atl. 137, it was held where the original judgment was entered against two, and the revived judgment was confessed by one alone, 'that the judgment so confessed was good against him, and sufficient to continue the lien, and nobody else could complain, and he does not.' 'There can be no question, therefore, but that the amicable revivals No. 407 May term, 1887, and 408 May term, 1887, continued the lien of the Landon judgments for another term of five years.' The lien of these judgments, if not revived, would expire on March 18, 1892; but in the meantime, on February 25, 1892, a scire facias issued on each judgment to revive and continue the lien. These scire facias were duly returned served by the sheriff, and, if in regular form, would operate to continue the lien. The mere issue of the scire facias within five years of the rendition of the judgment continues its lien for the period of five years from the date of such issue, whether it be served or not. 1 *Trickett, Liens*, p. 266.

"We are, however, met with the proposi-

tion that in sci. fa. No. 246 May term, 1892, issued to revive and continue the lien of judgment No. 407 May term, 1887, the parties are not correctly recited, and therefore it did not revive and continue the lien of said judgment. It is no doubt the rule, often laid down, that, in order to continue the lien of a judgment, a scire facias to revive must correctly recite the original judgment, and substantially identify it, as to parties, date, and amount. 'Was it not so identified in the present instance? The number, term, and amount in the scire facias are identical with the number, term, and amount in No. 407 May term, 1887, which it purported to revive. The names of the parties recited are nearly identical, and the variance is so slight that no one could possibly be misled by it. The auditor is of the opinion that it sufficiently described the original judgment, and therefore continued its lien.' On January 13, 1892, the death of A. R. Brown was suggested; and, James B. Brown having then taken out letters upon the estate, his name was substituted of record in No. 659 May term, 1892, and No. 660 May term, 1892, and the two writs of scire facias et quare executionem non, No. 314 February term, 1892, and 315 February term, 1892, respectively issued thereon. It is also contended that these sci. fas. did not correctly recite the parties to the original judgments, and therefore did not continue the lien. The variance can be seen when it is stated that the judgment No. 629 May term, 1882, was in favor of 'Julia C. Stiles, to Use of George Landon, vs. A. R. Brown, George Brown, Terre-Tenant,' for the sum of \$1,008.85. The recitals in the praecipe and writ were, 'George Landon vs. James B. Brown, Executor of A. R. Brown, Deceased, George Brown, T. T.,' for the sum of \$951.75. Judgment No. 660 May term, 1892, was in favor of 'George Landon vs. A. R. Brown and Geo. Brown,' for the sum of \$1,103.65. The recitals in the praecipe of the scire facias to revive were: 'George Landon vs. James B. Brown, Executor of A. R. Brown, Deceased, George Brown, and George Brown, T. T.' The writ recited: 'George Landon vs. James B. Brown, Executor of A. R. Brown, Deceased, George Brown, T. T.' for the sum of \$1,041.25. There does not seem to be a parallel case with the present one in the authorities cited to show that this variance was sufficient to make the identity of the original judgment doubtful. In the opinion of the lower court in Wood v. Coddling, affirmed in 134 Pa. St. 91, 19 Atl. 485, it was held: 'It is true that a scire facias on a judgment should follow the original judgment in the amount, date, and names of the parties; and if there is a failure or defect in any of these respects, on a plea of nul tiel record, it is fatal. But if that plea is not made, and there is a judgment obtained, it seems to us that we cannot collaterally set that judgment aside. It may change on the scire facias as to the amount,

or by substituting administrators or new names; and if there is a substitution of new names, and that objection is not raised upon the trial of the case, and judgment is entered, it seems to us that the judgment must stand. It seems to us that all that is necessary here is to ascertain that there is such an identity of these proceedings that one of these judgments is a revival of the other.' This seems to apply to the present case. 'These two writs may not have been as carefully drawn as they should have been; yet the auditor is of the opinion that they sufficiently point out the original judgments.' 'But it was not necessary, under the finding of the auditor, to revive these judgments against George Brown, as the lien had been kept good against the lands in his hands.' It is also alleged by the counsel for George Landon that these sci. fas. were issued only for the purpose of execution. From an inspection of the record it is seen that judgment was duly entered thereon, by default, on April 6, 1892, and duly docketed and indexed. On the same day the lands were levied upon, and on April 23, 1892, were sold. 'It seems evident that, under whatever judgment the lands were sold, these judgments would be first entitled to be paid in preference to any subsequent creditors of George Brown.' 'It is true that the proceedings are somewhat irregular, but it is the rule that, where a judgment is attacked as erroneous or on account of an irregularity, it must be done at the instance of the defendant himself; and, if he submits to an execution under it, others cannot object, except for fraud or collusion. The irregularity in this case is not one which could defeat the payment of the Landon judgments; but, even if this had been so if taken in time, it is one of which the defendants alone, who do not object, could have taken advantage.' There is no doubt in the mind of the auditor that A. R. Brown intended these lands to pay the Landon judgments; but, instead of charging them directly with the payment in his will, he depended upon the conditional delivery of the deeds to effect his intention, which, together with the attempt of the plaintiff to be his own lawyer, has caused the contention in this case. He has been diligent in keeping the judgments revived. If anything, there have been, perhaps, more revivals than were necessary; but, 'from whatever point the case is considered, the conclusion is inevitably reached that the judgment creditors of George Brown would not be entitled to come in on this fund until the Landon judgments had been first paid.'"

Rodney A. Mercur and Ulysses Mercur, for appellant. I. McPherson, Edward Overton, and E. J. Angle, for appellees.

PER CURIAM. We have considered this record with special reference to the several questions presented by the specifications of

error, and are not convinced that either of said specifications should be sustained. The questions involved have been so well considered and satisfactorily disposed of by the learned auditor that we think the decree should be affirmed for reasons given in his report. Decree affirmed, and appeal dismissed, with costs to be paid by N. N. Betts, cashier, etc., appellant.

(160 Pa. St. 490)

CITY OF SCRANTON v. BUSH.

(Supreme Court of Pennsylvania. March 26, 1894.)

PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS —AFFIDAVITS OF DEFENSE.

1. In an action against an abutting owner to recover benefits for grading a street, the affidavit of defense is sufficient where it alleges that the grading "was not done according to the grade established by ordinance, but according to another grade, established by the city engineer without authority."

2. Act 1874 conferred on cities power to improve streets, charging the costs to abutting lots according to frontage if in the urban portion of the city, and to the city at large if in the rural portion. Act 1889 authorized the assessment of costs "in case of grading only" on the properties benefited, according to benefits. *Held*, that abutting lots in the urban portion of a city may be assessed for the costs of grading, either according to benefits or according to frontage, and in the rural portion according to benefits only.

Appeal from court of common pleas, Lackawanna county.

Action by the city of Scranton against Nicholas Bush to enforce a lien for grading a street. From a judgment denying a motion for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

James H. Torrey, City Sol., for appellant. Joseph O'Brien and I. H. Burns, for appellee.

WILLIAMS, J. The grading of Luzerne street, in the city of Scranton, was done under Ordinance No. 45, approved September 4, 1889. This ordinance provided that the work should be done "in accordance with plan, profile, and specifications" which had been prepared by the city engineer, adopted by councils, and attached to the ordinance as part of it. Section 7 of the same ordinance declares that the work shall be done under the supervision of the city engineer, "but no departure from the plans, profile and specifications shall be allowed unless authorized by city councils." The second paragraph of the affidavit of defense alleges that the grading of Luzerne street "was not done according to the grade established by ordinance, but according to another grade, established by the city engineer without authority." This is a definite statement, and a positive one. If it is true, then the work done on Luzerne street was not done under the ordinance, but in disregard of it. The words

fairly relate to the whole street, and the whole work done upon it; and charge that lien cannot be supported for the work done, because not done as the ordinance directed. This is not a question of account between the city and its contractor of good faith on the part of city officials making the contract, as was the case in *City of Pittsburgh v. MacConnell*, 130 Pa. St. 463, 18 Atl. 645. It is a denial that the work done was authorized by the city, and a denial of the liability of the defendant for that reason. If the fact turns out to be as stated, the legal conclusion from it is well drawn, and is a defense to the lien filed in this case. In that event, the question upon which the learned judges of the court below divided may not be in the case. But the question is fairly raised, and it is as well to consider it. The act of 1874 conferred upon cities the power to grade, pave, or macadamize their streets, and charge the cost of such improvement upon the lots abutting on the street so graded, paved, or macadamized, according to the frontage of each. This court held, however, that the per foot front rule was applicable only to the built-up city, and not to rural property in its outskirts. *City of Scranton v. Coal Co.*, 105 Pa. St. 445. The consequence of this holding was that street improvements in the rural parts of cities of the third class could be made only at the cost of the city making them. The act of 1889 relating to cities of the third class empowered such cities to grade, pave, or macadamize their streets, and charge up the expense of the improvement to the lots fronting upon the street by the per foot front rule. If the section had ended with this provision, all cities of the third class would have remained exactly in the position in which previous legislation placed them. In the built-up city they could improve their streets at the cost of lot owners. In the rural portions of the city, the grading and paving, if paving was done, must be done at the cost of the taxpayers of the whole city. To remedy this inconvenience, the act of 1889 contained this additional provision: "Or in case of grading only, to assess the cost thereof when not paid by the city, upon the properties benefited according to benefits." The evident purpose of this provision was to enable a city to grade its streets stretching out into the rural parts of the city, and, where the situation of the properties along the street was such as to make it just to do so, to impose the cost of the improvement on the property benefited. There is no repeal of the act of 1874, no limitation on the power to grade, pave, or macadamize at the cost of lot holders under the per foot front rule conferred in the preceding sentences of the section; but, as to one form of work, mainly necessary in the rural districts of the city, a new remedy is put within the reach of the city. It may still pay for grading in such districts out of the city treasury, or it

may, in the exercise of its discretion, charge the cost to the properties benefited. The parts of the section so interpreted may stand together. In the built-up city all street improvements may be charged to property along the street by the per foot front rule. In the rural parts of the city grading may be charged to the properties benefited or paid by the city, but paving must still be done at the expense of the city. This interpretation of the act of 1889 is in harmony with *Hand v. Fellows*, 148 Pa. St. 456, 23 Atl. 1126. The single question presented in that case, as was distinctly stated in the opinion, was the effect of the act of 1891 upon that of 1889, and the point ruled was that both could stand together. What was said upon the provision relating to grading, only, was directed to the question then under consideration. If, as we assume, the defendant's lot is in the built-up part of the city, and if the improvement consists in grading only, we think he may be made liable either according to benefits or under the per foot rule. If his lot is in the rural portion of the city, it can be made liable only according to benefits. The judgment of the court, discharging the rule for judgment for want of a sufficient affidavit of defense, is affirmed.

(100 Pa. St. 494)

In re LACKAWANNA TP.

Appeal of HARRIS et al.

(Supreme Court of Pennsylvania. March 23, 1894.)

MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—TITLE OF STATUTE—SPECIAL LEGISLATION.

1. Act May 23, 1889 (P. L. 277), entitled "An act providing for the incorporation and government of cities of the third class," and containing provisions for the annexation of territory, is not unconstitutional on the ground that the subject of such provisions is not expressed in the title.

2. Act May 23, 1889 (P. L. 277), "An act providing for the incorporation and government of cities of the third class," is not invalid as local legislation, though the "third class," which, by the act of May 23, 1874, embraces for classification all cities having the requisite population, embraces for municipal government only those which were incorporated since the classification act, or have adopted its provisions.

Appeal from court of quarter sessions, Lackawanna county.

Proceeding by petition under Act May 23, 1889 (P. L. 277), to the councils of the city of Scranton to annex to the city a part of Lackawanna township. The councils passed an ordinance annexing the territory, from which David Harris and others appealed to the court of quarter sessions. Judgment approving the proceedings of the councils. David Harris and others appeal. Affirmed.

M. E. McDonald and I. H. Burns, for appellants. Everett Warren and Jas. H. Torrey, City Sol., for appellees.

WILLIAMS, J. The petition for annexation to the city of Scranton in this case is in conformity with the act of 1889, under which this proceeding seems to have been conducted. If that act is constitutional, the decree of the court below may be sustained. Its constitutionality is assailed upon two grounds. It is alleged, in the first place, that the subject of changing or enlarging the limits of a city is not within the purview of the title; and, in the next place, that the act is local, and therefore transgresses the constitutional prohibition against local legislation. The title is as follows: "An act providing for the incorporation and government of cities of the third class." The municipal authority of the city, when incorporated, extends over the territory included within the city limits as then established. The growth of the city may be rapid. Building may extend beyond its lines, and adjoining territory may be laid out by extending the city streets over it, and become indistinguishable from the city proper. It then becomes important for the people residing upon this territory, and for the city itself, that sewers, gas and water mains, police and fire protection, be extended over the district which, though separate in law, is physically a part of the city. The people residing on the territory so situated ask the city to take them in, and the city grants their request by an ordinance passed in the usual manner. This is an act that requires no special authority to sustain it. It is in the line of municipal legislation, needful for the proper government of the city, as its expanding proportions and municipal needs outgrow their original limits. The legislature has taken this view of the subject. Immediately after the adoption of the present constitution, the act of 1874, classifying cities and regulating the government of each of the several classes, was passed. The only words in its title that could cover the exercise of the power to admit adjoining territory are the words that constitute the title to the act of 1889. Yet the act of 1874 contains provisions authorizing the admission of out lots and adjoining territory into cities with which they are connected physically, and prescribes the mode of procedure to be adopted. It is clear, therefore, that the legislature did not regard an ordinance admitting adjoining territory into the city as an extraordinary exercise of municipal power that required to be taken notice of in the title of the act of 1874, but as an ordinary exercise of that power, by means of an ordinance passed and approved in the ordinary way.

The remaining question is as free from difficulty. The new constitution provided for the government of the commonwealth by general laws, and denied to the legislature the power to pass local laws on many subjects. Cities under constitutional provisions constituted one class, to be legislated for in future by laws applicable to all alike. To relieve

against this hardship, the classification act was passed during the following session of the legislature. The cities were divided into three classes upon the basis of population. There was at that time but one city in the first, and one in the second, class. Legislation for these classes was therefore easy of accomplishment; but in the third class there were many cities, each of which was provided, at the time of the passage of the act of 1874, with a form of government of its own selection. These differed quite widely in the terms and duties of some of the municipal offices, and in the powers possessed by the municipalities. The effort to reduce all these, at one time, to a uniform form of government was one that would be attended necessarily with some inconvenience. The act was made to take effect upon all cities to be incorporated after its passage, and upon those previously incorporated, when and as fast as they should severally elect to come in under its provisions. The expectation entertained by the lawmakers was that within a few years all the cities of the third class then existing would come by election into the class, and adopt the form of municipal government provided by the act of 1874. This expectation has been largely realized. A few cities still cling to their old charters, but much the larger part of them have adopted the provisions of that act and are members of the third class, not only by reason of their population, but by reason of the character of their municipal organization. The class is a steadily increasing one, and the number of cities standing outside of it is steadily decreasing. The tendency is towards absolute uniformity. Legislation for cities of the third class is applicable to all the members of that class, and it is general, within the definition we have frequently given to the phrase "a general law" since 1874. If, as is said by the appellants' counsel, Wilkes Barre is not bound by the provisions of the act of 1889, it is because that city is still outside the class for which the act of 1889 was framed. It is for some purposes a city of the third class, under the classification act; but, for purposes of local government, it remains under its charter and its system of local laws that were in force prior to 1874. For these purposes, therefore, it is not a member of the class, and is not affected by the legislation provided for the class as it exists under the provisions of the law of 1874. For purposes of classification, all cities not belonging to the first or second class belong to the third. For purposes of municipal government, only so many of these belong to the third class, in the legislative sense of the words, as have taken on the municipal uniform which the legislature has provided for the class. It follows logically from what has now been said that the act of 1889, being for the class and applicable to every member of it, is general, and is not open to the objection which the ap-

pellants urge against it. The assignments of error are overruled, and the judgment is affirmed.

(160 Pa. St. 555)

RHEES v. FAIRCHILD.

(Supreme Court of Pennsylvania. March 26, 1894.)

DEPOSITIONS—[IMMATERIAL IRREGULARITIES.

It is within the discretion of the trial court to admit depositions where the officer taking the same failed to comply with the formal instructions in particulars not affecting the merits.

Appeal from court of common pleas, Bradford county; B. M. Peck, Judge.

Action by R. T. Rhees against A. C. Fairchild. From a judgment for plaintiff, defendant appeals. Affirmed.

The following are the specifications of error:

"First. The learned court erred in admitting the offer of plaintiff. The offer and objections were in these words: 'Mr. Little: We now offer in evidence the depositions of R. T. Rhees, the plaintiff in this case, of John R. Brown and Andrew Wilson, taken before Daniel Hamer, commissioner, in the city of Ogden and territory of Utah, on the 8th day of June, 1893, on commission and interrogatories. Mr. Mercur: We object to the admission of the entire depositions, on the grounds: (1) That the return is not in accordance with the letter of instructions. (2) That the return of the commissioner who executed the same as to the indorsement upon the commission is not under seal, as required by the letter of instructions. (3) That the certificate at the end of the commission is not in compliance with the letter of instructions; that the commission is issued to him as a commissioner, and not as a notary public.' (Objection overruled. Defendant excepts. Bill sealed for defendant. Depositions admitted in evidence.) The indorsement upon the back of the first commission was as follows, to wit: 'This commission duly executed by me on the 8th day of June, A. D. 1893, as appears by the testimony, exhibit, and my certificate and schedule hereto annexed. [Signed] Daniel Hamer, Commissioner.' The certificate at the end of the first set of depositions was in the following form, to wit: 'Territory of Utah, County of Weber—ss.: I, Daniel Hamer, the within-appointed commissioner, do hereby certify that the foregoing depositions were duly taken before me at the time and place mentioned in caption; that the witnesses were first duly sworn by me before they were examined, when the interrogatories and cross interrogatories were all severally read by me to them, and their answers as given by them severally written down by me, and read over to the witnesses, who subscribed the same in my presence. All interlineations and corrections marked by my initials oppo-

site on the margin were made before signing by the witnesses. Witness my hand and seal this eighth day of June, A. D. 1893, at my office in Ogden city, Weber county, Utah territory. [Seal.] Daniel Hamer [Seal], Notary Public Weber County, Utah, and Commissioner of the County Court of Common Pleas, Bradford County, Pennsylvania. 'I am informed by credible persons that the witness G. S. Barker is absent from this part of the country at this time. Daniel Hamer, Commissioner.'

"Second. The learned court erred in admitting the offer of plaintiff on page 28, Appendix. The offer and objections were in these words: 'Mr. Little: We now offer in evidence the deposition of Theodore Robinson, taken by the same commissioner, in the city of Ogden and territory of Utah. Taken on commission and interrogatories. Mr. Mercur: We object to the admission of the deposition on the grounds: (1) That the certificate on the back of the commission is not under seal, as required by the letter of instructions sent to the commissioner with the commission; (2) that the certificate at the end of the deposition is not in the form required by the letter of instructions.' (Objection overruled. Defendant excepts. Bill sealed for defendant. Deposition admitted in evidence.) The indorsement upon the back of the second commission was as follows, to wit: 'Execution of this commission appears by a certain schedule annexed thereto. [Signed] Daniel Hamer, Commissioner.' The certificate at the end of the second set of depositions was in the following form, to wit: 'Territory of Utah, County of Weber—ss.: I, Daniel Hamer, a notary public in and for the said county of Weber, and a commissioner of the county court of common pleas of Bradford county, commonwealth of Pennsylvania, in a certain cause therein depending, wherein R. T. Rhees is plaintiff, and A. C. Fairchild, V. W. Grace, George Grace, and S. G. Dye, copartners trading as Fairchild, Grace & Co., are defendants, do certify that the foregoing depositions were duly taken before me at the time and place mentioned in caption; that the witness was first duly sworn by me before he was examined, when the interrogatories and cross interrogatories were all severally read by me to the said witness, and his answers as given by him written down by me, and read over to the witness, who subscribed the same in my presence. Witness my hand and seal at my office in Ogden city, Utah territory, the day and year aforesaid. [Seal.] Daniel Hamer [Seal], Notary Public in and for Weber County, Utah Territory, and a Commissioner of the County Court of Common Pleas for Bradford County, Commonwealth of Pennsylvania.'"

Rodney A. Mercur and Ulysses Mercur, for appellant. S. W. & Wm. Little, for appellee.

PER CURIAM. We are not prepared to say that the learned trial judge erred in v.28A.no.15—59

not rejecting the depositions mentioned in the first and second specifications. Instructions issued for the guidance of commissioners in taking testimony are directory, rather than mandatory; and while it is of course desirable that they should be substantially, if not literally, complied with, it would be a harsh rule of practice to exclude depositions because in some slight particulars, not affecting the merits of the case, the commissioner or officer taking the same may have neglected to comply with the formal instructions. Some latitude of discretion must be accorded to trial judges in such cases. As was said by Mr. Justice Thompson in *Kellum v. Smith*, 39 Pa. St. 241, 243: "It is a mistake to suppose that rules for commissions are to be rigidly construed against depositions, because testimony so taken is not supposed to be so satisfactory as the personal presence of the witness. While this may be conceded, it must be remembered that in a country composed of so many sovereign states * * * it is the only way of certainly obtaining testimony out of the state, although the witness may be within a few miles of the court, as is often the case. A bona fide, substantial compliance, therefore, with the rules of court, requiring notice to be given, is not to be defeated by a mere technicality, which could not eventuate in any possible injury to a party who desires nothing but fair play." In this case there was no abuse of that discretion with which trial judges are necessarily invested in such cases. Judgment affirmed.

(160 Pa. St. 535)

MCCLEARY v. FRANTZ.

(Supreme Court of Pennsylvania. March 26, 1894.)

ACTION FOR NEGLIGENCE — QUESTIONS FOR JURY.

In an action for personal injuries caused by the alleged negligence of defendant in shooting plaintiff while they were hunting together, questions of negligence and contributory negligence raised by the evidence were for the jury.

Appeal from court of common pleas, Franklin county.

Action by Harry McCleary against Samuel O. Frantz for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 26th day of October, 1887, the plaintiff and defendant and two other persons left the town of Waynesboro for a day's hunting in the country north of the town. Having reached a thicket or piece of woods along a hillside, about a mile from town, they started up a rabbit and some partridges, and hunted there a short time. In front of them, eastward, and nearly parallel with the wooded hill on which they were hunting, was a high ridge running north and south. They determined to go from this place towards Blue Rock schoolhouse, which lay east of them, across this high ridge, a distance of a mile or more away. McCleary, the plaintiff,

remained behind for a few minutes, hunting in the thicket. He saw the other three disappear across the hill in the direction of the schoolhouse. He followed in a short time, crossing the hill a little to the right of where the others crossed. This hill was cleared and cultivated land. After the defendant and his two companions had crossed the brow of the hill, and were out of the sight of the plaintiff, they suddenly turned to the right,—at right angles with the path in which they were moving,—and went southward, towards Waynesboro, on the east side of the hill, thus crossing the path of plaintiff as he was advancing across the hill in the direction they had started, towards Blue Rock schoolhouse. When the plaintiff approached the crest of the hill, not knowing that the other members of the party were in that immediate locality, but supposing that they had gone on towards the schoolhouse, as had been agreed, two shots were fired in quick succession, not more than two seconds apart, the second one of which struck the plaintiff in the face and neck, destroying his one eye entirely, and inflicting the other injuries complained of. These shots were fired at a rabbit which had sprung up in front of the other three hunters, on the opposite side of the hill from the plaintiff, and which had run towards the top of the hill in the direction in which he was advancing. The shot which struck and injured the plaintiff was fired by the defendant. The jury found for the plaintiff in the sum of \$800.

Charles Walter, A. F. Hostetter, and W. Rush Gillan, for appellant. N. Bruce Martin and O. C. Bowers, for appellee.

PER CURIAM. In view of the testimony, this was clearly a case for the exclusive consideration of the jury on the questions of negligence and contributory negligence. Belonging, as it does, to that large class of personal injury cases wherein the standard of duty is variable, and shifts with the facts developed on the trial, it became a question of fact for the jury to determine whether, in the circumstances, a reasonable and proper degree of care was exercised. The case was accordingly submitted to the jury by the learned president of the common pleas in a clear and concise charge, in which they were fully and accurately instructed as to the law applicable to every phase of the testimony. We find no error in either of the rulings complained of in the specifications. Judgment affirmed.

(160 Pa. St. 421)

STROUSE et al. v. LAWRENCE et al.
(Supreme Court of Pennsylvania. March 26, 1894.)

DEBTS OF DECEDENT—RIGHTS OF GENERAL CREDITORS—WRIT OF ERROR—REVIEW OF JUDGMENT ON CERTIORARI.

1. A general creditor having no security or preference at the time of his debtor's death can-

not, by a decree in proceedings commenced thereafter, appropriate a part of the estate to the payment of his own claims in full, to the exclusion of other creditors.

2. Act March 20, 1810, § 22, preventing writs of error to review the judgment of the court of common pleas on certiorari to a justice of the peace, does not apply to proceedings by writ of attachment execution under Act April 15, 1845.

Appeal from court of common pleas, Schuylkill county.

Suit by S. Strouse & Co. against Matilda R. Lawrence, administratrix of the estate of Jacob S. Lawrence, and others, and Matilda Lawrence, garnishee. From a judgment in garnishment for plaintiffs, defendants appeal. Reversed.

Geo. M. Roads, for appellants. Geo. J. Wadlinger, for appellees.

GREEN, J. The record of the judgment of the justice in this case shows affirmatively that the debt sought to be appropriated by the attachment execution was the private personal debt of Matilda R. Lawrence, due to the estate of her dead husband. The entry on the record is as follows: "Judgment is publicly given in favor of the plaintiffs, and against the said Matilda R. Lawrence, garnishee, for the sum of \$182.50 (dollars), it having been found that she has upwards of \$5,000 (dollars) in hand due to Matilda R. Lawrence, administratrix of the estate of Jacob S. Lawrence, deceased, and that the plaintiffs have execution of so much of the debt due by said Matilda R. Lawrence, garnishee, to Matilda R. Lawrence, administratrix of the estate of Jacob S. Lawrence, deceased, one of the defendants, as will satisfy the judgment of Strouse & Co., plaintiffs, against Matilda R. Lawrence, administratrix of the estate of Jacob S. Lawrence, deceased, with interest and cost." Jacob S. Lawrence died on the 15th of March, 1892, and on the 28th of April, 1892, Strouse & Co. brought suit before Justice of the Peace Chrisman, for a book account due by a firm of which Jacob S. Lawrence was a member, against Matilda R. Lawrence, administratrix of Jacob S. Lawrence, and the other members of the firm. Judgment was duly recovered before the justice for \$178.76, the amount of the plaintiffs' claim. On May 19, 1892, the plaintiffs issued an attachment execution on this judgment, and served Matilda R. Lawrence as garnishee. Interrogatories and answers followed in due course, accompanied with a protest against, and a denial of, the jurisdiction of the justice; but the justice gave judgment in favor of the plaintiffs, and against Matilda R. Lawrence, garnishee, thus appropriating an asset of the estate of Jacob S. Lawrence, to wit, a debt due to that estate by Matilda R. Lawrence, to the payment, exclusively, of the claim of a general creditor of Jacob S. Lawrence, entirely unsecured by any lien or preference at the time of his death. If this

can be done as to one asset of a decedent's estate, it can be done as to all, and any creditor with a claim sufficient to absorb the whole personal estate of a decedent can, by a process of attachment execution on a judgment obtained after the death of the decedent, appropriate the entire estate to the payment of his debt, to the exclusion of all other creditors. Of course, such a proceeding in the common pleas would oust the jurisdiction of the orphans' court in the settlement and distribution of decedents' estates. That this cannot be done is a most fundamental doctrine in our system of jurisprudence. In *Hammett's Appeal*, 83 Pa. St. 392, we held that the distribution of a decedent's estate among creditors as well as legatees and distributees belongs exclusively to the orphans' court, and creditors are bound to appear and claim their respective debts in this court, or be debarred from the distribution. Mr. Chief Justice Agnew, in delivering the opinion said, "The exclusive jurisdiction of the orphans' court to ascertain the amount of the estates of decedents, and order their distribution among those entitled,—creditors as well as legatees and distributees,—is so fully settled that nothing but future legislation can alter the law," citing many cases. Of course, a creditor may proceed in a common-law action to establish his claim, but he cannot take any part of the estate under any judgment in such case. He must come into the orphans' court and establish his claim there, and take the share of the entire estate which is allotted to him along with the other creditors. The rights of all creditors are fixed as they were at the death of the decedent. No one can obtain a preference over any or all the others by proceedings commenced subsequently to that event. These considerations are perfectly familiar to all, and yet in this case a general creditor, having no security or preference at the time of the intestate's death, has been permitted to appropriate by a judicial decree, in a proceeding not commenced until after the death of Jacob S. Lawrence, a part of his estate to the payment in full of the plaintiffs' claim, to the exclusion of all other creditors, although it is alleged without contradiction that the estate is insolvent.

So far as the motion to quash is concerned, it is only necessary to say that this is not a proceeding under the act of 1810, and the decisions as to writs of certiorari in such cases are inapplicable. The present proceeding is a writ of attachment execution, which is authorized by the act of 15th April, 1845 (P. L. 459; *Purd. Dig.* 999). The jurisdiction thereby given is entirely new. The subject-matter of it is altogether different from anything embraced within the act of 1810. The procedure is entirely different. The result,

which is a special judgment against the garnishee, appropriating a particular indebtedness due by the garnishee to the defendants in the original judgment to the payment of the plaintiffs' claim against that defendant, is altogether foreign to the jurisdiction conferred by the act of 1810. A right of appeal on the merits, without limitation as to amount or otherwise, is especially given by the sixth section, and the act contains no restriction, either expressly or by implication, upon the right either of the common pleas or of this court to review the proceedings by certiorari. In the case of *Com. v. Betts*, 76 Pa. St. 465, which was an action of debt to recover a penalty of less than a hundred dollars, and therefore presumably within the ordinary jurisdiction of a justice, the whole subject of the right of the common pleas and the supreme courts to review, by certiorari, proceedings before justices, was most exhaustively and carefully considered by Mr. Chief Justice Agnew. The right of review was not only sustained in that case, but the reasons and principles which determine the subject in any case were clearly set forth, the authorities were all reviewed, and the doctrine was announced "that the jurisdiction of this court cannot be taken away, except by express terms or necessary implication." It is unnecessary to repeat the very able and convincing discussion of the subject contained in that opinion. It is sufficient to refer to it, and to say that it entirely covers every aspect of this case. We certainly do not consider that the special and novel and peculiar jurisdiction conferred upon justices by the act of 1845, culminating in the special and unusual judgment authorized by the act against the garnishee, is embraced within the provisions of the twenty-second and twenty-fourth sections of the act of 1810, prohibiting writs of certiorari from the common pleas and writs of error from this court. In *Com. v. Burkhart*, 23 Pa. St. 521, we said that "section 22 of the hundred-dollar law, preventing writs of error to review the judgment of the common pleas on a certiorari to a justice of the peace, applies only to the jurisdiction given by that act." The jurisdiction conferred by the act of 1845 in attachment executions has no possible place in the act of 1810, and the ruling above quoted has precise application here. We think the learned court below was in error in affirming the proceedings before the justice. The want of jurisdiction to enter the judgment which was entered by the justice was apparent on the record, and was therefore reviewable by certiorari. The judgment of the court below is reversed, and the writ of attachment execution is dismissed and set aside, with all proceedings thereunder, at the cost of the plaintiffs.

(100 Pa. St. 391)

In re CLEMENT'S ESTATE.

Appeal of BAILEY et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

FRENCH SPOILIATION CLAIMS — BENEFICIARIES UNDER ACT OF CONGRESS.

1. Under Act Cong. March 3, 1891, making appropriations to pay the finding of the court of claims on certain French spoliation claims, including that of S., administratrix of C., and providing that awards should not be paid till said court certified "that the personal representatives on whose behalf the award was made represented the next of kin," the award was a direct gift to the next of kin of the original claimant who were living at the time of the passage of said act, and the next of kin then dead never acquired any interest in the fund. *Clement's Estate*, 24 Atl. 631, 150 Pa. St. 85, overruled.

2. Since Act Cong. March 3, 1891, making appropriations to pay the finding of the court of claims on certain French spoliation claims to the next of kin of the original claimant, made no provision for ascertaining the next of kin, it was proper for the orphans' court to ascertain them for purpose of distribution.

Appeal from orphans' court, Philadelphia county; Penrose, Judge.

Appeal by Mary P. Bailey and Susan P. Sterling from a decree of distribution upon the audit and adjudication of the first account of Mary B. Scott, administratrix d. b. n. of Jacob Clement, deceased. Reversed.

A. A. Hirst and Leonard Myers, for appellants. Charles H. Sayre and Geo. Sergeant, for certain appellees.

MITCHELL, J. This case has suffered somewhat from its intricacy and its unusual character. The important facts require to be briefly restated. The act of congress of 1891 awarded to the administratrix of Jacob Clement, on account of his losses by the French spoiliations, two sums, the net proceeds of which constitute the fund now in court for distribution. At the date of the act, Jacob Clement was, of course, dead, and all his children were dead. There were living, however, four grandchildren, children of a son, Samuel, and thirteen great-grandchildren, issue of seven deceased children of a daughter, Mary English. The questions to be determined were who were the next of kin meant by the act of congress, and in what proportions were they to take. Grandchildren were the nearest in blood to Jacob of any parties living, and the learned court below therefore treated all the grandchildren, living and dead, as a class of propiety; those living taking per capita, in their own right, and the issue of those dead taking per stirpes, in the right of their parents. From the distribution made in accordance with this view, the four living grandchildren appealed, claiming—First, that "next of kin," in the act of congress, meant nearest in blood, according to the common law, and, therefore, that the four living grandchildren were entitled to the whole fund, to the exclusion of the descendants of those de-

ceased; and, secondly, the appellants claimed that, if the principle of representation should be recognized at all, it should begin a step further back, with the children of Jacob, and, as there were but two children (a son and a daughter) who had living representatives at all, the four grandchildren who were children of the son should take one-half of the fund, instead of four-elevenths, which they got under the view of the orphans' court. Neither of these contentions was specifically sustained, but the decree was reversed, on the grounds, somewhat too broadly expressed, that the act of congress contemplated a succession of next of kin from the person himself on whose account the award was made, and that, therefore, the fund should be distributed as part of Jacob Clement's estate. The case thus decided is reported as *Clement's Estate*, 150 Pa. St. 85, 24 Atl. 631. The learned court thereupon proceeded to reopen the case, and ascertain the course of devolution of Jacob Clement's actual estate, and dispose of the present fund in the same way. From the distribution accordingly made, the present appellants, great-granddaughters of Jacob Clement, were entirely excluded, because, under the will of their grandmother, Mrs. English, her residuary estate went to her five children living at her death. The assignment of error to this exclusion brings up the whole subject anew of the intent of the act of 1891 as to the persons who were to take, and their proportionate shares. Further consideration and better acquaintance with the whole case have convinced us that our first views, as expressed in 150 Pa. St., 24 Atl., *supra*, are not sustainable, and that that case must be overruled.

The fund was a pure gratuity from congress, though it had a moral claim back of it that was the moving cause of the gift. It is part of the public history of the country that for more than three-quarters of a century the claims had been pressed, both houses of congress had twice recognized them, though Presidents Polk and Pierce had vetoed the acts, and the general consensus of jurists and historians had settled down into a conviction that the claimants had been wronged by acts admitted by the French government to give rise to valid obligations to make reparation, that the United States had yielded their right of reclamation for these acts in return for other considerations from France, and that the refusal or delay in making payment of the obligations thus become a duty had long been a reproach to the national good faith. In 1885 congress again took up the subject, and this time, the president concurring, passed an act to authorize the court of claims to "examine and determine the validity and amount of the claims, * * * together with their present ownership, and, if by assignee, the date of the assignment, with the consideration paid therefor." But this was to be a mere advisory report for the information of con-

gress, and it was expressly enacted that "nothing in this act shall be construed as committing the United States to the payment of any such claim." The court of claims having favorably reported on the claim of Jacob Clement, congress passed the act of March 3, 1891 (26 Stat. 897), under which the present fund was received by the accountant. By this act the money was awarded to Mary B. Scott, administratrix de bonis non of Jacob Clement, and it was provided that "in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy; and the awards in the case of individual claimants shall not be paid until the court of claims shall certify to the secretary of the treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations respectively shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards." This, as already said, was a pure gratuity. There was no right in any one which could be enforced, or which had any recognition at all in law. Congress, therefore, in making the gift, was free to make it to whomsoever it chose, and upon whatsoever terms. It was made to the next of kin, and the intent that it should go to them in their own right, as standing in the place of the original claimant, is apparent throughout this act, as well as the preliminary act of 1885. Assignees in bankruptcy were expressly excluded, and the personal representatives were not to get the money until it should be certified to the secretary of the treasury that they represented the next of kin. By unquestionable implication, all other parties, assignees, devisees, residuary legatees, widows, surviving husbands, etc., are also excluded. The right to the fund accrued in 1891 to those who were then the next of kin. That was the inception of the right, and those who were then dead never acquired any interest of any kind in the fund, and, of course, could transmit none by will or otherwise. It never was in fact part of Jacob Clement's estate, nor of his children's, nor of his grandchildren's who died before 1891. Nor was it the intent of congress that it should be so considered; for, if it was first made de jure a part of Jacob Clement's estate, then the power of congress to shut out the vested property rights of assignees, creditors, and others whose claims upon the estate were fixed by law would be at least extremely doubtful. There was not only no such intent, but such construction was carefully guarded against. The act made no express provision for the ascertainment of the next of kin, or of the proportions in which they were to take. As a matter of convenience, instead of ascertaining the facts and settling the question of distribution that we have

now before us, or committing that duty to the court of claims, the act passed the fund to the administratrix de bonis non of the original claimant, and therefore necessarily to the proper court of his domicile, but in so doing it dictated the scheme of distribution, which was expressly to be to the next of kin, and, by necessary implication, such next of kin were to be ascertained by the law of the domicile. The "legal disbursement" of the awards, for which the courts that granted the administrations were to require adequate security, can only mean disbursement according to the law of the tribunal. As was very well said by Ashman, J., in the first adjudication in the court below: "The award by the act to the administratrix of the decedent * * * designated the person whose losses were the efficient motive for the gift, and provided an agent for the distribution of the fund; but it pointed out the decedent, not as the person to whose estate the fund was awarded, but simply as the means of identifying the proposed recipients of the gift."

The question of the jurisdiction of the orphans' court, under this construction of the act, was not raised in the case, but it would not be insuperable. The ascertainment of the next of kin to a decedent, for purposes of distribution, is within the general jurisdiction of the court; and there would be little, if any, stretch of it in including such ascertainment with reference to a fund which, though not a part of the decedent's estate, was, for the purpose of ascertaining who were to take, to be treated as if it were. The fund, therefore, being a gift to the next of kin, vested, at the date of the act, in those then living who were the next of kin to Jacob Clement, according to the law of Pennsylvania. The appellants were his great-granddaughters, and, as such, were entitled to participate in the distribution. The facts bring the case within the express words of the intestate act of April 8, 1833, § 2, art. 4, cl. B (P. L. 316): Where there are no surviving children, but grandchildren and the issue of deceased grandchildren, "each of the grandchildren * * * shall receive such share as he or she would have received if all the other grandchildren who shall then be dead leaving issue, had been living at the death of the intestate;" and by clause C the issue of such deceased grandchildren are to "take by representation of their parents respectively, such share only as would have descended to such parent if they had been living at the death of the intestate." By the scheme of this act, when all the descendants are in the same degree, they take per capita, in their own right, and not by representation; but, when there are descendants in different degrees, those in the class nearest to the intestate take in their own right, and the remoter ones take by representation from deceased members of the same class as the nearest survivors. This is the plain mean-

ing of the act, and it has been so declared in Krout's Appeal, 60 Pa. St. 380; Eshleman's Appeal, 74 Pa. St. 42, 48; and Person's Appeal, Id. 121. Distribution, in the present case, therefore, should be made to the next of kin of Jacob Clement living on March 3, 1891, to be ascertained by the law of Pennsylvania in the same manner as if the fund had been part of the estate of said Jacob. The four living grandchildren will therefore each take an eleventh in their own right, as the nearest of kin, and an eleventh will go to the representatives of each of the deceased grandchildren per stirpes. This was the distribution made first by the learned court below, and reported in 150 Pa. St. 85, 24 Atl. 631, which maturer consideration convinces us should have been affirmed.

As this appeal results in a redistribution to the advantage of all parties entitled under it to share in the fund, it is only just that the expenses should be borne in common, and that they should include the counsel fees of appellants. Decree reversed, and record remitted for redistribution in accordance with this opinion, the costs of this appeal to be paid out of the fund, and to include a reasonable counsel fee to appellants, to be fixed by the court below.

(160 Pa. St. 475)

In re **BOROUGH OF TAYLOR**
Appeal of **ATHERTON** et al.

(Supreme Court of Pennsylvania. March 26, 1894.)

INCORPORATION OF BOROUGH—PROCEEDINGS—REVIEW.

1. On application for the incorporation of a borough, the fact that farm lands are included within its limits is not fatal.

2. Persons who appear and contest an application for the incorporation of a borough cannot question the form of the notice of intention to apply for incorporation.

3. The soundness of the discretion exercised by the court of quarter sessions on an application for the incorporation of a borough is not a subject for review.

Appeal from court of quarter sessions, Lackawanna county.

Petition by residents of the town of Taylor for the incorporation of said town as a borough. From a decree of the court of quarter sessions confirming report of grand jury approving such incorporation, I. C. Atherton and others appeal. Affirmed.

H. M. Hannah, for appellants. A. D. Dean and J. M. Harris, for appellees.

PER CURIAM. The objection to the form of the published notice of intention to apply for incorporation comes too late after the parties making it have taken notice, and appeared and contested the application. Borough of Edgewood, 130 Pa. St. 348, 18 Atl. 646. Such appearance and participation in the proceedings cures any defect of form in the published notice. The situation of the

territory included within the limits of the proposed borough is a proper subject for consideration by the grand jury and by the court of quarter sessions. The court exercises a judicial discretion in determining the application, and the soundness of the discretion exercised in the particular case is not a subject of review. Borough of Sewickley, 36 Pa. St. 80. An abuse of discretion this court will correct, but we cannot revise the judgment of the court below upon a subject within its discretion, unless abuse of discretion is alleged. The mere fact that farm lands are included within the limits of a proposed borough is not fatal to it. Borough of Blooming Valley, 56 Pa. St. 66. The grand jury and the learned judge of the quarter sessions have found that the situation of the territory, and of the three villages upon it, is such that a single municipal government is desirable, because the villages have reached out towards each other until they are practically one. A decided majority of the taxable inhabitants in the proposed borough desire its incorporation, and we see no error in the proceedings that is fatal to them. The order appealed from is therefore affirmed.

(160 Pa. St. 559)

WETTENGEL v. GORMLEY.

(Supreme Court of Pennsylvania. April 2, 1894.)

OIL LEASE—DEVISE OF LAND—RIGHTS OF DEVISEES.

Where, during the term of an oil lease of three contiguous farms embracing 600 acres, the lessor dies and devises the farms to different persons, the devisees are entitled to share alike in the royalty reserved, though the wells are all on one farm, as through such wells the oil may be drawn from all the farms.

Appeal from court of common pleas, Allegheny county; Ewing, Judge.

Agreed case between Annie B. Wettengel, as plaintiff, and James T. Gormley, as defendant, to determine the right to royalties under an oil lease embracing their farms. Judgment for plaintiff. Defendant appeals. Affirmed.

J. McF. Carpenter, for appellant. J. S. & E. G. Ferguson, for appellee.

WILLIAMS, J. The question raised by this appeal is both novel and interesting. It is presented upon the following facts: James Gormley was, in his lifetime, the owner of three contiguous farms, containing together about 600 acres. In July, 1888, he made an oil lease to Tomlinson, covering all the land. It was to run for 15 years, and reserved a royalty, upon all the oil produced, of one-eighth. The lease gave the lessee the usual privileges upon the land, among which was the right to take water from any part of it, and to any extent needed in his operations; a right of way into and over the body of the

land; a right to lay pipe lines to conduct the oil from the wells. It concluded with the following stipulation: "It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, and assigns." The lessor died in October, 1890. By his last will and testament he gave one of these farms to each of his three children in fee, making no mention of the lease, which included them all. The devisees have entered into possession of their respective farms under the will of their father, and each holds in severalty. The holder of the oil lease has, meantime, put down several oil wells, and is producing oil therefrom. These wells happen to be on the farm devised to James T. Gormley, the defendant, and he claims the entire royalty. The question is thus seen to be, who is entitled to the royalty reserved by the ancestor? Should it be divided between the three devisees in proportion to the acreage held by each, or should it be paid to James T. alone? The answer to this question must depend partly upon the character and legal effect of the lease, and partly on the nature of the product obtained under it. If the lease had been the ordinary agricultural lease, reserving a fixed annual rent payable in money, it would not be doubted that the fee descended to the devisees subject to the estate for years held by the tenant. The lessor could not change the rights of the lessee, or disturb his covenants, by a division of the land into parts, and a devise of these parts to separate devisees. All the devisees together take the place of the deviser, and receive the rent due as an entire sum from the tenant. It would not matter that the grain was grown on one of the divisions, the grass upon another, while the third was unimproved and covered with forest; their interests would be several as to each other under the terms of the will, but as to the tenant they would be undivided under the terms of the lease made by their ancestor, and covering the land at the time of his death. But this was not an agricultural lease. It was an agreement known as an oil lease. It conferred an exclusive right upon the tenant to take the oil that might underlie the whole 600 acres, and gave him 15 years within which to take it. It was, in its legal effect, a sale of the oil, for the removal of which the surface and the subsurface were subjected to the necessary servitudes. The subsequent division of the body of land by the lessor could not divide or diminish the privileges of the lessee or change his covenants. The lessee may locate his wells where he pleases, regardless of the interests of the devisees of his lessor. He may distribute them over the 600 acres, or locate them all on one of the divisions. He may crowd the lines of the adjoining divisions so as to enable him to draw the oil from them without

drilling upon them, and in this manner deplete, ultimately, the whole territory by operations conducted on the farm of one of the devisees. It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from 500 to 3,000 feet below the surface. This rock is saturated throughout its extent with oil, and, when the hard stratum overlying it is pierced by the drill, the oil and gas find vent, and are forced by the pressure to which they are subject, into and through the well, to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. For this reason, an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals. In the case of a coal lease, for example, the exact location, with reference to lines on the surface, of every pound of coal taken, may be easily determined. The stratum of coal is as fixed and permanent in its character as are the strata of superincumbent rocks and earth. Its ownership, as between several devisees or heirs at law after partition made, is as easily determined as that of the surface. The removal of the coal from one part does not diminish or disturb that which underlies another. The lines that divide the surface divide, with absolute fairness to all concerned, the subsurface, and secure to the several owners with certainty the mineral that belongs to each. The rules applicable to coal leases, or leases of land containing any other solid mineral, are therefore not always capable of application to leases for the production of oil or gas, because of the difference between the solid and the fluid minerals, and because of the deficient conditions under which they are found and brought to the surface. There is in this state no precedent that we are constrained to follow, and we cannot find that the question has been decided in any other of the oil-producing states. We are in a position, therefore, to consider and determine it on principle. For the reasons now briefly outlined, we concur in the conclusions reached by the learned judge of the court below. The judgment is affirmed.

(161 Pa. St. 28)

MATTHEWS v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. April 2, 1894.)

RAILROAD CROSSING—ACCIDENT—PERSON COMING ALONG TRACK—CONTRIBUTORY NEGLIGENCE.

Where a person walks along a four-track railroad till he comes to a street crossing, and then steps in front of a moving engine, which gives no signals, the question of his contributory negligence will not be affected by the fact that the gates at the sides of the crossing are up, and the watchman gives no signal, as the gates and watchman are only to guard against coming onto the crossing along the street.

Appeal from court of common pleas, Philadelphia county.

Action by Margaret Matthews against the Philadelphia & Reading Railroad Company for injury at crossing. Judgment for defendant. Plaintiff appeals. Affirmed.

Samuel Evans Maires and Richard C. McMurtree, for appellant. Gavin W. Hart, for appellee.

DEAN, J. The defendant's railroad, with a general direction east and west, crosses diagonally, at grade, Tenth and Eleventh streets, in the city of Philadelphia, with four tracks; the two outer tracks being sidings, and the two inner ones for east and west bound trains. At the Tenth street crossing there are two plank sidewalks over the railroad—one on the east, the other on the west, side of the street—for foot travelers, leaving the space between for vehicles. For a long time the railroad company had maintained safety gates on each side of the crossing, and had also employed a watchman, to guard against accidents. Between 12 and 1 o'clock in the daytime of the 17th of December, 1890, Robert Matthews, his brother Daniel, and Augustus Musick, all three of whom were in the service of the Penn Globe Gasoline Company, on Eleventh street, quit work, and started together for their homes. They walked down Eleventh until they struck the railroad; then on the roadbed, in the space between the east siding and the out-bound track, until they reached the first plank walk on the west side of the Tenth street crossing. Then they stopped for a couple of seconds, while on the roadbed of the railroad company, to listen for trains, heard none, and separated. Daniel Matthews and Musick turned off the track down Tenth street. Robert, whose home was on Diamond street, on the other side of the railroad, continued walking on the railroad to the plank walk on the east side of the street. A train was standing on that side of the street, and he turned to walk on the plank footway across the tracks in the direction of his home. As he stepped off the track where the train was standing, to the next track, he was struck by a locomotive coming towards him on that track, and kill-

ed. When he met his death he was on the plank walk of the street crossing. The safety gates were not closed. The watchman was in his box, but gave no warning of the approaching locomotive. It was a dark, rainy day. The steam from the standing locomotive settled near the ground, obstructing the sight, and the noise from blowing off steam made it difficult to hear coming trains, when on the crossing. No whistle was blown, or bell rung. This plaintiff, the widow of deceased, brought suit for damages, averring her husband's death was caused by defendant's negligence.

We think we have stated the facts disclosed by plaintiff's evidence in the view most favorable to her, as it is our duty to do where, as in this case, a compulsory nonsuit was entered on plaintiff's own evidence. From the refusal of the learned judge who tried the cause to take off the nonsuit, this appeal is taken. Were the facts for the consideration of the jury? For that is the only question raised on this appeal. The deceased stopped, and looked and listened for a train, while on the plank walk on the west side of Tenth street. He then crossed the intervening street to the walk on the east side, and then, in a couple of steps from where he turned in front of the standing train, was struck by the moving train, and killed. It is alleged no warning was given him, while on the crossing, of the coming locomotive; the gates were not lowered; the watchman waved no flag of danger. But was defendant, in any reasonable sense of the word, a "traveler" on the street crossing? From the time he set foot on the railroad at Eleventh street until he reached Tenth street, he was a foot traveler on the railroad,—was a trespasser. If his only purpose had been to cross the railroad, even as a trespasser, he could have done that in safety at any point between Eleventh and Tenth streets. But his object was, although entirely innocent in itself, to keep company with his companions to a point where they must take opposite directions to their homes, at Tenth street crossing. When that is reached, they stop right on the tracks, where they say an approaching locomotive could neither be seen nor heard, and look and listen. Then, with all these circumstances of danger surrounding him, he continues on the track to the other side, until confronted by the blinding steam and deafening noise of the standing locomotive; then deliberately turns to his right, where he can neither see nor hear, to cross three other tracks, and is immediately struck down. Certainly, the conduct of the deceased was manifestly negligent. It may be assumed that this would have been a question for the jury, under wholly different circumstances. If the deceased had been approaching this crossing from either direction on Tenth street, as one of the public, he would have been in the exercise of an unquestioned

right. He would then have been justified in expecting that degree of care which, under the circumstances, it was the duty of defendant to observe so as to guard against accidents. If the gates were up, inviting him to cross, and no warning was given by the watchman, notwithstanding the difficulties of seeing and hearing, it would have been for the jury to determine whether he exercised care according to the circumstances. But if a trespasser reached the middle of that crossing from the ties, either up or down the railroad, he is in no sense of the word a "traveler" from the street, approaching danger, and about to exercise a right common to the public,—that of crossing the railroad. The watchman will not be on the lookout to warn him, nor will the gates be lowered to stop him. These safeguards are to keep people from going on the crossing on the approach of trains, not to warn them to get off. The deceased was bound to know the purpose of the gates and the watchman, and that they were not there to guard against danger to those using the crossing from the direction of outgoing and incoming trains. The evidence clearly shows he thoughtlessly put himself in a place of danger; then, when unable to either hear or distinguish the imminence of it,—when, too, he might have stepped off in safety, as did his companions,—he recklessly attempted to cross three other tracks.

The cases cited by the learned counsel for appellant are not in point, when applied to the facts here. In *Railroad Co. v. Killips*, 88 Pa. St. 405, Chief Justice Sterrett, in delivering the opinion of the court, says: "The ground of complaint is that the keeper was withdrawn at 7 o'clock, and the gate left in such position as to mislead the traveling public,—invite them to cross, and lure them into danger,—and that the deceased was thus misled and injured." In *Railway Co. v. Frantz*, 127 Pa. St. 297, 18 Atl. 22, Justice Mitchell says: "But while the fact that the gates were raised is no excuse for the failure of the plaintiff to stop, look, and listen, yet, on the other hand, it is some evidence of negligence on the part of defendant. Its tendency is certainly to give the approaching traveler the impression that the crossing is safe, and thereby to blunt the edge of his caution." In *Stapley v. Railway Co.*, L. R. 1 Exch. 21, Channel, B., said: "The carriage gate being open, and no gate keeper present, a foot passenger was invited by that state of things to pass across the line; and the conduct of the company was therefore, we think, evidence of negligence to go to the jury." These and many other cases hold that open gates, which should be closed in case of danger, are an invitation to the traveler on the highway to cross; and while this fact does not relieve him from the duty of exercising care, it is a fact for the consideration of the jury, in determining whether he exercised care according to the

circumstances. But where, as here, the person injured was not a traveler on the public highway crossing the railroad, but reached the place of danger from the railroad, the rule laid down in these cases can have no application. Coming from the direction he did, he had no right to presume the company knew he was there for the purpose of crossing, and the duty of greater care and vigilance on his part was imperative. The judgment is affirmed, and appeal dismissed, at costs of appellant.

(161 Pa. St. 5)

WINKLEBLAKE v. VAN DYKE.

(Supreme Court of Pennsylvania. April 2, 1894.)

STATEMENT OF CAUSE OF ACTION—SUFFICIENCY—DAMAGES.

A statement in assumpsit, alleging that defendant orally agreed to convey to plaintiff a house worth \$2,000 if she would leave her home and keep a boarding house in defendant's lumbering camp in another state; that she broke up her home and sold some of her furniture, and held herself in readiness to go for two years; that defendant performed no part of his agreement; that she thereby sustained the loss of the house, valued at \$2,000, damages in loss of profits in keeping the boarding house, and money expended while unemployed for two years; and that the whole sum of her damages is \$5,000,—does not show a cause of action, as the damages are not stated with sufficient particularity to permit proof thereof.

Appeal from court of common pleas, Clinton county.

Assumpsit by Levinia Winkleblake against H. H. Van Dyke. From a judgment for defendant, plaintiff appeals. Affirmed.

A. F. Ryon and W. H. Clough, for appellant. C. S. McCormick, for appellee.

DEAN, J. This is an appeal by plaintiff from the judgment of court below, sustaining a demurrer to plaintiff's statement of cause of action. The statement avers that on the 18th of May, 1886, defendant made an oral agreement with plaintiff, who then resided in Lock Haven, to keep a boarding house for him at certain lumbering operations in West Virginia, this to continue while his lumbering business lasted. In view of removal to another state, she was to keep herself in such a state of readiness that she might start immediately on notice from him. Further, that defendant agreed to purchase for her in West Virginia a house suitable for a boarding house at an expense of \$1,500, and furnish it, in addition, at a cost of \$500, and then convey the whole to her free of all incumbrance; in addition, agreed to pay her cost of traveling to West Virginia, and expenses incident to breaking up her home in Lock Haven with a view to removal. She then avers that, relying on this undertaking of defendant, on the 15th of June, 1886, she did break up her home in Lock Haven, sold a large portion of her goods and furniture, and

at the request of defendant went to Harrisburg to await his further directions, where she waited two years for such directions, but defendant gave none, and in all particulars failed to perform his agreement and promises, except that he paid to her the sum of \$100. She further avers that she has thereby sustained the loss of the house and furniture which he promised to convey to her, valued at \$2,000, damages in loss of profits in keeping the boarding house as expected by her, damage to the amount of money expended in removing to Harrisburg and living there unemployed for two years, awaiting defendant's direction, and that the whole sum of her damages is \$5,000. Then follow the common counts in assumpsit for goods sold and delivered, work and labor done, money paid to use of defendant, money received by him to her use, and for money due on an account stated, her damage on each count being laid at \$5,000. The demurrer denies (1) that the statement sets out a good cause of action; (2) denies that it is a sufficient statement under the act of May 25, 1887.

Was the court right in sustaining the demurrer? That is the only question for our consideration. The act of May 25, 1887, was passed to simplify pleading. In construing it, we are not disposed to regard any merely formal defects as fatal. But, as was said with reference to the act in *Fritz v. Hathaway*, 135 Pa. St. 274, 19 Atl. 1011: "As to all matters of substance, completeness, accuracy, and precision are as necessary now to a statement as they were before to a declaration in the settled and time-honored forms;" or, as is said by the present chief justice in *Byrne v. Hayden*, 124 Pa. St. 170, 16 Atl. 750: "The act of 1887, providing for filing statement of claim, etc., was intended to have a wider scope than the old affidavit of defense law. It is necessary, however, that the statement should contain all the ingredients of a complete cause of action, averred in clear, express, and unequivocal language, so that, if the defendant is unable to controvert or deny one or more of the material averments of claim, a judgment in default of an affidavit or sufficient affidavit of defense may be entered and liquidated." These authorities, in effect, only hold that the act of 1887 shall be given its palpable meaning. It was intended to dispense with formality, but to insist on matters of substance, indispensable to an intelligent and just judgment between the parties. Assuming here (what we do not concede) that the date of the agreement and the scope of it are stated with sufficient accuracy, for what breaches of it, and in what particulars, shall the court, in default of an affidavit of defense, enter judgment? He did not convey to her the boarding house and furniture, which were to be of the value of \$2,000 when ready for her occupancy and use. But she did not go to a lumbering district in West Virginia. Did she sustain damage to the full amount

of the \$2,000, when the consideration did not pass, or were her damages less because she was saved the inconvenience and expense she would have been subjected to had she gone there? It must be assumed that something was to be done or suffered on her part as a consideration for this valuable transfer of property. He promised, if she would leave her home and friends in Pennsylvania, and work in a boarding house in a rude lumbering camp in another state, he would convey to her \$2,000 worth of real and personal property. By reason of his failure to provide for her journey, she did not leave Pennsylvania, and did not conduct a boarding house in West Virginia. Her damages, if any, are measured by the loss she sustained, and not solely by the value of the property promised. The contract is not to be enforced specifically, as would be the result if, when the consideration for the promise did not pass, she were awarded damages to the value of the property. She is to be made whole for loss suffered, which, from her statement in this particular, certainly did not equal the value of the property. Again, it is stated that he did not pay her the expenses incurred in breaking up her home in Lock Haven. How shall this be liquidated? She says she sold a portion of her furniture, but does not say for less than it was worth. It may have realized more than its value. She suffered loss by reason of being out of employment at Harrisburg. What was her actual loss, as measured by the value of her labor during this interval? How much per week or month? She lost the profits which might have accrued to her from keeping the prospective boarding house. On what does she base her estimate of profits? How much per week, month, or year? Assuming the agreement was made as stated, there is no averment of damage in any one of the particulars set out in the statement specific enough to have justified either admission or denial. The lumping of the whole at \$5,000 in the common counts, as is well known, is wholly formal, and these counts, since the act of 1887, seem altogether out of place. As her damages, if any, arose because of specific loss by reason of particular breaches of a parol contract involving a number of stipulations, there must be an averment, not only as to the aggregate loss, but specific statements of the damage sustained in the several distinct particulars. If plaintiff cannot state these damages with more particularity, then she cannot prove them, and a jury would not be permitted to find them in her favor. It is not the form that is objectionable in this statement; there is no substance in it, under the act of 1887, which would warrant a judgment for plaintiff. As to the last paragraph of the demurrer of which appellant complains, it is the one objection we sustain. Its insertion in the argument by counsel for appellee is not creditable to him, and certainly adds no strength to his reasoning. If anything, it be-

smirches an otherwise clean cause. The judgment is affirmed, and appeal dismissed, at costs of appellant.

(160 Pa. St. 609)

In re MAN'S ESTATE.

(Supreme Court of Pennsylvania. April 2, 1894.)

WILL—AMBIGUOUS PROVISIONS—VESTED REMAINDER.

Testator devised his estate to trustees, and directed them to pay the rents and profits to L., "and from and after her death the principal to be divided among such children of the said L. who shall be living at a period not exceeding nine months after my decease, and, in default of such children, remainder to my heirs." W. and three other children of L. were living nine months after the death of testator, but W. afterwards died before L. *Held*, that W.'s interest was vested, and on his death it passed to his personal representative.

Appeal from orphans' court, Philadelphia county; Hanna, Judge.

Adjudication of the account of the Real-Estate Title & Trust Company as trustee under the will of Daniel Man, Jr., deceased, and order of distribution. From a judgment dismissing exceptions of Juliet D. Man, administratrix of the estate of Walter Man, deceased, and confirming the adjudication, the administratrix appeals. Reversed.

Daniel Man, Jr., died leaving a will containing the following bequest: "I give and devise all the estate, real and personal, to which I am entitled under the will of my late father, unto Samuel W. Paul and John Jordan, Jr., of Philadelphia, and their heirs, in trust, nevertheless, and upon this express confidence: that they shall receive the rents, issues, and profits thereof, and, after deducting the necessary expenses of the trust, shall pay over the balance remaining in their hands into the hands of Louisa S. Anson, of Philadelphia, the daughter of William Arnel, late of Bordentown, New Jersey, her own receipt alone to be a discharge; and from and after her death the principal to be divided among such children of the said Louisa who shall be living at a period not exceeding nine months after my decease, and, in default of such children, remainder to my heirs." Four children of Louisa S. Anson were living at the expiration of nine months after testator's decease, viz. E. A. S. Man, George E. Man, Jane Man, and Walter Man. Walter Man subsequently died in the lifetime of the life tenant, leaving a widow, to whom were granted letters of administration on his estate. Upon the death of the life tenant, the Real-Estate Title & Trust Company, which had been appointed as trustee in place of the original trustees named in the will, filed its account of the estate, showing a balance of \$27,957.71, all in personal property. The administratrix of Walter Man claimed a one-fourth share of this fund. The court below (one judge dissenting) held that Walter's share was not

vested, but was contingent upon his surviving the life tenant, and awarded the whole fund to the other children. From this decree the widow and administratrix of Walter Man appeals.

Frank P. Prichard, for appellant. E. A. S. Man, for appellee.

STERRETT, C. J. The learned court erred in its assumption that the bequest to Walter Man was made contingent upon his surviving his mother, Louisa S. Anson. True, the "principal" of the estate was directed to be "divided" "from and after" her death; but by the express terms of the will it was to be "divided" among "such" of her children "as should be living at a period not exceeding nine months after" testator's—not her—death. The gift over to testator's "heirs" obviously had reference to the last antecedent, and could only become operative upon default of "such children" as should be "living" at the "period" fixed by the testator. The death of Mrs. Anson simply marked the limit of her interest, and the beginning, in possession, of those entitled in remainder. The rule is conceded that where there is bequest in the form of a direction to pay, or pay and divide, "from and after" the happening of any event, "then, the gift being to persons answering a particular description, if a party cannot bring himself within it he is not entitled to take the benefit of the gift. There is no gift in these cases except in the direction to pay, or in the direction to pay and divide. But if, upon the whole will, it appears that the future gift is only postponed to let in some other interest, or, as the court has commonly expressed it, for the greater convenience of the estate, the same reasoning has never been applied to the case. The interest is vested notwithstanding, although the enjoyment is postponed." *Graham v. Gregory*, 4 Hare, 398. Upon the whole of this will it is apparent that the interest of the children was simply postponed to let in their mother's. Even without the nine-months clause, such of her children as survived testator would have thereupon taken vested interests in remainder. That clause, which was evidently intended to embrace any posthumous child who might be born, extended the time for ascertainment of the class; and, as Walter Man survived the time so fixed, he took a vested interest, which, upon his subsequent death, passed by operation of law to his personal representative. This view is not in conflict with the decision of this court in *Cascaden's Estate*, 153 Pa. St. 170, 25 Atl. 1075. There the legatee died before the happening of the contingency upon which his interest was to vest, while here he survived. Nor is there any ground for presumption in favor of the testator's heirs at law. The children of Louisa S. Anson were preferred objects of his bounty, as the will shows,

and every intendment is in their favor. As already seen, testator's heirs at law could only have taken "in default of such children" of Louisa S. Anson as should be "living at a period not exceeding nine months after" testator's death; and Walter Man, who was one of these children, having survived the testator, necessarily thereupon took a vested interest. Decree reversed, with costs, to be paid by the appellees; and it is now adjudged and decreed that the balance for distribution, to wit, \$27,957.71, subject to apportionment of income accruing at the death of the tenant for life, be awarded to Edward A. S. Man, George E. Man, Juliet D. Man, administratrix of Walter Man, deceased, and Jane Man, in equal shares.

(160 Pa. St. 644)

KENG v. BALTIMORE & O. R. CO.
(Supreme Court of Pennsylvania. April 2, 1894.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

When the evidence is conflicting, it is a question for the jury whether a person killed at a railroad crossing was guilty of contributory negligence.

Appeal from court of common pleas, Delaware county.

Trespass by Matthew Keng against the Baltimore & Ohio Railroad Company for the death of his wife. A nonsuit was granted, and plaintiff appeals. Reversed.

O. B. Dickinson, for appellant. W. B. Broomall, for appellee.

DEAN, J. The defendant's railroad runs with two tracks through the city of Chester. Fourteenth street, a much-traveled street, crosses the railroad at an acute angle at grade. Mary L. Keng, wife of plaintiff, was a resident of the city. She was a German woman about 60 years of age. Her hearing was good, but her eyesight was somewhat defective. On the morning of the 13th of June, 1889, she attempted to cross the railroad at the crossing on Fourteenth street, and was struck by the locomotive of defendant's passenger train, and killed. The learned judge of the court below, after hearing plaintiff's evidence, directed a nonsuit, on the ground that it established contributory negligence on the part of deceased; and having afterwards, on motion, refused to take off the nonsuit, the plaintiff brings this appeal.

On its facts, the case is a very close one, but nevertheless we think, after very careful consideration, the evidence as to negligence on part of deceased was for the jury. There was evidence tending to establish negligence on part of defendant in running its passenger train at a high rate of speed in a city, and in giving no warning as it approached this crossing, at which there were neither guard gates nor watchman. Further, plaintiff's evidence, if the witness Gorman be believed,

showed that deceased, before stepping upon the tracks, stopped and looked both up and down the railroad for approaching trains; even took off her sunbonnet, that she might hear more distinctly. She then attempted to cross the track diagonally, to reach the opposite side of the street when she was clear of the tracks. This was because of an excavation on the east side of the street, on the further side of the railroad tracks. When in the act of clearing the second or last track, she was struck by the bumper or cylinder of the locomotive, and killed. The testimony of the witness Gorman is somewhat confused as to what occurred after she started to cross. In one part of his testimony he seems to state that deceased was either upon the north-bound track, or in the space between the north and south bound tracks, when the approaching train could be seen 100 yards distant. As the train which struck her was on the south-bound track, of course she would have been safe had she then stopped. But further on in his testimony he says: "Q. Where was Mrs. Keng when you first noticed her? A. She was on the other side of the east-bound track. She stopped about five feet the other side of the east-bound track. Q. She stopped about five feet before she got to the track? A. Yes. Q. What did she do? A. She looked up and down the track. Then she started across. She was on the side next the pike when she stopped to look. Then she started across, and when next she stopped she laid on the bank." If this be the fact, then she did not stop at all after her first exhibition of caution in stopping, looking, and listening before attempting to cross. Further on he says she was in about the center of the track the train was on before he saw the approaching train and realized her danger; that is, the train was two or three seconds distant, if the other testimony of plaintiff be believed. It was for the jury to find the circumstances from this testimony, as well as to determine the credibility of the witnesses. The deceased having, according to the testimony, exercised care before going into a place of danger, then, when it was apparent, she was bound to exercise care in escaping from it. Whether her first act of caution was followed under a change of circumstances,—an advance from a place of safety to one of danger,—by negligence, was for the jury. Certainly, if, when she saw the train coming, as the learned judge of the court below found, she deliberately and consciously left a place of safety, either on the north-bound track or between the tracks, and attempted to leisurely cross the south-bound track in front of a locomotive, she was guilty of contributory negligence, and plaintiff cannot recover. But, in view of this evidence, whether she did so do, the law interrogates the jury, not the court. The law applicable to inconsistent statements of witnesses has been so clearly stated in an opinion by our Brother Mitchell in *Elly v.*

Railway Co. 158 Pa. St. 233, 27 Atl. 970, that any repetition of it is unnecessary. The judgment is reversed, and a procedendo is awarded.

(161 Pa. St. 36)

WALTERS v. PHILADELPHIA TRACTION CO.

(Supreme Court of Pennsylvania. April 2, 1894.)

INSTRUCTIONS—CONFLICTING EVIDENCE—STREET CARS—PASSENGERS.

1. In the presence of conflicting evidence, the court may properly tell the jury to try to reconcile it, and conclude that the witnesses intended to tell the truth.

2. Where the evidence conflicts as to whether the car plaintiff tried to mount stopped in answer to his signal, the court properly charged that, if the car came to such a condition of stopping as to induce plaintiff to believe that it was about to stop, and started before he got fairly in it, so as to injure him, he should recover.

Appeal from court of common pleas, Philadelphia county.

Action by Thomas Walters against the Philadelphia Traction Company for damages for personal injuries. Judgment for plaintiff. Defendant appeals. Affirmed.

Defendant assigned error on the following parts of the charge: "The jury should, at all times when testimony is conflicting, endeavor to reconcile it, and, if possible, come to the conclusion that the witnesses intend at least to tell the truth, although there is evidence of such a character as to impress the jury unfavorably. * * * The important question in this case is whether or not the car had stopped, or had come to such a condition of stopping as to induce the passenger to believe that it was about to stop; and if it had come to such a condition, and if he had come to that conclusion, and he was about to enter, and it was started before he got fairly into the car, and an accident occurred in consequence thereof, he is entitled to recover. * * * If, however, you should come to the conclusion that it had stopped, or was in the act of stopping, or was in such a condition of running or stopping as induced the plaintiff to think it was about to stop, then he had a right to get on; and if the car started before he was safely seated in the car, and an injury resulted therefrom, then your verdict should be for the plaintiff."

Thomas Leaming, for appellant. Samuel Peltz, for appellee.

PER CURIAM. Plaintiff's right to recover depended on questions of fact which were clearly for the consideration of the jury. These questions were properly submitted to them, with instructions which appear to be adequate and free from any error of which defendant has any just reason to complain. The only subject of complaint is that part of the charge recited in the specifi-

cation of error. There is nothing in either of these excerpts that would justify a reversal of the judgment. Judgment affirmed.

(161 Pa. St. 33)

SUPPLEE et al. v. HALFMANN.

(Supreme Court of Pennsylvania. April 2, 1894.)

SCIRE FACIAS—DEFENSE AS TO USE PLAINTIFF.

In scire facias to revive a 20-year old default judgment on a note, defendant, admitting that he had no defense against the original plaintiff, cannot allege, against one to whose use the judgment has been recently marked, a defense as to him, growing out of the fraudulent negotiation of the note before suit was begun on it.

Appeal from court of common pleas, Philadelphia county.

Scire facias to revive judgment, by J. W. Supplee & Co., to use of John Born, against Whildin D. Halfmann. Judgment for plaintiff. Defendant appeals. Affirmed.

John Houston Merrill and J. Willis Martin, for appellant. William H. Peace, for appellees.

PER CURIAM. In this scire facias to revive the judgment entered December 20, 1873, for want of an affidavit of defense, the defendant interposes by way of defense matters which arose, as he alleges, out of the fraudulent negotiation of the note on which said judgment was entered, and prior to the commencement of suit in that case. He admits that he had no defense to said note in the hands of the legal plaintiffs, J. W. Supplee & Co., but claims he had a good defense as against the person to whose use said judgment appears to have been marked on May 1, 1893, and should now be permitted to interpose said defense. In any view that can reasonably be taken of the affidavit, the court below was right in holding that it is insufficient. The alleged defense, if any ever existed, arose more than 20 years ago, and before the original action was brought. It is conceded that the judgment, when entered, was perfectly good and valid, and, for aught that appears, no defense thereto has arisen since. Judgment affirmed.

(161 Pa. St. 1)

ARNOLD v. PHILADELPHIA & R. R. CO.

(Supreme Court of Pennsylvania. April 2, 1894.)

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, who was slightly deaf, was struck by defendant's train at a street crossing. Her testimony that she stopped and looked and listened was corroborated. The accident occurred about 18 feet from where she stopped. One witness testified that a train could be seen for a distance of 120 feet from where she stopped, another 300 feet, and there was evidence for defendant that the train was running 8 miles per hour, and for plaintiff that

it was running 30 or 40 miles per hour. *Held* a question for the jury whether plaintiff was guilty of contributory negligence. Green and Fell, JJ., dissenting.

Appeal from court of common pleas, Northampton county; H. J. Reeder, Judge.

Action by Hannah S. Arnold against the Philadelphia & Reading Railroad Company for damages for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

Wm. C. Loos, for appellant. James W. Fox and Edward J. Fox, for appellee.

DEAN, J. The plaintiff, a young married woman, having no defect of sight, but somewhat deaf, while attempting to walk over defendant's road at a street crossing in South Bethlehem borough on 12th of October, 1892, was struck by the locomotive of defendant's passenger train, and seriously injured. She brought suit against the company for damages, averring negligence on its part in running the train at a high rate of speed over the public streets of a town, with no warning of its approach to persons about to use the grade crossing. The learned judge of the court below entered a compulsory nonsuit, for these reasons, as stated by him: "It is admitted by the plaintiff's own witnesses that at the place where she was struck, had she looked for a coming train, she could have seen it at a distance, according to one witness, of 120 feet; another said 180 feet; and 300 feet, according to another witness; and another witness says that, standing between the tracks, she could have seen 400 feet. Therefore it is perfectly clear that she must have been guilty of negligence in stepping on that track and not looking, because, if she had looked, she could have seen the approaching train, and gotten off the track. Therefore, crossing the track in her condition, deaf, unable to hear as well as persons usually do, she was bound all the more to use her eyes." The first point incumbent on plaintiff to establish was the negligence of defendant. The grade crossing was on the streets of a populous borough. There were neither guard gates nor watchman at this crossing. The train that struck her was on a down grade, and there was evidence that at the time it was running at a high rate of speed, and gave no warning of its approach by whistle or bell. It is not seriously questioned that there was evidence for the consideration of the jury as to absence of care according to the circumstances on part of defendant. Assuming, then,—as in reviewing a judgment of compulsory nonsuit we must assume,—that the jury, on the evidence, would have found defendant was negligent, was the plaintiff guilty of negligence which contributed to bring about the accident? As before quoted, the court below thought she was. Was it for the court or the jury, under the law, and in view of this evidence, to answer this question? Plaintiff and defend-

ant both had the right to use this crossing. Her right was subordinate to that of the railroad company. Care did not require the company to stop before reaching the crossing, and look out for travelers over it. It did require of her to stop and look out for trains. The duty of stopping, looking, and listening before going into a known dangerous place is only the rule which the common sense of mankind has imposed upon itself,—“Look where you are going.” Now, the plaintiff herself swears positively she stopped when about two feet from the outside rail, looked up and down the track, and listened. In this statement she is corroborated by three witnesses, Harvey Lambert, Idah Kutte, and William Unangst. So on this point there was evidence which necessarily was for the jury; that is, there was evidence tending to show she exhibited care according to the circumstances before venturing on the crossing. She was struck just as she was clearing the outside rail of the second track, about 18 feet from the point where she stopped, looked, and listened. She testifies that, neither seeing nor hearing a train up or down the road, she hastened as fast as she could across. Saw the train almost upon her when in the middle of the second track, and before she could get off was struck. There was conflicting evidence as to what distance a train could be seen from the point where she stopped to look. One witness states 120 feet, another 300 feet. There is also conflicting evidence as to the speed of the train at the time of the accident. But the court could not say, as an established fact, that she ought to have seen, or could have seen, this train where she stopped, and there have waited until it passed. Nor could the court say she ought to have stopped on the first track, and again have looked, or in the space between the up and down tracks. Whether, after doing what care, under the circumstances, required before going upon the crossing, she crossed as care demanded when on it, could only be determined by the jury from all the evidence. It is not manifest that, if this train were running at a high rate of speed on a down grade, it could have been seen from where plaintiff stopped at the time she stopped; therefore the rule laid down in *Myers v. Railroad Co.*, 150 Pa. St. 386, 24 Atl. 747, does not apply. In that case the evidence was undisputed that a train could have been seen for half a mile in either direction. That being the established fact, it necessarily followed that the plaintiff did not look. The inference of the appellee that the train must have been visible when plaintiff stopped is based on these facts: That, moving at the rate of 8 miles an hour, it would have moved less than 300 feet while she walked 18 feet. This assumes—First (what is disputed), that it could have been seen 300 feet distant; and, second (what is disputed), that it was going at the slow rate of 8 miles an hour. But take the distance at which the train could be seen at

less than half of 300 feet, and the speed 30 to 40 miles an hour, of which there was much more than a scintilla of evidence, and no such inference is warranted. True, the evidence of plaintiff was not definite and exact on either point, but the plaintiff, as is ruled in *Ely v. Railway Co.*, 158 Pa. St. 237, 27 Atl. 970, has a right to go to the jury, even when his own witnesses make contradictory statements. Taking all of the evidence offered by plaintiff, it was for the jury to say whether it disclosed a case of contributory negligence on her part, and not for the court. The judgment is reversed, and a procedendo awarded.

GREEN and FELL, JJ., dissent.

(161 Pa. St. 9)

CARPENTER v. UNITED STATES LIFE INS. CO. OF NEW YORK.

(Supreme Court of Pennsylvania. April 2, 1894.)

INSURABLE INTEREST—WHEN EXISTS.

One has an insurable interest in the life of another, who, out of friendship, and without any bonds of kinship, has assumed the position of father to him.

Appeal from court of common pleas, Lycoming county; Edwin Albright, Judge.

Action by Adaline Carpenter against the United States Life Insurance Company of New York. A nonsuit was granted, and plaintiff appeals. Reversed.

Watson & McLean, for appellant. S. J. Strauss, Addison Candor, and C. La Rue Munson, for appellee.

DEAN, J. Alanson B. Tyrell, a man about 60 years of age, living with his family near Wilkes Barre, had in his house, as a domestic, a poor girl, named Adaline Carpenter. So far as appears from the evidence, prompted solely by a benevolent and kindly disposition, this old man befriended this girl; sent her to school, and paid her expenses. In return, she, at times, for small wages, performed some services for him, such as keeping his books and copying his letters. He was a designer and builder of coal breakers, and seems to have had considerable business. On the 10th of December, 1892, he took out a policy of insurance on his life, in the sum of \$2,000, payable to himself, in the defendant company. He paid the first annual premium, \$104.84. Thirteen days thereafter, on the 23d of the same month, he assigned the policy, in writing, to Adaline Carpenter, sealed it in a package, and delivered it to her, with the injunction not to open it until after his death. Notice of the assignment, as provided by the policy, was duly given the company; and, without objection, acknowledgment of the notice was made by indorsement on a duplicate. On April 1, 1893, Tyrell died. Adaline Carpen-

ter inspected the package delivered to her, found in it the policy regularly assigned to her, and made proper proof of the death of the insured, and demand for payment. The company, on the ground that the policy was a wagering contract, refused payment. Thereupon, this suit was brought, and the learned judge of the court below, holding that, so far as concerned this plaintiff, the contract was a wagering contract, and therefore void, nonsuited her; and from that judgment we have this appeal.

The judgment of the court below is based on *Gilbert v. Moose*, 104 Pa. St. 74; *Melly v. Hershberger*, 16 Wkly. Notes Cas. 186; *Downey v. Hoffer*, 110 Pa. St. 109, 20 Atl. 655,—and that line of cases which holds that the absolute assignment of a policy to one having no interest in the life of the insured, the assignor parting with all control over the policy, renders it a wagering contract as to such assignee, and he cannot recover thereon. It seems to us the learned judge's conclusion is not drawn from all the material facts, but only from a part of them. At the trial, counsel on both sides admitted the following facts, which were put upon the record: "Alanson B. Tyrell, after he had made the assignment of the policy in question to the plaintiff, placed the policy and the assignment and the receipt in an envelope, and sealed it, and inclosed it in a package, and delivered it to the plaintiff, and it has remained in her possession ever since; and further, that, at the time the papers in question were delivered to the plaintiff, she was not a creditor of the insured, nor a relative, nor connected by ties of blood or marriage, but only a friend of the insured." The facts, as contained in this admission, were assumed to be all of the material facts bearing on the issue. From them it was inferred the plaintiff had no insurable interest in the life of Tyrell; and as he had, by the assignment and delivery of the policy, relinquished control over it, it was, under the authority of the line of cases already noticed, held to be a wagering contract. But do all the facts of which there was evidence, when taken together, warrant the conclusion that this plaintiff had no insurable interest in the life of Tyrell? If Tyrell, when she was young, had taken this girl into his family, treated her as a member of it, reared and educated her; when she was of age, had assisted her in getting remunerative employment, had watched over her, and interested himself in her welfare,—it could have been truthfully said he stood in the place of a parent to her, not by virtue of the legal relation of a child born to him in wedlock, or by adoption under our statute, but by his voluntary assumption of the paternal relation towards her, with her consent. Without any legal obligation other than friend, he chose to assume all the burdens incident to this domestic relation of parent and child. His conduct and

promises for years warranted her in believing the relation would continue while his life lasted. Having thus raised her from the humbler station in which he found her, he was continuing his kindness at the date the policy was assigned; for this offer, although rejected by the court as immaterial, must be taken as the facts: Plaintiff, among other facts, offers to prove: "That, during the first two years of her acquaintance with the insured, she was a servant girl in his house, he being a married man with a family, and about sixty years of age; that, about the time she quit his service, he told her that she ought to educate herself, so that she might be fit to earn a living by keeping books and type writing; that he then told her, if she would go to a business college at Wilkes Barre, he would pay her tuition; that she went to a business college, and was there for several months, and studied bookkeeping; that the insured paid her tuition there; that when she left the business college the insured purchased for her a desk and chair, and secured her desk room in the office of Mr. Gunster, of Wilkes Barre; that, when in Mr. Gunster's office, she kept the insured's time book (the insured being a builder of coal breakers, and employing a large number of men); that for keeping said books the insured paid her at the rate of \$20 per month; that she left the office of Mr. Gunster in February, 1893, and came to Williamsport, for the purpose of entering Pott's Commercial College, to learn shorthand writing and type writing; that the insured told her before she left Wilkes Barre that he would pay her tuition at said college; that she entered said college, and studied shorthand writing and type writing, and the insured paid her tuition; that after she came to Williamsport she received several letters from S. W. Tyrell, the son of the insured, informing her of his father's sickness, and that she also received two letters in the mean time from the insured, stating the fact of his sickness, and inquiring how she was getting along; that, in response to said letters, she went to the home of her father and mother, in the borough of Edwadsville, near the home of the insured, and while there the insured died."

As this case stood upon the record, the plaintiff, as the assignee of the deceased, stood in his place,—was his representative. So far as appears, she was making no claim adverse to the right of deceased, or any representative of his right. The antagonist was the obligor in the policy. Therefore, she was not incompetent, under clause e, § 5, Act 1887. Her competency as a witness against some other representative of the deceased assignor could not be properly raised in this issue between these parties. Therefore, the offer was material, the witness was competent, and the facts offered to be proven must be taken as proven. The court below, in the opinion refusing to take off the non-

suit, treats these facts as proven, but considers them wholly immaterial. We think, having in view these facts, as well as those admitted of record, the plaintiff had an insurable interest in the life of the deceased. It does not matter that this interest was one without legal obligation on part of the insured. It was a relation in every other respect parental. Peculiarly and otherwise he assumed a parent's part towards her, and she was justified in expecting the continuance of it. The question in *Gilbert v. Moose*, supra, was as stated by this court in these words: "Can one having no interest in the life of the insured, and for the purpose of speculation only, acquire, by assignment or otherwise, such title to the policy as the law will enforce?" In *Downey v. Hoffer*, supra, this court assumes, with the court below, that the purchase by Downey was purely for a speculative purpose, and says: "The mischief resulting from a sale of the policy for purposes of speculating on human life is so contrary to the policy of the law, and so in conflict with the just principles of life insurance that it is unsafe to relax the rule that the holder of the policy must have some pecuniary interest in the life of the insured." And so will all the other cases cited by appellee where no recovery by the assignee of a policy was permitted. In each, the holder of the policy, was interested in the death, rather than in the life, of the insured, and the policy was speculative. In the case before us the plaintiff's interest was wholly in the life of the insured. From the facts, the benefit to her from his fatherly care and pecuniary aid would, in a very few years, have far more than equaled the \$2,000 policy assigned to her. From the severance of this relation by death, she perhaps sustains a greater pecuniary loss than any of his children. There may be an insurable interest not accompanied by kinship. Such interest implies a pecuniary interest, present or prospective. *Cooke, Life Ins.* § 59. A moral obligation is sufficient to support it. *Ferguson v. Insurance Co.*, 32 Hun, 306. A creditor has an insurable interest in the life of his debtor, who has been discharged in bankruptcy. Says May on Insurance (section 107): "The relationship seems to be of but little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doctrine of the latest of the Massachusetts cases before cited is broad enough to cover a case where there is no relationship at all, save one, perhaps, of mere friendship. If the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insurance." Here the plaintiff had nothing whatever to do with the procurement of the policy, or its assignment; paid no part of the premium, and, so far as appears, never expected to pay any, for she was ignorant of its existence during the lifetime of the insured. She had substantial

grounds for expecting decided pecuniary advantage from his life. Why, then, should the contract be termed speculative? Her expectancy, except in the one feature,—the absence of legal obligation to enforce it,—was as well founded as that of a wife or creditor. If a voluntary copartnership gives to each partner an insurable interest in the lives of the others; if the relation of superintendent or manager of a business concern gives to his employers an insurable interest in the life of the superintendent or manager, as is well settled,—then the voluntary relation here gave to this plaintiff an insurable interest in the life of one who, in all pecuniary respects, occupied towards her the place of a parent, and the court below ought not to have held otherwise. The judgment is reversed, and a *procedendo* is awarded.

(160 Pa. St. 568)

HOFFMEISTER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 2, 1894.)

ACCIDENT AT RAILROAD CROSSING—CONTRIBUTORY NEGLIGENCE—QUESTION, FOR JURY.

Where there was evidence that deceased stopped, and looked and listened, before going upon a railroad crossing, the question whether, after going upon a track, and seeing a locomotive a few seconds away, she still exercised care, is for the jury.

Appeal from court of common pleas, Philadelphia county; Biddle, Judge.

Action by Harry Hoffmeister against the Pennsylvania Railroad Company for the death of his wife. A nonsuit was granted, and plaintiff appeals. Reversed.

Lincoln L. Eyre and Benjamin F. Hughes, for appellant. David W. Sellers, for appellee.

DEAN, J. A public street of the city of Philadelphia, known as "Hart Lane," crosses the New York division of defendant's railroad. At the point of crossing there are five railroad tracks, having a general direction east and west. The street runs north and south, almost at right angles to the railroad. On the north side the approach of the street to the railroad, close up to the tracks, is a cut between embankments about 12 feet in height. On the railroad, west of the crossing about 360 feet, is a sharp curve, beyond which an approaching train going east cannot be seen. On the 19th of November, 1890, Emma Hoffmeister, wife of plaintiff, with three others,—George Stevenson, Andy Zolters, and Kate Koreko,—all residents of the city south of the railroad, were working for Michael Simon on a truck farm north of the railroad. About 5 o'clock in the evening they stopped work, and together started for home. Their way was by Hart lane, crossing over the railroad. As it took from 15 to 20 minutes to walk from the truck field to the cross-

ing, at that time of the year it was getting dark when they reached it. There was testimony that, by reason of the embankment, nothing could be seen, up or down the railroad tracks, until almost on them, but that when near the tracks they stopped and listened before attempting to cross. Neither seeing nor hearing trains, they started to cross the five tracks. Emma Hoffmeister was behind the others, following them closely. A passenger train running at the speed of 40 miles an hour from the west around the curve struck and killed her. The headlight of the locomotive of the coming train could be seen from four to six seconds before it reached the crossing where the deceased was struck; but, before it was seen, the testimony of Stevenson and Kate Koreko is, they were on the tracks. There was evidence on part of plaintiff that no whistle was sounded or bell rung. The learned judge of the court below, on motion of defendant's counsel, nonsuited plaintiff, because, as given in his own words: "There is no better settled principle of law connected with accidents of negligence, numerous as they are, than this: That no matter how negligent the railroad company may be, nobody has the right to cross in the face of a moving locomotive. You cannot attempt to get across the track in the face of a locomotive, where you have had an opportunity of seeing, and then complain that the company did not sound a whistle or ring a bell. Your own contributory negligence defeats your action. Now, in this case, it is very clear that there were four people, and three of them are the only people to testify to what happened; and they testified positively that they saw the train, and deliberately walked across in perfect safety. This lady had a bag of spinach on her head, and she was also notified by these people calling to her that the train was coming; and she seems to have taken the risk of getting across, but was not so successful as the parties who did get across. It seems to me, therefore, that it presents just that case,—that it was an attempt to go across in the face of a moving train. I therefore grant a nonsuit."

Neither side disputes the law as here stated, and, as only the plaintiff's testimony was heard, the facts must be taken to be those of which he gave evidence. If, before getting on the railroad, they saw or heard this train, and then deliberately walked across, as assumed by the learned judge, the nonsuit was properly ordered. But the testimony of Stevenson and Kate Koreko does not show this to be the fact. On the contrary, it tends to establish, with more or less positiveness, they were on the tracks when the headlight was first seen; they escaped because a few feet in advance of the deceased, and were thus enabled to clear the track while she met her death. If the party stopped, and looked and listened, before going upon the tracks; then, getting no warning from the approaching train, they attempted to cross; then, when

on the tracks, they got only four to six seconds' warning from the headlight of the coming locomotive,—it seems to us the question of contributory negligence was for the jury. As we read the printed testimony, the first indication of danger was the headlight, after the alleged negligence of defendant had lured them into a situation of peril. Then, it was go on, stop, or turn back, and must have seemed so to them. Whether there was absence of care, according to the circumstances, was peculiarly the province of the jury to decide; and so do all the cases from Railroad Co. v. Helleman, 49 Pa. St. 60, to Ely v. Railroad Co., 158 Pa. St. 233, 27 Atl. 970, hold. Assuming the deceased exercised care, according to the circumstances, before going upon the tracks,—stopped, looked, and listened for a warning which it was defendant's duty to give, but which it neglected,—then was she negligent when she discovered danger was imminent, after she got upon the crossing? True, she was still bound to exercise care, but care according to the circumstances, and these had changed from the time she stopped and listened before going upon the tracks. Then she was in a place of safety, and, if defendant had given proper warning, she was bound to hear and heed it; but, being upon a crossing over five tracks without negligence, then it was for the jury to say whether she was negligent in not turning back, or in not hastening her steps, or in not stopping between the tracks with a locomotive four to six seconds off. The judgment is reversed, and a procedendo awarded.

(161 Pa. St. 23)

**GUNDELSWEILER v. H. W. JAYNE
CHEMICAL CO.**

(Supreme Court of Pennsylvania. April 2,
1894.)

NEGLIGENCE—EVIDENCE—NONSUIT.

Where the evidence is not such as to warrant the submission of a question of negligence to the jury, a refusal to take off a nonsuit is not error.

Appeal from court of common pleas, Philadelphia county.

Action by Richard Gundelsweiler, by his father and next friend, Joseph Gundelsweiler, against the H. W. Jayne Chemical Company, for personal injuries caused by defendant's negligence, in which there was a judgment of nonsuit. From an order denying his motion to take off the nonsuit, plaintiff appeals. Affirmed.

George W. Shoemaker and Francis G. Gallagher, for appellant. William C. Hannis, for appellee.

PER CURIAM. Conceding, as we must, that, on this appeal from refusal of the court below to take off the judgment of nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact which might be fairly found by a jury, or drawn by them,

from the testimony adduced to sustain his claim, we are unable to discover anything in the evidence to justify a finding that the injury complained of resulted from any negligence of the defendant company. Without reviewing the testimony relied on, it is sufficient to say that it is not such as any trial judge would be warranted in submitting to a jury, on the controlling question of defendant's negligence as the cause of said injury, and hence there was no error in refusing to take off the nonsuit. Judgment affirmed.

(161 Pa. St. 38)

**CITY OF PHILADELPHIA, to use of
PARKER et al., v. HENRY.**

(No. 253.)

(Supreme Court of Pennsylvania. April 2,
1894.)

**SIDEWALKS—DESTRUCTION BY CITY—COST OF RE-
LAYING.**

When a good sidewalk is torn up and destroyed by the city in changing the street grade, the lot owner cannot be taxed with the cost of a new one.

Appeal from court of common pleas, Philadelphia county; Willson, Judge.

Scire facias sur lien by the city of Philadelphia, to the use of Parker & Smart, against Charles W. Henry. Judgment for defendant. Plaintiff appeals. Affirmed.

William W. Smithers, for appellants. J. Bayard Henry, for appellee.

PER CURIAM. This and two other municipal liens, for repairing sidewalk pavements which were torn up and destroyed by the city authorities in changing the grade of Broad street, were argued together, and may be disposed of by briefly referring to the undisputed facts, and a few of the authorities applicable thereto. In substance, the following facts were admitted on the trial in the court below: The sidewalk pavement in front of the liened premises was put down by the defendant, at his own expense, about two years before the grade of Broad street, at that point, was changed. In changing said grade, defendant's pavement, then in perfect order and condition, was torn up, and practically destroyed, by the city authorities. The learned trial judge directed a verdict in favor of the plaintiff subject to the opinion of the court on the following reserved question, predicated of said admitted facts: "Whether, in view of the fact that the city herself, at the time when she changed the grade of Broad street, had destroyed a pavement that was in good condition of repair, she is entitled to recover in this case." This cardinal question of law was promptly and correctly disposed of by entering judgment for defendant non obstante veredicto. While nothing was said by the learned court below in support of this judgment, it may be safely assumed that its rendition was prompted by the mani-

fest illegality and injustice of such a claim against a private property owner, as well as the propriety of adhering to the principles enunciated by this court in several cases, among which are *Wistar v. Philadelphia*, 80 Pa. St. 505, 111 Pa. St. 604, 4 Atl. 511; and *Philadelphia v. Wistar*, 92 Pa. St. 404. In the former, Mr. Chief Justice Agnew said: "If, while the pavement is good, and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be exaction, not taxation." Referring to this and a subsequent case, the city solicitor, in one of his opinions cited by defendant, says: "It must be borne in mind, however, that the city has no right to require a property owner to take up a good sidewalk pavement, and put down another and different one." It should not be forgotten that the foundation of the power to tax specially is the special benefit that had been conferred on the owner of the property. It is difficult to conceive of anything more unjust and vexatious to property owners than such claims as the one now under consideration. It is to be regretted that such cases find their way into the courts. Judgment affirmed.

**CITY OF PHILADELPHIA, to use of
PARKER et al., v. HENRY.**
(No. 254.)

(Supreme Court of Pennsylvania. April 2,
1894.)

Appeal from court of common pleas, Philadelphia county; Willson, Judge.

Scire facias sur lien by the city of Philadelphia, to the use of Parker & Smart, against Charles W. Henry. Judgment for defendant. Plaintiff appeals. Affirmed.

William W. Smithers, for appellant. J. Bayard Henry, for appellee.

PER CURIAM. This case was argued with City of Philadelphia v. Henry (No. 253 of this term) 28 Atl. 948, and for reasons suggested in that case this judgment should be affirmed. Judgment affirmed.

**CITY OF PHILADELPHIA, to use of
PARKER et al., v. HENRY.**
(No. 255.)

(Supreme Court of Pennsylvania. April 2,
1894.)

Appeal from court of common pleas, Philadelphia county; Willson, Judge.

Scire facias sur lien by the city of Philadelphia, to the use of Parker & Smart, against Charles W. Henry. Judgment for defendant. Plaintiff appeals. Affirmed.

William W. Smithers, for appellant. J. Bayard Henry, for appellee.

PER CURIAM. This case was argued with City of Philadelphia v. Henry (No. 253 of this term) 28 Atl. 948, and for reasons suggested in that case the judgment in this should be affirmed.

(161 Pa. St. 58)

MURPHY et ux. v. CORRIGAN.

(Supreme Court of Pennsylvania. April 9,
1894.)

**PARENT AND CHILD — CONTRACT FOR SERVICES—
EVIDENCE.**

A father's declarations of appreciation of the housekeeping services of his daughter, who, with her children, lived with him up to the time of his second marriage, and of an intention that she should be paid after his death, in answer to a neighbor's suggestion that he should pay her wages, are not evidence of an express contract, such as to support a claim against his estate, when said daughter has successfully objected to production of his will to show what provision he made for her.

Appeal from court of common pleas, Allegheny county; S. A. McClung, Judge.

Assumpsit by Peter P. Murphy and Mary S. Murphy, his wife, in right of the latter against Margaret Corrigan, executrix of the will of James Corrigan, deceased. Judgment for plaintiffs. Defendant appeals. Reversed.

John D. Watson and Daniel Harrison, for appellant. A. V. D. Watterson and A. B. Reid, for appellees.

McCOLLUM, J. The burden was on the plaintiff to prove by competent evidence that the services for which she claimed compensation in this action were rendered under an express contract with the decedent to pay for them a stipulated sum, or what they were worth. It was for the court to determine whether the evidence, if believed, was sufficient to establish such a contract, and it was for the jury to decide whether it was credible. The learned trial judge charged that, in order to recover, it was necessary for the plaintiff to prove by clear, direct, and positive evidence that there was an express contract to pay for the services; and in this he was in accord with the well-settled rule or principle governing actions by children for services rendered to their parents. If any error was committed by him it was in holding that the evidence produced by the plaintiff in support of her claim was sufficient to justify the jury in finding that her services to her father were rendered under an express contract. It is claimed that in so doing he erred, and we are therefore required to examine and consider the evidence, and to determine whether it has the qualities which have been repeatedly adjudged to be essential to sustain an action of this character. The facts appearing in the undisputed testimony are that the plaintiff, after the death of her mother, lived with and was supported by her father, as before, until his marriage in 1888; that during that time she kept house for him, and, in the language of one of her witnesses, "they lived happy together, like any father and daughter would." She was his only child, and before the marriage referred to had had two children, who, like herself, were cared for and sup-

ported by him. In conversation with his neighbors he often spoke approvingly of her services, and declared that she would be well paid for them, as at his death she would have all his property. The learned judge conceded that declarations of this nature did not create or tend to establish the relation of master and servant between the father and daughter in respect to the services sued for, but he thought that Mrs. Haney's testimony contained an admission by the former that they were rendered under an express agreement with him that the latter should be paid for them at his death. Five witnesses were called to support her claim. None of them testified to being present at any conversation between the father and daughter in relation to her services, or the payment of wages for them. All the testimony on this point consisted of the decedent's declarations to his neighbors, which evinced his appreciation of his daughter's services, and his intention that she should have at his death, by inheritance or by will, all that he was worth; but there was no element of contract in it, unless it can be found in what Mrs. Haney testified he told her in 1880. She was the plaintiff's first and last witness, and when first called she testified she told the decedent he ought to pay his daughter wages,—“to pay her a certain sum every week, and he would say then she would get wages, and good wages, but she would have to wait until his death. He always said that until the time of his second marriage, and he was then an old man,—77 years old.” When she was recalled and particularly interrogated as to a conversation with him respecting his daughter's demand for wages, she testified as follows: “On one occasion he was talking to me. He was angry, and he said that Mollie was crying, wanting this and that and wanting something else, and had finally asked him for wages, and said if he didn't give it to her she would go and live out,—if he did not give her wages. Then I suggested that he should give her wages, and he always said that he would give them to her, but she would have to wait until his death.” The testimony we have quoted was elicited on the examination in chief, and it was not essentially modified on the cross-examination. There were some expressions in the latter which at first blush seemed to indicate that the decedent admitted to Mrs. Haney that he had agreed or promised to pay his daughter wages for her services, but a careful consideration of her entire testimony has satisfied us that it was substantially the same as the testimony of the other witnesses, which the learned judge rightly held did not prove or tend to prove that there was an express contract between the parties. To hold that there is evidence in this case to support a finding that there was such a contract is to depart from the well-settled rule governing actions of this nature. It is a reasonable and just rule,

and experience has shown that it is necessary to protect the estates of the dead from claims usually preferred by children who are dissatisfied with the disposition their parents have made of their own property. As there was no proof in this case of an express contract under which the services sued for were rendered, it is quite probable that the litigation was born of the feeling of the daughter and her friends in the neighborhood that the decedent should not have married again, or made a will, and thus diminished the inheritance she would have received if he had remained a widower and died intestate. It seems that the jury shared this feeling, as they gave her for her services nearly three dollars a week more than she charged for them in the account filed with her statement of claim. It appears from the record that the appellant offered the decedent's will to show what provision he made in it for his daughter, and that it was rejected on her objection that it was irrelevant. It is not likely that any objection would have been made to its admission, or that it would have been offered if it had cut her off entirely, or with a mere pittance. We are satisfied, upon a careful consideration of the case, that it is another illustration of the wisdom of the rule which requires clear and unequivocal evidence of an express contract to support actions by children against the estates of their parents for services rendered to the latter while living with and supported by them. The specification of error is sustained. Judgment reversed.

(190 Pa. St. 367)

McDEVITT et al. v. PEOPLE'S NATURAL GAS CO.

(Supreme Court of Pennsylvania. March 26, 1894.)

GAS COMPANIES—PIPES IN CITY STREETS—DAMAGES TO OWNERS.

1. Sidewalks are a part of the street, in so far as concerns the abutting owners' right to damages for the laying of pipes thereunder.
2. Abutting owners on a city street have title in the street, subject to all the urban servitudes of subservice pipes and subways.
3. If abutting owners are injured by the proximity of a natural gas main laid in the street of a city, their remedy is by action, and not by appointment of viewers under the natural gas act of 1885, as for damages caused by the company's entry on private property.

Appeal from court of common pleas, Allegheny county.

Petition by James A. McDvitt, Albert J. Barr and Mary A. Barr, his wife, in right of said Mary A., and E. C. Schmertz and Amelia Schmertz, his wife, in right of said Amelia, for the appointment of viewers to appraise the damages from the laying of the main of the People's Natural Gas Company under the sidewalk in front of petitioners' property. Granted. From the appraisal of the viewers, defendant appealed. From a

judgment entered on a verdict for plaintiffs, defendant appeals. Reversed.

The following are the assignments of error which are sustained:

"(1) The court below erred in overruling the appellant's exceptions to the petition to appoint viewers to assess damages proper to be paid to them for the occupation of certain property, etc., described in said petition, which exceptions are as follows, to wit: 'First. They deny that the petitioners have any title to any part of the premises occupied by exceptants described in said petition, the property line of the petitioners being the street line of Forbes street, as exceptants believe and expect to be able to prove. Second. That Forbes street, for the entire width of it, including cartways and sidewalks, is a public highway appropriated by law as and for a public street in the city of Pittsburgh, and as such public street includes in its dedication public uses under the surface thereof, as well as on it, for its whole width. That exceptants are a corporation duly organized under an act of assembly of this commonwealth, approved May 29, 1885, entitled "An act for the organization and regulation of natural gas companies;" and the purposes of their organization are by said act declared to be public purposes, and that in pursuance thereof they are vested with authority to enter in and upon streets, lanes, and alleys of the city of Pittsburgh for the purpose of laying their pipes, etc., for the transmission of natural gas to consumers, and that for such taking no compensation is required to be given. Third. That this proceeding is not the proper one for securing remedy for consequential damages, if any, resulting to other property of petitioners by the use of the street as described in said petition. Fourth. That for the taking aforesaid the forms of the statute have not been complied with.'"

"(4) The court erred in refusing appellant's second point: 'That the use of Forbes street by defendant is a public use, and as the owners of property abutting on public streets in the city of Pittsburgh, including Forbes street, have no rights therein, except such as are subordinate to the public use thereof, plaintiffs are not entitled to compensation for the use thereof by defendant under the natural gas act of 1885, such use being authorized by ordinance of the city of Pittsburgh.'

"(5) The court below erred in refusing appellant's third point: 'That in this proceeding damages for an actual appropriation or taking can alone be recovered, and not consequential damages; and as plaintiffs do not aver any such taking or appropriation of their property, or any easement thereon, they cannot recover.'"

"(7) The court below erred in refusing appellant's fifth point: 'If the court should refuse to affirm the foregoing points, it is requested to instruct the jury that plaintiffs

can only, in this proceeding, recover damages caused by the laying or construction of the pipe line, in itself, and not for injuries arising from the future use thereof.'

"(8) The court below erred in refusing appellant's sixth point: 'Abutting property owners are not entitled to an assessment of damages under the natural gas act of May 29, 1885, where gas pipes are laid in the public street under legislative and municipal authority.'

"(9) The court below erred in refusing appellant's seventh point: 'The plaintiffs have not shown any taking or appropriation by the defendant company of any private property of the plaintiffs, or of any easement thereon, such as to entitle the plaintiffs to maintain this proceeding.'"

"The court below erred in charging the jury as follows: 'The next suggestion is the one you have heard discussed through the case in reference to the use of the pipe, as distinguished from the pipe itself. The defendant's counsel contends that all they are responsible for is the damage done by the laying of the pipe itself, and that we cannot consider the damages arising from its use. This, as I have said, is not the law, in my judgment. But what is the use that you are to consider? It is the lawful use of those pipes. Of course, you must consider, when a construction of this sort is made, the purpose for which it is made, and you have a right to consider that it is to be used for gas, instead of water. Any legitimate damage arising from that you have a right to consider, but you have not a right to consider any damages that might possibly arise by an improper or negligent use of the pipe. I do not know whether I can illustrate that to you so as to show you the distinction. You can very readily see, however, the injustice that would be done to undertake now to give damages for the burning of a house hereafter which might be erected upon that property, by some improper conduct of the defendants, because, if that occurs, there is an action which the party who suffers the loss may have by reason of the negligence of the defendants; and that you cannot estimate now, and especially in view of the fact that the property is not built upon at all. You cannot undertake to say now what sort of houses will be built there,—what sort of houses will be in danger,—and therefore you would be perfectly at sea. The true rule is this: You have a right to consider, in view of the property as it now lies,—unbuilt upon and unoccupied,—what would be the difference in the value of that property, for selling purposes, by reason of the anticipated danger from the legitimate and lawful use of the pipe line for the purpose for which it was designed, and that is all you can consider. How much that will be is for you to determine. All of these things are to a certain extent uncertain, and they must be left to the good sense and judgment of the jury.

But remember that all these considerations are simply as to the present selling value of the property, in view of the circumstances, and nothing more. Therefore, you cannot undertake to anticipate the damages which may arise from an unlawful use of the property. Take the testimony of the plaintiffs, on one side, showing the property was damaged, and take the testimony of the defendants, showing, on the other hand, that it was benefited, and apply your own judgment as to whether or not that property was damaged by the laying of this pipe for the purposes for which it was intended. And right here I may say, in reference to the digging of the sidewalks, the same rule applies. It must be the proper, legitimate, and lawful exercise of the power; and therefore you would have the right to consider what injury, if any, was done by the digging into the sidewalk, the inconvenience which occurred during the time of its construction by digging a ditch, and leaving the pipe in it, if it were filled up properly. If they failed to fill it up properly, they were derelict in their duty, but that is not an element of damage in a proceeding like this. Such damage can only be recovered by a proper action for that special injury, and therefore any injury from the failure to relay the pavement as it was originally laid ought to be excluded."

S. Schoyer, Jr., and W. S. Miller, for appellants. Geo. C. Wilson and F. M. Magee, for appellee.

WILLIAMS, J. The People's Natural Gas Company was incorporated under the act of 1885 (P. L. 29), known as the "Natural Gas Act," for the purpose of supplying natural gas to the citizens of Pittsburgh for use as fuel. The city had given its permission to the company to occupy the streets with its mains and service pipes, and had undertaken to impose certain modes and restrictions upon it, in the manner of conducting its business, that have since been held to be unauthorized by law, and therefore without force or effect. Pittsburgh's Appeal, 115 Pa. St. 4, 7 Atl. 778. Pending the litigation over this subject the company began laying its mains into the city, and in July, 1896, entered upon Forbes street, in the city, for that purpose. The appellees, who are the owners of lots on said street, then began proceedings by bill in equity to restrain the company from laying its gas main under the sidewalk in front of their premises on Forbes street. Relief was asked on two grounds: First, because the ordinances of the city of Pittsburgh had not been complied with by the company; second, because the sidewalks along the sides of the cartways were not within the meaning of the act of 1885, and were no part of the highways, but were private property, except for the purposes of passage by pedestrians. A preliminary in-

junction was granted, which was afterwards dissolved on condition that the company should execute a bond to indemnify the plaintiffs in that case for any loss they might sustain by reason of the laying of said main under the sidewalk in front of their premises. The bond was given, and the gas main laid. The plaintiffs then made application for the appointment of viewers to appraise the damages done to their property by the laying of the main under the sidewalk. Viewers were appointed, and an appraisal of the damages was made by them, which was appealed from. On a trial before a jury a verdict has been rendered against the company for a few cents less than \$5,500, and the judgment entered thereon is now before us for review.

The first question, and a controlling one, is whether the proceedings on the application for the appointment of viewers in this case can be sustained. It is urged that this question has already been passed upon by this court in a *per curiam* opinion (7 Atl. 588), disposing of the appeal by this company from the decree of the court below requiring a bond to be given as a condition precedent to the dissolution of the injunction restraining the laying of the gas main under the sidewalk in front of the premises of the plaintiffs. It is probable the *per curiam* was written under the impression that the property affected was suburban. The question then raised was over the power of the court to impose the condition. While it might have been unnecessary, it could not be said to be error, to require the giving of the bond, since the plaintiffs were alleging that they had suffered, or would suffer, direct injury, in the disturbed condition of a sidewalk which it was their duty to keep in repair, and a consequential injury to their land abutting thereon. For whatever damage the company might do in the laying of its gas main, it was liable, and the chancellor had the power to require security to be given in advance for the payment of the amount, when properly ascertained. Beyond the question raised by the appeal, and decided by this court, the case is not authority. Upon that question its authority is unquestioned. We are in a position, therefore, to enter unembarrassed upon a consideration of the subject brought to our attention by the first assignment of error. The act of 1885 confers the right of eminent domain on companies formed for the transportation of natural gas. In the exercise of this right, they may enter upon private property, or upon public streets or highways. If the entry is upon private property, the company must try "to agree with the owner as to the damage properly payable for an easement in his or her property, if such owner can be found and is *sui juris*." Failing to agree with the owner, the corporation must tender him a bond to secure the payment of damages, and, if this is refused, must

apply to the court of common pleas of the proper county to approve the sufficiency of the bond. After this has been done, viewers may be appointed by the court to assess the damages proper to be paid to the property owner "for the easement appropriated by the company." If the entry is upon a public street in a borough or city, the corporation must first procure the consent of the municipality, expressed "by ordinance duly passed and approved." So long as the gas main follows the street, the entry upon and occupation of the street is under the authority of the municipality. Whenever it leaves the street, and enters the private property of an individual, then the duty to negotiate with the owner arises, since entry upon and occupation of private property must be under authority derived from the owner. Forbes street was a city highway, and subject, like all other streets in a city, to urban servitudes for the benefit of the public. In land taken for a highway in the country, the easement acquired by the public is only for the purposes of a way over the surface. For all other purposes the land may be occupied by the owner, so long as the public easement is not disturbed. We accordingly held in *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 105, that the maintenance of a pipe line under such a highway imposed an additional servitude upon the land. It may be a very slight one, but to some extent it abridges the rights of the landowner in the soil. Our Brother Sterrett said in that case: "As to streets and alleys in cities and boroughs, there are reasons why a different rule, to some extent, should prevail." These reasons are obvious. The necessity for drainage, for a water supply, for gas for purposes of lighting, for natural or fuel gas for heat, for subways for telegraph and other wires, and for other urban necessities or conveniences, gives to the municipality a control over the subsurface that the township has not. Property in a city is no less sacred than property in the country. The title of the owner is neither better nor worse because of the location of his land. But its situation may subject it to a greater servitude in favor of the public in a large, compactly built city than would be imposed upon it in the open country. The city has the right to use the streets and alleys, to whatever depth below the surface it may be desirable to go, for sewers, gas and water mains, and any other urban uses. In taking the streets for these necessary or desirable purposes, it is acting, not for its own profit, but for the public good. It is the representative of the inhabitants of the city, considering their health, their family comfort, and their business needs; and every lot owner shares in the benefits which such an appropriation of the streets and alleys confers. If the city abridges his control over the soil in and under the streets, it compensates him by making him a sharer in the public ad-

vantages that result from proper drainage, from an abundant water supply, from the general distribution of gas, and the like. The disturbance of the owner's control over the subsurface of the streets is, in a legal sense, an invasion of his rights, but it is *damnum absque injuria*. He has no right of action against the municipality therefor. *Dill. Mun. Corp.* §§ 691, 699; *Ang. Highw.* §§ 25, 312; *Elliott, Roads & S.* 299; *Lockhart v. Railway Co.*, 139 Pa. St. 123, 21 Atl. 26; *Sterling's Appeal*, 111 Pa. St. 35, 2 Atl. 105. The use of the surface is not restricted to the modes of travel in common use when the street is opened, but such improved methods of travel as the public interest requires may be adopted, with the consent of the municipality. In *Rafferty v. Traction Co.*, 147 Pa. St. 579, 23 Atl. 884, we held that the operation of a street railway on a public street, when authorized by law, does not impose an additional servitude on the land, whether the railway company employs horses as motive power, or a cable, or electricity. It is a legitimate use of the surface in aid of the public right of passage over the streets. The act of 1835 declares the transportation and supply of natural gas to be a public use, confers upon the corporations organized under its provisions the right of eminent domain, and requires them to furnish natural gas to consumers along their lines, or within the districts supplied by them, respectively. The appellant was organized under the act of 1835. It came to the city of Pittsburgh proposing to furnish its citizens with natural gas as a fuel. The city was then to judge whether such fuel was desirable, and whether its introduction would be a convenience to its citizens so great as to justify the occupancy of the public streets by its mains and service pipes. This question was decided in favor of the company, and permission was given to use the streets of the city as a means of reaching customers. Under this permission, it might lawfully enter upon the streets, as we have already seen, to lay its pipes, without liability to lot owners therefor.

But it is contended that the sidewalks are not a part of the street, and that, in laying its pipes under the sidewalk, the gas company has entered private property by virtue of its power of eminent domain, and must treat with the owner for the damages it may have done. This contention cannot be sustained. The act of 1847 gives to cities the power "to cause to be graded, paved or macadamized any public street, lane or alley or parts thereof which is now or may hereafter be laid out and opened in any of the said cities * * * and to regulate grade pave and repave, curb and recurb, the said footways or sidewalks," and to make regulations concerning the deposit of lumber, building material, or other articles "on any of the said footways, sidewalks or other portions of the said streets or alleys." The

street includes the whole of the land laid out for public use as a highway. The city determines how much of it shall be devoted to a cartway, and how much to a footway, and regulates the grading and paving of both. The separation of one from the other by a line of curbing is for the security of that part of the public that passes along the streets on foot, and for no other purpose. The municipality has the same control over the sidewalks that it has over the carriage ways. *Livingston v. Wolf*, 136 Pa. St. 533, 20 Atl. 551. The learned judge of the court below took the same view of this question, and affirmed the defendant's first point, which asked an instruction that the "defendants have the same right in the sidewalks as they would have in that portion of the street lying between the curbstones." The situation of the defendant under this ruling was precisely the same as it would have been had the gas main been laid under the cartway.

The defendant's second point asked the court to say that the lot owners on Forbes street had no rights in the street except such as were subservient to the public use, under the direction or sanction of the city, and that as the defendant's gas main was laid for a public use, under the authority of the act of 1885, and with the consent of the municipal government, the lot owners along Forbes street were not entitled to recover damages for the use of the street. This point the learned judge refused. The logical result of this ruling is to put the rights of the lot owner in the street in front of his premises above the rights of the public represented by the municipality. In other words, it puts the urban servitudes in a subservient position, and makes the imposition of each of them upon a city street an additional servitude upon the land of the adjoining lot owner, for which he has a right of action. This is not the law in this state, as is shown by the authorities already cited. As applicable to a country highway, it would be quite right, for under the general road laws the public easement in such a highway is for passage over the surface only. Land taken for a street in a city is subjected to a very different easement, because of the sanitary and business needs of a city; and the extent of the easement depends upon the municipal judgment as to the extent of occupancy necessary to subserve the health, the comfort, and convenience of the citizens. Elevated structures that interfere with the passage of light and air stand on different ground. *Jones v. Railroad Co.*, 151 Pa. St. 30, 25 Atl. 134. In this case no entry was made upon the close of the plaintiffs. The pipe is buried in the street, at a depth of four feet under the surface. Access to the plaintiff's property has not been affected. There is no physical change made in it, or in the street on which it fronts. If the lots are affected in value, it is as a consequence of

the proximity of the gas line, and not because of anything done to or upon them. Their remedy, under such circumstances, is by action, or upon the bond given to secure them against loss by reason of the dissolution of the injunction. It is not by the appointment of viewers, and the proceeding provided by the act of 1885 for the assessment of damages done by an entry upon private property under the right of eminent domain. The 1st assignment of error is sustained; also, the 4th, 5th, 7th, 8th, and 9th assignments. The judgment is reversed, and the order appointing viewers is set aside.

(160 Pa. St. 602.)

SOHNATZ et al. v. PHILADELPHIA & R. CO.

(Supreme Court of Pennsylvania. April 2, 1894.)

ACTION FOR DEATH BY WRONGFUL ACT—WHO MAY MAINTAIN.

1. Under Act April 4, 1868, providing that in case of death, for which a common carrier is responsible, no damages are recoverable, other than the pecuniary loss to those entitled to recover, and Act April 26, 1855, providing that children of the person thus killed may recover, an unmarried daughter, who spent three months each year with her mother, without cost, and who frequently received presents of money and clothing from her, could maintain an action against a carrier for the wrongful death of her mother.

2. A married daughter of decedent could also maintain such action, it appearing that she was an invalid, and spent several months each year with decedent for her health, and that decedent often visited her when she was sick, to nurse her and perform her household duties; decedent making no charge for board or for services in such cases. *Williams and Mitchell, JJ.*, dissenting.

3. Decedent's other married daughter could also maintain such action, it appearing that for 16 years decedent had sent her, each year, vegetables, without charge, and had nursed her when ill, and done sewing for her. *Williams and Mitchell, JJ.*, dissenting.

Appeal from court of common pleas, Philadelphia county.

Action by Francis Schnatz and others against the Philadelphia & Reading Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Gavin W. Hart, for appellant. John Walker Shortledge, for appellees.

DEAN, J. Ellen Devine, the mother of Mary Schnatz, Maggie Kriese, and Ellen Devine (in whose right, as daughters, this suit is brought), on the 24th of October, 1892, while being carried as a passenger, was killed on defendant's road, in a collision near Flat Rock tunnel. The action is for damages for the pecuniary loss sustained by the daughters because of the death of their mother through defendant's negligence. There having been a verdict and judgment for plaintiffs, defendant takes this appeal. The assignments of error, both to the charge of the court and the rulings on plaintiffs' offers of evidence, all go

to a denial of any right in plaintiffs to maintain this suit.

The mother, for 30 years, had lived at Phoenix Park, in Schuylkill county, where she owned a small property, consisting of a house and four acres of ground. At her death she was 59 years old, and in good health. All three daughters had left home, and for some years had resided in Philadelphia. The two married ones, Mrs. Schnatz and Mrs. Krise, lived with their husbands. Ellen, who was single, worked at wages from \$4 to \$6 per week, and lived alone. There was testimony tending to show that she generally went to her mother's home, about three months, during the summer, and while there paid no board; that her mother at times gave her money when she needed it,—once, as much as \$20,—and sometimes clothing. As to Mrs. Krise, there was evidence that for some years she had suffered from a pulmonary disease, and had each summer gone to the mother, whose home was in a mountainous region, for the benefit of her health, and remained there for two or three months; that at times, in the winter, when ill, her mother had come to Philadelphia, and stayed with her, doing such household work as was required for her sick daughter; further, that she charged nothing for boarding this daughter at Phoenix Park, or for the service rendered her in Philadelphia. As to Mrs. Schnatz, there was testimony tending to show that, for 16 years before her death, the mother, in autumn and spring, had given her potatoes for consumption in the house, and had nursed her at times during illness, and had made no charge for either. There was also testimony showing that both Ellen and Mrs. Krise were improved in health by their summer residence with their mother. On the other hand, it appeared very clearly that the actual residence of all three daughters was in Philadelphia. They were not members of the mother's family in Schuylkill county. Their homes, in the sense of domicile or place of abode, were in Philadelphia.

The main question is, the right of action being exclusively statutory, are the plaintiffs within the provisions of the statute? Section 2, Act April 4, 1868, says: "In all actions now or hereafter instituted against common carriers, or corporations owning or operating or using a railroad as a public highway whereon steam or other motive power is used, to recover for loss and damages sustained, and arising either from personal injuries or loss of life, and for which by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been peculiarly suffered or sustained." The positive terms of this act eliminated all evidence of damage in cases of death, other than a loss of money to those entitled to recover. If these plaintiffs have lost money by the death of their mother, then the ex-

press terms of the first section of the act of April 28, 1855, give them a right to recovery from this defendant. That act says: "The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children, or parents of the deceased, and no other relative." The act itself makes no distinction between children over age and those under, between those married or single, between those having homes and families of their own and those still members of the parents' household. Such distinctions may have significance in determining the amount of damage peculiarly suffered, as limited by the act of 1868, but they do not affect the statutory right on the part of children to a standing in court as claimants or suitors. Having shown the existence of the parental relation,—that the deceased was their mother,—then the plaintiffs had a right to submit proof of what they had lost in money by her death, just as the parents, in *Railroad Co. v. Adams*, 55 Pa. St. 499, had the right to prove that, although their deceased son was over age, he had continued to contribute to their support, had given them his bounty money, and had declared he would continue to support them while they lived. True, in that case the son still continued to live with the parents; but the case is not decided on that fact alone, but is put on that and other facts in evidence, as furnishing a probable ground for expectation of future support. And the court there cites with approval *Dalton v. Railway Co.*, 93 E. C. L. 296 (decided under 9 & 10 Vict. c. 93), which, almost in the same words as our statute, provides "that every such action shall be for the benefit of the wife, husband, parent and child." In the English case the deceased son was twenty-eight years of age, unmarried, but living away from his parents. It appeared that for seven or eight years he had visited them often, and at times had taken them presents of provisions, and had given them some money, amounting in all to about £20 a year. It was held that, although the actual family relation had been severed, yet in view of the parental relation, and the conduct of the deceased, which was prompted by no legal duty, but resulted wholly from filial affection, the jury had a right to consider what reasonable pecuniary expectation in the parents had been disappointed, and the actual pecuniary damage sustained. Justice Thompson, delivering the opinion of this court, says, the English statute being so nearly the same as ours, this is a precedent which may be safely followed, and concludes "that, if there be a reasonable expectation of pecuniary advantage, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action." All of the adjudicated cases in this state either proceed upon, or are reconcilable with, that principle. In *Iron Co. v. Rupp*, 100 Pa. St.

95, the rule is repeated, and an illustration is given of a case where there can be no recovery: "If the child was free, by age or emancipation, and living apart from his parents, and in no way contributed to their support, they could not maintain an action, for they suffered no pecuniary loss." It may be assumed, then, that the mere existence of the parental relation, while it would give the children a standing in court as parties, without more, would not sustain this judgment; but, if there was evidence from which the jury could find a reasonable expectation of pecuniary advantage from the continued life of the mother, they might assess as damages the actual money loss of the children.

To show the pecuniary loss they had sustained by her death, plaintiffs offered evidence as to what pecuniary benefit they had derived from her life. This mother was not wealthy, but she appears to have been thrifty. She cultivated her four acres of ground, and kept a small store. The single daughter and sick daughter testified that for years, with almost unbroken regularity, they had spent the summer with her, for which she made no charge. This was an annual contribution of just what it was worth in money for the benefit and comfort of these daughters. As they had for years received it, they had a reasonable expectation of receiving it as long as the life and ability of the mother lasted. By her death, they lost it. Why could not the jury, from the evidence, estimate what they had lost in money? True, it was only about one-fourth of the yearly boarding of the two daughters, but it was as capable of computation as any of the elements of damages admissible in this class of cases. So as to the money and clothing contributed from time to time. These were capable of a valuation as certain as the tea and sugar contributed by Dalton to his parents when he visited them, as stated in the leading case already cited. As to Mrs. Schnatz, she testified that regularly, for 16 years, in fall and spring, her mother sent her the potatoes used in her house, for which she paid nothing; that she was nursed by her, at times, in illness; did sewing for her, and performed like services. The jury might find from such evidence a reasonable expectation of future benefits of like value and character, and thereby approximate a money loss. Of course, all these benefits were gifts, as distinguished from payments made or services rendered because of a legal obligation; and perhaps it jars somewhat rudely on sentiment to affix a value in dollars, after the mother's death, to gifts prompted solely by maternal love. But these statutes were not enacted to nurture sentiment. They are essentially sordid, and must be so construed. They were passed to compensate, in dollars, those who had lost by death those pecuniary benefits which have their origin in the purest sentiment. The learned counsel for appellant is clearly

right when he argues that occasional gifts made or services rendered by a parent to the daughters, who had long before her death left her home, and established homes of their own, are not sufficient proof on which to found a pecuniary loss. The trouble here, however, is with this evidence, which went much further than occasional gifts and services. It tended to show a persistent regularity of contribution for many years,—so regular and unvarying as to justify a reasonable expectation of continuance. Nor were these gifts and services, in view of the ability of the mother, and the necessities of the children, of trifling value. They must have very appreciably contributed to the comfort and health of those who were favored by them.

Appellant's whole fourteen assignments of error embrace, in substance, but three complaints: (1) That no such relation as intended by the statute existed between the mother and these plaintiffs; (2) that there was no actual contribution towards the support and maintenance of the children by the mother; (3) that the evidence showed only occasional gifts and favors, and therefore there could be no reasonable expectation on part of the children of pecuniary advantage. What we have said disposes of them all, and the judgment is affirmed.

WILLIAMS, J. I dissent from this judgment. I do not think Francis Schnatz or Maggie Krise entitled to recover.

MITCHELL, J., concurs in this dissent.

(160 Pa. St. 572)

CITY OF PHILADELPHIA v. MASONIC HOME OF PENNSYLVANIA.

(Supreme Court of Pennsylvania. April 2, 1894.)

TAXATION—EXEMPTIONS — PURELY PUBLIC CHARITY.

1. A "Masonic Home," which, by means of voluntary contributions, without charge to the beneficiary, profit to itself, or pay to its officers, houses and maintains indigent, afflicted, and aged persons, unable to support themselves, is not an "institution of purely public charity," exempt from taxation by Const. 1874, art. 9, § 1, since its benefits are limited to Freemasons.

2. Act May 6, 1871, exempting from taxation the property of "the Masonic Home of Pennsylvania," was repealed by the general act of May 14, 1874.

Williams and Green, JJ., dissenting.

Appeal from court of common pleas, Philadelphia county.

Appeal by the Masonic Home of Pennsylvania from assessment of taxes for the years 1886 and 1888 by the board of revision of taxes of the city of Philadelphia. Assessment reversed. The city appeals. Reversed.

Isaac H. Shields, James Alcorn, and Chas. F. Warwick, for appellant. Robert H. Hinkley, for appellee.

DEAN, J. There is nothing of doubt in this case except the question as to whether the appellee is an "institution of purely public charity," within the meaning of section 1, art. 9, of the constitution of 1874. If it be not, nothing in its charter or the statutes can avail to exempt it from liability to taxation. The contention turns on the constitutional meaning of the words "purely public charity." "Words in a constitution, that do not of themselves denote that they are used in a technical sense, are to have their plain, proper, natural, and obvious meaning." *Navigation Co. v. Coons*, 6 Watts & S. 114. The legal definition of the word "charity" has been the subject of much discussion in the courts, especially in those of England, but its meaning here, discarding all technical sense, is "a gift to promote the welfare of others." The appellee clearly is a charity. It provides for and maintains in the "Masonic Home" indigent, afflicted, and aged Freemasons. This, too, from voluntary contributions, without charge to the beneficiaries, and with no profit either to the corporation or to its officers. Not one of the corporate officers receives a cent of compensation for administering its affairs. Such unselfishness excites the admiration and approval of all friends of humanity. Gen. Wagner, president of the home, testifies: "The number of inmates at present is thirty. Their average age is 72 years. All are decrepit. If they could support themselves, they would not be admitted. The money to support them is contributed by different Masonic lodges, individuals, Masons, men and women. The receipts are always less than the expenses, and a deficit has to be made up at the end of each year. No one is benefited except the inmates. They are fed, clothed, and lodged during life, and buried at death, at the expense of the home." Of course, if this be not purely charity, nothing is. But is it a public charity? The word "public" relates to or affects the whole people of a nation or state. Gen. Wagner further testifies: "The home is open only to those who are Masons. A man, to be admitted, must be a Mason." When the eligibility of those admitted is thus determined, it seems to us the institution is withdrawn from public, and put in the class of private, charities. A charity may restrict its admissions to a class of humanity, and still be public. It may be for the blind, the mute, those suffering under special diseases; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread; and, as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, be-

cause they are men, women, and children, not because they are Masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics, or Methodists, would not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word "purely" is prefixed by the constitution. This is to intensify the word "public," not "charity." It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity. Nor does the argument that to the extent it benefits Masons it necessarily relieves the public burden, affect the question. There is no public burden for the relief of aged and indigent Masons. There is the public burden of caring for and relieving aged and indigent men, whether they be Masons or anti-Masons; but age and indigence concern the public no further than the fact of them; it makes no inquiry into the social relations of the subjects of them. *Burd Orphan Asylum v. School Dist.*, 90 Pa. St. 21, is cited as sustaining a different view. The test there, as to whether the defendant was a purely public charity, was whether there was any gain or profit to any class of persons or corporations who could assert a right to be beneficiaries. As there was not, and as the administrators of the charity could, in their discretion, select those who should be the recipients of the benefits, giving only a preference, the court held it to be a purely public charity. While concurring in the judgment in that case, because the facts showed it was administered as a purely public charity, I do not concur in the reason given for distinguishing a quasi public from a purely public charity. I would put the distinction on firmer, as well as on what seems to me more clearly defined, ground: Is any member of humanity—that greater public of whom the commonwealth is constructively the parent or trustee—excluded because he has not a particular relation to some society, church, or other organization, which relation is dependent on his wholly voluntary act? If so, if he be excluded in fact, because he is not a Presbyterian, Freemason, or a member of some one of the innumerable religious, social, or beneficial organizations of the commonwealth, then, however pure may be the charity, however commendable its purpose, it is not "purely public," and its property must, under the constitution, be taxed; not because this court says so, but because the people have said so in their fundamental law. Here, while the charter and by-laws of the institution do not show that it is not "purely public," the undisputed facts as to the administration of the charity show that none were admitted except Freemasons; of course excluding all other aged and indigent men, because they had not chosen to become mem-

bers of a particular society. This made admission depend on an artificial badge of distinction, and not on one incident to humanity, and therefore it is not "purely public." If this be purely public, then what is not purely public? This is not a question to be decided on sentiment. If it were, our inclinations would prompt to a different conclusion. But there is not much sentiment in the constitution. It is a barrier erected by the whole people against encroachments on the rights of the people as a whole. They have forbidden an annual appropriation of their money in a sum equal to the amount of taxes here imposed, for the benefit of a favored few. The duty of a court, when called upon to decide such a question, is so plain, that "he who runs may read." As to the argument that the act of 1871 exempted the home from taxation, the act of 1874, when read in connection with the constitution of 1874, repealed all such exemptions enacted after the constitutional amendment of 1857. It is so decided in *Wagner Free Institute v. City of Philadelphia*, 132 Pa. St. 612, 19 Atl. 297, and *City of Philadelphia v. Pennsylvania Hospital*, 134 Pa. St. 171, 19 Atl. 490. The judgment is reversed at costs of appellee, and a new trial is awarded.

WILLIAMS, J. (dissenting). This appeal depends on a definition. Its decision will affect many of the noblest charities in the state. The words requiring definition are the words "purely public," as used in section 1, art. 9, of the constitution of Pennsylvania. The paragraph in which the words occur is as follows: "But the general assembly may, by general laws exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." A majority of this court holds that the defendant, the Masonic Home, is not an institution of purely public charity, and for that reason is subject to taxation like all other property held by private persons or organizations for private purposes. The correctness of this decision depends on the result of two preliminary inquiries: First. What is the meaning of the words "purely public," as used in the constitution? Second. What is the character of the Masonic Home, and its work? In reply to the first of these questions it should be noticed that the legislature has undertaken an interpretation of the constitutional provision, and of these particular words, by a law passed at the same session at which the adoption of the constitution was formally declared. The law was passed for the express purpose of giving effect to the constitutional provision authorizing the exemption of certain property from taxation, and to guide the taxing officers of the state in determining what property was entitled to the exemption authorized by the constitution. This purpose made

it necessary to consider and determine the exact extent of the limits within which the exercise of legislative power was permissible under section 1, art. 9; and to define accurately each class of property to which the privilege of exemption was extended by it. Our present concern is with the fourth class, viz.: "Institutions of purely public charity." The act of 1874 interpreted these words, and enumerated the institutions embraced by them, so as to include "all hospitals, universities, colleges, seminaries, academies, and institutions of learning, benevolence or charity, * * * founded, endowed and maintained by public or private charity." This definition is broad enough to include the Masonic Home, and all similar institutions of charity; and, unless the constitutionality of the act can be successfully assailed, the judgment of the court below must be affirmed. It should be noticed, in the next place, that this court has adopted and followed the legislative definition in several cases in which the question was fairly raised and squarely decided. The first of these was *Burd Orphan Asylum v. School Dist.*, 90 Pa. St. 21. The Burd Asylum was founded and endowed under the will of Mrs. Burd, "to establish an asylum for poor white female orphans." But not all poor white female orphans were entitled to admission. They were required to be of legitimate birth, not less than four nor more than eight years of age, and baptized in the Protestant Episcopal Church; preference being given to such orphans in the city of Philadelphia; after them, to such orphans in the state of Pennsylvania. If both city and state failed to fill the asylum with those who met all the requirements, then poor white female orphans within the required age might be admitted without regard to the place of their birth or the fact of their baptism. This was not a public asylum in the sense of being open to the general public. It was a denominational institution, under denominational control, open, in the first instance, to children baptized in the churches of the denomination, and, if enough such could be found, then to no one else. We held that such an institution was a charity. As it was administered in the interest of the helpless in the city and the state, it was a public charity; as there was no element of private or corporate gain in its organization or management, it was a purely—that is, wholly—public charity. It was within the letter of the act of 1874, and within the spirit or intention of the constitutional provision. In *Insurance Patrol v. Boyd*, 120 Pa. St. 624, 15 Atl. 553, we held that an organization whose purpose was to save life and property endangered by fires, without charge to the persons or to the owners of the property rescued by the efforts of the members and employees of the organization, was a charity. It was supported by contributions made by insurance companies and others, and rendered its services gratuitously whenever and

wherever a fire occurred in the city. It was, therefore, a public charity; and, as there was no profit or gain to its projectors or managers contemplated, and no return received from those benefited by its labors, it was wholly—that is, purely—a public charity. The same doctrine was held in *Philadelphia v. Women's Christian Ass'n*, 125 Pa. St. 581, 17 Atl. 475; in *Northampton Co. v. Lafayette College*, 128 Pa. St. 132, 18 Atl. 516; and *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 25 Atl. 55. In each of these cases the act of 1874 was treated as a correct exposition of the constitutional provision. Other questions were raised and considered, but in no one of these cases has this court given expression to the slightest doubt about the constitutionality of the act of 1874, or attempted to give any other definition of the words "purely public charity" than that given by the legislature in that act. The same definition may be found, in substance, in *Donohugh v. Library Co.*, 86 Pa. St. 306, in which we said that a purely public charity "is not necessarily one solely controlled and administered by the state, but the phrase extends to and includes private institutions for purposes of purely public charity, and not administered for private gain." We defined the word "purely" in the same manner in that case as in the later cases above referred to, as meaning "completely," "entirely." The institution must not be administered for private gain, but completely, entirely, purely, in the interest of the charity. Upon this distinction the property of the Delaware County Institute was held liable to taxation. *Delaware Co. Inst. v. Delaware Co.*, 94 Pa. St. 163. The advantages of that institute were confined to its members, and it was for that reason a private charity, if it could be regarded as a charity at all. The benefits came back to the members, who were necessarily the contributors, and no one else shared in them. It was not intended to serve the public, or to relieve in the slightest degree the public burdens, but to minister to the tastes and the intellectual improvement of those whose money purchased the books and provided for their care. A provision for one's self, or for those for whom he is legally bound to provide, is private and personal in its object. It has no public purpose or work. So a hospital or school designed to secure to a town or a region better medical attention or better education than would otherwise be within the reach of such town or region, may be a charity in an important sense, but if it is conducted with a view to private or corporate gain it is a private charity. If it is conducted and maintained by the gifts of individuals or the public, for the benefit of its inmates, it is a public charity; and, being free from the element of private or corporate gain, it is a purely public charity, within the meaning and the letter of the act of 1874, and is pro-

tected from taxation by the list of decided cases already cited.

But let us suppose that the legislative definition of a purely public charity had not been made, and the decisions cited had not been rendered, and the question was now to be considered as one of first impression, how, in such case, ought it to be determined? The subject before the framers of the constitution was taxation. They declared this should be uniform, and levied under general laws, but some property ought not to bear taxation, and so exemption from the public burden came to be considered. This also must be regulated by general law, and not left to the caprice or favoritism or prejudice of the lawmakers. Where may the legislature draw the line that shall separate the taxable from the nontaxable property of the state? This question was answered by the adoption of the well-understood distinction between public and private uses. The words employed were "public property used for public purposes,"—that is, property the title to which is in the public, and which is actually used for some public purpose; "actual places of religious worship," no matter who may own them or worship in them, for the support of public worship tends to the public improvement; "places of burial, not used or held for private or corporate profit," for the gift of land to the public for purposes of burial is a gift to a public use; and, finally, "institutions of purely public charity," or, in other words, institutions that are already ministering to the public, and so ought not to pay taxes, because public in the ends they serve, and without any element of private gain in their organization or management. This is the plain, obvious meaning of the consecutive sentences devoted to the subject of exemption from taxation. Moreover, the reason for any exemption should be considered. Why ought any property to be exempt? Taxes are levied and collected to provide the public purse with money for the support of public institutions conducted by it, and to defray public expenses, in the preservation of order, the administration of justice, and the support of public schools. A woman like Mrs. Burd, or a man like Stephen Girard or Isaiah Williamson, devotes a large fortune to the founding and endowment of an institution intended to relieve the public burden, and advance the public good, by taking up some part of its work, and doing it with more thoroughness and fidelity than the public could do it through its officers. The property of such an institution is not simply contributing, like taxable property in general, to the public good, but is devoted absolutely and irrevocably to it. The title may remain in trustees, but it is, in effect, dedicated wholly to public uses, with no element of private gain whatever. To levy taxes on property so given to a charitable use is unjust towards the benevolent giver, and

is coldly cruel to the beneficiaries. This will be conceded as to the Burd Orphan Asylum and Girard College. To deny it, would be to shock the public sense of justice. A majority of this court, however, deny exemption to the Masonic Home, and the reasoning on which that denial rests would logically lead to a denial of it to all social, denominational, or trade organizations providing for the education, support, medical treatment, and burial of its members, their widows, and orphans. What is the Masonic Home? It is a corporation, whose object is set out in its charter, its constitution, and its by-laws. In the constitution it is stated thus: "The object of said institution shall be to provide and sustain in the state of Pennsylvania one or more houses for destitute widows and orphans of deceased Freemasons of the state, and an infirmary or infirmaries for the reception and care of sick and afflicted Freemasons in indigent circumstances, and all such as may be placed under its charge by its managers." In the by-laws it is stated in these words: "The Masonic Home shall have for its object to provide and maintain a home for indigent, afflicted, or aged Freemasons, and for the destitute widows and orphans of Freemasons, in the state of Pennsylvania, and for such others as may be placed under its charge."

It is conceded by my brethren that this is a charitable object, and that the home is a charity. The point taken is that it is a private, and not a public, charity. It was founded and endowed, as the evidence clearly shows, and it is maintained, by voluntary gifts. Out of the contributions made to it the grounds and buildings have been paid for, and the maintenance of its inmates provided. It is supporting, nursing, and caring for 30 or more aged men, who would otherwise be dependent upon the almshouse or other forms of charity supported by taxation. No profit is possible to any person, corporation, or society. The entire plant, and the stream of voluntary gifts on which it is dependent, are devoted wholly to the charitable work described in the constitution and by-laws of the home. The contributors get nothing for their money but the approval of their consciences, and the knowledge that they are increasing the happiness of the aged, indigent, and afflicted. I see nothing private about such a charity. It is not limited in its work to the donors or their children. It brings no pecuniary benefit or return. It is done in relief of public taxation, and in the interest of humanity, and that brotherly love that becomes the children of a common father. Preference is given to members of the Masonic fraternity, their widows and orphans, but it is also open to all persons, regardless of their relation to the Masonic body, who may apply for admission, and be found by the managers to be suitable persons "to be placed under its charge." Its doors are as wide as those of the Episcopal Academy,

or the Burd Orphan Asylum, or the Girard College. The requisites to admission are fewer and simpler. They are, first, Masonic connection, and helplessness; next, helplessness, and suitability for admission to an institution conducted in the manner adopted by the managers for the home. The qualifications in both instances are to be judged of by the managers. So in any almshouse or hospital or asylum, the fitness of the applicant for admission must be determined by the proper officer before the doors will open to him or her. But it will perhaps be said that the purpose that moved the contributors was to provide for Masonic brethren and their families, and that this ought to subject their gifts and their noble charity to taxation. Then every denominational hospital, school, or asylum should be taxed for the same reason. All contribute alike to the public good; all alike relieve the public burden and the taxpaying property of the commonwealth; but all give, to some extent, preference to a particular class of the public, and then open their doors to those outside the class who are within the general purpose of the charity. The Women's Christian Association has for its beneficiaries young unmarried women. The Snug Harbor for Seamen provides for sailors. The Bricklayers' Union for a limited subdivision of house builders. The homes for mechanics, apprentices, newsboys, sewing women, actors, disabled clergymen, and the like, all limit admission to the class of persons described in the names they have adopted. Indeed, in all charitable institutions, whether founded and maintained by private beneficences or by public taxes, some principle of selection prevails. The county poorhouse is for the care of those whose legal settlement is within certain geographical lines, and the wretch who cannot show his title to admission on the map must starve on the outside. A member of the great public may, like Lazarus, subsist on crumbs, or die for want of them at the gateway of a "public charity," if he belongs to another "poor district." Such a thing as a charitable institution that is open absolutely to the general public without limitation or restriction is not to be found in our state or country. Sailors and soldiers are cared for by the public in separate homes and separate hospitals. The state cares for injured miners in hospitals devoted to them exclusively. The deaf are in one institution, the dumb in another, the blind in a third. Hospitals are provided for consumptives, for persons afflicted with contagious or infectious diseases, for invalids whose diseases are of a nervous origin, and so on. The feeble-minded are gathered in one place, those crippled or deformed in body in another. The foundling has institutions to which it is admitted, and from which others are excluded. Homes for aged persons, for aged couples, for fallen women, are open only to those for whom the charity was founded. Then, too, there are homes for widows, to admission to which a previous

marriage and the death of a lawful husband are the necessary requisites; schools for soldiers' orphans, from which all other children are excluded; homes for decayed merchants, for superannuated and disabled clergymen, for disabled and aged firemen, and a long list of similar charities founded for a class of beneficiaries selected by reference to their trade, occupation, social position, denominational affiliation, age, color, disease, or place of residence. These are all engaged in ministering to the public needs. They all do some part of the work, and bear some part of the burden, that would otherwise fall upon the public. They are all public charities, and, when free from any private or corporate gain, are purely public charities. The institution now made subject to taxation by the decision just rendered is one of the many charities, doing the work of the public without the aid of public money, and doing it more tenderly and more thoroughly than it could be done in charitable institutions supported by taxation. Such institutions not only provide food and clothing and necessary medical attention to their inmates, but they go further, they seek to assuage the sorrows, and cheer the last days of those to whom they minister, and surround them with the comforts of a well-appointed home. For this added liberality and care they are declared to be private charities, and compelled to take part of the gifts of the benevolent from those they were intended to benefit, and use it to pay taxes upon property actually dedicated to the public use. The position of the city of Philadelphia in levying taxes upon such charities is ungracious. It says, in effect, to them: "It is true, your property represents the unselfish gifts of the benevolent; it is true that it is devoted to the relief of suffering, and the care of persons who must otherwise be chargeable to us; it is true that your work is for the public good, and in relief of taxpayers,—but you must do what we do not; you must ask no questions, and take all who come. If you do not, then charity is a luxury which we shall tax you for. You must convert your home into a mere public almshouse, or else pay roundly for the privilege of carrying part of the public burden." The judgment of this court seems to be that the position of the city is correct, and that, notwithstanding the fact that a man or a society devotes a fortune to the care of the helpless and the relief of the taxpayers, the property occupied for the purposes of the charity so founded and maintained must be treated as a business investment, and compelled to pay taxes, though the money used for that purpose is taken out of the mouths and off the bodies of the inmates. I dissent from the judgment and from the reasons on which it is rested. In my opinion, nothing marks the advancement of the age in which we live so much as the growth of organized charity, and the increased care for the unfortunate and the helpless. This growth shows itself in the character of the

hospitals, reformatories, and asylums supported by the public funds. It is seen in a still more striking manner in the number and variety of richly-endowed charitable institutions that owe their existence and their power for good to the munificence of individuals. So long as sickness and poverty and misfortune are in the world, so long this field for private generosity will offer room for the labors and the fortunes of the benevolent. The better the field is occupied, the better it will be for the public at large, and for the individuals who help to make up the indefinite body we call the public. Now and then some piece of property used for charitable purposes may cease to pay taxes, but for every dollar so withheld from the public treasury many dollars will be saved to it by the relief of the public burdens by means of the charity so established.

But if we lift our eyes from the tax list, and consider the work done by these charities, of which there are several hundreds in this city alone, we shall see that the public gain from their labors and expenditures is incalculable. There is probably no city on either side of the ocean so justly celebrated for the multitude of its charitable institutions as Philadelphia. A distinguished citizen, who is himself actively identified with several of them, places the total number at about 600. Some of these are supported by public funds, but most of them are monuments to the enlightened liberality of private citizens who have given their money with a freedom and discrimination that are without any parallel, at least in this country. It would be difficult to name a form of suffering that has not been provided for by some generous man or woman whose attention has in some manner been drawn to that particular field for charity. The sums thus dedicated to the public service make an enormous aggregate, and the institutions supported by them embellish the city, and honor it. The Masonic Home is one of these. It now enjoys the undesirable distinction of being the first admitted charity which has no trace of private or corporate gain about its organization or management to be condemned by this court to the payment of taxes as the price of being allowed to go on with its unselfish work of charity. It carries part of the public burden. It lifts what it carries off the shoulders of the taxpayers. It does this with a stream of generous contributions from the pockets of private citizens. But it is now judicially determined that it must take the money contributed for the care of the sick, the infirm, the aged, the afflicted, and use a part of it to pay taxes on the buildings and grounds in which its work is carried on, and in which the homeless and helpless are sheltered and fed. I dissent wholly from the proposition that such charities are private. They are purely public. They are within the act of 1874, as is admitted. They are within our own cases beyond any doubt. They are

within the intent and meaning of the constitution, and are, in my opinion, clearly entitled to exemption from taxation. I would affirm the judgment of the court below.

GREEN, J., concurs in the foregoing opinion.

(160 Pa. St. 590)

**PHILADELPHIA TRUST, SAFE-DEPOSIT
& INS. CO. v. PHILADELPHIA &
E. R. CO.**

(Supreme Court of Pennsylvania. April 2,
1894.)

**EVIDENCE—SUFFICIENCY—POSSESSION—PRESUMPTION
OF OWNERSHIP—QUESTION FOR JURY.**

In 1858 defendant empowered its officers to raise money for it on their personal credit, and to sell or pledge its bonds of the issue of 1857. About this time a bank lent \$12,000 on a note signed by defendant's then president and C., then a director, secured by 24 of said bonds. The note was paid, but the bonds remained in the bank. The sums raised by its officers, personally, for defendant, were all paid by defendant. From 1866 to 1877, C. used, from time to time, to borrow of the bank, on said 24 bonds, sums less than the amount of their overdue coupons, only the first having been cut. In June, 1877, C. took the bonds away, but when the issue was redeemed, the following month, the 24 were not presented. Twenty-four bonds of that issue were found after C.'s death, in 1891, in an envelope addressed to defendant in an unknown hand, among papers of no value, in an old desk in C.'s room. Two years before, C. had gathered his securities into the vault of a trust company, and scheduled them carefully. *Held*, that it was error to take from the jury the question of the ownership of the bonds.

Appeal from court of common pleas, Philadelphia county.

Action by the Philadelphia Trust, Safe-Deposit & Insurance Company against the Philadelphia & Erie Railroad Company on bonds of defendant. Judgment for plaintiff. Defendant appeals. Reversed.

A. H. Wintersteen and Geo. Tucker Bispham, for appellant. Robert H. Neilson, William H. Armstrong, and Richard L. Ashhurst, for appellee.

DEAN, J. The plaintiff sued to recover from defendant the principal and interest on 24 \$1,000 bonds issued in 1857 by the Sunbury & Erie Railroad Company, which last-named company had, by legislative enactment, been changed to the Philadelphia & Erie Railroad. There was no denial by defendant of its obligation to pay the bonded indebtedness of the Sunbury & Erie Company. The only real contention, in view of the evidence, it seems to us, was whether plaintiff or defendant was the owner of the bonds. Plaintiff was in possession, and offered them in evidence. Defendant denied plaintiff's testator's right to the possession of them, and alleged they belonged to the Sunbury & Erie Railroad Company, to whose rights it had succeeded. The learned judge of the court below, being of opinion that de-

fendant had adduced no sufficient evidence to rebut the presumption of title in plaintiff necessarily raised by the possession of the bonds, peremptorily directed a verdict against defendant for the principal and interest, which at date of trial amounted to \$62,833.32. Judgment having been entered on this verdict, defendant brings this appeal, assigning for error the refusal of the court to submit the evidence as to the ownership of the bonds to the jury.

The possession of the bonds was *prima facie* evidence of title. Should the evidence offered by defendant to rebut the inference warranted by the possession have been submitted to the consideration of the jury? This evidence is circumstantial, and must be viewed as a whole. If, when so viewed, it be not inconsistent with the presumption of ownership warranted by the possession, the learned trial judge was right in directing a verdict for plaintiff. In that case, then, there was no evidence of ownership in defendant to rebut the inference of ownership derived from possession. And this inconsistency must be such as may fairly bring the mind to an opposite conclusion from that warranted by the possession.

A. Boyd Cummings, at his death, on March 1, 1891, was in his eighty-second year. He had been enterprising and successful in business; was possessed of a personal estate valued at nearly a half million dollars; besides, was the owner of considerable valuable real estate. The personal securities were deposited in many places. About two years before his death, at the suggestion of a friend, he collected them all together, and placed them in a box with the Philadelphia Trust & Safe-Deposit Company. They consisted of a large number of different notes, stocks, bonds, and mortgages, were carefully scheduled by number, denomination, and name, and were safely kept with that company until his death. These 24 Sunbury & Erie bonds were not among them. For many years preceding his death, in the winter, he lived with Mrs. Glass, at 910 Pine street, Philadelphia. He occupied a room on the third story, in which he had an old-fashioned desk. After his death, his executor found these bonds in that desk. There were in it no other papers of value. The bonds were in a sealed envelope addressed "Phila. and Erie R. Road, 233 South 4th Street, Philadelphia." The address was not in the handwriting of Mr. Cummings, nor is it shown whose is the handwriting. On the envelope were three 10-cent postage stamps, uncanceled, of a date of issue not before 1882. The bonds bear date the 10th of September, 1857, and have interest coupons appended, at rate of 7 per cent. per annum, payable 1st of October and April. The principal was payable 1st of October, 1877. All the coupons were still on these bonds, except the first one, payable April 1, 1853. The successor of the Sunbury & Erie Com-

pany, this defendant, in the 20 years preceding the 1st of October, 1877, the date the bonds matured, always paid the interest coupons when presented. In July, 1877, the defendant, under the terms of the bonds, advertised extensively to all holders of this issue, amounting to \$1,000,000, to present them at the office of the Philadelphia & Erie Railroad Company on the 1st of October following for payment. All the bonds out, except these 24, were presented, and paid, or extended at a lower rate of interest. It appeared from the books of the Farmers' & Mechanics' Bank of Philadelphia, where Mr. Cummings transacted part of his business, that from December 18, 1866, to June 22, 1877, he had borrowed money many times, in amounts from \$1,000 to \$10,000, generally giving his note at three months, with these bonds as collateral. On the date last named the bonds were delivered to Cummings, and taken away by him. Apparently, they were not out of his possession afterwards. Mr. Cummings was a director of the Sunbury & Erie Company from 1857, the year the bonds were issued, until 1862, when the road passed into the control of defendant company. He was a stockholder in the Philadelphia & Erie Company until after the maturity of the bonds. In 1857 and 1858 there is evidence in the minutes that the Sunbury & Erie Company was pressed for money, and that the bonds of this issue were authorized to be sold or hypothecated to raise funds for the use of the company. Further, there was evidence from the books of the Farmers' & Mechanics' Bank that on April 30, 1858, 24 \$1,000 bonds of this issue were deposited as collateral to secure a loan of \$12,000; the loan being at three months, on a note drawn by W. G. Moorehead, then president of the railroad company, to the order of Cummings, and indorsed by him, which note was paid at maturity, but the 24 bonds were not taken away. As before noticed, they remained in the bank until June 22, 1877, when they were receipted for by Cummings, and taken away by him. While the bonds remained with the bank, they were in the nominal ownership of Cummings, for, as we have seen, he borrowed money on them as collateral. There was other evidence which tended to show the company had authorized the borrowing of money on the notes or personal credit of its managers, among whom was Mr. Cummings, with the bonds of the company as collateral, and that all the loans so made, unless this was an exception, had been taken up by the company.

Whatever uncertainty there is in this case, if this was a loan of this character, arises from the inability of the company to identify these particular 24 bonds as having been delivered to anybody for purposes of hypothecation. So far as the books of the company show, they may have been a part of these bonds, or they may

have been among those sold, the proceeds of which went into the company's treasury. In the absence of any other circumstances, the presumption would be the company parted with them for value received. But we have these facts: The company, in 1857 and 1858, did authorize the hypothecation of bonds of this issue to raise money. On July 29, 1858, 24 bonds were hypothecated for a loan of \$12,000 made to Moorehead (who was president), as drawer, and Cummings (who was manager), as indorser. Presumptively, the note was paid by the drawer, Moorehead. There is nothing to identify these bonds as those of the company. They were deposited as collateral on April 30, 1858, by Cummings, indorser of the \$12,000 note, and were the same bonds received by him June 22, 1877. As there remained only 24 bonds unredeemed by the call at maturity in 1877, it is not an unwarranted inference that the bonds in Cummings' possession at his death were the same bonds taken away from the bank by him. Of course, he might have sold the 24 bonds taken from the bank, and bought 24 others, between the 22d of June, 1877, and the date of the last redemption by the railroad company; but the coincidence in number and possession in the same person at the end of this comparatively brief interval would render probable the inference that they were the same. If they were the same, then they came into Cummings' possession while he was a manager of the railroad, and were used in a transaction in which the president of the railroad was a party, for the purpose of raising money; and this at a time when the company had authorized the hypothecation of this issue of bonds by the officers for the purpose of raising money. Standing by itself, this transaction would have no significance, for there is no direct evidence that these particular bonds were delivered to either Moorehead or Cummings for this purpose, or that the \$12,000 of money borrowed went into the company's treasury, or that the company furnished the money to lift the note. The next fact is that the bonds remained in the bank, nominally belonging to Cummings, from July 31, 1858, to June 22, 1877, nearly 20 years. During this time, not one of the maturing coupons was cut off and presented for payment, although the interest on this issue was promptly paid on presentation of coupons at the office of the company, only a few squares distant. Cummings, from December 18, 1866, to November 22, 1870, used them as collateral for individual loans, at short dates, to himself, but in no instance did the loan equal the amount of the overdue coupons, which entitled him to the cash at the end of a 10-minutes walk. While the use of the bonds by Cummings as collateral for individual loans to himself was,

as plaintiff argues, an implied assertion of ownership, yet the force of the implication is weakened by what may be termed the absurdity of the transaction, as business conduct. For example, he borrowed on his own note, on April 26, 1867, \$2,000, at three months, with the whole 24 bonds and matured coupons as collateral. There was then due him in cash at the office of the company, to be had on mere demand, on the coupons, over \$14,000. He borrows \$2,000 when he had lying unused \$14,000, not bearing interest, and paid interest on \$2,000 which he did not need to borrow; that is, he practically puts up as collateral \$14,000 in cash, for a loan of \$2,000 in cash, and pays interest on the \$2,000. Certainly the owner of the bonds had a right to do this, if he wished, as argued by plaintiff; but when this alleged assertion of ownership is invoked, as corroborative of the inference of ownership from possession, the absurdity of the conduct detracts from its significance as evidence. Regarded as a mere wasteful eccentricity, it is wholly immaterial; but if explicable on the theory that the possessor of bonds not his own was willing to borrow money on them as collateral, without actually converting them to his own use by an absolute relinquishment of possession, the apparent exercise of ownership in no way strengthens the inference warranted by the possession. The next fact, which ought not to be disregarded, is the delay in demanding payment of either the bonds or coupons, when the holder knew they had been called as stipulated by their terms. From October, 1877, until his death, in 1891,—a period of more than 13 years,—he held this large amount of personal securities, in great part wholly unproductive, in his desk. This, of itself, is immaterial. The law imposes upon no holder of a bond a penalty for not demanding and exacting that which is owing to him; but, as an act out of the course of conduct of the average business man, it may, with other facts, have weight in determining a question of ownership. The presentation for payment of either the coupons or the bonds would have located the claimant. If the claim were wrongful, the assertion of it might have led to investigation, which might or might not have resulted in disagreeable consequences. The next fact is the insecurity of the place where this large amount of bonds was kept. As a business man, Cummings knew the value of these bonds, and that they could be easily appropriated by dishonest persons. Yet, apparently, he kept them in an old desk in a room and house in no way protected. While he lacked system in the care of his other securities of a similar character, there is no evidence that he kept them in places wholly unsafe, as he kept these. Two years before his death, he gathered his personal estate together, scheduled it,

and deposited it in a secure place, but left these out. As the actual owner, he might have done this. The mere fact that we do not know why he did it warrants no inference unfavorable to his ownership. But this fact, with others, may prompt the natural query, was he thus negligent as to these bonds because he was not the owner? The next fact is the condition in which the bonds were found after his death. They were in an envelope sealed and addressed "Phila. and Erie R. Road, 233 S. 4th Street, Philadelphia." On the envelope were three uncanceled 10-cent stamps. Presumably, this was sufficient postage to pay for their delivery. Suppose they had been deposited in the post office. They would then have been delivered to the company. The package would have been opened. Not a line would have been found inclosed, indicating from whom they came. The postmark would have shown they had been deposited in the office in Philadelphia. An examination of the handwriting of the address would have disclosed nothing further than is here disclosed,—that the address had been written by some one whose handwriting was unknown. But the company would have been warranted in assuming that the bonds belonged to it; that whoever sent them was not the owner, and did not even wish to have the fact known that for long years they had been in his possession. The condition of the envelope, the absence of any explanation within it, the address on the outside, the affixing of the necessary stamps for delivery, all constitute a fact indicative of a disclaimer of ownership, and an admission of ownership in the company. If the package had been actually mailed and delivered to the company, it would have been conclusive as to title, because the *prima facie* fact of possession in Cummings would have disappeared; but not having been mailed, the possession still remaining in Cummings, these facts are only material as tending to show that some time between 1882 and his death he made an admission that the bonds were not his, but the property of defendant. This was more than the declaration of an intention to make a gift, which avails nothing without a delivery. It was a declaration against his interest as to the ownership of the bonds, and indicative of an intention to deliver them to the rightful owner. A declaration, it is true, not so clear and unequivocal as of itself to warrant a determination of title against plaintiff, but a significant fact, to have its proper weight, along with the other facts, in reaching the truth. All the facts urged by defendant as inconsistent with ownership in Cummings are to be considered as a whole, and not taken up singly. When thus considered, what belief is induced in an unprejudiced mind?

In looking at plaintiff's testimony, we find

but one established, material fact on which the right to recovery is based,—the fact of possession. From that fact is inferred the essential one that Cummings was the owner of the bonds. But if other facts be established, from which an opposite inference may with reason be drawn, the inference essential to recovery is rebutted. We have attempted to indicate such facts. It is not for us to express our opinion as to what inference ought to be drawn from them. As is said in *Burrill on Circumstantial Evidence* (page 53): "Another and a material point of distinction between presumptions of fact and presumptions of law is in regard to the tribunal appointed to deal with them. The inferences, as we have seen, are to be made upon a basis of actual fact, and as nearly as possible according to the exact truth of the particular case which is the subject of inquiry. Hence, the deduction of them necessarily falls within the particular province of that tribunal—or rather that branch of the tribunal—whose allotted duty it is to investigate and declare the truth of disputed matters of fact, namely, the jury. * * * In the process of inference, the jury merely exercise their natural faculties of judgment and common sense." And as said in *Greenleaf on Evidence* (sections 44-48), when speaking of these inferences of fact: "They are derived wholly and directly from the circumstances of the particular case, by means of the common experience of mankind, without the aid or control of any rules of law whatever." It seems to us the court could not properly withdraw this evidence from the jury. It may be that it will fail to convince them that plaintiff's right to the bonds has been successfully attacked; but still they must say so, and not the court. While defendant's evidence did not convince a learned and impartial lawyer, still it might have convinced 12 intelligent and impartial laymen. As, under the law, the laymen are the judges of disputed facts, and the probable or reasonable inferences from them, we cannot say, when there was evidence sufficient to sustain a verdict for defendant, it ought not to have been submitted to them, for there is in this case no rule of law to guide us in reaching a conclusion,—a conclusion which must be wholly based on presumptions of fact. The simple question is, on this evidence, what is the truth?

We do not see, as argued by defendant's counsel, how, on the facts, any presumption of payment can here arise. The whole evidence, both that of plaintiff and defendant, established beyond question the bonds never were paid, because not presented. Suit was brought within 14 years after their maturity. There was no place for presumption in the face of the indisputable fact of nonpayment. The case turns on whether Cummings was the owner, absolutely, of the bonds, or was a mere bailee of defendant. The same may be said concerning the coupons ma-

turing more than 20 years before commencement of suit. Under the facts, no distinction could be drawn between principal and interest. All the coupons, except the one first maturing, were attached to the bonds. As against them, no statute of limitation could be set up. Nothing could avail to defeat a recovery but the presumption of payment which the law allows at the end of 20 years, as an act of tenderness towards the debtor. This presumption, where the suit is on a specialty, is not such conclusive answer to a stale demand as is a positive statutory enactment which extinguishes the demand, and requires a new promise to revive it. It is a presumption, merely, which may be rebutted by evidence of nonpayment. *Eby v. Eby*, 5 Pa. St. 435; *Reed v. Reed*, 46 Pa. St. 239. Mr. Van Zandt, treasurer of defendant company, testifies positively that the coupons maturing more than 20 years before suit were not paid by the company. Any presumption of payment is therefore rebutted by defendant's own testimony that the coupons had not been paid. And as is held in *City of Kenosha v. Lamson*, 9 Wall. 477: "Coupons are not received or intended to have the effect of extinguishing the interest due on the bond. * * * They are given simply as a convenient method of obtaining payment of the interest as it becomes due upon the bonds. There is but one contract, and that evidenced by the bond, which covenanted to pay the bearer \$500 in twenty years, with semiannual interest at rate of ten per cent. per annum. The bearer has the same security for the interest that he has for the principal." If the coupons had been detached from the bonds, and had passed into the hands of another than the holder of the bonds, it may be it would be held that the contract evidenced by the specialty would not, after the lapse of the statutory limitation, protect them in the hands of a third party; but we pass no opinion on this question. It is sufficient to say these coupons were not only in the possession of the holder of the bond, but in fact had never been separated from it. Therefore, the same contract covered interest as well as principal. But on the main question, as to who was the rightful owner of the bonds, we are of the opinion there was evidence for the consideration of the jury. Therefore, the judgment is reversed, and a new venire awarded.

(18 R. I. 545)

SENFT v. CARPENTER.

(Supreme Court of Rhode Island. April 13, 1894.)

CUSTODY AND MAINTENANCE OF INSANE PERSON—SUPPORT BY HUSBAND.

1. Under Pub. Laws, c. 819, providing that, where a person has been adjudged insane, unless recognizance be given that she shall not go at large till cured, the court shall commit her to the insane hospital or state insane asylum until cured, or until the necessity of restraint

be removed, a person cannot have his wife restrained in an insane hospital, where she has given such recognizance, though she be insane.

2. Where the husband refused to support the wife at any other place than the insane asylum, he may be compelled to support her outside of the matrimonial home.

3. Where the wife, with the consent of her bail, went to the house of her sister to board, the fact that the husband shortly after provided a place for her among strangers would not relieve him from liability for her board and care at the sister's house; the wife being in an enfeebled condition, and in need of relatives' care.

Exceptions from court of common pleas.

Action by Frederick Senft against Horace F. Carpenter. There was judgment for plaintiff, and defendant excepts. Exceptions overruled.

Page & Owen, and A. J. Cushing, for plaintiff. S. S. Lapham, for defendant.

TILLINGHAST, J. This is assumpsit to recover for the board, nursing, and care of the defendant's wife for the period of 17 weeks at \$20 per week. The jury found for the plaintiff in the sum of \$295. The facts in the case, in so far as they are material to the question raised by the bill of exceptions, are as follows, viz.: The defendant's wife, who had been confined for several years in the Butler Hospital for the Insane, had escaped from that institution, and on the 16th day of January, 1891, was arrested, and brought before the district court in Providence, upon a complaint by her husband, setting forth that she was insane, and so furiously mad as to render it dangerous to the peace and safety of the people of the state for her to go at large, whereupon, upon giving satisfactory recognizance under the provisions of chapter 819, Pub. Laws, she was released from said arrest. She was thereupon taken by her sister, the plaintiff's wife, to plaintiff's home, where, for a period of 17 weeks, she was provided with board, lodging, nursing, and medical attendance; she being during all of that time an invalid, and requiring much care and attention. The defendant objected to his wife's going to plaintiff's house, and notified him on said 16th day of January, at said district court, that he would not pay his wife's board at plaintiff's house, but would do so at said Butler Hospital for the Insane, but that outside of that institution he would pay nothing for her. The defendant offered testimony to prove that his wife was insane at the time when she was placed in said Butler Hospital, and had continued so ever since; that the reason why he did not take her to his own home was that he did not consider it safe to live with her; that said hospital was a fit and proper place for her to be kept, and that he was ready and willing to support her there. But the court ruled that it was impertinent, in so far as it was offered for the purpose of showing that the defendant had the right to dictate as to the con-

finement of his wife in said hospital as a condition for her support after bond for her liberty had been given as aforesaid; that, having given such recognizance, she was entitled to freedom from incarceration in the Butler Hospital, or the State Asylum for the Insane,—the places specified in said recognizance. To this, and many other rulings of a similar character, defendant duly excepted. He also excepted to the ruling of the court in not permitting him to testify as to his conversation with Mr. Dorsey while his wife was under his control as bail for her, and as to his being willing to support her, and as to whether he had provided a suitable place for her to live and be taken care of outside of his own home. He also excepted to the ruling of the court in not allowing Dr. Palmer to testify as to whether the Butler Hospital was a proper and the best place for Mrs. Carpenter to be taken care of and attended to. The defendant's wife persistently refused to hold any communication with, or even to see, him, from the time when he first caused her to be confined in said Butler Hospital, she claiming that she was not insane, and, therefore, that her said confinement was wrongful.

The exceptions to the various rulings of the court for excluding testimony to prove that the Butler Hospital for the Insane was a fit and proper place for defendant's wife raise the question as to whether the defendant had the right to have his wife detained in said institution, and thereby restrained of her liberty, after having given recognizance as aforesaid. We think it is clear that this question must be answered in the negative. Section 2 of said chapter 819 provides as follows: "If the court on such examination shall adjudge such complaint to be true, it shall, unless a recognizance satisfactory to said court be then given before it that said person shall not be permitted to go at large until restored to soundness of mind, commit such person by warrant under its hand and seal to the Butler Hospital for the Insane or to the State Asylum for the Insane, there to be detained until, in the judgment of the district court of the district in which he may be detained, he shall, upon inspection and examination, be declared to be restored to soundness of mind, or to be no longer under the necessity of restraint, or until recognizance as aforesaid, satisfactory to said district court of the district in which he is confined, shall be given before it." The defendant's wife, having complied with said provision by giving recognizance satisfactory to the court, was entitled to her liberty so far as the defendant was concerned; and hence he had no right to insist, as a condition for his supporting her, that she should be returned to said hospital. It was immaterial, then, whether as a matter of fact she was still insane, or whether said hospital was a proper place for her. She had taken the proper legal proceedings to free herself, for

the time being, at any rate, from said restraint, and the defendant could not debar her from the privilege thereby secured. The responsibility of her subsequent conduct was placed upon Mr. Dorsey, who had the right to control her movements, and whose duty it was to see to it that she be not permitted to go at large until restored to soundness of mind.

The next question raised by the bill of exceptions is whether, defendant having refused to support his wife at any other place than said Butler Hospital for the Insane, he can be compelled to support her outside of the matrimonial home. We think this question must be answered in the affirmative. It is clearly the duty of the husband to furnish necessities for the support and maintenance of his wife according to his station and ability, provided she is not guilty of such misconduct as works a forfeiture of her marital rights. See *Anthony, Cowell & Co. v. Phillips*, 17 R. I. 188, 20 Atl. 933. And it is not claimed in the case at bar that the defendant's wife had in any manner forfeited said right (see *Gill v. Read*, 5 R. I. 343), nor is it claimed that the defendant made any provision for or offered to support her at the matrimonial home; but, on the other hand, it does appear that he had declined so to do. After being liberated from said hospital, then, she was without a home and without support, and hence had a right to select for herself, by the permission of her bail, a proper and suitable place to live, upon the credit of her husband, and at his expense. See *Seaton v. Benedict*, 2 Smith, Lead. Cas. 480-504, and note. The charge of the court below upon this branch of the case, which was substantially correct, was as follows: "The husband has the right to dictate what is called 'the matrimonial home.'" "He can establish his home where he sees fit, and it is the duty of the wife to live with him in that matrimonial home; and if he establishes a home, and provides for his wife there, he can dictate where it shall be." "Now, gentlemen, if he does not provide that matrimonial home, but requires the wife to live elsewhere,—if he either refuses or neglects to provide such matrimonial home,—he will be responsible for her reasonable board. * * * When she goes out from this matrimonial home, if the husband does not provide her with support there, she goes out with the credit of the husband for the necessities of life, * * * by virtue of her relation to him as a member of the family having the right to claim those necessities; and, though she may be weak, though she may be feeble, though she may be insane, she is still entitled to have necessities provided for her, and those who are willing to provide them for her would have a right of action against the husband." Of course, we do not intend to be understood, in adopting the foregoing language of the court below concerning the right of the husband to dictate as to the matrimonial dow-

idle, that the rule stated may not, like most legal propositions, be subject to exceptions, but simply that such is the general rule. If there is evident unfitness in the husband's selection of the matrimonial domicile, we are not prepared to say, as matter of law, that the wife is bound to accompany him. *Powell v. Powell*, 29 Vt. 148; 9 Am. & Eng. Enc. Law, pp. 812, 813; *Schouler, Dom. Rel.* (3d Ed.) § 38, and cases cited; for with the constantly growing sentiment and legislation in favor of both the personal and property rights of married women, the harsh and arbitrary rules of the common law relating thereto are gradually and justly being modified, and the more humane doctrine of equal rights before the law is coming to be recognized as far as practicable. But the defendant further contends that he is not liable in this case for the reason that, shortly after his wife went to the plaintiff's house to board, he provided a suitable place outside of his own house for her to board and be taken care of, and communicated this fact to Mr. Dorsey, her bail, and also to Mr. Albert R. Sherman, who was instrumental in having her released from the hospital. We cannot assent to this proposition. Mrs. Carpenter was, and long had been, an invalid. She was in a very nervous and enfeebled condition, and specially in need of that sympathy and loving care which could best be bestowed by near relatives. She wished to be with her sister, and, as she had rightfully gone to the plaintiff's house after her husband had declined to support her outside of said hospital, we do not think he could relieve himself from the liability of paying for her board and care at plaintiff's house by simply providing a place for her among strangers. The defendant, being of sufficient ability, was bound to provide for his wife in a manner suitable to her debilitated condition of health, and we do not think this duty was discharged in the peculiar circumstances of this case by the provision which he subsequently made or offered to make for her; for, as well said by the presiding justice in his charge to the jury on this branch of the case: "When the husband fails and refuses to provide a matrimonial home, and says: 'Here, I will support my wife at such a place, or at such another place, no matter how distasteful it may be to the wife, no matter how unfortunate it may be to her if her physical condition should be such as to require sympathy and attendance and the loving ministrations of kindred,' * * * if the condition of the wife be such that she is peculiarly dependent upon the ministrations and the presence of relatives, and the husband refuses or declines to provide this matrimonial home, then he cannot dictate to the wife, husband though he be, 'You may live anywhere except in the matrimonial home, or in the home of your kindred.' That is going further than he, by law, as I understand it, has the right to go." We have considered the numerous other ex-

ceptions taken by the defendant's counsel, but do not think they are well founded. The exceptions are overruled, and the judgment of the court of common pleas is affirmed, with costs of this court.

(18 R. I. 464)

SAVINGS BANK OF NEWPORT v. HAYES et al.

(Supreme Court of Rhode Island. Jan. 31, 1894.)

CONSTRUCTION OF WILL—NATURE OF ESTATE.

Testator gave his wife the interest of his estate, the residue to be divided equally among his daughters J., D., and M. on the wife's death or remarriage, and, if D. should die before the wife, D.'s part to go to her daughter R. *Held*, that on the widow's remarriage the gift to the daughters became absolute, and that the gift to D. was not contingent on her surviving the widow.

Bill of interpleader by the Savings Bank of Newport against the administrator of the estate of Deborah J. Dunn, and John Frank Hayes, executor of the will of Edward Hayes, deceased, to determine which of the two defendants is entitled to a fund. Decree for the administrator of the estate of Dunn.

Francis B. Peckham, for complainant. Christopher E. Champlin, for executor of Edward Hayes. William P. Sheffield, Jr., for administrator of Deborah J. Dunn.

STINESS, J. The third clause of the will of Edward Hayes, late of New Shoreham, gave to his wife, Mary E. Hayes, as long as she should remain sole and unmarried, all the interest that should accrue on his notes, mortgages, and money. The fourth clause gave the residue, after his wife's decease, or, in case she should again marry, equally to his three children, John Frank Hayes, Deborah J. Rose, and Maggie Hayes. The sixth clause was as follows: "In case my said daughter Deborah Jane Rose should die before my said wife, Mary E. Hayes, the said Deborah Jane Rose's part is to go to her daughter Joanna L. Rose." Edward Hayes died December 3, 1884, and his widow remarried September 5, 1886. Deborah married Edward M. Dunn October 2, 1886, and was subsequently known as Jane D. Dunn. After the remarriage of the widow, the respondent John Frank Hayes, as executor of the will of his father, delivered one-third of the personal property referred to above, amounting to about \$1,700, to his sister Deborah; and a portion of that sum was deposited in the complainant bank, in her name, as Jane D. Dunn, where it now remains. Joanna L. Rose died January 5, 1890, without issue, and Deborah died October 4, 1890, intestate. As both these deaths occurred during the life of the widow, the respondent John Frank Hayes claims that the fund in question belongs to the next of kin of Edward Hayes, as part of a lapsed legacy, and

the administrator of the estate of Deborah J. Dunn claims that it belongs to him.

The case has been elaborately presented in behalf of the claimant John Frank Hayes, upon the assumption that the bequest to Deborah, taking the fourth and sixth clauses of the will together, was a contingent interest, simply, dependent upon her surviving her mother, the widow of Edward Hayes. But the question arises, is this assumption correct? We do not think it is. The fourth clause provided for the absolute division of the personality upon the death of the widow, or upon her remarriage. Upon the happening of the latter event the gift was complete, and there is nothing in the will which evinces any intention to cut it down. The sixth clause relates to but one of the events named in the fourth. If we should hold that this affects the whole gift under the fourth clause, we should thereby cut down, by an implication, the absolute bequest upon the contingency of a remarriage, and violate the plain words of the testator. The sixth clause was evidently intended to direct how the gift should go in case Deborah should not take it upon the event of a remarriage. It was an executory bequest to Joanna, dependent upon the fact that the estate had not previously vested in her mother upon the happening of the event as provided in the fourth clause. In no other way can we construe the clause without striking out of the fourth clause the unqualified direction to divide the estate upon that event. The remarriage occurred. Thereupon, Deborah's right became vested and absolute; and that this is the natural meaning of the language of the will is further evidenced by the fact that the parties themselves so understood it, and acted accordingly. Her share was properly turned over to her, and became and is a part of her estate. The case is similar to *Edwards v. Edwards*, 15 Beav. 357; and although one of the rules of construction therein set forth was subsequently disapproved in *O'Mahoney v. Burdett*, L. R. 7 H. L. 388, the house of lords considered that the language of the will in the former case amply sustained the decision. *Deposit Co. v. Brown*, 71 Md. 166, 17 Atl. 937, cited by the executor, is in line with the construction we have given to the will, although the time of vesting in that case was more clearly expressed; as, also, *Straus v. Rost*, 67 Md. 465, 10 Atl. 74. Our conclusion is that the fund in question belongs to the administrator of the estate of Deborah J. Dunn.

(18 R. I. 463)

In re **WHEELOCK et al.**

(Supreme Court of Rhode Island. Jan. 29, 1894.)

ATTACHMENT — RELEASE — POWERS OF NONRESIDENT—RECEIVERS.

1. An attachment against the property of a partnership composed of a resident and non-

resident cannot be released under Pub. St. c. 237, § 12, providing that a judgment debtor may release an attachment before the property is sold by recording where the assignor resides, or his real estate is situated, an assignment of his property for the benefit of his creditors.

2. Under Pub. St. c. 237, the supreme court has no jurisdiction to appoint a receiver of the estate of an insolvent nonresident.

George O. Johnson, a resident of Rhode Island, and Daniel A. White, a resident of Massachusetts, carried on business in Rhode Island, as copartners, under the name of George O. Johnson & Co. The partnership property having been attached at the suit of James Rothwell & Co., creditors of George O. Johnson & Co., Johnson and White, individually and as copartners, executed an assignment of all their property to Charles A. Wheelock for the benefits of their creditors. The assignee and the attaching creditors concur in a statement of the facts, and petition the court for an opinion as to whether the assignment operated to dissolve the attachment.

Adoniram J. Cushing, for assignee Charles A. Wheelock. Edward D. Bassett and Edward L. Mitchell, for creditors.

PER CURIAM. We are of the opinion that the assignment by George O. Johnson and Daniel A. White, as set forth in the petition, was ineffectual to dissolve the attachment on the property of the firm of George O. Johnson & Co. by James Rothwell & Co. Pub. St. R. I. c. 237, seems to contemplate as within its provisions only insolvents who are residents of the state. In *Phillips v. Newton*, 12 R. I. 489, it was held that under Pub. Laws R. I. 1878, c. 723, of which chapter 237, §§ 11-15, 17, 19-21 are a reenactment, this court had no jurisdiction to appoint a receiver of the estate of an insolvent debtor unless at the time of filing of the petition the debtor was a resident of the state. Again, section 12 makes it necessary to the dissolution of an attachment that the assignment, according to its provisions, shall be recorded in the records of the town or city where the assignor resides, or where his real estate is situated. *Alves v. Barber*, 17 R. I. 712, 24 Atl. 528. A compliance with this requirement, so far as the nonresident partner, White, is concerned, is impossible.

(18 R. I. 481)

**BANK OF AMERICA LOAN & TRUST CO.
v. BURDICK.**

(Supreme Court of Rhode Island. Feb. 21, 1894.)

**PARTNERSHIP—BILL FOR DISSOLUTION—RECEIVER
—ASSIGNMENT FOR CREDITORS—ATTACHMENT—
Costs.**

The right given by Pub. St. c. 237, § 19, to have costs of an attachment preferred, where, under section 12, it is dissolved by an assignment by the debtor for the benefit of creditors, is not affected by the fact that prior to the attachment a suit was instituted among the part-

ners of the debtor firm for a dissolution, accounting, and receiver, in which a decree was rendered merely for the appointment of a receiver, subsequent to which the assignment was made, where there is no decree for an account of the partnership property and debts.

Exceptions from court of common pleas.

Action by the Bank of America Loan & Trust Company against Marcus M. Burdick for the costs of an attachment dissolved by an assignment to defendant for the benefit of creditors. Judgment for plaintiff. Defendant excepts. Exceptions overruled.

Edward D. Bassett and Edward L. Mitchell, for plaintiff. Dexter B. Potter, for defendant.

MATTESON, C. J. This is an action to recover the sum of \$114.35, costs taxed in favor of the plaintiff in a suit brought by it against the firm of George F. Chapman & Co. The facts are as follows: William F. Perry, Jr., and George F. Chapman were copartners in business under the name and style of George F. Chapman & Co. While such copartners, on November 23, 1892, Perry filed a bill in equity in the supreme court, for this county against Chapman for a dissolution of the partnership, the taking of an account, the appointment of a receiver of the partnership assets, and the winding up of its affairs. The subpoena issued on the bill was served on Chapman on November 25, 1892. On the following day the plaintiff sued out from the district court of the sixth judicial district a writ of attachment against the firm of George F. Chapman & Co., on a claim which it had against them, and had it served on that date by attachment of certain personal property of the firm. The defendant in the present suit was appointed receiver in the equity suit (Perry v. Chapman) on November 29, 1892, and thereupon, before the recovery of judgment by the plaintiff in the suit brought by him in the district court, demanded from the plaintiff and the attaching officer possession of the attached property. Compliance with this demand was refused. On December 6, 1892, Chapman and Perry made an assignment of all their property—partnership and individual—to the present defendant, which assignment was intended, as the defendant alleges, for the equal benefit of all the creditors of the assignors, and was duly recorded. It was, however, in consequence of an omission by the scrivener, imperfect. The plaintiff denied its sufficiency under Pub. St. R. I. c. 237, § 12, to dissolve the attachment. Subsequently, on December 20, 1892, Chapman and Perry made a second assignment to the defendant of all their property,—partnership and individual,—for the equal benefit of all their creditors, which was also duly recorded. Thereupon, the officer in possession of the property attached, acting for the plaintiff, delivered the property to the defendant. On December 15, 1892, the plaintiff recover-

ed judgment against the firm, in the suit begun by the attachment, for its debt and costs.

Pub. St. R. I. c. 237, § 19, provides that the costs in cases upon which attachments or levies are made, which are dissolved under the provisions of that chapter, shall be preferred and be first paid by the receiver appointed thereunder. The plaintiff claims that it is entitled to recover, under this provision, the costs which accrued on the attachment to the date of its dissolution. The defendant having declined to pay these costs, it brought this suit against him, as assignee of Chapman and Perry, in the district court of the sixth judicial district. In that court the defendant submitted to judgment for the plaintiff, and appealed to the court of common pleas for this county. The latter court heard the case,—jury trial being waived,—and gave judgment for the plaintiff for the amount claimed and costs. The defendant excepted to the judgment as erroneous, and now brings the case before us, on his exception, for review. The defendant claims that, when the decree was entered in the equity suit, it took effect, as to the plaintiff, as of the filing of the bill, or, at any rate, as of the time of the service of the subpoena; that the title to, and the right to the possession of, the property then passed to the receiver, and, the plaintiff's attachment having been made after the equity proceedings were begun, it had no right to maintain the attachment after demand by the receiver for the property.

A bill for the dissolution of a partnership, for an account of the partnership property and debts, and for a receiver, is necessarily a bill for the complete administration of the partnership affairs. When a decree granting relief on such a bill has been entered, the bill cannot be dismissed by the consent of the complainant and respondent, without that of the creditors of the firm, though they may not be parties to the bill, since the decree is in the nature of a judgment in their favor. In *Updike v. Doyle*, 7 R. I. 446, 460, it is said: "The creditors were not, indeed, parties to this bill or decree; but as the latter provides for the ascertainment, in order to the payment, of their debts, they were interested in it. Any creditor could avail himself of it, and, after it, could be enjoined from proceeding at law for his debt, for the very reason that the decree opened to him a mode of recovering it." If, then, a decree for the taking of an account of the partnership debts and assets had been entered in the equity suit, at or prior to the appointment of the receiver, we think there would have been good ground for the defendant's contention,—so far, at least, that the plaintiff might have been enjoined from prosecuting its suit at law, and required to surrender the attached property to the receiver on his demand. But on looking into the papers in the equity suit, which are made by reference

a part of the bill of exceptions, we do not find, though a decree for the appointment of a receiver appears to have been entered by consent, any decree for taking an account of the partnership debts and assets. Apparently, for some reason, the parties, after the appointment of a receiver, thought it advisable to settle the partnership affairs under the assignments to the defendant, rather than to go forward with the equity suit. In the absence of a decree providing for the taking of the partnership accounts, as stated, the creditors were in no wise interested in the suit, since no mode was provided, of which they could avail themselves for the recovery of their debts. This being so, there was no reason for requiring the plaintiff to discontinue its suit, and to surrender the property attached. Indeed, to have required this of the plaintiff might have worked a gross injustice to it; for the partners, having gotten rid of the attachment, and obtained a surrender of the property to the receiver, could have dismissed the bill, and compelled the receiver to dispose of the property as they might direct. Exceptions overruled, and judgment of the court of common pleas affirmed, with costs.

(18 R. I. 472)

STATE v. WHITE et al.

(Supreme Court of Rhode Island. Feb. 17, 1894.)

ASSAULT—REMOVAL OF PUBLIC NUISANCE—SELF-DEFENSE.

1. On trial on indictment for assault with intent to kill it appeared that A. maintained a gate across a highway leading to a beach where defendant W. had a seaweed privilege, and tried to prevent defendants, who came there with the intention of forcing the gate in case of resistance, from going through on their way to the beach, whereupon defendants forced the gate, causing a fight, resulting in the injuries to A., for assaulting whom defendants were indicted. Held that, although A. was maintaining a public nuisance, which was a source of special injury to W., defendants were not justified in using violence to overcome his resistance.

2. Where defendants brought on the difficulty themselves, they cannot plead self-defense.

Prosecution against Isaac White and Emerson Ash. Defendants were convicted, and petition for a new trial. Petition denied.

Willard B. Tanner, Asst. Atty. Gen., for the State. Arnold Green, for defendants.

TILLINGHAST, J. This is an indictment against the defendants, charging an assault on one Samuel E. Almy with intent to kill and murder. At the trial of the case in the court of common pleas the defendants were found guilty of an assault with a dangerous weapon, and they now petition for a new trial on the ground that the verdict is against the evidence, and that the presiding justice erred in his rulings of law and in his instructions to the jury.

The facts in the case, as shown by the stenographer's report thereof, are substan-

tially these: The defendant Isaac White had a seaweed privilege on Fogland beach, in the town of Tiverton, which he had habitually exercised, and which was known to said Almy. On the day of the happening of the alleged assault, White sent his hired man, Ash, one of the defendants, together with a boy named Sweet, with a team, to get seaweed from said beach. There was, and for upwards of a century had been, a public highway leading to the beach, as was subsequently decided by this court in *Almy v. Church*, Index LL. 170, 28 Atl. 58; but at the point where the affray occurred it was, and from time immemorial had been, obstructed by a gate wrongfully maintained by said Almy and his predecessors in title to the farm then owned by him, and the case referred to was then pending in this court to determine as to the right of the town council of Tiverton to open and define said highway from the gate westward to the beach. On the arrival of said Ash and Sweet at the gate on their way to the beach, the complainant, who, having seen them approaching, had left his work in the field, and gone to said gate for the purpose of preventing them from going through the same, forbade them from opening the gate; telling Ash that if he went through the gate he (Almy) would go through his blood; Almy at the same time stepping back, and procuring two sticks from the corner of the wall, and giving one of them to Hussey, his hired man, and telling him to use it if necessary. After some talk between Ash and Almy as to the right of the former to go through said gate, and after being forbidden as aforesaid, Ash said to the boy Sweet: "We can't get anything here now. We might as well go and tell the old man [as he called him, referring to White], and if he wants to go through to come down;" whereupon the young man started on his errand, and Ash turned his team around, and drove away to a neighbor's house near by. After an hour or so had elapsed, Ash, who in the mean time had armed himself with a pistol, returned to the gate with his team, White then being with him; whereupon Ash said, "Will you open that gate now?" and Almy replied, "No, I will prevent your entering for any purpose whatever." Ash said, "We have got the tools to do it with, and we are going through;" whereupon the defendants, after some delay and parleying, during which violent, profane, and threatening language was used by the defendants towards Almy, and after a request by White to Almy to open the gate, which was again refused, Almy saying to White that if he did open it he would have to go over his (Almy's) dead body, Almy and Hussey having the sticks in their hands, turned their ox team around, and backed it violently against the gate several times, for the purpose of breaking it down, and thereby obtaining access to the beach. While the de-

fendants were thus engaged, Almy, together with said Hussey, persistently and violently strove to prevent the team from going through, by holding the gate, by punching and belaboring the oxen with the stick; and also by inserting the stick in the wheels of the cart. The defendants, however, finally succeeded in breaking through the gate. Whether or not any direct personal violence was used by either party before the gate was actually forced open is not entirely clear from the evidence, but either during the breaking thereof, or immediately afterwards, there was a violent personal encounter between Almy and the defendants, growing out of the transaction, during which the defendants used a hoe, pitchfork, and pistol, breaking the arm of Almy and otherwise injuring him to the extent of disabling him from offering further resistance to their attempts to go through the gate with their team; whereupon they proceeded to the beach for the purpose aforesaid. The defendants testify that White was knocked down and rendered insensible by Almy during the affray, and also that Ash was beaten by him with a stick or club. Briefly summarized, then, the evidence submitted shows that the defendants were lawfully on a public highway, going to the beach, to collect White's property, the seaweed which was there; that said Almy had illegally obstructed the highway by maintaining the gate across the same, which was a public nuisance, and which specially damified the defendant White; that Almy refused to allow the gate to be opened, and aggressively defended the same by holding it to prevent it from being opened, and attacking the vehicle and the oxen of the defendants, while the latter were striving to force their way through; and that during or immediately after the removal of said obstruction in the manner aforesaid a personal encounter ensued between the defendants and Almy, in which the latter received the injuries complained of, and also in which, according to defendants' testimony, White was knocked down and rendered insensible by Almy, and Ash was also beaten by him with a stick.

The first question which arises in view of this state of facts is whether the presiding justice erred in his refusal to instruct the jury as requested by the defendants' counsel: (1) "That if the jury finds that the defendants and their cart were on this highway intending to take the most direct track to the beach and salt water for their seaweed, and that Almy interrupted them, Almy, and not they, was the aggressor;" (2) "that if the jury find that these parties were attacked while upon a public highway of the state, Almy, and not they, was the aggressor." The answer to this question depends upon the correctness of the defendants' contention as to their legal right to remove said obstruction by force, while the complainant was present and actively defending the same.

If they had this right, then Almy, and not they, was the aggressor, and said request to charge should have been granted; otherwise not. We think it is well settled, notwithstanding some decisions and dicta to the contrary, that a private person may not, of his own motion, abate a strictly public nuisance. *Dimes v. Petley*, 15 Q. B. 276; *Brown v. Perkins*, 12 Gray, 89; *Griffith v. McCullum*, 46 Barb. 561; *Wood, Nuis.* §§ 729-737, and cases cited; *Bowden v. Lewis*, 13 R. I. 189. It is also equally well settled that a private person may, of his own motion, abate a public nuisance where the existence thereof is a source of special injury to him, provided he can do so without a breach of the peace. 3 Bl. Comm. 5; 16 Am. & Eng. Enc. Law, 990-994, and cases cited; *State v. Keeran*, 5 R. I. 497, 510; *Clark v. Ice Co.*, 24 Mich. 508; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Rung v. Shoneberger*, 2 Watts, 23; 4 Wait, Act. & Def. 778, and cases cited; *Day v. Day*, 4 Md. 262, 270; *State v. Flanagan*, 67 Ind. 140. In *Cooley on Torts* (2d Ed. pp. 48, 49) the law is well stated as follows: "The question who may abate a nuisance may depend upon whether the nuisance is public or private. If it is a private nuisance, he only can abate it who is injured by its continuance; if it is a public nuisance, he only may abate it who suffers a special grievance, not felt by the public in general. Therefore, if one places an obstruction in a public street, an individual who is incommode by it may remove it; but unless he has occasion to make use of the highway he must leave the public injury to be redressed by the public authorities. It is the existence of an emergency which justifies the interference of the individual. In permitting this redress, certain restrictions are imposed to prevent abuse or unnecessary injury. One of these is that the right must not be exercised to the prejudice of the public peace. Therefore, if the abatement is resisted, it becomes necessary to seek in the courts the ordinary legal remedies." This being the law, the question which naturally arises is, did the defendants commit a breach of the peace in the abatement of the nuisance in question? We think they did. Any violation of the public order or decorum is a breach of the peace. *Galvin v. State*, 6 Cold. 283. The term is generic, and includes unlawful assemblies, riots, affrays, provoking a fight, and other acts of a similar character. The use of grossly indecent, profane, and abusive language towards another person upon the public street or highway, in the presence of others, is a breach of the peace. In *Davis v. Burgess*, 54 Mich. 514, 20 N. W. 540, the court said: "Now, what is understood by a 'breach of the peace?' By 'peace,' as used in the law in this connection, is meant the tranquillity enjoyed by the citizens of a municipality or community where good order reigns among its members. It is the natural right of all persons in political society, and

any intentional violation of that right is 'a breach of the peace.' It is the offense of disturbing the public peace, or a violation of public order or public decorum. Actual personal violence is not an essential element in the offense. If it were, communities might be kept in a constant state of turmoil, fear, and anticipated danger from the wicked language and conduct of a guilty party, not only destructive of the peace of the citizens, but of public morals, without the commission of the offense. The good sense and morality of the law forbid such a construction." "Besides actual breaches of the peace," says Blackstone (4 Bl. Comm. 150), "anything that tends to provoke or excite others to break it is an offense of the same denomination." It has been held that driving a carriage through a crowded or populous street at such a rate or in such a manner as to endanger the safety of the inhabitants is an indictable offense at common law, and amounts to a breach of the peace. *U. S. v. Hart*, 3 Wheeler, Cr. Cas. 304. See, also, *Com. v. Foley*, 99 Mass. 497; 1 Bish. Cr. Law (2d Ed.) § 400, and cases cited; *Crosland v. Shaw* (Pa. Sup.) 12 Atl. 849; *Taaffe v. Kyne*, 9 Mo. App. 15. These authorities are sufficient to define and illustrate what constitutes a breach of the peace, and to show that the defendants were clearly guilty of the commission thereof in attempting to abate the nuisance in the manner aforesaid. They went with the evident intention of breaking open the gate by overcoming whatever force Almy might oppose to them. They were armed with a pitchfork, a hoe, and a pistol. They used violent and profane language in a public highway, in the presence of at least six persons. They backed their team against the gate while Almy and Hussey were on the opposite side thereof, the latter holding the gate, and the former striving to prevent the cart from going through. They provoked a quarrel, and brought on a personal encounter. In short, they went to the place in question prepared for, and evidently expecting, a fight in connection with the abatement of the nuisance, and they were not disappointed. They took the law into their own hands, and in doing so they acted at their peril. That Almy was in the wrong, and liable to indictment for maintaining the nuisance, as well as for the use of violence against the defendants, may be assumed; but this fact did not justify the defendants in committing a breach of the peace in abating it, the public peace being of more importance than the assertion of the defendants' right to use said highway. We are therefore of the opinion that the defendants, and not Almy, were the aggressors in the affray referred to, and hence that the presiding justice properly refused to charge as requested. If the defendants' counsel, in making said requests to charge, intended to claim that, in case the jury should find that Almy, and not the defendants, committed the first act of personal

violence, then they were entitled to an acquittal, it is enough to reply that, as the defendants were the aggressors in the affray by wrongfully bringing on the fight as aforesaid, it was wholly immaterial who actually struck the first blow, and hence that said requests were properly refused.

But the defendants' counsel contends that the case at bar is quite similar to *State v. Sherman*, 16 R. I. 631, 18 Atl. 1040, and hence that the defendants are entitled to be exonerated, as the defendant was in that case. *State v. Sherman* was a very different case from this. There the defendant, while peaceably engaged in removing a causeway of dirt and stones, wrongfully placed by the complainant across the mouth of the cove, through which defendant had the right of ingress and egress to and from his land by boat, was attacked by complainant, whereupon defendant, as he testified, pushed him away, using no more force than was necessary in so doing. At the trial of said case in the court of common pleas the defendant asked the court to instruct the jury "that a man in a public place, if attacked, may resist with his natural weapons, using no more force than is necessary, without retreating." This request was refused, and this court held it was error; that one wrongfully assailed in a public place is not obliged to retreat from his assailant in order to avoid a conflict, but may defend himself, meeting force with such force as is needful for his protection, unless such defense involves a homicide, when a different rule may prevail. In the case at bar no question of self-defense arises. The defendants were not engaged in the peaceable removal of the obstruction in question when attacked by Almy, but were proceeding in a hostile manner, in violation of the peace, to effect its removal. The personal conflict which resulted was brought on by the defendants themselves, and hence they cannot be permitted to urge that they acted in self-defense. In *State v. Sherman*, the exact reverse of this was true, and the defendant was properly permitted to rely on his right of self-defense.

The second ground for a new trial is that the verdict was against the evidence. Upon a careful examination of the evidence, we are not convinced that it is insufficient to sustain the verdict. Petition for a new trial denied and dismissed.

(18 R. I. 540)

HARRIS et ux. v. DYER.

(Supreme Court of Rhode Island. April 5, 1894.)

WILLS—LIMITATIONS—DEATH OF DEVISEES.

Pub. St. c. 182, § 5, makes a devise without words of limitation pass the fee, or all testator's estate, unless the will show a contrary intention. A holographic will, drawn without help of a lawyer, gave the residue to testator's children, in equal shares; should testator survive his wife, then the amount devised to her

to be divided among her children or their lawful heirs, and, "in case of the death of any of the six named heirs to the residue of my estate without leaving lawful issue, then the survivors will inherit the portion of the deceased party," but, should they die leaving issue, these to "inherit the parent's portion." *Held*, that the "death" of the heirs included one occurring in the lifetime of the testator; the word "inherit" being used loosely, as by a layman.

Bill by Edward M. Harris, and Amy, his wife, against Oliver Dyer, for specific performance of a contract. Demurrer to bill overruled.

James Tillinghast, for complainants. Wm. R. Tillinghast, for respondent.

MATTESON, C. J. This is a bill for the specific performance of a contract for the sale of real estate. The complainant Amy A. Harris derived title by warranty deed to the tract of land which is the subject of purchase and sale, one-half from Henry M. Taber, and the other half from Adelaide Horner Toel, Florence Taber Holt, Robert Schell Taber, Charles Taber, Henry Taber, and Edward Martin Taber, who were the children of Charles C. Taber, deceased, and the devisees named in his last will and testament. The clause of the will in which the devise is contained, and which is material to the present inquiry, is as follows: "First, after my lawful debts are paid, I give and bequeath to my dear wife, Cornelia Frances Martin Taber, the sum of twenty-five thousand dollars (\$25,000), in lieu of her right of dower in my estate, and also bequeath to her all my interest in any household furniture, paintings, silver, &c. The residue of my property or estate which I may possess at the time of my death, I give and bequeath to my children, in six equal shares, as follows: One-sixth part to my daughter Adelaide Horner Toel, wife of my dear friend William Toel; one-sixth part to my daughter Florence Taber Holt, the wife of my friend Henry Holt; one-sixth part to my son Henry Taber; one-sixth part to my son Charles Taber; one-sixth part to my son Edward Martin Taber; and one-sixth part to my son Robert Schell Taber. In case of the death of my wife, and my survival of her, then the amount which I had as above devised to her shall be divided among her surviving children, or the lawful heirs of her children, in equal portions, and also, in case of the death of any of the six named heirs to the residue of my estate without leaving lawful issue, then the survivors will inherit the portion of the deceased party; but in case of the death of any one of the six parties named, leaving lawful issue, then they are to inherit the parent's portion." The will is dated March 9, 1877. At that date the said Adelaide Horner Toel was married, and had two children, born, respectively, July 19, 1874, and December 19, 1876, both of whom are now living. The said Florence Taber Holt was married, but had no child. She now has one child, born July 18,

1889. The said Henry Taber was married, but had no child. He now has three children, born, respectively, May 18, 1887, February 12, 1889, and April 30, 1891, all of whom are living. The said Robert Schell Taber, Charles Taber, and Edward Martin Taber have never been married. The respondent has demurred to the bill on the ground that the complainants Harris are not able to make a good title to the one-half of the land conveyed to the said Amy by the devisees under the devise above set forth.

There have been a number of cases of devises where a gift to one in fee has been followed by a gift over in case the devisee die with or without issue, in which the event of death has been referred to the lifetime of the testator. *Doe v. Sparrow*, 13 East, 359; *Clayton v. Lowe*, 5 Barn. & Ald. 638; *Gee v. Mayor, etc., of Manchester*, 17 Adol. & E. (N. S.) 737; *Ware v. Watson*, 7 De Gex, M. & G. 248; *Rogers v. Rogers*, 7 Wkly. Rep. 541; *Caldwell v. Skilton*, 13 Pa. St. 152; *Fahrney v. Holsinger*, 65 Pa. St. 388; *Hancock's Estate*, 13 Phila. 283; *Mickley's Appeal*, 92 Pa. St. 514; *Stevenson v. Fox*, 125 Pa. St. 508, 17 Atl. 480; *Barrell v. Barrell*, 38 N. J. Eq. 60; *Burdge v. Walling*, 45 N. J. Eq. 10, 16 Atl. 51; *Murchison v. Whitted*, 87 N. C. 463. This construction has been adopted to avoid repugnancy, inasmuch as the alternative limitations over, if not so qualified or restricted, would reduce the prior devise from a fee to a life estate. It is based on the obvious reason that if the testator had intended to give only a life estate, in the first instance, he would have said so in the terms of the gift itself. If, then, in the case at bar, the testator's intent that the primary gifts to his children should be in fee is sufficiently manifest, the case is brought within the rule laid down in the authorities cited, which limits the event of death to the testator's lifetime. We think that the testator's intent is sufficiently manifest. The gift is of the residue of the testator's estate. It is never to be presumed that the testator intended to die intestate as to any part of his property. Though the devise contains no words of limitation, the word "estate," as is well understood, has frequently been held broad enough, unless restrained by the context, to pass a fee. In the devise before us there is nothing in the context to restrict its effect. On the contrary, by the terms of the gift over, the survivors or issue, as the case may be, are to take the portion of the deceased party or parent; so that, if the survivors or issue are to take in fee the portion of the deceased, it necessarily follows that the deceased, from whom that portion is to be taken, must also have taken in fee. And unless the children, or the survivors of them, or issue, are to take in fee, the testator will have died intestate as to the remainder in fee,—a construction which is not to be adopted, if it can reasonably be avoided. Moreover, Pub. St. c. 182, § 5, provides that: "Whenever any real estate shall be devised

without words of limitation, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will." It is suggested that a contrary intention does appear in the present will, because of the gifts over. If, however, the purpose of the gifts over, as we think, was merely to guard against the possibility of a lapse by the death of the primary devisee in the testator's lifetime, such purpose would not be inconsistent with the taking of the fee by the primary devisee; and the contrary intention, which would prevent the operation of the statute, does not appear in the will. The construction which refers the event of death to the testator's lifetime is strengthened in the present case by the fact that the gifts over on the death of the children are closely connected, being in the same clause with that on the death of the wife, which is expressly predicated on the testator's survival of her. The strongest objection, perhaps, to the construction that the word "death" is to be referred to the testator's lifetime is the use of the word "inherit" in the gifts over, since it may be argued, by the use of this word, the testator must necessarily have contemplated that the taking by the survivors or issue of the primary devisees was to be subsequent to his own death; for the survivors could not inherit the portion of the deceased party, nor the issue the parent's portion, unless the deceased party or parent had first taken such portion under the devise, and that could not be until after the devise had taken effect on the death of the testator, and the probate of his will. The will, however, was holographic,—prepared, doubtless, without professional aid,—a fact which probably explains the absence of words of limitation in the devise, and which leads us to suppose that the word "inherit" was not used in its strict sense of taking by descent, but merely as equivalent to "take." Indeed, in its strict sense of taking as heirs by descent, the word "inherit" would be wholly inappropriate to a devise. In *Gee v. Mayor, etc., of Manchester*, 17 Adol. & E. (N. S.) 737, the language of the gift over was as follows: "And, in case any of my sons and daughters die without issue, that their share returns to my sons and daughters, equally amongst them; and in case any of my sons and daughters die, and leaving issue, then they take their deceased parent's share, share and share alike." The use of the word "returns" in the gift over to the surviving sons and daughters would seem to have implied that the deceased son or daughter, from whom the share was to return to the survivor, should have already taken it under the devise, but the circumstance was not adverted to by the court as affecting the construction. We are of the opinion that the complainants Edward M. Harris and Amy A. Harris, his wife, can make a good

title to the one-half of the land conveyed to the said Amy by the devisees under the devise in the will of Charles C. Taber, above set forth, and, therefore, that the demurrer should be overruled.

(18 R. I. 484)

OAKDALE MANUF'G CO. et al. v. GARST.
(Supreme Court of Rhode Island. Feb. 27, 1894.)

CONTRACTS—RESTRAINT OF TRADE—MONOPOLY—CORPORATIONS—ORGANIZATION IN ANOTHER STATE.

1. A contract by which three of four companies in New England, engaged in the manufacture of oleomargarine, consolidate as a corporation, partly for the purpose of stopping the sharp competition between them, and agree that none of them shall separately engage in the business for five years, is not invalid as constituting a monopoly.

2. It is not against the laws or policy of a state for citizens to form a corporation under the laws of another state to do business in the state of their citizenship.

3. It is not an unreasonable restriction on trade for persons, forming a corporation under which they shall unite their business of manufacturing oleomargarine, to agree that none of them shall separately engage in the business for five years, without any limitation as to territory, they having in contemplation an extensive business, which should include the building up of a foreign trade.

Bill in equity by the Oakdale Manufacturing Company and others against Sebastian Garst for an injunction to restrain the defendant from carrying on business in violation of the following agreement: "And it is further mutually covenanted and agreed by and between the parties hereto, each for himself, however, and not for the others, that they will not engage, directly or indirectly, in any business of the same kind, or for the same purpose or purposes, as that to be carried on by the corporation to be formed; nor will they directly or indirectly be concerned in or be interested in any firm, firms, corporation, or corporations engaged in the same business or business similar to the business of the corporation to be formed for the period of five years from and after the date of this agreement." The complainant the Oakdale Manufacturing Company is the corporation organized by the other parties to the suit, under the laws of the state of Kentucky, in pursuance of the agreement referred to in the opinion of the court.

Arnold Green, Richard B. Comstock, and Rathbone Gardner, for complainants. Simon S. Lapham, for respondent.

STINESS, J. The complainants seek an injunction against the respondent to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to

unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts, and good will of their respective concerns, at a valuation greatly in excess of the value of the property itself, taking an amount of stock in the corporation represented by such valuation. The corporation has carried on the business since that time. In August, 1892, the defendant sold his stock in the company, to present holders, for \$60,000, although, as he says, the property it represented was worth only about \$28,000. After this he entered the same business again, and claims the right to do so upon the following grounds, viz.: (1) That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants; (2) that the contract is void as a combination to raise the price of a necessary and useful commodity in trade, and to stifle competition; (3) that one purpose of the contract was to form a corporation in violation of the laws of this state; (4) that, the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates, and that it was engaged to some extent in such export are shown by the proof.

In support of the second ground of defense, the respondent cites cases of contracts to create a monopoly and to force prices. Such was *People v. North River Sugar Refining Co.*, 54 Hun, 354, 7 N. Y. Supp. 406, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the court of appeals (121 N. Y. 582, 24 N. E. 834) the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. *Arnot v. Coal Co.*, 68 N. Y. 558; *Craft v. McConoughy*, 79 Ill. 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; and *Emery v. Candle Co.*, 47 Ohio St. 320, 24 N. E. 660,—were cases where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public in-

jury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. This is well put in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, where 24 owners of stone quarries, on account of a ruinous competition, which made it impossible to work their quarries at a profit, made an agreement to sell through a common agent for the space of six months, and the agreement was sustained. The court says: "But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages the industry, diminishes the production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry, and engrosses the markets,—tends to 'make a corner,' to use the slang of the stock and provision gamblers,—it is against the policy of the law. But restraints upon trade imposed by agreement, under limitations as to locality, time, and persons, are not necessarily restraints of trade in the general sense which is objectionable." So in *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, the defendants had sold their business of making cheese by secret process, under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction on either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. The restriction under consideration, however, was not unlimited as to time." These two cases state a very sensible rule, both as to the public and the parties, and they are exactly like the case before us. Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so,

not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, being a party to it, could not set it up. *Chafee v. Manufacturing Co.*, 14 R. I. 163. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court. *Bank v. Kendall*, 7 R. I. 77; *Machine Co. v. York*, 11 R. I. 388; *Smelting Co. v. Smith*, 13 R. I. 27; *Manufacturing Co. v. King*, 14 R. I. 511. They are also recognized as doing business here by comity. *Pierce v. Crompton*, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders, given to creditors under our statute, are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, c. 1200) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu* with social progress, to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (*French v. Parker*, 16 R. I. 219, 14 Atl. 870), nor of space (*Herreshoff v. Boutineau*, 17 R. I. 3, 19 Atl. 712); but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really

turn upon the reasonableness of the restriction. For example, in *Wiley v. Baumgarten*, 97 Ind. 66, cited by the respondent, sale was made of a dry-goods store, with the vendor's agreement not to engage in the dry-goods business for five years; and in *Hershehoff v. Boutineau* the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character, and outside restraint was unreasonable. On the other hand, in *Thermometer Co. v. Pool*, 51 Hun, 167, 4 N. Y. Supp. 861, where the business was extensive, restraint within the entire territory of the United States, and in *Tode v. Gross*, 127 N. Y. 480, 28 N. E. 469, unlimited restraint as to territory, were sustained. The contract is to be determined by its subject-matter and the conditions under which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for, when he sold his stock, he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable. We think the complainants are entitled to the relief prayed for.

(18 R. I. 467)

LAUZON v. CHARROUX.

(Supreme Court of Rhode Island. Feb. 2, 1894.)

MALICIOUS PROSECUTION—WHAT IS—COMPLAINT—SUFFICIENCY.

1. A malicious arrest of defendant in an action which plaintiff has a right to bring is a ground for malicious prosecution.

2. A declaration in an action for malicious prosecution, alleging that defendant maliciously procured plaintiff's arrest in an action against

him by falsely and maliciously and without probable cause making affidavit that he was about to leave the state without leaving property on which execution might be had; that plaintiff was committed to jail in default of bail, and was subsequently discharged,—states a good cause of action.

Case certified from court of common pleas, Providence county.

Action by Maxime Lauzon against Nazaire Charroux for malicious prosecution. Demurrer to declaration overruled.

Elisha C. Mowry and Livingston Scott, for plaintiff. Edwin Aldrich and George W. Greene, for defendant.

TILLINGHAST, J. This is an action on the case for malicious prosecution. The declaration, omitting the formal part, is as follows, viz.: "For that the defendant, at said Woonsocket, on, to wit, the 24th day of March, A. D. 1893, maliciously intending to oppress and unjustly to imprison the plaintiff, prosecuted out of the clerk's office of the district court of the twelfth judicial district a writ of arrest against the plaintiff, in due form of law, in an action of debt on judgment wherein the said defendant was named as plaintiff, and containing appended thereto a sworn affidavit of the defendant, Nazaire Charroux, wherein he declared—First, that he, the aforesaid Nazaire Charroux, had a just claim against the plaintiff, Maxime Lauzon, upon which he, said Nazaire Charroux, expected to recover in the action commenced by said writ a sum sufficient to give jurisdiction to the court to which said writ was returnable; and wherein, secondly, he declared, falsely and fraudulently, maliciously intending to oppress and unjustly to imprison the plaintiff, that the plaintiff was about to leave the state, without leaving therein real or personal estate whereon an execution that might be obtained in said action could be served. That the aforesaid writ of arrest was directed to the sheriff of the county of Providence, his deputies, or to either of the town sergeants or constables in the county of Providence, commanding them to arrest the body of the plaintiff, and him in safe custody keep, to answer the complaint of the aforesaid Nazaire Charroux at a district court of the twelfth judicial district, to be holden in the Hope building, in Woonsocket, in said county, on the 5th day of April, A. D. 1893, at nine o'clock in the forenoon. That, to wit, on the 27th day of March, A. D. 1893, by force of the aforesaid writ, and on the false and fraudulent affidavit of the defendant, the defendant caused the plaintiff to be arrested, and, for want of sufficient bail to the said writ, which the plaintiff could not obtain, to be committed to the jail in the county of Providence, where the plaintiff was detained for a long space of time, to wit, for the space of seventeen days; and that thereafterwards, to wit, on the 24th day of May, A. D. 1893, at a dis-

strict court of the twelfth judicial district, aforesaid, to which the said writ was returnable, and wherein the said writ and action of the said Nazaire Charroux against the plaintiff was duly entered, it was adjudged and considered by the justice of the said court, upon the motion of the plaintiff to that end made, that the plaintiff was not about to leave the state, either at the time of the making of the said affidavit or at the time of the said service of the aforesaid writ, and that the plaintiff was legally entitled to be discharged from said arrest; but that he had been previously discharged therefrom, on taking the poor debtor's oath, according to the statute in such case made and provided; and that thereafterwards, to wit, on the 24th day of May, A. D. 1893, judgment was duly rendered and entered in said suit in favor of said Nazaire Charroux, the plaintiff therein, for the amount claimed, with costs, and that execution issue thereon against the goods, chattels, and real estate only of said Maxime Lauzon, the defendant therein, and that said action and all proceedings therein were thereby fully and completely ended and terminated. And the plaintiff in fact says that the defendant, the said Nazaire Charroux, in prosecuting the said writ against the plaintiff, the said Maxime Lauzon, maliciously caused the plaintiff to be imprisoned by means of the false and fraudulent affidavit of the defendant aforesaid, without having any lawful or probable cause for making said affidavit, and thereby causing said imprisonment; but that the defendant was wholly guided in the premises by wanton malice, and by a desire to oppress, injure, and defraud the plaintiff. And the plaintiff further says that by means of the imprisonment aforesaid of him, the plaintiff, procured through the aforesaid false and fraudulent affidavit of the defendant, and the malicious prosecution of said writ of arrest, he was deprived of his liberty, his business was greatly impeded, his reputation injured, and he was put to great expense, and suffered great vexation, grief, and oppression." To this declaration the defendant has demurred on the following grounds, viz.: First, because it is not alleged that the action mentioned has terminated in favor of the plaintiff, Lauzon; second, because it is not alleged that said action was instituted maliciously; third, because it is not alleged that said action was begun or prosecuted by the defendant without probable cause; and, fourth, because it is not alleged that the proceeding for the arrest therein alleged to have been malicious has terminated in favor of the plaintiff, Lauzon.

The general and familiar rule of law is that, in order to entitle the plaintiff to recover in an action for malicious prosecution, three things must concur, viz.: (1) The motive of the party instituting or prosecuting the suit or proceeding must have been ma-

licious; (2) the suit or proceeding complained of must have been instituted without probable cause; and (3) the suit or proceeding must have terminated in the plaintiff's favor. Newell, Mal. Pros. 397; Cooley, Torts (2d Ed.) 208; 14 Am. & Eng. Enc. Law, 42, 43, and cases cited. It is manifestly necessary, therefore, that the declaration should contain allegations covering each of these points. The declaration before us shows that the defendant had a good and sufficient cause of action against the plaintiff, but that the manner in which it was instituted was fraudulent and malicious; in other words, the declaration sets forth that, in so far as the bringing of the action proper was concerned, there was probable cause, but that as to the arrest of the defendant in that suit (the present plaintiff) it was without probable cause.

The first question which arises, therefore, is whether a fraudulent and malicious arrest of the defendant in an action which the plaintiff has a right to bring, and therefore has actual—which is more than probable—cause for instituting, is a ground for malicious prosecution. The authorities recognize a distinction between an action for the malicious abuse of process and the malicious use thereof. *Emery v. Ginnan*, 24 Ill. App. 65, 68. An abuse of legal process is where one employs it for some unlawful object, not the purpose which it is intended to effect; in other words, a perversion of it. Thus, as stated by Sharswood, J., in *Mayer v. Walter*, 64 Pa. St. 236: "If a man is arrested, or his goods seized in order to extort money from him, even though it be to pay a just claim other than that in suit, or to compel him to give up possession of a deed or other thing of value, not the legal object of the process, it is settled that in an action for such malicious abuse it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was sued without reasonable or probable cause. *Grainger v. Hill*, 4 Bing. N. C. 212. It is evident that when such a wrong has been perpetrated it is entirely immaterial whether the proceeding itself was baseless or otherwise. On the other hand," says the same authority, "legal process, civil or criminal, may be maliciously used, so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class of cases to aver and prove that he has acted not only maliciously, but without reasonable or probable cause." We think the declaration before us shows a case of the malicious use of legal process by procuring the arrest and imprisonment of the plaintiff in the manner therein set forth without probable cause. The arrest of the defendant in

the former suit was procured solely by the making of an affidavit by the plaintiff therein that the defendant was about to leave the state without leaving therein real or personal estate whereon an execution, etc., could be served (see Pub. St. c. 206, § 9, cl. 3); and this affidavit, it is alleged, was fraudulently and maliciously made. If this is so, the proceeding, in so far as the arrest was concerned, was clearly a malicious proceeding, and the case is analogous to that of maliciously suing out a writ for a much larger sum than is due, and requiring bail to answer for such larger sum, or of maliciously suing out a writ of attachment for a much larger sum than is due, in each of which cases it has been held that an action for malicious prosecution will lie. *Savage v. Brewer*, 16 Pick. 453, 455, 456; *Ray v. Law*, Pet. C. C. 207, Fed. Cas. No. 11,592; *McNamee v. Minke*, 49 Md. 122; *Preston v. Cooper*, 1 Dill. 589, Fed. Cas. No. 11,895; *Moody v. Deutsch*, 85 Mo. 237; *Turner v. Walker*, 3 Gill & J. 877. In the case of *Goslin v. Wilcock*, 2 Wils. 302, which was an action for a malicious prosecution of a civil proceeding wherein the party was arrested, it was said by Lord Camden, C. J., that "there are no cases in the old books of actions for suing where the plaintiff had no cause of action, but of late years, when a man is maliciously held to bail where nothing is owing, or when he is maliciously arrested for a great deal more than is due, this action has been held to lie, because the costs in the cause are not sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due." In *Ray v. Law*, *supra*, Washington, J., said: "Demanding excessive bail, although the plaintiff has a well-founded cause of action, or holding to bail when the plaintiff has no cause of action, if done for the purpose of vexation, entitles the party aggrieved to an action for malicious prosecution." In *Everett v. Henderson*, 146 Mass. 93, 14 N. E. 932, the court says: "The remedy for causing an arrest by maliciously bringing a suit upon false charges, or maliciously making a false affidavit, is by an action on the case for a malicious prosecution." See, also, *Legallee v. Blaisdell*, 134 Mass. 473; *Steph. Mal. Pros.* 20, 21, and cases cited; *Donnell v. Jones*, 13 Ala. 490, 501; *Davis v. Clough*, 8 N. H. 157; 2 Chit. Pl. (16th Am. Ed.) 552; *Newell, Mal. Pros.* 52, 53, and cases cited; *Sloan v. McCracken*, 7 Lea, 626.

In answer to the defendant's grounds of demurrer, then, we reply specifically: First, that as to the first and fourth grounds, which may be considered together, while the declaration does not allege that the original action proper has terminated in favor of the plaintiff in the present suit, yet it does show that the proceeding of arrest complained of in said original action has finally terminated in his favor; second, that while

said declaration does not allege that said original action was instituted maliciously, yet it does allege that the arrest of the defendant in said action was maliciously instituted; and, third, that while said declaration shows that there was probable cause for instituting the action in which said arrest was made, yet it also shows that the proceeding of arrest in connection therewith was instituted without probable cause. And, such being the allegations, we are of the opinion that a good cause of action is set forth. Nor do we think the declaration is demurrable because it alleges, although unnecessarily, that the defendant in said original action was discharged from the imprisonment complained of by reason of his taking the poor debtor's oath at the jail prior to his being discharged by the court to which said writ was returnable under the provision of Pub. St. c. 206, § 9; for, in order to obtain a discharge that would operate upon the particular proceeding in question, it was necessary, under said statute, to resort to the court from which the writ is issued. Demurrer overruled.

(79 Md. 165)

GUMP v. SIBLEY.

(Court of Appeals of Maryland. March 14. 1894.)

CONVEYANCES—CONSTRUCTION—RELIGIOUS SOCIETIES—RIGHT TO ACQUIRE LAND—LEGISLATIVE POWER.

1. Where the owner of a leasehold subleases a portion described as "bounding" on a street to the center of which such owner has title, the sublessee's title extends to the middle of the street, subject to the easement of the right of way.

2. Though a conveyance of land to the trustees of a Catholic church for a cemetery be void for failure to show on its face the purpose thereof, adverse possession thereunder for 20 years perfects the title as against all persons not under legal disabilities.

3. Though a conveyance to the trustees of a Catholic church for a cemetery required the assent of the legislature to make it valid, because it failed to show the purpose thereof, objections thereto on that account are removed by Act 1832, c. 308, providing that the trustees of any Catholic church who hold title to any lot used as a graveyard may convey it to the archbishop of Baltimore, to be used only as a church lot, parsonage, or graveyard.

4. The legislature, after authorizing a religious body to hold land for a specified purpose, may remove the restrictions requiring that the land be used for such purpose.

Appeal from circuit court of Baltimore city; J. Upshur Dennis, Judge.

Bill by Ansil H. Sibley against Moses B. Gump to enforce specific performance of a contract under which defendant agreed to purchase land from complainant. From a decree for complainant, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Harry C. Gaither and John H. Grill, for appellant. Geo. R. Willis, for appellee.

BRYAN, J. Ansil H. Sibley contracted to sell to Moses B. Gump certain real estate in the city of Baltimore. He filed a bill in equity for the specific performance of the contract, and by consent the court passed a pro forma decree commanding Gump to accept the property, and to pay for it. An appeal has been taken for the purpose of obtaining the opinion of this court on the validity of the title to the property.

George Weller was possessed of a leasehold estate in 23 acres of land in the city of Baltimore, renewable forever. He subleased in 1808 four acres of this tract to John Hildt, and covenanted that this sublease should be renewable forever. In this sublease each party covenanted that he would keep open on the north side of the 4-acre lot, and adjoining it, 1 perch of his ground, running from Rose street to Price street (now Madison avenue), so as to make a street 33 feet wide, for the mutual benefit of themselves, their heirs and assigns. In 1809 he subleased another portion of the said 23 acres to Frederick Jourdan, renewable forever. This lot is described as beginning 2 perches north, 43 degrees west, from a corner of John Hildt's lot, and bounding on an alley called "Schoolhouse Alley," which is the street 33 feet wide mentioned in the lease to John Hildt. This was originally a private alley, and it does not appear ever to have been dedicated to the public; at all events, it has been closed, and its site is now occupied by dwelling houses. The controversy is about the title to the northwestern half of it; that is to say, the portion not embraced in the lease to Hildt. George Weller, by his last will and testament, devised to Jourdan all his estate in the lot which he had leased to him, and the reversionary title in the 23-acre tract is now vested in Sibley, the complainant below. As we have said, the lease to Jourdan describes the lot as bounding on Schoolhouse lane. In *Peabody Heights Co. v. Sadtler*, 63 Md. 533, the effect of such a description was considered. All the judges who heard the case adopted the views of Chancellor Kent on the subject. He says: "The established inference of law is that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road to the middle of it after parting with all his right and title to the adjoining land is never to be presumed. It would be contrary to universal practice, and it was said in *Peck v. Smith*, 1 Conn. 103, that there was no instance where the fee of a highway, as distinct from the adjoining land, was ever retained by the vendor. It would require an express declaration, or something equivalent

thereto, to sustain such an inference; and it may be considered as the general rule that a grant of land bounded on a highway or river carries the fee in the highway or river to the center of it, provided that the grantor at the time owned to the center, and there be no words or specific description to show a contrary intent." A majority of the court held that the rule did not apply in that particular case, because stones were placed by the parties at the side of the road as boundaries, and the deed called for these boundaries, and the lines ended at them. They therefore decided that the roadbed was excluded by literal and exact description. The same ruling was made in *Hunt v. Brown*, 75 Md. 481, 23 Atl. 1029. In this last case, after stating the general rule, it was said: "And, whatever may be the rule elsewhere, it is well settled in this state that a grant of land by metes and bounds and courses and distances, with calls for visible boundaries on the side of a highway,—for instance, a call for a stone planted on the south side of a road, and running thence, by the south side of the road, to another stone,—these calls and boundaries will be construed as defining the limits of the property thereby conveyed; and the grantee, under such a grant, will not take the fee to the middle of the road. Such was the description of the property in the *Peabody Heights Co. Case*." In the present case there is nothing to prevent the operation of the general rule, and therefore Jourdan's title extended to the middle of Schoolhouse lane, subject, of course, to the easement of the right of way over it.

In 1833, Jourdan, for valuable consideration, conveyed a portion of his lot in fee simple to the trustees of St. John's German Catholic Church of Baltimore, describing its boundaries according to a plat annexed to the deed of conveyance, and made a part of it. According to this plat, the first line of the lot bounds on Schoolhouse alley, and there are no calls in the deed for fixed objects, natural or artificial, to mark the ends of the lines. Under the rule which we have just cited, the title conveyed reaches to the middle of the alley, subject to the right of way. The lot contained less than two acres, and was purchased to be used, and was used, as a burial ground. It is contended that the deed is void under the thirty-fourth section of declaration of rights of 1776, and that no title vested in the grantee, because it was not stated upon the face of the conveyance that it was to be used as a burial ground. The lot was purchased for a lawful purpose, and was used for a lawful purpose. If the decision in *Grove v. Trustees*, 33 Md. 451, is to be construed as establishing the right of a grantor, who had received full and valuable consideration, to vacate his deed, because it did not express on its face the lawful purpose for which the property was bought, this right vested in Jourdan as soon

as he had delivered the deed. Consequently the statute of limitations commenced running against him on that very day, and has been running for more than 60 years. The deed, even if void, could not be less than color of title, and the entry under it would constitute adverse possession to the extent of the boundaries contained in it; and a continuance of this possession for 20 years would perfect the title against all persons not under legal disabilities. *Hoye v. Swan*, 5 Md. 237; *Carter v. Woolfork*, 71 Md. 283, 17 Atl. 1041; *Lurman v. Hubner*, 75 Md. 268, 23 Atl. 646. As the statute began to run against Jourdan in his lifetime, it is not suspended by his death, nor by the supervention of infancy, coverture, or other disability; but it has become a bar against all persons claiming under him. In 1840 the trustees of St. John's Church conveyed this lot to "the Most Reverend Samuel Eccleston, Archbishop of Baltimore, and his successors in the Archiepiscopal See of Baltimore, according to the discipline and government of the Roman Catholic Church, forever, according to the provisions, and for the uses, intent, and purposes set forth in the act of 1832" (chapter 308). We have quoted the language of the conveyance. It is unnecessary to say anything more about this deed than that it is in conformity with the act of assembly. It appears that a decree was passed by the circuit court of Baltimore city for the sale of this lot under proceedings in said court by virtue of the act of 1868, for the sale of burial grounds. The record of these proceedings is not set out in the transcript sent to this court, but we understand the agreement of counsel to mean that they were regularly conducted in compliance with the statute. A deed was made in 1873 to the purchaser by the trustee appointed to make the sale. The deed conveyed the burial ground, bounding one of its lines on Schoolhouse lane, and in the granting part it used these words: "Together with all interest, the bed of Schoolhouse lane, and to any and all ground formerly used as part of said burial ground, to which the parties owning said burial ground may have acquired title by possession or otherwise." The act of 1832 provided that the trustees of any Roman Catholic church who held the title to any lot on which a Roman Catholic church was erected, or which was used as a graveyard, attached to any such church, might convey the same to the archbishop of Baltimore and his successors, according to the discipline and government of the Roman Catholic Church, forever. It also provided that the lot should not exceed two acres, and that it should be used only as a church lot, parsonage, and burial ground, meaning, of course, that it should be used for one of these purposes, and not intending to require that the same lot should be used for all of them. There was another provision, that, if not used for these purposes,—that is, for one or other of them,—the

conveyance should be void. By this act the archbishop of Baltimore was empowered to hold property in a corporate capacity. It was an enabling act. One incidental effect of it may be noticed in passing. If the deed from Jourdan to St. John's Church be supposed to require the assent of the legislature because it was not stated therein that it was intended to be used as a burial ground, all objection for that reason is removed by this act. It in the clearest possible manner gives the assent of the legislature, inasmuch as it enables St. John's Church to make a valid conveyance of the title. It would be a waste of words to show that this was a full recognition and confirmation of the title already existing. It is true that this deed is not specially mentioned in the act of 1832, but that act, in its terms, comprehends all lots used as graveyards under the circumstances therein mentioned. And it is settled by *Trustees v. Manning*, 72 Md. 116, 19 Atl. 599, that a deed may be sanctioned and confirmed by an act of assembly without making special reference to it. The sale of the lot under the act of 1868 (chapter 211), relating to burial grounds, put an end to the use for which the archbishop was authorized to hold the lot by the terms of the act of 1832. But when the legislature authorized the sale of these burial grounds, and a devolution of the title to the purchasers, it would be an absurdity in the interpretation of the language to hold that it intended to defeat the title of the persons or corporations whose property they had authorized to be sold. The reasonable, just, and necessary construction of the act of 1868 is that in this particular it enlarged the corporate powers granted to the archbishop by the act of 1832. It removed the restriction which required that this lot should be used only as a burial ground, and enabled him to cause the title to be conveyed to a purchaser. It was certainly competent for the legislature to do this. All legislative power belongs to the legislature, except where limited by the constitution of the United States, or by the declaration of rights, or by the constitution of the state. We refer not now to certain proceedings in the form of statutes which have been so unjust and oppressive, and so repugnant to the spirit of enlightened government, that some good men and able lawyers have declared that they were not in the nature of legislative acts. Such exceptional transactions do not pertain to our present purpose. We are considering the ordinary course of lawmaking power within its well-recognized limits. There was nothing in the constitution to prevent the legislature from granting corporate capacity to the archbishop, and there is nothing to prevent it from enlarging and extending that capacity. It had the undoubted right to limit the purposes for which lots of ground conveyed under the act of 1832 should be held, and it had the undoubted right to remove that limitation. A further reference

to this question is not necessary, as it has been ably and lucidly discussed by Judge McSherry in *Trustees v. Manning*. Our opinion is that, under the equity proceedings authorized by the act of 1868, the purchaser took a good title to the burial lot, including the northwestern half of Schoolhouse lane. We understand from the agreement of counsel that Sibley has acquired this title, and that the objection which Gump makes to the completion of his purchase applies only to a strip of land a foot and six inches wide, lying in the northwesternmost portion of the alley, and adjoining its boundary. We must affirm the decree below. Decree affirmed, with costs.

(64 Conn. 126)

BARNES v. STARR et al.

(Supreme Court of Errors of Connecticut.
March 8, 1894.)

**RESCISSION OF CONTRACT—FRAUD ON PART OF
PLAINTIFF—LACHES.**

1. A man made an agreement with a woman, to whom he was engaged to be married, whereby, in consideration of a certain sum, she was to release her dower right in his estate. This agreement was made with the understanding that it was to be shown by him to his heirs, who were endeavoring to prevent the marriage, in order to induce them to cease their opposition, and then destroyed. He showed it to them, and it accomplished its purpose, but, instead of destroying it, he delivered it to his son-in-law, in whose possession it was found after his death. *Held* that, having been a party to the fraud practiced on her husband's heirs, she could not maintain an action to cancel the contract as obtained by fraud.

2. A man and woman, engaged to be married, made an agreement in writing, whereby she released her right to dower in his estate, and which was to be shown to his heirs, to remove their objections to the marriage, and then destroyed. Over a year before the death of her husband, then 80 years old, she learned that the contract was still in existence, but she took no action to cancel it, though she knew of the execution of a will by him. *Held*, the delay not being explained, she could not, after her husband's death, maintain an action to cancel the contract.

Appeal from superior court, Fairfield county.

Action by Lizzie T. Barnes against William H. Starr and others. From a judgment for plaintiff, defendants appeal. Reversed.

Samuel Tweedy, Lyman D. Brewster, and J. Belden Hurlbut, for appellants. Goodwin Stoddard and Samuel Fessenden, for appellee.

ANDREWS, C. J. The plaintiff is the widow of Samuel H. Barnes, who died at Wilton on the 23d day of April, 1891. He left a paper, which was duly executed as his last will. The defendants are the executors and legatees named therein, and all the persons who would be distributees of his estate in case of intestacy. The plaintiff was married to the said Samuel H. Barnes on the 4th day of August, 1886. On the 19th day of

July, prior to their marriage, they mutually executed a marriage contract in these words:

"This agreement and written contract, made this 19th day of July, A. D. 1886, by and between Lizzie T. Cartwright, of the town of Norwalk, in Fairfield Co., and state of Connecticut, party of the first part, and Samuel H. Barnes, of the town of Wilton, in said county, party of the second part, witnesseth that whereas, a marriage is intended to be had between the parties to this agreement, and each has property of his or her own, and in the event of such marriage the survivor of them would be entitled to a statutory share of the property owned by the other at the time of his or her death, as appears by the statutes of this state; and whereas, both parties desire that by this written contract said Lizzie T. Cartwright shall receive from the said Samuel H. Barnes his promise to pay her the sum of five thousand dollars, in the event of such marriage, out of his estate, in case she outlives him, to be hers and her representatives' forever, which sum is intended as a provision in lieu of such statutory share: Now, therefore, in consideration of the premises, and of the sum of one dollar, received from the said Samuel H. Barnes by the said Lizzie T. Cartwright, she hereby agrees to receive, and doth receive, the same from him as a provision in lieu of such statutory share of his property in case she outlives him, and she doth relinquish and release his estate from any and all further claims and demands by her and her representatives thereupon whatever. And the said Samuel H. Barnes, in consideration of the premises, and of the sum of one dollar received to his full satisfaction from Lizzie T. Cartwright, doth hereby promise and agree to relinquish any claim upon her estate in case he outlives her, and, in case she outlives him, doth promise to pay, or that she shall be paid by his representatives, out of his estate, to her or her representatives, the sum of five thousand dollars, as a provision for her in lieu of her statutory share of his estate, to be hers and her representatives' and heirs' forever. In witness whereof said parties have severally set their hand and seals the day and year above first written, and to the faithful performance of which they mutually bind and engage themselves, each to the other, his executor and administrator and her executrix and administratrix. Lizzie T. Cartwright. [L. S.] Samuel H. Barnes. [L. S.]

"Signed, sealed, and delivered in presence of Curtis Thompson, Howard N. Wakeman."

"County of Fairfield, Town of Bridgeport—ss.: July 19th, 1886. Personally appeared Lizzie T. Cartwright and Samuel H. Barnes, signers and sealers of the foregoing instrument, and acknowledged the same to be their free act and deed, before me, Curtis Thompson, Notary Public."

The complaint in this action, after setting

out the fact of the marriage of this plaintiff to the said Samuel H. Barnes, and that prior to their marriage they executed the said marriage contract, alleges that: "(3) The said Samuel H. Barnes, in order to induce the plaintiff to execute the said instrument, represented that he had received a letter from some anonymous writer, declaring that the plaintiff's sole object in the proposed marriage with him, the said Barnes, was to obtain his, the said Barnes', money; that he believed it was inspired by relatives of his, and persons connected with him by marriage, and who were desirous of becoming the objects of his bounty; that he desired to convince them that there was no foundation for their anxiety or fear in this respect; that he did not believe that such was the object of the plaintiff, or that she had any such purpose in view, and that he had given them to understand that he so believed, but that he desired her to execute the said instrument, that he might show it to those who were taking so much interest in his affairs, in order to relieve himself from annoyance and vexatious interference by them; and that as soon as she had executed it, and he had shown it to these parties, and thereby accomplished the purpose which he had in view, he would destroy it; and that the plaintiff's rights should not be in any manner injuriously affected by the execution of said instrument of agreement. * * * (5) Subsequently, and before the execution thereof, the said Barnes renewed his request that the plaintiff should join with him in the execution of said instrument, and, as a further inducement to cause the plaintiff to acquiesce and to execute the same, represented to her that it would make but little difference to her any way, as he was worth only fifteen thousand dollars; and he again stated to the plaintiff the reason why he desired her to execute the instrument, and again declared that he would destroy it as soon as he had shown it to the parties to whom he referred. (6) Relying upon these statements and the promise of the said Barnes, the plaintiff was induced to execute the said instrument, and did execute the same on the 19th day of July, A. D. 1886. * * * (10) The said representations made by the said Barnes to the plaintiff to induce her to execute said instrument, and relying upon which she did execute the same, were false, and were made with the fraudulent intent to defraud the plaintiff, and to induce her to execute said agreement, and without any intention to use it for any such purpose with the parties referred to by said Barnes, or to destroy it after he had shown it to them; and at the time when the said representations were made the said Barnes was worth seventy-five thousand dollars. (11) Said representations were made, and said instrument was procured to be executed in the manner in which it was, fraudulently, and with intent

to defraud and to deprive the plaintiff of her statutory rights in the estate of said Barnes." The complaint ended with a prayer that the said marriage contract be declared to be void, and to be delivered up to be canceled. The superior court passed a decree granting the prayer of the complaint. The defendants have appealed to this court.

There are in the complaint, as claimed by the plaintiff, three specifications of fraud by her late husband, relying upon which she says she signed the said marriage contract, and on account of which she asks that it should be set aside: (a) That he had received an anonymous letter, the authorship of which he attributed to his relatives, and persons connected with him by marriage, warning him not to marry the plaintiff; and he wanted the contract to relieve him from their interference, etc.; (b) that he promised to destroy the contract as soon as he had secured that purpose; and (c) that he represented to her that he was not worth more than \$15,000. The finding, so far as it bears upon these claims of the plaintiff, is as follows: The plaintiff, whose maiden name was Lizzie T. Cartwright, first became acquainted with Mr. Barnes about the 1st of January, 1885. He was then a widower,—his wife having died in the month of September, 1884. He was then 75 years of age. It was about the middle of July that he first proposed marriage to her. She was then 45 years old, and had never been married. She did not accept the proposal at that time, hesitating on account of the disparity of their ages and for other reasons. At that time, and for about 10 years prior thereto, she had been living with her sister, Mrs. George T. Hunter, where she was treated as one of the family. She had upwards of \$1,000 deposited in savings banks to her credit. Mr. Barnes was a well-preserved man for his years, and apparently vigorous. He had always been a farmer. The plaintiff knew in a general way that he had considerable property. She knew that he owned his farm, which was a nice farm, well stocked, and that he owned the Van Zant place in Norwalk, which was worth \$5,500, and believed that he had sufficient income or property from which an income was derived by him to enable him to give up farming, rent or sell his farm, and live upon the Van Zant place in moderate and comfortable manner, and support her and himself upon the income of his said property, without the necessity of his performing any labor himself. But she did not know, nor did she inquire, the amount of his property, nor in what it was invested. They became engaged to be married about the last of August or the first of September of that year. At an interview which took place between them about a month after their engagement, Mr. Barnes showed the plaintiff an anonymous letter, which he said he had recently

received, which read: "Norwalk, July 9, 1885. Mr. Barnes—Dear Sir: I write this to warn you against taking a step you will always regret. Miss Cartwright is not the woman you should select for a wife. She is too hateful and quarrelsome. She is the most disagreeable person to be found. She wants to rule and ride over everybody. Now, I will tell you of something I overheard her say. She said, when asked if she loved you, 'No; how could I love that old thing? But I could love his money, and when I get him, I will have things all my own way, and I will make him stand around.' Yes, and so she would. I felt sorry for you to think you were going to throw yourself into such an abyss of trouble, and so wrote, as a friend, to warn you in time to steer clear of her. She expects to marry you, and, when once installed in your home, you can bid farewell to happiness. Now, this is the truth. You may not believe it, but will have a chance of believing it, should you marry her. Mr. Hunter would be happy to have some one take her off his hands, because she quarrels with all around her. Of course, she will be sweet on you, as the spider was on the fly, until she gets you where she wants you. Then, look out. Remember, you have been warned. Now, do as you please. This is in confidence. If you should speak of this, it would all be denied, and smoothed over; but these are the facts I have written. From a Friend,"—and said to her he thought it came from Mr. Nelson Gorham's folks. He also showed her the marriage contract, and asked her to sign it. She asked what it was. He said it was a little form he wanted her to sign, so that he could show it to those people who felt so badly about his getting married, and said to her: "I don't believe you have any idea about marrying me for my money, but I would like this, so that I can show it to them. They feel so badly about my marrying you, and I want to convince them that you are not such a person; and you can have confidence in me that I will destroy it as soon as we are married." He appeared to be angry and excited about the letter, and said he did not believe the purport of the letter, but thought it a scheme to set him against her; yet at the same time he would like to have her sign the marriage contract, so that he could show it to those people who were complaining or objecting about his getting married; and that, if she would sign "it, he would destroy it as soon as he had shown it to them." The plaintiff at that time declined to sign the contract. In the autumn of that year Mr. Barnes again spoke to the plaintiff about the marriage contract, and she again declined to sign it, telling him that the other people might get hold of the paper and make trouble. About the last of June, 1886, Mr. Barnes spoke again to the plaintiff about the marriage contract. At that time he told her "that she need not be

afraid to sign this marriage contract; that all he wanted it for was to convince those people that she was not the person they represented; that if she signed it, it would stop those people bothering her; that it would make little difference with her any way, as he was not worth more than \$15,000; that after they were married he would have it in his power to do what was right; and that if she would sign it he would destroy it as soon as he had showed it to those people." Mr. Barnes had only one child, a daughter, who was married to Mr. Nelson Gorham in 1855. She died in 1857, leaving no children. Mr. Barnes lived with Mr. Gorham for a number of years after Mrs. Gorham had died, and for some time after Mr. Gorham had married again, and was on terms of great intimacy with him and his family. Gorham was a near neighbor to, and at all times a trusted and confidential friend of, Mr. Barnes. He attended to matters of business for Mr. Barnes, collected his rents, and deposited money for him. Bradley Gorham, a son of Mr. Nelson Gorham, also attended to business matters of a like nature for Mr. Barnes. Mr. Barnes delivered the marriage contract to Mr. Gorham shortly after the marriage, who informed the nephews and most of the legatees in the will that he had it, and of the nature of its contents. He kept possession of it until after Mr. Barnes' death.

It is found that, relying upon the representations of Mr. Barnes, and believing that said contract was not to be of binding force upon her, or in any way to affect her right in her husband's estate after her marriage, but was to be destroyed and canceled within a short time, and as soon as it had served the purpose which Mr. Barnes said its execution was intended to accomplish, and without intending to agree to, or to be bound by, the provisions of the said marriage contract, the plaintiff signed the same on the day it bears date; and that the statements made by Mr. Barnes as to the amount of his property and as to his intended destruction of said marriage contract as soon as he had shown it to certain people, who, as he claimed, were objecting to his marriage with the plaintiff, were false and untrue, and were made to the plaintiff for the purpose of fraudulently inducing her to sign said contract, and thereby relinquish the interest in his estate which would, after marriage, vest in her as his wife; and that Mr. Barnes was worth at that time at least \$75,000; and that he had no intention whatever of keeping his promise, and destroying said contract as soon as he had shown it to certain people, or at any time thereafter. And the trial judge says: "I find that the plaintiff was induced to sign said contract mainly by reason of the promise and representation that the same should be destroyed; but I do not intend to find that she was wholly influenced by the other false representations, made to her by her husband

previous to the execution of said contract, and hereinbefore detailed." Mr. Barnes made his will on the 16th day of June, 1890. The plaintiff knew at the time that he was making his will, but did not know anything of its provisions until after his death. The plaintiff learned, some time before the will was made, that the marriage contract had not been destroyed.

Whenever fraudulent representation is the ground upon which relief is sought in a court, certain essential ingredients must be proved: That the representation was made as a statement of fact; that it was untrue, and known to be untrue by the party making it, and it was made for the purpose of inducing the other party to act upon it; and that the party to whom the representation was made was in fact induced thereby to act to his injury. Unless these ingredients are shown, the case is not sustained. An examination of the foregoing finding discloses that the representation mentioned in the first specification of fraud set forth in the complaint is not found to be untrue, but rather the contrary. As to the representation which is the subject of the third specification, it is not found that the plaintiff was induced thereby to execute the marriage contract. The trial court, after finding specifically that the promise by Mr. Barnes to destroy the marriage contract did induce the plaintiff to sign the same, says, as to the other false representations (of which the one contained in the third specification is the only one found to be untrue): "But I do not intend to find that she was wholly uninfluenced by the other false representations made to her." The whole significance of this language is explained in declaring the state of mind in which the judge then found himself. It is not a finding that the plaintiff was not influenced by the other false representations; and still less is it a finding that she was in fact induced by such other representations to sign that contract. At the most, it is the declaration of an inability to find either way.

The only fraudulent representation, then, upon which the judgment in this case can be founded, is the promise by Mr. Barnes to destroy the marriage contract. The circumstances which led up to the making of the contract involved in this case, as they appear in the complaint and in the finding, and upon which the plaintiff claims that it should be canceled, are these: In the summer of 1885, the plaintiff, a maiden lady of high respectability, aged 45 years, of limited pecuniary means, living in the family of her married sister as a member of the family, received a proposal of marriage from a man 30 years her senior, but well preserved, against whose character and standing nothing is suggested, and whom she understood to be possessed of considerable fortune. It was an eligible offer, creditable to her, and one which, in a prudential point of view, it would seem, was an exceedingly desirable one to accept.

It is stated on the very highest authority that marriage is honorable in all. Preference in marriage may always be sought by an honorable woman with the approval of the law, and with the approbation of society. The plaintiff and Mr. Barnes had both reached that time in their lives when the ardor amantium does not hold sway, and when considerations drawn from sober practical experience are altogether likely to influence the conduct. At five and forty a woman can calculate. Unless the plaintiff was different from most of her sex, she desired this marriage. That she regarded the offer as a favorable one, is shown by her subsequent action. After a suitable period of delay, sufficient for such reflection and inquiry as she deemed necessary, she accepted the offer, and she and Mr. Barnes became engaged to be married. No time was, however set for the celebration of the ceremony. Shortly after their engagement, Mr. Barnes received a letter, which is set out in the finding. Its tone of candor towards and friendship for him and its severe criticism upon the plaintiff were well calculated to make estrangement between them. Its authorship gave it much force. Mr. Barnes attributed it to that family to which he was most closely allied of any in the world by association and ties of affection. They were his most trusted and confidential friends,—friends of long standing, who would naturally have great influence with him. Mr. Barnes also believed that others of his relatives, and persons connected with him by marriage, were privy to the letter. Such objections to her as the letter contained, coming from such a source, could not be disregarded. If the plaintiff desired to marry Mr. Barnes, or if Mr. Barnes desired to marry her, such objections from these people must be met and overcome; otherwise, the marriage would be put in peril. If the near friends of Mr. Barnes held such an opinion of the plaintiff as that letter indicated, she would be very unwilling to marry him. If she was really such a person as that letter described her to be, it is quite certain he would never willingly marry her. The use of the marriage contract was adapted to that condition of things in which they were situated. If Mr. Barnes could have that contract duly executed to show to those persons from whom the letter came, their opposition would be removed. But to have this effect the contract must be a valid one. To secure that effect the plaintiff signed that contract. It apparently was used as she expected, and such use accomplished the purpose for which it was intended. Those persons to whom the contract was shown were apparently convinced that they had misjudged the plaintiff. All their opposition ceased. There was no more interference with Mr. Barnes, nor was there any more "bothering" the plaintiff. The marriage took place, and the contract was found, later, in the possession of

the very parties to remove whose opposition it was executed and delivered. According to the version of the matter given by the plaintiff, and found by the court, the marriage contract was to be a valid one for a time,—until Mr. Barnes had shown it to some parties who were objecting to the marriage. It was to be used with them as a valid one, and then it was to be “destroyed and canceled.” There would be little occasion to “destroy or cancel” an invalid contract. It was this marriage contract, so executed and so used, that the plaintiff prayed the court to cancel. We think she ought not to succeed and that the superior court erred in granting the prayer of her complaint.

These circumstances, viewed in that aspect to which the plaintiff herself asks attention, show that, in order to remove the opposition which was being made to her marriage with Mr. Barnes, she took part with him in misleading his relatives. These relatives were the heirs apparent to Mr. Barnes, persons who had rights in his estate of which equity takes note and permits to be conveyed. 2 Spence, Eq. Jur. 865; Story, Eq. Jur. 1040e; Fitzgerald v. Vestal, 4 Sneed, 268; Jenkins v. Stetson, 9 Allen, 128. They were the same persons who are the defendants in this action. They were interested in preventing the marriage. They were taking measures to prevent it. They might have succeeded. To stop their opposition, and to keep it from being successful by removing it entirely, and to gain the corresponding advantage to herself, she participated in practicing a deceit on them. She now asks the court to add another element to her deceit, and make it a fraud, by canceling the contract which she signed to deceive Mr. Barnes' relatives, the present defendants, and to take away from them the consideration upon which they ceased their opposition to her marriage. This is conduct which debars her from obtaining aid in a court of equity. The very foundation principle of equity is good conscience. One of its primary maxims is that “who comes into a court of equity must come with clean hands,”—a maxim which has been interpreted by long use to mean that whenever a party who, as actor, seeks to set the judicial machinery in motion to obtain some relief, has himself violated conscience or good faith in his prior conduct connected with the matter of the controversy, then the door of the court will be shut against him; the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy. Pom. Eq. Jur. 393, 404. In Maddock's Chancery Practice (volume 1, pp. 404, 405) this rule is stated somewhat more fully: “A party calling for the aid of a court of equity must come, as it is said, with clean hands.” Cadman v. Horner, 18 Ves. 11. “It being a maxim of equity that he that hath committed iniquity shall not have equity.” This statement is followed by numerous citations

of cases in which contracts have been sought to be set aside or to be enforced, and in which, by the application of this maxim, aid has been refused to the plaintiff,—as when it is shown that there was chargeable to the plaintiff an omission or mistake in the agreement (Joynes v. Statham, 3 Atk. 388; Wooliam v. Hearn, 7 Ves. 211; Mason v. Armitage, 13 Ves. 25; Ayers v. Watson, 1 Sim. [N. S.] 523; Costigan v. Hostler, 2 Schoales & L. 186; Howell v. George, 1 Madd. 1); that it was unconscientious (Vaughan v. Thomas, 1 Brown, Ch. 556), or unreasonable (Flood v. Finlay, 2 Ball & B. '9); or that there has been fraud or surprise (Clowes v. Higginson, 1 Ves. & B. 526, 527; Townsend v. Stongroome, 6 Ves. 328; Twining v. Morrice, 2 Brown, Ch. 326); or that there had been concealment (Shirley v. Stratton, 1 Brown, Ch. 440; Oldfield v. Round, 5 Ves. 508); or that there had been misrepresentations, whether willful or not, latent or patent (Scott v. Merry, 1 Ves. Sr. 2); or any unfairness (Wall v. Stubbs, 1 Madd. 81). The rule just quoted, that he who comes into equity must come with clean hands, is a broad one. It includes within its operation several other maxims frequently acted upon in courts of equity; as, “ex turpi causa non actio oritur;” “ex dolo malo oritur actio;” “jus ex injuria non oritur;” “in pari delicto potior est conditio defendentis.” The fundamental reason upon which each of these maxims seems to rest is that a party does not come into court with clean hands to whose cause either of these maxims may be justly applied. See, also, Beach, Mod. Eq. Jur. 16; Pom. Eq. Jur. 38–404, inclusive; Story, Eq. Jur. (12th Ed.) 64e, note; Snell, Eq. 35; Smith, Man. Eq. 23; Overton v. Bomister, 3 Hare, 504; Savage v. Foster, 9 Mod. 35; Nelson v. Stocker, 4 De Gex & J. 458, 461; Johns v. Norris, 22 N. J. Eq. 102; Walker v. Hill, Id. 513; Wilson v. Bird, 28 N. J. Eq. 352; Atwood v. Flisk, 101 Mass. 363; Creath v. Sims, 5 How. 192; Bischoffsheim v. Brown, 34 Fed. 156. A very numerous class of cases coming within the same equitable doctrine is where the contract or other act is substantially a fraud upon the rights, interests, or intentions of third parties. In a case of this kind relief is refused to a plaintiff on the ground that he does not come into court with clean hands. The general rule is that the parties to a contract must act not only bona fide between themselves, but that they shall not act mala fide in respect to other persons who stand in such a relation to either as to be affected by the contract or its consequences. Pom. Eq. Jur. 881; Lord Hardwicke in Chesterfield v. Janssen, 2 Ves. Sr. 156, 157; Egerton v. Earl Brownlow, 4 H. L. Cas. 100; Ferris v. Hendrickson, 1 Edw. Ch. 132; Paddock v. Fletcher, 42 Vt. 389; Huxley v. Rice, 40 Mich. 73; Denison v. Gibson, 24 Mich. 187; Bolt v. Rogers, 3 Paige, 154; Dunaway v. Robertson, 95 Ill. 419; Miller v. Marckle, 21 Ill.

152; *Everett v. Raby*, 104 N. C. 479, 10 S. E. 526; *Parlett v. Guggenheimer*, 67 Md. 542, 551, 10 Atl. 81; *Medford v. Levy*, 31 W. Va. 649, 8 S. E. 302; *Bleakley's Appeal*, 66 Pa. St. 187; *Lewis' Appeal*, 67 Pa. St. 166.

There is another feature of the case which invites brief attention. It has been pointed out that the only false representations on which the judgment in this case can be founded is the promise by Mr. Barnes to destroy the marriage contract as soon as he had shown it to those persons from whom he believed the letter had come. In the same connection it was noted that a representation, to be a fraudulent one, cognizable as such in equity or actionable at law, must be made as a statement of fact, and that it must be untrue at the time it is made. Counsel for the defendants claim that the promise by Mr. Barnes to destroy the contract at a future time is not, and cannot be, a fraudulent representation. A promise to do an act in the future cannot be untrue at the time it is made, and therefore, as is claimed, cannot be a fraudulent representation. We suppose the doctrine of this claim to be well settled by the authorities. In *Beattie v. Lord Ebury*, 7 Ch. App. 777, 804, it is said: "There is a clear difference between a misrepresentation in point of fact—a representation that something exists at that moment, which does not exist—and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and, although you may call it a representation, if it is anything it is a contract or a promise." A representation of this kind, if so made as to be enforced, is so because it is a contract. "There is no middle ground, no tertium quid, between a representation so made as to be effective for such a purpose, and being effective for it and a contract. They are identical." *Mannell v. Waite*, 4 H. L. Cas. 1056; *Jorden v. Money*, 5 H. L. Cas. 185, 213, 214; *Citizens' Bank of Louisiana v. First Nat. Bank of New Orleans*, L. R. 6 H. L. 360; *Knowlton v. Keenan*, 146 Mass. 80, 15 N. E. 127; *Dawe v. Morris*, 149 Mass. 188-192, 21 N. E. 313; *University v. Hamilton*, 34 Ind. 506; *Grove v. Hodges*, 55 Pa. St. 504; *Long v. Woodman*, 58 Me. 49. Counsel for the defendants insists that this is all there is of the plaintiff's case, and that she cannot recover. Counsel for the plaintiff deny that this is the whole of her case. They admit the rule established by the authorities cited, but they claim that her case is not in conflict with it. They insist that the promise to destroy is not their case,—certainly not the whole of it, not the essential part of it. They say that the promise to destroy the marriage contract at a future time was coupled with the present intention not to keep the promise, and that the declaration of a present intention, although the act is the

statement of a fact, i. e. the intention existing at the time; and that, if no such intention existed, it was a fraudulent representation. *Cooley, Torts*, 487; *Dowd v. Tucker*, 41 Conn. 197; *Dow v. Sanborn*, 3 Allen, 182. The superior court seems to have adopted the contention of the plaintiff on this point.

In any case where a fraudulent representation has induced a party to enter into a contract it is not wholly void. It is voidable only, at the election of a party misled. If nothing is done to avoid such a contract, then it stands as a valid one. Obviously the person misled could waive the fraud, and elect to treat the contract as a binding one. And what such a person could do directly he might do indirectly. A party who, having entered into a contract, afterwards learns that a fraud has been practiced upon him by reason of which the contract may be avoided, and who neglects to take reasonable measures to set it aside, will be held to have waived the fraud and elected to treat the contract as valid. Especially is this rule applied when, during the delay, the rights of other persons have been changed. The marriage contract was executed on the 19th day of July, 1886. The plaintiff was married to Mr. Barnes on the 4th day of August following. Mr. Barnes made his will on the 16th day of June, 1890. He died on the 23d day of April, 1891. The plaintiff testified that she knew "some time before the will was made" that the marriage contract was still in existence,—not destroyed. Whether the expression "some time" means one month or two months, or more or less, perhaps makes no great difference. Whenever it was, at that time the plaintiff's cause of action was complete, as fully as when this suit was brought. The fraud of which she now complains was then complete; her knowledge of it was then complete. The secret agreement between herself and Mr. Barnes, the nonperformance of which constituted that fraud, could be testified to by no person other than Mr. Barnes and herself. Mr. Barnes was then 80 years old. Whether she speculated on the advantage of having a hostile witness removed is open only to conjecture. From that time until after the death of Mr. Barnes she did nothing to assert her rights as she now claims them. Nothing has been suggested as a reason why she so remained quiescent, or why she did not take measures then to have the fraud upon her exposed. During her delay Mr. Barnes made his will. She knew that he made it, although she did not know its contents. Mr. Barnes died, and the rights of the defendants in his estate have become fixed. She has been under no disability or constraint; on the contrary, she has acted, so far as appears, from her own choice. She did nothing because she chose to do nothing. In suits to rescind contracts for fraud, it is the duty of a plaintiff to put forward his complaint at the earliest possible period. *Jennings v. Broughton*, 5 De Gex,

M. & G. 126. "Acquiescence in the wrongful conduct of another, by which one's rights are invaded, may often operate, upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctive equitable remedies to which he would otherwise be entitled. * * * The same rule applies, and for the same reasons, to a party seeking purely equitable relief against fraud, such as the surrender or cancellation of securities, the annulling of a transaction, and the like. Upon obtaining knowledge of the facts he should commence the proceedings for relief as soon as is reasonably possible. Acquiescence consisting of unnecessary delay after such knowledge will defeat the equitable relief." Pom. Eq. Jur. 817; Price's Appeal, 54 Pa. St. 472; Bolton v. Dickens, 4 Lea, 569; Seminary v. Keifer, 43 Mich. 105, 4 N. W. 636. This part of the case has been noticed, not because the case depends upon it, but because it illustrates and enforces the other parts of the case which have been previously considered. The conduct of the plaintiff touching the subject of her complaint in this action is pretty fully delineated throughout the case. It shows that she has not acted with that sincerity, conscientiousness, candor, and regard for fair dealing which entitles her to the aid of a court of equity. She does not come into court with clean hands. There is error, and the judgment appealed from is reversed. The other judges concurred.

(66 Vt. 234)

LABBEE v. JOHNSON.

(Supreme Court of Vermont. Windsor. March 28, 1894.)

CONTRACTS—PAROL EVIDENCE.

Plaintiff swapped a horse for defendant's mare, giving defendant a note for \$70, reciting that it was given for a mare "conditionally sold" to plaintiff, and to remain defendant's property till the note was paid. Held, that parol evidence was competent to show the terms of the trade.

Exceptions from Windsor county court; Munson, Judge.

Action by Charles Labbee against Nelson S. Johnson. There was judgment for plaintiff, and defendant excepts. Affirmed.

The plaintiff sought to recover for the conversion of a brown horse. The referee reported that the plaintiff had swapped this brown horse with the defendant for a black mare, giving the defendant \$70 boot. For the purpose of securing the payment of this \$70, the plaintiff gave the defendant a lien note on the black mare, as follows:

"\$70 00/100. Lebanon, N. H., May 24, 1892. For value received, I promise to pay Nelson S. Johnson, or order, the sum of (\$70.00) seventy dollars, payable ten dollars the first of July, and ten dollars a month thereafter until all is paid. This note is given for one black mare, four years old, with four white feet,

and a white stripe in the face, this day conditionally sold and delivered by Nelson Johnson to Charles Labbee; and said property is to be and remain the property of said Nelson S. Johnson until said note is wholly paid. And my residence is in the town of Hartford, Vt.

his
"Charles X Labbee.
mark.

"Witness:

"L. E. Johnson.

"J. E. Johnson."

The plaintiff then proposed to show by parol that, at the time of the trade, it was agreed that, in case the black mare did not prove all right, the defendant should receive her back, and deliver to the plaintiff his note and horse; that the black mare was not all right, and that the plaintiff had returned her to the defendant, and demanded back his note and horse; but that the defendant could not and did not return the horse, since he had disposed of him. The referee received this evidence, subject to the objection and exception of the defendant, and found the facts which the evidence tended to establish.

J. G. Harvey, for plaintiff. William Batchelder, for defendant.

THOMPSON, J. The only question made is in respect to the admission of parol evidence to show that, as a part of the trade by which the parties exchanged horses, it was agreed that, if the black mare received by the plaintiff of the defendant was not all right, and satisfactory, he might return her, and the defendant would return the brown horse in suit to the plaintiff. The defendant contends that the execution and delivery of the note and lien described in the referee's report preclude the plaintiff from showing by parol what the contract of exchange in fact was. The contention is not sound. The lien note was intended only as security, and not as a repository of the terms of the contract. It does not even allude to the contract in regard to the brown horse, and, as to the black mare, it only says she was "conditionally sold." The maker of a promissory note may always show the terms and conditions on which it was delivered, and that the payee or holder had no right to hold it, except for the accomplishment of a particular purpose. Winn v. Chamberlin, 32 Vt. 318; Park v. McDaniel, 37 Vt. 594; Stewart v. Martin, 49 Vt. 266; Reynolds v. Hassam, 56 Vt. 449; Perry v. Dow, Id. 569. The defendant recognized and acted under the contract after receiving the lien note as security. He took back the black mare, and surrendered the note to the plaintiff; and it would now be a strange anomaly in the law if he could stand behind the note to prevent a recovery for the brown horse, which he has converted to his own use. Such is not the law. Judgment affirmed.

(66 Vt. 229)

WATSON v. GOODNO.

(Supreme Court of Vermont. Washington. March 28, 1894.)

CONVERSION—CERTIFIED EXECUTION.

1. An oral agreement that the title to a horse shall remain in the vendor until paid for is valid as between the parties, and the vendee, having disposed of it without consent, is liable in trover for such conversion.

2. Where the conversion of personalty is malicious, a certified execution is properly granted.

Exceptions from Washington county court; Rowell, Judge.

Action in trover for conversion of a horse. From a judgment for plaintiff, defendant excepts. Affirmed.

The court adjudged, upon the facts reported by the referee, that the cause of action arose from the wilful and malicious act of the defendant, and that a certified execution should issue. The referee reported that the plaintiff had sold the defendant the horse upon the agreement that he was to have a lien for the purchase price, and that a written agreement was drawn up, but never signed, and that subsequently the defendant disposed of the horse without the consent of the plaintiff. Nothing was reported as to the manner or circumstances under which the horse was disposed of by the defendant.

J. P. Lamson, for plaintiff. B. E. Bullard, for defendant.

THOMPSON, J. 1. The referee found that plaintiff bought the horse of Smith for the defendant, paying towards it \$138, and that it was agreed between the plaintiff and defendant, at the time of the purchase, that the horse should remain the plaintiff's until he was paid the \$138. While there was a talk subsequently between the parties about releasing this lien upon the horse, and taking other security, such an arrangement was never consummated. Although the lien was not evidenced by writing, yet, as between the plaintiff and defendant, it was valid; and the latter, having disposed of the horse, and converted it to his own use, without the consent of the plaintiff, is liable in trover for such conversion.

2. On the facts found by the referee, it was not error to grant a certified execution. *Melendy v. Spaulding*, 54 Vt. 517; *Hill v. Cox*, Id. 267; *Boutwell v. Harriman*, 58 Vt. 516, 2 Atl. 159. Judgment affirmed.

(66 Vt. 213)

MARSH v. FISH et al.

(Supreme Court of Vermont. Rutland. March 28, 1894.)

BREACH OF COVENANT—INCUMBRANCES.

Where the widow and sole heir executed a quitclaim deed of a farm belonging to a deceased, and covenanted to save the grantee harmless from liens arising out of claims against

the estate, the grantee cannot sue for a breach of such covenant because, at the time of the execution of the deed, a right of way across the farm was vested in another.

Exceptions from Rutland county court; Rowell, Judge.

Action by William G. Marsh against William G. Fish and another. To a judgment for defendants, plaintiff excepts. Judgment affirmed.

J. C. Baker, for plaintiff. Geo. E. Lawrence, for defendants.

THOMPSON, J. This is an action of covenant broken, heard below on a general demurrer, which was sustained, the declaration judged insufficient, and judgment for the defendants to recover their costs. From the declaration it appears that the defendant Caroline M. Fish is the widow, and the defendant William G. Fish is the sole heir at law, of Winslow G. Fish, late of Clarendon, deceased, and that they executed to the plaintiff a quitclaim deed of a certain farm owned by Winslow G. at the time of his decease, in and by which deed the defendants covenanted as follows, viz.: That in case any claim or claims should be made against the estate of Winslow G. Fish, deceased, which should not be paid out of other property of the estate of said Fish, outside of the above-described farm, and said claim or claims should in any way become a lien on the above-described premises, they (the defendants) would pay said claim or claims, and save the plaintiff harmless from all payments, demands, damages, and claims for the same, so that the plaintiff should hold and enjoy said premises free and clear from all liens and incumbrances. The alleged breach of this covenant is that, at the time of the execution and delivery of the deed, there was and still is a right of way across the farm in one Frederick Chaffee, or his heirs and legal representatives. Had this quitclaim deed contained the usual covenant of warranty against incumbrances, such covenant would not avail the plaintiff as a ground of recovery against the defendants for the alleged incumbrance. *Cummings v. Dearborn*, 56 Vt. 441, and the cases there cited. The intention of the parties to a deed, when it can be clearly ascertained from the instrument, is to control, unless it conflicts with some rule of law. *Palmer's Ex'r v. Ryan*, 63 Vt. 227, 22 Atl. 574. The defendants, as the heir and widow, were entitled to all the real estate of the deceased. Their right thereto was subject to the contingency that, if the personal estate of the deceased was found to be insufficient to pay the debts against the estate, all of the real estate, except the widow's homestead and dower, was by law held for the payment of such of the debts as the personal assets were inadequate to pay. A purchaser from the heir and widow took it subject to this contingency. A sale

of it by an executor or administrator duly licensed by the probate court would give title without such contingency. The parties to the deed are presumed to know the law in this respect, and the language of the covenant shows that they in fact knew it. We think the true construction of the covenant is that the parties intended to only provide against the contingency of charging the farm, to the detriment of the plaintiff, with the payment of claims which had been proven, or which might be proven, against the estate, in the manner provided by law. The right of way was not such a claim, nor was it one which the defendants could, by payment or otherwise, compel Chaffee, or his representatives, to relinquish or discharge. Should the covenant be held operative for the purpose for which it was intended, the alleged breach is not within it. Judgment affirmed.

(98 Vt. 242)

CASWELL v. CASWELL.

(Supreme Court of Vermont. Washington.
March 28, 1894.)

DIVORCE—NONSUPPORT.

The neglect of a life prisoner to contribute to the support of his wife (whom he married while awaiting sentence) out of pension money he receives is not sufficient to sustain an action for divorce for nonsupport, under R. L. § 2362, cl. 5, providing for divorce "on petition of the wife when the husband, being able, refuses to maintain her," where it appears that she is able to earn \$2.50 a week, and has a farm worth \$1,000, mortgaged for \$690.

Exceptions from Washington county court; Rowell, Judge.

Petition for divorce by Laura Caswell against James A. Caswell. To a judgment of dismissal, petitioner excepts. Judgment affirmed.

The court found the following facts: "Petitioner has been in state prison for three and a half years, under a life sentence for slaying petitioner's former husband. After conviction, and before sentence, the parties were married, while the petitioner was in jail. The petitioner owns, and has owned during the time in question, a farm in East Montpelier worth one thousand dollars (\$1,000). There is, and has been during that time, a mortgage on the farm of six hundred and ninety dollars (\$690). For two years last, petitioner has rented her farm on shares, and has herself worked out during that time at two and a half dollars (\$2.50) a week. She has kept the interest and the taxes paid, and has now fifty dollars (\$50) due her for her services, and the debt is good. The petitioner has during this time, and still does receive, a pension of twenty-four dollars (\$24) a month. He continued to contribute more or less to his wife's support until about two years ago, when he refused to further contribute, and has not since contributed. The parties have during all this time correspond-

ed with each other about business matters, and one thing and another. The petitioner refused to further contribute because the petitioner did not conduct matters in respect to her farm as he desired. No other cause is shown for his refusal. The petitioner has no one dependent upon him for support, except his wife, and the petitioner has no one dependent upon her. The petitioner is about forty-two years old; petitioner, about fifty. The petitioner is in good health, for aught that appears, and well able to work. The petitioner has, in excess of any debts that he owes, a sum of money nearly equal to the amount of his pension for a year, and during all this time he has been of sufficient pecuniary ability to contribute to her support. If it is a question for the court to find, the court finds that his ceasing to contribute to the support of his wife for the reason stated is without cause."

S. C. Shurtleff, for petitioner.

THOMPSON, J. The petitioner has been in state prison for 3½ years, under a life sentence for slaying the petitioner's former husband. After conviction, and before sentence, the parties were married, while the petitioner was in jail. A divorce is now sought on the ground of refusal to support. To bring a case within this cause for divorce, something more must be shown than mere abandonment, or a simple refusal or neglect to support the wife. The words "grossly or wantonly and cruelly," as well as the words "without cause," of the statute, are to have some force, although they are not very definite. *Mandigo v. Mandigo*, 15 Vt. 786. By renting her farm and working out during the time the petitioner has refused to support her, the petitioner has paid the taxes, and the interest on the mortgage, on her farm, and accumulated \$50, besides maintaining herself. For aught that appears, she has been in good health, and well able to work. No indignity was imposed upon her by the manner of the refusal to support, nor was the door of her home shut in her face, and she, in effect, turned into the street, as in *Lillie v. Lillie*, 85 Vt. 109, 28 Atl. 525. The petitioner did not conduct matters in respect to her farm as the petitioner desired, and for that reason he refused to contribute further to her support. During all this time the parties have corresponded with each other in regard to business matters, and one thing and another. Without doubt, under some circumstances, a sudden and continued refusal to provide the necessities of life to a wife, who is thereby left to her own earnings, would be within the statute meaning of "grossly or wantonly and cruelly" refusing or neglecting to support, as where, from the previous habits, or mode of life, or state of health, or incapacity to labor, from any cause, such conduct would cause injury to health, or danger of

such injury, or reasonable apprehension thereof. So, too, the refusal might be made in such a manner, or coupled with such indignity and aggravation, as, in and of itself, to be a gross or wanton and cruel refusal or neglect to support the wife. But such is not the case at bar. Here, there was simply refusal and neglect, with no circumstances of aggravation to bring the case within R. L. § 2362, cl. 5.¹ Judgment affirmed.

(86 Vt. 231)

In re BODWELL et al.

(Supreme Court of Vermont. Orleans. March 28, 1894.)

APPEAL—BOND—EVIDENCE.

1. On failure to give the requisite bond within the 20 days prescribed by statute, an appeal from the probate court will be dismissed.

2. Parol evidence is inadmissible to vary the record of a court.

Exceptions from Orleans county court; Taft, Judge.

Application for the appointment of a guardian for a minor child. From a judgment adjudging the mother not a fit person to have the care of the child, and appointing a guardian, the mother appeals. Affirmed.

The decree was made March 28, 1893, and an appeal at once taken. No bond was then filed, but the appellant offered to show that one E. A. Cook proposed to become bail in the probate court, and was accepted by the court; that later an arrangement was made between Cook and one Baldwin that other surety should be furnished; and that a satisfactory bond was filed September 6, 1893. Cook and Baldwin were the attorneys of the respective parties. The court rejected the evidence, and the appellant excepted.

E. A. Cook, for appellant. F. W. Baldwin, for appellee.

THOMPSON, J. This is an appeal from a decree of the probate court for the district of Orleans, adjudging the appellant (the mother of the minor, Burleigh W. Bodwell) to be a person incompetent and unsuitable to have the custody, care, and education of the minor, and appointing L. M. Hibbard his guardian, to have the custody of his person and the care of his education. The application for an appeal from this decree was made to the probate court within 20 days from the date of the decision appealed from, as required by R. L. § 2270, but within the 20 days the appellant did not give a bond to the satisfaction of the probate court, conditioned that she would prosecute her appeal to effect, and pay the intervening dam-

¹ R. L. § 2362, cl. 5, provides for the granting of divorce on petition of the wife, when the husband, being of sufficient pecuniary ability to provide suitable maintenance for her, without cause, grossly and wantonly, or cruelly, refuses or neglects so to do.

ages and costs occasioned by the appeal. After the expiration of the 20 days, she gave such a bond to that court. On motion, the court below dismissed the appeal. The appellant now assigns this action of the county court as error.

This question was before this court in *Lambert v. Merrill*, 56 Vt. 464; and it was there held that, under the provisions of R. L. §§ 2270, 2273, the requisite bond must be given within 20 days from the decision appealed from, or, on motion, the appeal would be dismissed in the county court. We think this is the correct construction of the statute. This appeal was therefore properly dismissed.

2. The parol evidence offered to vary the record of the probate court was properly excluded. *Beech v. Rich*, 13 Vt. 595; *Eastman v. Waterman*, 26 Vt. 494; *Farr v. Ladd*, 37 Vt. 156; *Porter v. Gile*, 47 Vt. 620. Judgment affirmed, and ordered to be certified to the probate court.

(86 Vt. 237)

FIRST NAT. BANK OF PLATTSBURG v. POST.

(Supreme Court of Vermont. Franklin. March 28, 1894.)

JURORS—QUALIFICATIONS—ACTION OF DEBT—SET-OFF—EVIDENCE.

1. St. 1884, No. 111, § 1, providing that every person drawn to serve as a grand or petit juror, from any town containing more than 200 inhabitants, shall be disqualified from again serving as a juror for two years from such drawing, applies only to persons drawn on the regular panel, and not to a talesman.

2. In debt, defendant pleaded as a set-off a claim against plaintiff, assigned to him by S., who testified, as defendant's witness, that he assigned the claim to defendant, in trust, to secure a debt due from witness to M. Defendant was afterwards permitted to testify that after such assignment it was arranged between him, S., and M., that the assignment should be to him, individually, to pay certain indebtedness,—the balance, if any, to go to M.; that he notified plaintiff thereof; and that it promised to pay him what was due on the claim. *Held*, that defendant's testimony did not contradict S.'s testimony, and was properly admitted.

3. Evidence is not inadmissible because it is in direct contradiction of other testimony introduced by the same party.

4. In debt by a bank, defendant pleaded as a set-off a claim for services of S., as an attorney, which had been assigned to him. There was evidence of a special agreement between plaintiff and S. in regard to his compensation, but there was a conflict as to its terms. *Held*, that it was not error to exclude evidence, offered by plaintiff, "that but a small amount was received from one of the claims put into" S.'s hands.

5. In an action on two recognizances, to recover bills of costs for which plaintiff obtained judgment in the suits in which the recognizances were entered, defendant pleaded, as set-off, a claim against plaintiff assigned to him by S. *Held*, that plaintiff could not set up the claim that such costs belonged to its attorney in such suits, in order to defeat defendant's right of set-off, in the absence of evidence that such attorney gave notice that he claimed an attor-

ney's lien on such judgments for costs, or that he had not been fully paid for his services and disbursements in such cases.

Exceptions from Franklin county court; Ross, Chief Judge.

Action of debt by the First National Bank of Plattsburg against Nathan Post, on two recognizances, in which defendant pleaded an offset. There was a judgment entered on the verdict of a jury in favor of defendant, for the balance of his claim, after deducting the amount due on plaintiff's declaration, and plaintiff excepts. Exceptions overruled.

E. A. Sowles, for plaintiff. Ballard & Burleson and Farrington & Post, for defendant.

THOMPSON, J. 1. A juror who served in this case was drawn and served as a talesman in a state case tried by jury in the Franklin county court, at its April term, A. D. 1893. He was thus drawn from St. Albans, a town then and now having more than 200 inhabitants. The trial of the case at bar, at which this juror served, occurred at the September term, A. D. 1893, of that court. The plaintiff moved to set aside the verdict on the ground that this juror was disqualified from being drawn and serving, for two years from the time he was drawn as talesman. In support of this contention the plaintiff relies upon St. 1884, No. 111, § 1. This statute relates wholly to the election or appointment of persons to serve as grand and petit jurors in the county court, from the respective towns in the county, and to the manner in which the names of such persons shall be drawn for jury service by the sheriff or his deputy. After providing in detail how the names of persons elected or appointed for jurors shall be kept, and how the same shall be drawn, that act further provides that "every person drawn by the sheriff or his deputy to serve as a grand or petit juror, from any town containing more than two hundred inhabitants, shall be disqualified from again serving as a juror for two years from such drawing." Construing this statute as a whole, it is evident that such disqualification was intended to apply only to such jurors as might be drawn in the manner therein provided; and we therefore hold that it does not apply to a person drawn as a talesman, and the motion to set aside the verdict was properly overruled.

2. In support of his declaration in offset, the defendant introduced the testimony of A. G. Safford, who was the creditor to whom the claim sought to be recovered in offset originally accrued against the plaintiff, the same being for Safford's services as its attorney. His testimony tended to prove that he assigned the claim to the defendant, in trust, for the benefit of one Mooney, to whom Safford was then indebted, to secure the payment of such indebtedness, and that he notified the plaintiff of such assignment. After

this evidence had been introduced, the defendant was permitted to testify, in substance, that, after the assignment to which Safford had testified, it was arranged between himself, Safford, and Mooney that the assignment should be to the defendant, individually, to pay him a small debt which Safford then owed him, and for his expenses, disbursements, and services for collecting the claim, and the balance, if any, to go to Mooney, and that prior to the bringing of the suit at bar he notified the plaintiff of this assignment to him, and it then promised to pay him whatever there was due on the claim, if anything. The plaintiff excepted to the admission of this testimony given by the defendant, on the ground that it contradicted that of his witness Safford. This contention cannot be maintained. It had no tendency to impeach Safford. It only tended to prove that subsequent to the transaction, as detailed by Safford, a different arrangement was made in respect to the assignment, by all the parties interested therein, of which the plaintiff had notice, and, in consideration thereof, promised to pay defendant, Post, as stated. It did not even contradict Safford, for Post did not testify that the arrangement was not, originally, as stated by Safford. But, had his testimony tended to contradict Safford on this point, it would have been admissible. In such case the rule is that "the party calling a witness is not precluded from proving the truth of any particular fact, by any other competent testimony, in direct contradiction to what such witness may have testified; and this not only where it appears that the witness was innocently mistaken, but even where the evidence may, collaterally, have the effect of showing that he was generally unworthy of belief." 1 Greenl. Ev. § 443. Hence, it was not error to admit this testimony.

3. The plaintiff offered to prove, as bearing upon what the contract in fact was in respect to the compensation which Safford was to receive from it for his services, "that but a small amount was received from one of the claims put into his hands." The evidence offered was excluded, to which the plaintiff excepted. The testimony on both sides was to the effect that there was a special agreement between the plaintiff and Safford in regard to the compensation he should receive for his services, and in regard to which the alleged balance assigned to the defendant arose, but there was a conflict as to the terms of such agreement. The evidence excluded had no tendency to show whether the contract was as claimed by the plaintiff, or by Safford. So far as the offer discloses, the claim upon which but a small amount was received may have been a small claim, or, if a large one, and collectible when put into his hands, but little may have been realized from it, without his fault, by reason of the subsequent financial condition of the

debtor, or by reason of some other cause. The plaintiff can take nothing by this exception.

4. There was no error in the refusal of the court below to instruct the jury that the two bills of costs for which it obtained judgment in the suits in which the recognizances were entered, and for the recovery of which this action is brought, belonged to Edward A. Sowles, its attorney in those suits. This claim was set up to defeat the right of the defendant to recover in offset. There was no evidence that Sowles had ever given Safford or the defendant notice that he had or claimed an attorney's lien on the judgments for costs, nor do the exceptions disclose that Sowles has not been fully paid for his services and disbursements in those cases, by the plaintiff. The case standing thus, the plaintiff cannot now set up an attorney's lien, in the name of Sowles, to defeat the defendant's right of set-off. *Machine Co. v. Bouteille*, 56 Vt. 575; *Hurlburt v. Brigham*, Id. 368; *McDonald v. Smith*, 57 Vt. 502; *Fairbanks v. Devereaux*, 58 Vt. 359, 3 Atl. 500.

5. All the other questions raised and urged in this court were decided when this case was before this court in A. D. 1892, as reported in 65 Vt. 222, 25 Atl. 1093, and that decision must be taken to be the law of the case. Judgment affirmed.

(161 Pa. St. 111)

OTTERSBACH v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 9, 1894.)

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The death of plaintiff's son from asphyxia was caused by an escape of gas from defendant's main into a water-closet on premises occupied by plaintiff. For two weeks before the accident plaintiff had noticed the smell. Plaintiff's brother-in-law, who rented the premises, had been warned by the city authorities not to light a match in the closet because of the danger of an explosion, but it did not appear that such warning was conveyed to plaintiff or decedent. *Held*, that it was a question for the jury whether plaintiff or her son was negligent.

Appeal from court of common pleas, Philadelphia county.

Action by Margareth Ottersbach against the city of Philadelphia for the killing of her son. From a judgment for defendant, plaintiff appeals. Reversed.

The death of plaintiff's son from asphyxiation was caused by an escape of illuminating gas from defendant's main into a water-closet on premises occupied by plaintiff. For two weeks before the accident, plaintiff had noticed the smell, and it was worse at certain times than at others. Plaintiff's brother-in-law, who rented the premises, had been warned by the city authorities not to light a match in the closet, because of the danger of an explosion, but it did not appear that such warning was conveyed to plaintiff or decedent.

John G. Johnson, for appellant. Howard A. Davis and Charles F. Warwick, for appellee.

STERRETT, C. J. It was admitted that the death of plaintiff's minor son resulted from asphyxia, caused by inhaling illuminating gas, which, as the testimony tends to show, escaped from defendant's broken gas pipe in the street at the corner of Diamond and Palethorp streets. Without referring in detail to the uncontradicted testimony tending to prove that the proper city authorities were duly notified of the fact that gas was escaping at that point, and that they neglected for several days to locate the leak, and replace the broken pipe, etc., it is sufficient to say that the evidence introduced by the plaintiff, if believed by the jury, presented a case of inexcusable and protracted neglect of duty on the part of defendant, resulting, as the jury would have been warranted in finding, in the death of plaintiff's son. The duty of promptly locating and stopping the leak was one that devolved solely on the proper authorities of the city. No one else had any right to interfere with the gas pipe, or open the street for the purpose of locating or stopping the leak. That this was their duty, and theirs alone, is a proposition too plain to need either argument or citation of authorities. It cannot be seriously contended that there was any lack of competent and sufficient proof of defendant's negligence as the proximate cause of the boy's death, etc., to carry the case to the jury on that question of fact. But it is contended that plaintiff and her son were both guilty of contributory negligence, and on that ground, if no other, the learned court was warranted in refusing to take off the judgment of nonsuit. We cannot assent to this proposition. Conceding, for the sake of argument only, that there is some evidence of such contributory negligence, an examination of the testimony has satisfied us that it is not of such a character as warranted the court in virtually declaring as matter of law that either the plaintiff or her son was guilty of negligence which contributed to the death of the latter. In view of all the evidence, we think the case involved questions of fact which were clearly for the exclusive consideration of the jury, and to them it should have been submitted, with proper instructions as to the law applicable thereto. Judgment reversed, and a *procedendo* awarded.

(160 Pa. St. 614)

MELLOR v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 2, 1894.)

MUNICIPAL CORPORATIONS—CHANGING GRADE OF STREET—DAMAGES TO PROPERTY—CONSTITUTIONAL LAW—EVIDENCE.

1. Under Const. art. 16, § 8, providing compensation for property taken, injured, or destroyed for public use, the property owner may

recover for damages caused by changing the grade of a side street, though his property does not abut upon it.

2. In an action for damages to property, caused by changing the grade of a side street, damages caused by changing the grade of a street on the other side of the property, where the changes were made about the same time, may be considered if plaintiff files a conditional release in regard to the damages sustained from the latter change.

Appeal from court of common pleas, Philadelphia county; Thayer, Judge.

Action by Robert Mellor, as administrator, against the city of Philadelphia, for damages caused by changing the grade of a street. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellant. Thomas Leaming, for appellee.

STERRETT, C. J. This is one of sixteen cases which were tried in the court below on appeals from the report of viewers appointed to assess damages caused by changing the grade of Orthodox street, in the city of Philadelphia. The plaintiffs respectively owned property fronting on the north side of Trenton avenue, a narrow street running nearly east and west along the northerly line of the New York Division of the Pennsylvania Railroad. Until recently, Orthodox street and another street named "Margaret," about 450 feet further east, both crossed said railroad at grade, and nearly at right angles thereto. Owing to the vast increase in every form of street travel, and the greatly increased business of the railroad company, these grade crossings became so exceedingly dangerous that the councils deemed it necessary to lower the grades of Orthodox and Margaret streets, and thus carry them both under the railroad. This was accordingly done by lowering the grade of each to such an extent that the cut across Trenton avenue was about 15 feet deep. That, of course, cut off all communication, except by pedestrians, with either of said streets and that portion of Trenton avenue lying between them, and practically prevented ingress and egress by vehicles to and from that part of Trenton avenue west of the Orthodox street crossing. The respective properties of ten of the plaintiffs were located between said streets, and are referred to by counsel as the "eastern group." The remaining six properties, located west of Orthodox street, are referred to as the "western group." For convenience sake, the appeals relating to the respective lots of each group were tried by the same jury. In each case, however, separate verdicts were rendered in favor of the plaintiffs respectively.

It is not our purpose to refer to the testimony showing the extent to which the several properties were damaged by said change of grade. The proof is clear, positive, and undisputed, except as to the

amount of damages in each case. Speaking approximately, the plaintiff's witnesses fixed the damages at about 50 per cent. of what was the market value of the property before the grades were so lowered as to practically cut off access to Trenton avenue. On the other hand, defendant's witnesses testified that the damage was about 25 per cent. of said market value. The witnesses, of course, differed more or less as to what the market value was, but, aside from these discrepancies as to amounts, the consensus of the testimony on both sides is that all of the properties in question were injured by the change of grade to the extent of from about one-fourth to one-half of their previous market value. On the trial of each group of cases the testimony bearing on the question of damages was fairly submitted to the jury by the learned president of the common pleas in a clear and able charge, which appears to be entirely free from error. The respective verdicts in each class of cases were fully warranted by the evidence, so far at least as the proof of damages and the proximate cause thereof are concerned.

It is conceded that in making the improvements the city authorities acted in the line of their duty. In fact the public safety demanded that the grade crossings should be avoided, and the only feasible way of doing so was that which was adopted. The respective claims of the plaintiffs to compensation were based on the constitutional provision that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements." Const. art. 16, § 8. Defendant's contention was that this provision is inapplicable to any of the cases under consideration, because neither of the properties front or abut on either of the streets the grade of which was changed. This would, indeed, be a very narrow and unreasonable construction of the words above quoted, especially in view of the history and object of the constitutional provision. It was intended to provide against the great injustice that was continually resulting from the ruling of this court in *O'Connor v. Pittsburgh*, 18 Pa. St. 189, that "the constitutional provision for the case of private property taken for public use extends not to the case of property injured or destroyed." In connection with this statement of the controlling principle in that case, Mr. Chief Justice Gibson suggested that the omission might be supplied by ordinary legislation, but no such legislative action was ever taken. It was not until the adoption of our present constitution, nearly a quarter of a century thereafter, that an appropriate remedy was provided in the form of the section above quoted. In doing this, the people of the commonwealth recognized, in a practical

way, the justice of compensating private property owners, not only for property taken, but also for property injured or destroyed by municipal and other corporations and individuals of the specified class, by the construction and enlargement of their works, highways, or improvements. There is nothing in the phraseology of the section that can be even tortured into a limitation of its provisions to property fronting or abutting on the particular work, highway, or improvement by the construction or enlargement of which said property was injured or destroyed. The section in question cannot be thus narrowly construed without reading into it words which are not in it, and were never intended to be there. It was contended on behalf of the city that, inasmuch as the properties of the several plaintiffs do not front on Orthodox street, they "are not entitled to any damages; that, because Trenton avenue has not been changed, the plaintiffs, no matter how much they may have been injured, are not entitled to damages for the alteration of the side street;" and points for charge substantially to that effect were submitted. The learned trial judge very properly refused to thus narrowly and unreasonably construe the constitution. He rightly conceded, however, "that where the street which undergoes an alteration is not sufficiently near to the property of a citizen as to make the injury proximate and immediate and substantial, he would have no right to claim damages for change of grade of such a street;" and, in connection therewith, he appropriately added: "In case of properties situated as these properties are, and so affected by the change of grade that their ingress and egress to and from their houses is virtually injured,—partly destroyed,—and where the injury is so obvious that it admits of comparatively easy calculation as to the extent of the diminution of the value of the property, I cannot doubt that such a case is covered by the constitution," etc.

The first three, together with the fifth, specifications of error to the respective judgments in the "eastern group" of cases relate to the admission of testimony tending to show the damages resulting, not merely from lowering the grade of Orthodox street, but from changing the grades of both Orthodox and Margaret streets, and the effect of that testimony. This did the defendant no harm. The work on Margaret street was completed shortly after that on Orthodox, but before the trial. The record of the testimony shows the difficulty, if not the impossibility, of ascertaining with any degree of accuracy what proportion of the damage was done by each; and the plaintiff, with the approbation of the court, proceeded to show the damages done by the grading of both streets, and, in connection therewith, filed provisional releases of further claim for damages occasioned by the grading of Margaret street. This was entirely just and proper, and should not have

v.28A.no.16—63

been objected to by the city. If either party was more benefited than the other by this mode of trial, it was the defendant. Upon the payment of these judgments the releases referred to will operate as an absolute bar to any claim by either of the plaintiffs for further damages resulting from the cutting down of Margaret street.

Further consideration of the questions involved in the specifications of error is quite unnecessary. The cases were carefully and ably tried by the learned president of the court below. The correctness of his rulings, so far as challenged by either of the specifications, is amply vindicated by his clear and concise charge in each group of cases respectively. The judgment in this case, as well as the judgment in each of the other cases, is therefore affirmed.

TAYLOR v. CITY OF PHILADELPHIA.
JOHNSON v. SAME. COLLIGAN v.
SAME. BOOTH v. SAME. GALLAGHER
v. SAME. WINNALS v. SAME. CLABBY
v. SAME. PILKINGTON v. SAME. GAL-
LAGHER v. SAME. WINNALS v. SAME.
McCLOSKEY v. SAME. POWELL v.
SAME. PETERS v. SAME. SMITH v.
SAME. FITZPATRICK v. SAME.

(Supreme Court of Pennsylvania. April 2, 1894.)

Appeal from court of common pleas, Philadelphia county; Thayer, Judge.

Separate actions by John Taylor, as executor, Albert Johnson, Dennis Colligan, Reuben Booth, Catherine Gallagher, as executrix, Sarah Winnals, Margaret Clabby, Elijah Pilkington, Patrick Gallagher, Thomas C. Winnals, James McCloskey, Nathan Powell, Francis Peters, Peter Smith, and James Fitzpatrick, against the city of Philadelphia, for damages caused by changing the grade of a street. Judgments for plaintiff in each case, and defendant appeals. Affirmed.

Ohas F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellant. Thomas Leaming, for appellees.

PER CURIAM. These cases were argued with *Mellor v. City of Philadelphia*, 28 Atl. 991, involving same questions. For reasons given in opinion just filed in that case, the judgments are affirmed.

(161 Pa. St. 53)

TAYLOR v. FRIED et al.

(Supreme Court of Pennsylvania. April 9, 1894.)

PARTNERSHIP—WHAT CONSTITUTES.

1. B., who owned an oil lease, sold interests therein to defendants, B. agreeing to furnish necessary appliances, and to drill a well, and defendants agreeing to pay their proportion of the cost of drilling. *Held*, that defendants and B. were merely tenants in common as to the lease, and defendants were not liable as B.'s partners on his unauthorized purchase of machinery to carry on the drilling.

2. The fact that oil was obtained and run in the pipe line to the credit of each cotenant in the proportions their interests bore to the lease did not create a partnership *inter se*.

Appeal from court of common pleas, Allegheny county; Thomas Ewing, Judge.

Action by M. V. Taylor against Edward Fried and others to recover the price of a boiler. There was judgment for plaintiff, and defendants appeal. Reversed.

Levi Bird Duff and L. B. D. Reese, for appellants. Wise & Minor, for appellee.

MCOLLUM, J. We think the evidence in this case is insufficient to sustain a verdict against the defendants. They were sued as joint debtors, and, under the instructions of the learned court below, were held liable as partners on a purchase by one of them of a boiler which he used in drilling a well upon property they owned as tenants in common. The following facts are admitted or established by uncontradicted evidence: In the summer of 1891, W. P. Black, being the owner of an oil lease, sold to Jeremiah Miller one-tenth, to Lewis Sands one-tenth, to Lee Phillips one-tenth, and to Edward Fried two-tenths, of his interest therein. It was agreed between him and his vendees that he should furnish the necessary appliances and drill a well on the leased premises, and that Fried should pay to him two-tenths of the expense incurred in drilling it, and each of the others should pay to him one-tenth thereof. In accordance with this agreement the well was drilled, and each vendee paid his proportion of the cost of it. It appears that Sands and Phillips were joint and equal owners of a boiler which they sold to Black, and that it was to be paid for by a credit to each of them of one-half the price of it, on his share of the expenses. Black used it in drilling a considerable portion of the well, and then bought a boiler of the plaintiff, which he used in completing it. Neither of his vendees authorized this purchase, nor did they know of it until some time after he left the state without paying his debts. It was then that the plaintiff set up the claim that she sold the boiler to the owners of the leasehold, and that they were jointly liable to her for the price of it. It appears that the boiler is charged in her book of original entries to "W. P. Black and Ed. Fried," but it is admitted that her bookkeeper, to whom the sale was reported, charged it to W. P. Black, and that the words "and Ed. Fried" were added by her direction after her salesman told her Fried was interested in the well. Turning to the evidence of her salesman, we find that his information concerning Fried's interest in the well was derived from Robert Black, who was at most an employé of W. P. Black in the performance of the latter's contract with his vendees. He was not the agent of W. P. Black's cotenants for any purpose, and his statements to plaintiff's salesman did not affect them. We think it is clear that W. P. Black and his vendees were tenants in common of the leasehold, and that the agreement under

which he drilled the well did not create a partnership inter se, or a joint liability. It is quite evident that it was not the intention of the parties to become partners in the work to which their agreement was limited. It is probable that Black and his vendees believed, or at least entertained a hope, that the work contracted for would demonstrate that the leasehold was good oil property; but the latter did not consent to be jointly bound to the former, his employés or material men, for all or any portion of the price of it, nor did their agreement include anything more than the drilling of the well. We have, then, a case in which one cotenant improves or tests the common property under an agreement with each of the other cotenants to pay his share of the expenses incurred in making the improvement or test. Thus the promise of each cotenant created a distinct and individual liability which was measured by his interest in the leasehold. This liability was not affected by the mere fact that oil was obtained and run in the pipe line to the credit of each cotenant in the proportion above stated, because (1) the operation of the well was not included in the agreement under which it was constructed, and (2) a division of the product between tenants in common does not make them partners, although they may have contributed labor or money to raise it. *Lindl. Partn.* 18-53; 17 *Am. & Eng. Enc. Law*, p. 853; *Brown v. Jaquette*, 94 Pa. St. 113; and *Walker v. Tupper*, 152 Pa. St. 1, 25 *Atl.* 172. Mr. Lindley, on page 53 of his treatise, says that "persons who join in the purchase of goods, not for the purpose of selling them again, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third parties as if they were. *Coope v. Eyre* [1 H. Bl. 37] is a leading case in support of this proposition. There an agreement was come to that one person should purchase oil, and then divide it amongst himself and others, they paying him their proportion of the price. The oil was bought accordingly, and, the purchaser becoming bankrupt, the seller sought to make the other parties to the agreement pay for the oil. But it was held that the purchaser purchased as a principal, and not as an agent; and that, as there was no community of profit or loss, the persons amongst whom the oil was to be divided should not be made liable as partners or quasi partners." In our case there was no presumption, arising from the fact that W. P. Black and his vendees were tenants in common of the leasehold, that they authorized him to purchase the boiler as their agent. Presumptively he was a principal in the transaction, and the burden was therefore on the plaintiff to show that he was their partner or agent, and not on them to show that he was a principal. Did they hold themselves out to the plaintiff or others as partners? There is no evidence that they did. No act or declaration of either of the cotenants we have mentioned was shown which tended to place them

in the position of partners in respect to third persons dealing with him. It is true that Roland, who did some work in drilling the well under an agreement with W. P. Black, testified to a conversation with Glatzau which might have affected the latter, and possibly Black, if he had been served with process; but it is doubtful whether Glatzau was a cotenant, and, if he was, his declarations would not affect his cotenants unless made in their presence or authorized by them. While the facts in this case are not precisely like those in *Walker v. Tupper*, supra, the principles which control it are the same, and the specifications of error are accordingly sustained. Judgment reversed.

(161 Pa. St. 69)

SHERMER v. PACIELLO.

(Supreme Court of Pennsylvania. April 9, 1894.)

LANDLORD AND TENANT — FRAUDULENT REMOVAL — SUBLETTING.

1. Where the lessor, on finding the lessee gone, and part of the premises in possession of a subtenant in violation of a covenant against subletting, leaves a notice to the lessee to give security for three months' rent or deliver possession (Act March 25, 1825, § 2), he is not bound to accept security from the subtenant, but may proceed to eject him.

2. Where the lessee under a lease with a covenant against subletting surrenders it, and procures a like one to be issued to another, the possession of a subtenant, though begun before the issue of the new lease, may be terminated by a judgment of ejectment entered under a power in the new lease.

Appeal from court of common pleas, Philadelphia county.

Ejectment by Joseph H. Shermer against Joseph Paciello. From an order opening the judgment for plaintiff, plaintiff appeals. Reversed.

E. Cooper Shapley, for appellant. Aaron Thompson, for appellee.

FELL, J. This case is before us on an exception to an order making absolute a rule to open a judgment in ejectment, entered by virtue of authority contained in a lease, and upon the averment of a breach of the covenant not to sublet. The depositions develop these facts: In August, 1889, John A. Shermer, father of the plaintiff, leased the premises in question as a fruit store to Charles Willidge. In February, 1893, the lessor having died, a new lease was made by his son, the plaintiff, to the same lessee. In August, 1893, Charles Willidge surrendered his lease and procured a new one to be executed to Joseph Paciello, the defendant, who went into possession. The three leases were exactly alike, and contained covenants against subletting. In October, 1893, Paciello called at the office of the plaintiff's agent, handed him the key, and said he had moved out. When the agent went to the premises, he found Banner Her-

man, on whose affidavit and at whose instance the rule was granted, in possession of a part of the building, and conducting a dry goods business for himself. The lessor's agent, for the purpose of obtaining possession, left on the premises a notice to Paciello to give security within five days for three months' rent, or deliver possession. This notice fell into the hands of Herman, who tendered security, which was refused, and judgment in ejectment was entered. Herman had been a subtenant for some months, but of this neither the plaintiff nor his agent had any knowledge. A subtenant in possession with the consent of the landlord or by right, when there is no covenant against subletting, may be entitled to enter security under the act of March 25, 1825, but the right now asserted by the plaintiff is not the right as against his tenant to security or possession under the provisions of that act. The first step to lay ground for that proceeding was taken, but it was abandoned; and the case before us grows out of the landlord's assertion of the remedy secured to him by the lease for breach of the covenant not to sublet. The defendant did not resist this proceeding, and the subtenant has no standing to do so unless he has acquired some right. There is no evidence of a waiver of the covenant by agreement or acquiescence. The commencement of a statutory proceeding by the agent did not debar the owner from the use of the remedy provided by the lease. The only standing that the subtenant claims is that he was in possession before the date of the lease to the defendant. The preceding tenants had no right to sublet, and the testimony is distinct and clear that the property was not sublet with the knowledge or consent of either the owner or his agent, and that they had no knowledge of the possession of Herman until the keys had been delivered to the agent, and he went to take possession. The possession of Herman under both Willidge and Paciello was that of a subtenant under a tenant who had covenanted not to sublet, and it gave him no right against the landlord. The judgment is reversed.

(161 Pa. St. 102)

ROLAND v. READING SCHOOL DIST.

(Supreme Court of Pennsylvania. April 9, 1894.)

SCHOOL DISTRICT — CONTRACT BY PRESIDENT OF BOARD — WHEN BINDING — AUTHORITY — EVIDENCE — NOTICE.

1. A school district is not bound by a provision in a written contract inserted by the president of its board of directors without the authority of the board.

2. Where no record is made of the action taken by a school board, it may be shown to have been regularly taken by witnesses cognizant of the fact.

3. A person contracting with a school district is bound to know what contract the board has authorized its president to make.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by Walter G. Roland against the Reading School District on an account and contract for books sold and delivered to it by plaintiff. From a judgment for plaintiff, defendant appeals. Reversed.

William Kerper Stevens, for appellant.
Howard P. Wanner and Ermentrout & Ruhl, for appellee.

WILLIAMS, J. In the spring of 1892 the school district, defendant, decided to introduce free textbooks into the public schools. In pursuance of this decision, a list of school-books needed was made out, and bids were asked for from book dealers, giving the terms on which they would supply the books needed. The plaintiff was the successful bidder, and a contract was agreed upon and reduced to writing. The list of textbooks was incorporated into the contract, together with the number of copies of each, and the price per copy, amounting altogether to \$5,758.86. The contract contained a further stipulation "that in case an additional number of any of the books set out in the foregoing list are required by the said party of the second part during the current school year, commencing Sept. 1, 1892, and ending June 30th, 1893, the said party of the first part is to furnish same at such time and place as may be designated by the said party of the second part, with the addition of six per centum on the cost price of said books, exclusive of transportation, the transportation being added to the cost price." The books enumerated in the contract were provided and paid for. An additional number of books of the same kinds set out in the contract was ordered and furnished, and the plaintiff's account therefor is \$1,625.36, for the recovery of which this suit is brought. The defense made is that these books were to be furnished at cost, and that their cost was but \$1,226.67; and evidence was given for the purpose of showing the offer of the plaintiff to furnish them at cost in case the contract was awarded to him, and its acceptance and the award of the contract by the school board. Witnesses were then called to show that, when the plaintiff and the president of the school board met to execute the contract, the plaintiff insisted upon adding the sentence beginning with the words "with the addition of six per centum on the cost price." The words were finally incorporated into the contract without any previous authority from the school board. This fact was not reported to the board, and no resolution or other official action was taken for the purpose of ratifying this concession by the president to the request made by the plaintiff; but, when attention was called to the subject by the presentation of the bill, the action of the president was not agreed

to, and payment of the bill as presented was refused.

The defendant's second point presented this question to the court below. It requested the court to instruct the jury that the contract really agreed upon is found in the bids of the plaintiff and the resolutions accepting them, and that "Roland, the plaintiff, was bound to know what that contract was. If the jury find that the president of the district, or any members thereof, had the contract changed without action by the school board, such change would be unauthorized, and the plaintiff cannot recover." The point was refused. It should have been affirmed. The plaintiff's right to recover from the school district in excess of the cost of the books did not depend on the action of the president or any member of the school board, but upon the action of the board, sitting as such.

School directors can bind the district they represent only when they act in their official character, and the best evidence of their official action is the minutes or record of their actions kept by the proper officer. *Wachob v. School Dist. of Bingham Tp., 8 Phila. 568.* If action actually taken by the board fails, for any reason, to get upon the minutes, it may be shown to have been regularly taken by the testimony of witnesses cognizant of the fact; but the rule is, as we have stated it, that the best evidence of the action of a quasi municipal corporation is the official record of the governing body. The third assignment of error is therefore sustained.

For the same reasons, the fourth specification must be sustained. The plaintiff was bound to know what contract the board had authorized its president to make. It was not too late, therefore, for the district to repudiate any provision of the written contract to which it had not given its assent, or which had not been brought to its attention subsequently, and ratified by it. The judgment must for these reasons be reversed. The plaintiff is entitled to recover for the actual cost of the books enumerated in his bill as rendered. To enable him to do this, if the amount is not already paid, a *venire facias de novo* is awarded.

(161 Pa. St. 26)

ROONEY v. CARSON et al.

(Supreme Court of Pennsylvania. April 2, 1894.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK.

Where plaintiff, who had been engaged as a weaver in defendant's mill, after being laid off till a new mill, in which alterations were being made, was started up, was employed to assist in moving into the new mill and making alterations, and while so engaged was injured by a shafting which an employe let fall while taking it down from over the place where he was working, he cannot hold defendant liable, as he assumed the increased risk incident to the making of alterations.

Appeal from court of common pleas, Philadelphia county.

Action by Hugh Rooney against George Carson and George D. Irwin, trading as Carson & Irwin, for personal injuries received while in defendants' employ by reason of another employé letting fall a shafting which he was taking down from above the place where plaintiff was fixing a loom. Judgment for defendants. Plaintiff appeals. Affirmed.

Thos. A. Fahy, for appellant. A. S. L. Shields, for appellees.

PER CURIAM. At the time of the accident, defendants were engaged in moving from one mill to another, in which alterations were then being made. Some time prior thereto, plaintiff worked in the old mill as a weaver, but had been "laid off" until the new mill "started up." Afterwards, he was employed to assist in moving, and making alterations, and while so engaged was injured. As was said in *Wannamaker v. Burke*, 111 Pa. St. 423, 2 Atl. 500, it would be unreasonable to hold defendants "to the same degree of strictness during alterations to the building as might be required after such alterations were completed." When plaintiff undertook to assist in moving, etc., he assumed the increased risk incident to such work. There is nothing in the testimony that would have warranted a jury in finding that the defendants were guilty of any negligence that resulted in plaintiff's injury, and hence there was no error in refusing to take off the nonsuit. Judgment affirmed.

(161 Pa. St. 100)

MCNEAL v. MCNEAL.

(Supreme Court of Pennsylvania. April 9, 1894.)

MARRIED WOMEN'S CONTRACTS—VALIDITY.

Under Act June 3, 1887, authorizing a married woman to acquire property and contract in regard to her separate property as if unmarried, a married woman's note, with power to confess judgment, given for mules purchased by her, and used on a farm owned by her and occupied by herself and husband, is valid, and judgment by confession thereon is binding.

Appeal from court of common pleas, Sullivan county; John A. Sittser, Judge.

Action by Harry McNeal against Eliza E. McNeal to recover on a note. Judgment for plaintiff was entered on the note, and, from an order striking off the judgment, plaintiff appeals. Reversed.

J. G. Scouten, for appellant.

STERRETT, C. J. There was nothing on the face of this judgment to indicate that defendant was a married woman when she gave the note on which the judgment was entered. It was shown, however, by depositions taken in support of the rule to strike

off, etc., that she was a married woman living with her husband on a farm which she had owned for many years, and that the note in question had been given for a pair of mules purchased by her, and put upon her farm, where they were kept and used until she subsequently sold them. The time was when, by reason of her common-law disability to contract, a married woman, as a general rule, could repudiate at pleasure her written as well as oral promises to pay; but, upon the passage of the act of 1887,¹ her inability to bind herself by contracts ceased to be the general rule, and became nearly the exception thereto. Hence, a judgment confessed by a married woman is no longer *prima facie* void. At most it is voidable, and, on her application, may be set aside only when it appears to have been unauthorized by the act. Her power to contract is now so general that her inability is the exception, rather than the rule. *Adams v. Grey*, 154 Pa. St. 253, 26 Atl. 423, and cases there cited. In view of what has been said in those cases, further discussion of the subject is unnecessary. Applying the principles therein enunciated to the facts of this case, the judgment in question is valid, and binding on the defendant, and it follows that the learned court erred in striking it off. The decree of the court striking off the judgment is reversed and set aside, and said judgment is hereby reinstated.

(160 Pa. St. 623)

ALTOONA & P. CONNECTING R. CO. v. TYRONE & C. R. CO. et al.

(Supreme Court of Pennsylvania. April 2, 1894.)

RAILROADS—GRADE CROSSING—AVOIDANCE.

Under Act 1871, requiring courts to ascertain the mode of crossing which will inflict the least practicable injury on the rights of the company whose road is to be crossed, and prevent a grade crossing when in their judgment it is reasonably practicable to avoid it, grade crossings will not be allowed where it is necessary to cross four branches of a road within eight miles, and the increased cost of overhead crossings will be only \$12,000 to \$15,000 for each crossing, and the maximum grade of the crossing road is 79 feet to the mile, and the grade of the overhead crossings need not exceed 60 to 80 feet to the mile.

Appeal from court of common pleas, Clearfield county.

Suit by the Altoona & Philipsburg Connecting Railroad Company against the Tyrone & Clearfield Railroad Company and others for a determination of plaintiff's right to grade crossings. Decree for plaintiff. Defendants appeal. Reversed.

Thomas H. Murray, for appellants. Joseph B. McEnally and Daniel W. McCurdy, for appellee.

¹ Act June 3, 1887, authorizes a married woman to acquire property, and contract in regard to her separate property, as if unmarried.

STERRETT, C. J. This bill, brought against the Tyrone & Clearfield Railroad Company and others, lessees, etc., avers, *inter alia*, that plaintiff company was organized July 12, 1892, and proceeded to locate a railroad from Philipsburg to Janesburg, in Clearfield county; that the route of said road crosses the following five branches of said Tyrone & Clearfield Railroad Co. viz. (1) Mapleton, (2) Big Run, (3) Coal Run, (4) Goss Run, and (5) Amesville, all of which branches plaintiff proposes to cross at grade; that it is not reasonably practicable to avoid grade crossings; and praying the court to declare plaintiff company's right to such crossings, and the mode thereof, etc. The answer demands proof of the several averments as to organization, location, rights of way, work on the line, etc., and denies the averment that it is not reasonably practicable to avoid said grade crossings, etc. Without the aid of either examiner or master, the learned judge of the common pleas heard the testimony and filed an opinion, finding, *inter alia*, that as to each of the first four named crossings it is not reasonably practicable to avoid crossing at grade, and he accordingly entered a decree that, after three days' notice to defendants, said crossings be placed, etc., granted an injunction restraining interference with said work, etc., and provided in detail for the maintenance and use of said crossings, as will fully appear by reference to said decree. As to the Amesville branch, he decreed "that the plaintiff company shall have the right to construct and operate its railroad underneath the defendants' roadway and tracks," as is fully set forth in the third paragraph of his decree. This undergrade crossing does not appear to be the subject of complaint in any of the specifications, and may, therefore, be dismissed without further notice except in sustaining that part of the decree. A considerable portion of the learned judge's opinion is devoted to a consideration of the topographical features of the territory traversed by the projected and constructed roads in question, together with the position and importance of said territory in its geological aspects as a freight-producing field, etc. As to some of these matters, he appears to enjoy the advantage of a personal knowledge of the locality which we do not possess. His consideration of the subjects referred to is followed by a statement or findings of fact, bearing on the merits of the controversy, in relation to each of said proposed grade crossings, and from all these are drawn the general conclusions on which the decree is based. It does not appear that an opportunity of excepting to the opinion was afforded, and hence many of the matters above referred to are for the first time subjects of complaint in several of the specifications of error. It is not our purpose, nor do we deem it necessary, to consider said specifications in detail. In our opinion, the contention hinges on the soundness of the general conclusions on

which the decree appears to be based. A careful consideration of all the testimony has led us to the conclusion that the learned judge underestimated the present and prospective importance, to the defendants as well as the public, of the four branch roads over which grade crossings are sanctioned by the decree, as well as the danger, inconvenience, and ultimate loss that are likely to result from such crossings if the decree is permitted to stand. On the other hand, we think he has attached undue importance to the increased cost of constructing, increased expense, and difficulty of operating plaintiff company's road, and other injurious consequences likely to result to it as well as the public from prohibiting said grade crossings. It may be conceded that the increased cost of construction with over or under grade crossings will be very considerable; but, on the other hand, the compensation for that increased outlay can scarcely be overestimated. Four dangerous, expensively constructed and maintained grade crossings, within a distance of about eight miles, with the expense, inconvenience, delay, loss of life and property necessarily incident thereto, are avoided, not for a few years, but for all time, and in lieu thereof a clear and unobstructed roadway and tracks are permanently secured. While the learned judge refers to estimates of increased cost of overgrade as compared with grade crossings, he has not given us any distinct and definite finding on that subject. As is usual in such cases, the witnesses of the respective parties differ widely in their estimates. Those of the defendants range from about \$36,000 to \$46,000 for all four crossings, or an average of from \$9,000 to less than \$10,000 each, depending somewhat on the mode of construction, materials, etc. They profess to give the data upon which their calculations are based. The plaintiff's estimates, on the other hand, are about 100 per cent. higher. Making proper allowance for these discrepancies, and giving due weight to the respective witnesses on the subject, we think an estimate of \$12,000 to \$15,000 for each crossing would not be much out of the way. To what extent the witnesses took into consideration the cost of constructing grade crossings and signals, keeping a watchman at each, etc., as required by the decree, does not clearly appear; but the necessary outlay would certainly be very considerable. The annual expense of maintaining the crossings, including watchmen's salaries, etc., if capitalized, would be no insignificant sum. The alleged increased expense and difficulty of operating plaintiff's road with overgrade crossings as compared with crossings at grade is not so serious as some of their witnesses appear to think. The maximum grade of their road, as shown by the evidence, is about $1\frac{1}{4}$ feet to 100 feet, or about 79 feet to the mile. The weight of the testimony is that the grade of overhead crossings need not exceed 60 or 80 feet to the mile. As was

said in Northern Cent. Ry. Co's Appeal, 103 Pa. St. 629, the practicability of overhead crossings depends almost entirely on the circumstances of each particular case. It is always a question of fact, or rather a conclusion drawn from a variety of independent facts and circumstances. The location and surroundings of the proposed crossing, the character of the railroads, and the uses made and intended to be made of them, the increased cost of construction and expenses of operation, the public safety and convenience, the interests and convenience of the road intended to be crossed, are some of the many factors that enter into the solution of the question of the reasonableness of an overhead crossing in almost every case; and the same may be generally said of undergrade crossings. The act of 1871 requires courts of equity "to ascertain and define by their decree the mode of crossing which will inflict the least practicable injury upon the rights of the company owning the road * * * intended to be crossed;" and "by their process prevent a grade crossing," whenever in their judgment "it is reasonably practicable to avoid such crossings." The necessity which, nearly a quarter of a century ago, moved the legislature to enjoin these duties on the courts, is now greater than ever; and in several cases, among which are *Perry County Railroad Extension Co. v. Newport & S. V. R. Co.*, 150 Pa. St. 193, 24 Atl. 709, and *Pennsylvania R. Co. v. Braddock Electric Ry. Co.*, 152 Pa. St. 126, 25 Atl. 780, we have had occasion to emphasize the importance of the ever-increasing and now almost imperative necessity of prohibiting grade crossings. That constantly growing necessity has more than kept pace with the rapid multiplication of railroads and urgent demands for high rate of speed, few stoppages, etc. But it is unnecessary to enlarge on the many considerations that are opposed to grade crossings, and the comparatively few that can be even plausibly urged in their favor. After fully considering and carefully weighing all the facts and circumstances which make for as well as against the reasonable practicability of avoiding the proposed grade crossings, we have reached the conclusion that the learned court below erred in not adjudging and decreeing that it is reasonably practicable to avoid each and all of said grade crossings. It is therefore adjudged and decreed as follows:

First. That so much of the decree of the court below as authorizes the undergrade crossing of the Amesville branch, specified in the third paragraph of said decree, and also so much of said decree as in any manner relates to the construction, maintenance, and operation of said undergrade crossing, be affirmed, with costs, including the costs of this appeal, to be paid by the plaintiff.

Second. That so much of the decree of the court below as authorizes grade crossings at either of the four points named therein,

and also so much and such parts of said decree as in any manner relate to the construction, maintenance, and operation of said crossing, and any of the appliances intended to be connected therewith, be, and the same are hereby, reversed, and set aside; and in lieu thereof it is now adjudged and decreed that it is reasonably practicable to avoid each and all of said four grade crossings.

Third. That so much of the decree of the court below as is not hereinbefore mentioned, referred to, and disposed of, be, and the same is hereby, reversed; and it is further ordered that the record be remitted to the court below for such further action as may be necessary to carry into effect the provisions of this decree.

(161 Pa. St. 83)

DIRECTORS OF POOR AND OF HOUSE OF EMPLOYMENT OF MONTGOMERY COUNTY v. NYCE.

(Supreme Court of Pennsylvania. April 9, 1894.)

INSANE PERSONS—SUPPORT—REIMBURSEMENT FROM LEGACY.

Act June 13, 1836, permitting the directors of the poor of a county in which a person "shall have become chargeable" to sue for his property, dispose of the personalty, receive the profits of the realty, and apply to his support, entitles the directors to sue for a legacy falling to a person who is being supported by the county in a state insane asylum, and apply it to defray the expenses already incurred on his account.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Action by the directors of the poor and of the house of employment of Montgomery county against Samuel E. Nyce, committee, etc., of Edward Malone, a lunatic. Judgment for plaintiffs. Defendant appeals. Affirmed.

Following is the opinion of the court of common pleas (Aaron S. Swartz, P. J.):

"Edward Malone was admitted to the Montgomery county almshouse in 1877. In 1888 he became insane, and was transferred to the hospital for the insane at Norristown. Under the will of Jane Malone, his sister, a legacy of thirty-one hundred dollars came into the hands of the committee of the lunatic. Jane Malone died in June, 1891. Since June 7, 1891, the lunatic was maintained at the asylum out of his own estate. The plaintiffs claim the right to be reimbursed out of the money in the committee's hands for past maintenance at the almshouse and asylum. Is the after-acquired property liable for the previous maintenance? Edward Malone, the inmate and patient, was without any means prior to June, 1891. Numerous authorities may be cited to show that, at common law, supplies furnished to a pauper are gratuities, for the payment of which no promise is implied. *Deer Isle v. Eaton*, 12 Mass. 338; *Stow v. Sawyer*, 3 Allen, 515; *Kennebunkport v. Smith*, 22 Me. 445; *City of Albany*

v. McNamara, 117 N. Y. 168, 22 N. E. 931; *Benson v. Hitchcock*, 37 Vt. 567; *Charlestown v. Hubbard*, 9 N. H. 195. It is true, where one voluntarily furnishes food to another, the contractual relationship of debtor and creditor does not arise. Whether this principle should have any application where the supplies must be furnished upon the demand of the pauper is not so clear. Why should the recipient of the supplies under such circumstances escape payment when in funds? If he is compelled to pay, he simply does that which, in good morals, he ought to do voluntarily. His payment enables the county to enlarge its liberality in other needy cases. It is said that such repayment is in conflict with the policy of our poor laws, and our ideas of charity. But it seems to us there is something radically wrong with the theory that a patient may leave an institution, with a large estate of his own in his pocket, without any legal obligation vesting upon him to pay for the food he consumed. Such treatment of the patient is not calculated to stimulate his honesty, or improve his citizenship. Nor does the demand for reimbursement under such circumstances detract from the charity. If the pauper receives the maintenance upon the condition that he shall pay when able, it answers his needs just as much as if there were no obligation to pay under any conditions.

"Whether there is any obligation to pay, without a statute creating the liability, is immaterial, for our act of 1836, by section 33, fixes the obligation to pay. The act declares: 'It shall be lawful for the directors of the poor of any county and for the overseers of any district, as the case may be, in which any person shall have become chargeable, to sue for and recover any real and personal estate belonging to such person, and to sell or otherwise dispose of the personal property, and to collect and receive the rents and profits of the real estate and to apply the proceeds or so much thereof as may be necessary to defray the expenses incurred in the support and funeral of such person.' If this act does not cover the case before us, it is difficult to see the purpose of the enactment. The man who has an estate sufficient to provide for his maintenance at the time he makes application for charity is not in fact a pauper, and the authorities are not obliged to furnish the support. If he gains admission through false statements, his estate is liable without any statutory provision. *Stow v. Sawyer*, 3 Allen, 515; *City of Albany v. McNamara*, 117 N. Y. 168, 22 N. E. 931. There are no doubt cases of emergency, where it is the duty of the authorities to furnish aid before there is any opportunity to inquire into the condition of the man's estate, but it cannot be that the act was intended to protect the county against these exceptional cases alone. The act declares that the directors of the poor may take the estate to defray the expenses incurred. They are not limited to the expenses which

may be incurred in the future. Nor is there anything in the act limiting them to the property which the pauper had at the time the expenses were incurred. The act seems to contemplate a case similar to the one before us: The 'person shall have become chargeable,' that is, he was chargeable at the time he was admitted, because he had no estate. The estate is to be applied to expenses incurred; not the estate which he had when the supplies were furnished, because then he had no estate at all, and by reason of that fact became a charge. An act was passed in Massachusetts, 24th February, 1818, wherein it was provided 'that the inhabitants of any town or district within this commonwealth, who have incurred expenses for the support of any pauper, whether he was legally chargeable to them by means of his settlement or not, may recover the same against such person, his executors or administrators in an action of assumpsit, for money paid, laid out and expended for his use.' Under this law the pauper was liable, and it does not appear that any exception was made in his behalf if he happened to be without estate at the time the relief was furnished. *Groveland v. Medford*, 1 Allen, 23; *Inhabitants of Medford v. Learned*, 16 Mass. 215. Our act is as broad as the law just cited. It is true, under our law, the directors of the poor can only sue for the property which belongs to the person chargeable, but the power to sue where there is no property is of little value. Under the law the poor district has a direct recourse to the relatives bound to maintain the pauper. *Wertz v. Blair Co.*, 66 Pa. St. 18. And where, in such case, suit is brought for past maintenance, the present ability of the relative to pay seems to be the limit of the inquiry. We know of no case where the ability to pay at the time the relief was furnished was made the test of liability. It would certainly be a hardship to relieve the person, under such circumstances, who received the aid, and compel the relative to pay, who may be less able at the time than the pauper himself. The act of 1836, so far as it provides for the reimbursement of the poor directors, is a remedial statute, and should, therefore, receive a liberal construction. We are satisfied that under it the plaintiffs are entitled to recover from the committee for the support furnished at the almshouse. The act of 8th April, 1861 (P. L. 249), gives the directors of the poor the right to recover the moneys expended at the insane asylum. The estate of the pauper is liable to the extent of its liability under the poor laws. *Lower Augusta Tp. v. Northumberland Co.*, 37 Pa. St. 143; *Wertz v. Blair Co.*, supra.

"The defendant pleaded the statute of limitations. The recovery must therefore be limited to the money expended within six years immediately prior to the bringing of this suit. The latter date is not set forth in the case stated. Counsel will make the computation, submit the same to the court, and judgment

will be entered for the same, with costs, in favor of the plaintiff."

Henry Freedley, for appellant. Edw. F. Kane, and James B. Holland, for appellee.

FELL, J. Edward Malone was an inmate of the almshouse of Montgomery county from May, 1877, until June, 1888, when he became insane, and was removed to the hospital for the insane at Norristown, where he is still confined. In June, 1891, he became entitled, under the will of a relative, to a legacy of \$3,100. This action is by the directors of the poor of the county, against the committee of his estate, to recover the amount expended for his board and maintenance while in the almshouse, and subsequently, while an inmate of the asylum, up to June, 1891, since which time he has been maintained out of his estate. Judgment was entered in the common pleas on a case stated for the plaintiff. It may be conceded, for the purposes of this inquiry, that supplies furnished a pauper are gratuities, and that an action for the price could not be maintained on an implied promise, or unless an obligation is created by statute. The right to recover in this case was based upon the thirty-third section of the act of June 13, 1836 (P. L. 548), which reads as follows: "It shall be lawful for the directors of the poor of any county, or for the overseers of any district, as the case may be, in which any person shall have become chargeable, to sue for and recover any real and personal estate belonging to such person, and to sell or otherwise dispose of the personal property, and to collect and receive the rents and profits of the real estate, and to apply the proceeds or so much thereof as may be necessary to pay the expenses incurred in the support and funeral of such person." The evident purpose of this act was to give a right which did not before exist, and a fair construction of it, in view of the old law and the remedy, would seem to sustain the judgment. It works a change in the relation of the pauper to the community, and imposes an obligation to pay for the maintenance received. The case has been so thoroughly considered in the clear and able opinion of the learned judge of the common pleas that further discussion is unnecessary. The judgment is affirmed.

(160 Pa. St. 647)

JOHNSON et ux. v. READING CITY PASS. RY. CO.

(Supreme Court of Pennsylvania. April 2, 1894.)

HORSE AND STREET RAILROAD — ACCIDENT TO CHILD ON THE TRACK — NEGLIGENCE — QUESTION FOR JURY — CONTRIBUTORY NEGLIGENCE OF MOTHER — WHAT CONSTITUTES.

1. In an action by parents against a horse-railway company for the death of their child, killed on the track, the evidence as to how long the child had been on the track, and at what distance the driver could have seen it had he

looked along the track, was conflicting. *Held*, that the question of defendant's negligence was for the jury.

2. It appeared that the child's father was in moderate circumstances; that its mother cared for it herself, and attended to her household duties; that just before the accident she left it in the kitchen, and accompanied some visitors to the front door; that while she was there, in full view of the track, the child passed her, crossed the street to the further track, and sat down on it; and that she did not know that it was her child till after the accident. *Held*, that the mother was guilty of contributory negligence.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Action by James E. Johnson and Annie Johnson, his wife, against the Reading City Passenger Railway Company to recover for the death of plaintiffs' child, caused by defendant's negligence. From a judgment for plaintiffs, defendant appeals. Reversed.

R. L. Jones, H. A. Muhlenberg, and C. H. Schaeffer, for appellant. Ermentrout & Ruhl, for appellees.

DEAN, J. The defendant's horse-car railway is on Eleventh street in the city of Reading. James E. Johnson was a young married man, living with his wife, Annie Johnson, in dwelling No. 222, fronting on the street where the railway was operated. He was a freight handler, receiving moderate wages, and his wife did her own work. They had one child, James E. Johnson, a boy 20 months old. About 11 o'clock of the forenoon of May 7, 1891, this child was run over by defendant's car in front of its parents' house, and killed. The parents, averring that its death was caused by the negligence of the defendant, brought suit, and, on trial in the court below, got a verdict and judgment in damages, and from that judgment comes this appeal by defendant. The assignments of error, in substance, are two: (1) There was no evidence of negligence on part of the company; (2) there was undisputed evidence of negligence on part of the mother of the child, one of these plaintiffs. If the averment in either assignment be true, the appeal must be sustained; otherwise, not.

At the time of the accident the car was going at the rate of four or five miles an hour; certainly not a dangerous speed. The child was sitting on the track. It was first seen by a passenger in the car, who warned the driver, when an ineffectual attempt to stop the car was made. The distance of the child from the horses, when first seen by the passenger, was from three to six feet. Apparently, just at the moment the child was noticed on the track the driver's face was turned towards the side of the street, his attention being diverted in that direction by the movement of some persons he thought wanted to get on the car. When he saw the child, he put on the brake, and did all he could to stop the car; but it was too late. The plaintiff alleged it was the

duty of the driver to constantly keep his eyes on the track in front of his horses. Instead of so doing, he turned to watch the movement of persons on the side of the street who desired to take passage, and, from this neglect of duty on his part, he failed to see the child in time to stop the car. We decline to say, as urged by appellee, that a street-car driver may not, under any circumstances, turn his head to observe the movements or signals of those who desire to get on the car. His duty is to drive the horses with care; to be on the lookout for obstructions, whether persons or vehicles, on the track. He may, in the performance of this duty, ascertain from a person on the side of the street, by looking at him, whether he desires to take passage; in doing this, he may for an instant turn his face to the sidewalk. It does not necessarily follow from this he was guilty of negligence. But how long this child had been on the track, and at what distance the driver might have seen it had his attention been directed to the track, does not clearly appear; the evidence is somewhat conflicting on this point. When the passenger first saw the danger, it was impossible to stop soon enough to avoid it; but the child was on the track when he saw it. Whether the driver could have seen it, had he been looking at the track, in time to stop before reaching it, was a question, it seems to us, for the jury. If without doubt it had appeared that the same moment the driver turned his face to the sidewalk the child got on the track, there would have been nothing to warrant an inference of negligence on part of defendant, because then it was only three to six feet from the horses. But appellant alleges, even if there was any evidence of negligence on part of defendant, there was manifest negligence on part of the mother, one of these plaintiffs, which contributed to the accident, and therefore there can be no recovery.

As we have stated, the father of this child was in moderate circumstances. The mother cared for her own child, and attended to her household duties; she did not permit it to run on the street. We held in *Smith v. Railroad Co.*, 92 Pa. St. 454, that the parent owes to the child protection. It is his duty to shield the child from danger, and his duty is the greater, the more helpless and indiscreet the child is. If by his own carelessness—his neglect of the duty of protection—he contributes to his own loss of the child's services, he may be said to be in *pari delicto* with a negligent defendant, and cannot recover. Whether the parent was negligent depended on whether, according to the circumstances, he took reasonable care of his child. Also, from *Rauch v. Lloyd*, 31 Pa. St. 358, through a long line of cases, this court has uniformly held that the mere fact of the incapacity of the child neither creates nor shields from liability. If there be no negligence on part of defendant, the injury

of the child is its misfortune; if there be negligence on part of defendant, and no negligence on part of parent, the want of discretion in the child is no protection to defendant. We assume, then: (1) That defendant here was negligent; (2) that the fact that a child of this age was on the track, where it ought not to have been and had no right to be, of itself in no degree excuses defendant. But then comes the next question: Was it there because of the carelessness of the mother? The facts, as stated by her, are these: Immediately before the accident, her two sisters-in-law, Mrs. Rightmeyer and Mrs. Johnson, with their three children, called, and remained about half an hour. When they left, Mrs. Johnson went with them to the door, and stood talking with them about five minutes on the porch immediately outside. She had left her own child in the kitchen. While standing at her own door, talking to her departing visitors, the child came from the kitchen, through the house, passed its mother at the door, crossed the intervening sidewalk and street, a distance of about 28 feet, to the furthest track of the railway, where, in immediate view of the mother, it was killed. She did not even know it was her child until after the accident. A child 20 months old; an open door; a dangerous railway track within a few feet of the open door; the mother standing in full view of the door and the track; and the further fact that it would probably take the little child as long to toddle from the door to the track before the eyes of its mother as it took the approaching street car to come a square,—was this such care as was due from the mother to her child, according to the circumstances? It would be a harsh rule to hold that this mother, in her pecuniary circumstances, was bound to give her undivided attention to her child, to the neglect of all other wifely duties, and there is no such rule of law in Pennsylvania, as we have held in very many cases. If the child had escaped from the house while the mother's attention was given to some other of the many cares which burden the woman who keeps her own house, the case would have come within the rulings in *Kay v. Railroad Co.*, 65 Pa. St. 269; *Smith v. Railroad Co.*, *supra*, and like cases. But here, when there was nothing whatever to prevent watchfulness, this mother permitted this child to come out of the open door, pass at her feet out to a railway, and there, in full view, place itself on the track, with an approaching car also in full view. Was this care, according to the circumstances, or was it negligence? The answer must be, and there is no escape from it, that it was negligence, and negligence which contributed to the accident. If these parents had been in different circumstances, and had had in their service a nurse whose special duty it was to watch the child, and who, while talking to companions at the

door, had permitted it unobserved to go out on this railway track, where it was run over, the servant would have been immediately discharged by the parents, and justly, too, because of gross negligence. But where is the distinction in duty between that of the servant and the mother in that particular five minutes in which occurred the circumstances resulting in this accident? The mother, at that time, had no paramount or exacting duty to perform which could excuse inattention to her child. Her first duty, under the circumstances at that particular time, was to guard it. She was in the most favorable situation to perform the duty,—the child before her, the danger in full view; and this, not for an instant, but during the time it took the child to make its way from the door, over its mother's feet, over the pavement, into the gutter, out to the rails.

In so far as this opinion reflects on the conduct of plaintiff, we regret that what we have said seemed necessary in vindication of the judgment. Without the criticism of others, her regret must be lifelong as well as unavailing, and, as far as possible, we have refrained from adding anything to her burden. The evidence of contributory negligence is so clear and indisputable that the judgment cannot stand. Appellant's seventh assignment of error is sustained, and the judgment is reversed.

STERRETT, C. J., and McCOLLUM, J., dissent.

(161 Pa. St. 17)

PAIRPOINT MANUF'G CO. et al. v. PHILADELPHIA OPTICAL & WATCH CO. et al.

Appeal of KEYSTONE WATCH-CASE CO. (No. 419.)

(Supreme Court of Pennsylvania. April 2, 1894.)

CONFLICT OF LAWS—PREFERENCES—JUDGMENT CONFESSED.

1. A new Jersey corporation, not forbidden by its charter to prefer creditors, may confess judgment by way of preference in a state where that method of preference is permitted, in spite of the New Jersey law forbidding preference by judgment confessed.

2. The fact that a sale by receivers would be better for all the creditors of a corporation is not ground to enjoin execution against it on a lawful judgment.

Appeal from court of common pleas, Philadelphia county.

In the matter of a bill by the Pairpoint Manufacturing Company and others against the Philadelphia Optical & Watch Company and others. Appeal of the Keystone Watch-Case Company from an order enjoining execution on judgment confessed by defendants. Reversed.

B. H. Lowry, for appellant. T. D. Finletter, Francis E. Brewster, Samuel M. Hyne-man, and Wm. W. Wiltbank, for appellees.

FELL, J. On the 10th of January, 1894, the appellant, the Keystone Watch-Case Company, caused judgment by confession to be entered on the bond of the defendant the Philadelphia Optical & Watch Company for \$50,000. On the same day a writ of execution issued and a levy was made on the property of the company. On the 18th of January a bill was filed by the Pairpoint Manufacturing Company and others, creditors, against the defendant, under which receivers were appointed. On the 16th of February, on petition of the receivers, an injunction was granted restraining the appellant from proceeding with the execution, commanding the sheriff to surrender to the receivers the property levied on, and directing a sale by the receivers without prejudice to the rights of the judgment and attaching creditors as to liens acquired. The reasons assigned in the petition, and on which the order is based, are that the judgments of the appellant and others effect preferences, and are therefore fraudulent in law, and that a sale by the sheriff would cause a sacrifice of the property, and a distribution of the proceeds in violation of the rights of the plaintiffs in the bill and other creditors. The statement that the judgments are fraudulent in law is evidently founded upon an averment in the bill that the defendant is a New Jersey corporation, and that the laws of that state regulating corporations provide (Revision, § 80): "In payment of the creditors and distribution of the funds of any company the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors." No actual fraud is alleged, and the claim that the judgment is legally fraudulent is based entirely upon the fact that it works a preference in a manner forbidden by the statute of New Jersey. The New Jersey act does not make unlawful the preference of a creditor by an insolvent corporation except when effected by means of a confessed judgment. *Wilkinson v. Baerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Vall v. Jameson*, 41 N. J. Eq. 648, 7 Atl. 520. No disability to make a preference is imposed upon this corporation by its charter, and the prohibition by a general enactment can have no extraterritorial effect. Not being forbidden by the organic law of the corporation, the legality of the act must depend upon the law of the state where it is done. In Pennsylvania, an insolvent corporation may prefer a creditor by a confession of judgment. *Banking Co. v. Fuller*, 110 Pa. St. 156, 1 Atl. 731. The confession of judgment to the appellant being lawful, the only remaining reason presented by the petition for interfering with the writ of execution is that a sale can be more advantageously conducted in the interests of all the creditors by the receivers. This is not a sufficient reason.

The appellant is pursuing the regular and orderly course for the collection of a judgment lawfully obtained for a debt admittedly due. This is its right. The interest of other creditors may be affected thereby, but, until it is shown that their rights are violated, no one has a standing to challenge the appellant's right to use the means provided by law for the enforcement of its claim. The assignment of error is sustained, and the decree of the court of common pleas of February 16, 1894, is reversed, and set aside, with costs to be paid by the appellees.

(161 Pa. St. 123)

LOWRY v. PHILADELPHIA OPTICAL & WATCH CO. et al. (No. 405.)

(Supreme Court of Pennsylvania. April 9, 1894.)

Appeal from court of common pleas, Philadelphia county.

Bill by the Pairpoint Manufacturing Company and others against the Philadelphia Optical & Watch Company and others. From an order enjoining an execution, John C. Lowry, as trustee for Arthur H. Williams' Sons, appeals. Reversed.

B. H. Lowry, for appellant. T. D. Finletter, Francis E. Brewster, Samuel M. Hyneman, and Wm. W. Wiltbank, for appellees.

STERRETT, C. J. This case involves the same question that was recently considered and decided by us in *Manufacturing Co. against same defendant* (No. 419 of this term, 28 Atl. 1003). For reasons given in the opinion of our Brother FELL in that case, we think the decree complained of should be reversed. Decree reversed, and set aside, with costs to be paid by the appellees.

(161 Pa. St. 47)

WESTERN PENNSYLVANIA GAS CO. v. GEORGE.

(Supreme Court of Pennsylvania. April 9, 1894.)

LANDLORD AND TENANT — OIL AND GAS LEASE—CONSTRUCTION.

An oil lease "for the purpose of drilling and operating for oil and gas," for 2 years, "and as much longer as oil or gas is found in paying quantities, or the rental paid thereon," provided that the lessee should commence a well within 30 days, and complete it in 90 days, or, in default, pay an annual rental of \$60 until such well should be completed; that a failure to complete it or pay such rental within 10 days after the time specified should render the lease void; and that it should be optional with the lessee at any time either to drill the well, to pay the rental, or forfeit the lease. *Held*, that the lessee, who did no drilling for oil or gas during the two years, could not hold the premises after the two years by paying the \$60 annual rental.

Appeal from court of common pleas, Washington county; J. A. McIlvaine, Judge.

Action of ejectment by the Western Pennsylvania Gas Company against Robert S. George. From a judgment for defendant, plaintiff appeals. Affirmed.

The facts found by the trial court, so far as they are necessary to an understanding of the case, are as follows: (1) The defendant,

Robert S. George, on the 16th day of July, 1890, was, and still is, the owner in fee simple of the tract of land described in the writ, containing 60 acres. (2) On July 16, 1890, he executed and delivered to D. J. Sterling an oil and gas lease, in which he "granted, demised, and let unto the said D. J. Sterling, for the purpose, and with the exclusive right, of drilling and operating for oil and gas," said tract of land. In said written lease it was provided, *inter alia*, as follows: "The party of the second part to have and to hold the said premises for and during the term of two years from the date hereof, and as much longer as oil or gas is found in paying quantities or the rental paid thereon. * * * It is further agreed that the party of the second part shall commence a well on the above-described premises within thirty days from the date above, and complete it within ninety days, or, in default thereof, pay to the party of the first part for further delay an annual rental of sixty dollars, payable quarterly in advance, on the premises from the time above specified for completing a well until such well shall be completed. * * * A failure to complete such well or pay said rental within the time specified or within ten days thereafter shall render this lease null and void. * * * It shall be optional with the lessee at any time either to drill said well, to pay said rental, or to forfeit and surrender said lease. * * * Party of the second part is 'to protect said land from any undue drainage done by wells drilled upon adjoining land.'" (3) On December 2, 1890, D. J. Sterling assigned and transferred this lease to the Western Pennsylvania Gas Company, the plaintiff in this suit. (4) Neither the lessee nor his assignee entered upon this land for the purpose of exercising the rights granted in the lease, and no oil or gas well was commenced by either of them before the bringing of this suit or since. (5) The plaintiff, for its default in not commencing and completing a well during the term of two years, paid to the defendant for further delay an annual rental of \$60, quarterly in advance, as stipulated in the lease, the last payment being made on June 13, 1892. (6) At the expiration of two years from the date of the lease the defendant claimed that it was at an end, and so notified the plaintiff in writing. (7) The plaintiff, after the expiration of the two years, regularly and in due time tendered all the subsequent quarterly payments of the annual rental as they became due, treating the lease to be still in force, which were refused by the defendant. (8) The leased premises are situated in the edge of the McDonald oil field, and during the two-years term a number of wells were drilled within a mile or two of it. Some were dry, and in some oil was found in paying quantities. One well on the McCarty farm, within 1,000 feet of the line of the land in dispute, was finished in the spring of 1891, and was considered a paying oil well. Another paying oil well on this

farm, but further from the George land, was finished in the fall of 1890.

A. M. Todd and J. A. Wiley, for appellant. David Sterrett, J. F. McFarland, and John B. Chapman, for appellee.

MCCOLLUM, J. The land described in the summons was leased for "the purpose of drilling and operating for petroleum oil and gas." The lease was for a term of two years, and it contained a provision for its continuance for a longer period on certain conditions, which will be hereinafter considered. The lessor, in consideration of the right granted to the lessee, was to receive from the latter one-eighth of the oil produced from the premises, and \$500 per annum for each well from which gas should be obtained in paying quantities, and so long as it should be sold therefrom. The lessee was to commence a well on the premises within 30 days, and to complete it within 90 days, from the date of the lease; and, in case of his failure to do so, he was to pay to the lessor \$60 per annum, quarterly in advance. This sum was called a "rental," but it was in the nature of a penalty for the lessee's default in the performance of his covenant to commence and continue operations in execution of the purpose expressed in the lease. It was not a sum to be paid quarterly in advance to the lessor after the development of the property, and while he was receiving one-eighth of the oil produced therefrom, or the rent from the gas wells drilled thereon. It was manifestly intended to hasten the performance of the lessee's covenant to drill the well; and whether it is called a rental, a penalty for the lessee's default, or compensation to the lessor for the delay occasioned by it, is of no consequence. The lessor could not exact it beyond the period covered by the lessee's default, because, after the covenants of the latter in respect to the development of the property were performed, there could be no accruing rental under this provision of the lease. The appellant company has succeeded, by assignment, to the rights and obligations of the lessee, and its contention is that it may continue the lease in full force so long as it pays or tenders to the lessor quarterly in advance the sum of \$15. In other words, it claims to have the right, on payment of this comparatively insignificant rental or penalty, to postpone indefinitely all operations for the development of the property, and thus defeat the expressed purpose of the parties, and render inoperative the principal covenants of its assignor. This is an extraordinary claim, and it is based on a construction which makes the lease a mere option, and the so-called "rental" the price of it. The five words relied on to accomplish this result are found in and conclude the habendum clause of the agreement. The learned judge of the common pleas thought these words did not warrant the construction contended for, and that they were applicable only to the definite term of

two years within which it was manifestly intended by the parties that the property should be developed. He therefore held that the failure of the lessee and his successor to complete a well upon the premises within that term enabled the lessor to terminate the lease on the expiration of it, and in this conclusion we concur. A provision obviously designed to hasten the development of the property should not be allowed to prevent such development, if it admits of a construction which harmonizes with the other provisions of the agreement, and gives effect to the controlling intention of the parties to it. The continuance of the lease beyond the definite term was contingent upon the finding of oil or gas in paying quantities, and on the payment to the lessor, in such case, of his share of the oil produced, or the stipulated sum for each well from which gas was obtained and sold. The primary and essential condition to any extension of the lease after the lapse of two years from its date was the finding of oil or gas in paying quantities within that time, and the secondary condition was that the rent reserved for the oil or gas found should be paid in conformity with the covenants in relation thereto. If we were at liberty to substitute "and" for "or" in the concluding words of the habendum clause, as we might well do if we were construing a will or statute, there would be no room nor basis for the appellant's contention, because on such substitution the rental mentioned therein would plainly refer to that which the lessor would be entitled to receive after the development of the property, and while oil or gas was found thereon in paying quantities. But fortunately the lease as written fairly admits of a construction which gives effect to all of its provisions, and to the intention of the contracting parties. This construction was adopted by the learned judge of the common pleas, and it referred the rental mentioned in the habendum clause to the definite term of two years within which it was possible for the lessee to continue the lease, without commencing operations thereunder, by paying the rental or penalty prescribed for his delay in the performance of his covenant to drill a well on the premises. We are satisfied that the construction placed on the lease in the court below was fully warranted by its provisions, and the dominating purpose of the parties to it. We therefore overrule the specifications of error. Judgment affirmed.

(161 Pa. St. 115)

SMITH v. EYRE.

(Supreme Court of Pennsylvania. April 9, 1894.)

EVIDENCE—ADMISSIBILITY OF DECLARATIONS.

A declaration by defendant in the absence of plaintiff is inadmissible.

Appeal from court of common pleas, Philadelphia county.

Action by A. Lewis Smith against Mary Y. Eyre for professional services. Judgment for plaintiff, and defendant appeals. Affirmed.

H. G. Hartranft and Charles Davis, for appellant. A. J. Wilkinson and J. Howard Gendell, for appellee.

PER CURIAM. It appears that after protracted litigation between the defendant in this case, as tenant for life of certain real estate, and the owners thereof in remainder, a compromise was effected, whereby the former received \$12,000, which, as plaintiff alleged, included \$1,000 agreed upon as compensation for his services as her attorney in said litigation. Defendant not only refused to pay plaintiff said sum which he alleged she had received to his use as aforesaid, but she denied that he had been her attorney in said litigation and compromise thereof; hence this suit to recover said \$1,000 and interest. The burden was, of course, on plaintiff to prove the allegations on which his claim is grounded, and testimony was accordingly introduced for that purpose, and thus questions of fact were presented and properly submitted to the jury. Their verdict for plaintiff necessarily implies a finding of said facts in his favor. So far, therefore, as the controlling facts are concerned, they have been definitely settled by the verdict; and, unless there is some error in the ruling or instructions of the learned trial judge complained of, the judgment entered on the verdict should not be disturbed.

There is no error in the ruling complained of in the first specification. For obvious reasons the objection to the question propounded to the witness Anna Heller was rightly sustained. The witness herself stated that plaintiff was not present when the declaration referred to in the question propounded was made.

We also think there is no error in either of the learned judge's answers to points recited in the second, third, fourth, and fifth specifications; nor in his refusal to direct a verdict for defendant as requested in her fifth point, recited in the last specification. Neither of the questions thus presented requires elaboration. It would serve no useful purpose. The case appears to have been carefully and ably tried, and we find nothing in the record of which defendant has any just reason to complain. Judgment affirmed.

(161 Pa. St. 98)

SNYDER v. PATTERSON.

(Supreme Court of Pennsylvania. April 9, 1894.)

VIOLENT DOG—LIABILITY FOR INJURIES.

An uncle who permits a minor nephew, living with him, to keep a known vicious dog, is liable for injuries to a child caused by it.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by Webster Snyder, by his next friend, against H. L. Patterson, for injuries caused by a vicious dog. Judgment for plaintiff, and defendant appeals. Affirmed.

Ermentrout & Ruhl, for appellant. J. H. Jacobs and H. P. Keiser, for appellee.

WILLIAMS, J. The learned judge of the court below made no mistake in refusing the defendant's first point. This point asked an instruction to the effect that the defendant was not liable in the action if he did not own the dog that committed the injury. The fact assumed did not support the legal conclusion sought to be drawn from it. The defendant, although not the owner of the dog, might make himself liable to others, as owner, by knowingly keeping or harboring the animal upon his premises after knowledge of his vicious propensities. The important questions in this case were therefore whether the defendant did harbor the dog upon his premises, and whether he knew of his bad temper and propensity to bite before the injury to the plaintiff was inflicted. These were questions for the jury, which, upon the facts of this case, were properly submitted. The several assignments of error relating to these subjects are therefore overruled.

The sixth assignment is to an instruction contained in the general charge, which was in these words: "The question for you is simply, was or was not this dog kept on defendant's premises with defendant's knowledge and consent, so that the defendant's property was the dog's home?" The context shows that the jury were instructed that, if they answered this question in the affirmative, the defendant was liable precisely as an owner would be. This was right, upon the circumstances of this case. The injury complained of was inflicted by the dog in the immediate vicinity of the defendant's premises. The owner was a young boy of about 14 years, who lived with the defendant. His mother was the defendant's sister and housekeeper. The boy was a member of his family, therefore, to whom he stood, in some sense, in loco parentis. The dog had been given to the boy some two years before this accident took place, and had been brought by him to the defendant's home, and there kept, with his knowledge and consent. Upon these facts the question we are considering was entirely proper. We do not wish, however, to be regarded as assenting to any general rule that the owner of the premises on which a dog may be harbored is liable for its vicious acts, regardless of the age, employment, or home of its owner, or the circumstances under which the injury was inflicted. The question of liability must depend on the circumstances in each case, and no general rule can be laid down depending solely on the answer to the question embodied in this assignment of error, "Was or was not this dog kept on defendant's premises with defendant's knowledge and consent, so that the de-

defendant's property was the dog's home?" If injustice has been done in this case, it is the jury, and not the learned trial judge, by whom it has been done. The judgment is affirmed.

(161 Pa. St. 106)

ROLAND v. READING SCHOOL DIST.
(Supreme Court of Pennsylvania. April 9, 1894.)

CONTRACTS—CONSTRUCTION.

Plaintiff contracted to furnish defendant school district a certain number of each sort of text-book needed, at a fixed price per volume. During the negotiations, plaintiff wrote, "Our price on any books not called for in your bid will be supplied at cost." The contract provided that, if an additional number of any of the books set out in defendant's list were needed, plaintiff should furnish them as directed by defendant. *Held*, that the question whether plaintiff had undertaken to furnish books of other kinds than those mentioned in defendant's list at cost was for the jury.

Appeal from court of common pleas, Berks county; G. A. Endlich, Judge.

Action by Walter G. Roland against the Reading School District for the price of books furnished defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

William Kerper Stevens, for appellant. H. P. Wanner and Ermentrout & Ruhl, for appellee.

WILLIAMS, J. The plaintiff in this case is a bookseller in the city of Reading. In July, 1892, he entered into a contract in writing with the Reading school district to furnish text-books for use in the public schools of that city. The contract required him to furnish a certain number of each sort of school-book needed, at a fixed price per volume. During the negotiations that led up to this contract the plaintiff wrote a letter to the secretary of the school board, saying, "We wish most respectfully to remind you that our price on any books not called for in your bid will be supplied at cost." This letter was evidently understood by the school board to refer to any additional number that might be needed during the year of the same text-books enumerated in the schedule on which bids had been asked for from dealers. The action of the school board in the acceptance of Roland's bid, and in directing its secretary to prepare and execute a contract with him, shows this understanding clearly. It appears also in the terms of the written contract which was executed by the parties in the following stipulation: "It is understood and agreed by and between the parties hereto that, in case an additional number of any of the books set out in the foregoing list are required by the said party of the second part during the current school year commencing September 1, 1892, and ending June 30, 1893, said party of the first part is to furnish the same at such time and

place as may be designated by said party of the second part." This, it will be seen, relates only to an additional number of the same text-books provided for by the contract, and not to other books not so provided for. As to such other text-books as might be required during the year, not included in the plaintiff's bid and the contract, there was no stipulation in the written agreement as to price. If such books were needed, they might have been provided for by an additional agreement before they were ordered. The books claimed for in this case are not additional in number of the kinds named in the contract, but they are additional in kind. They are not embraced in the contract, because, as it would appear, they were not then thought to be necessary. The question raised was, had the plaintiff undertaken in any manner to furnish these books at a particular price? The school board set up the letter that preceded the making of the contract, and alleged that its terms covered these books. This question the learned trial judge submitted to the jury upon all the evidence in the case, including the written contract. The defendant is in no position to complain of this. The jury has disposed of the question in a manner which seems to have been satisfactory to the court below, and has found that there was no undertaking on the part of the plaintiff to furnish the books sued for at cost, or at any fixed price. This being so, the plaintiff's right to recover is clear, and the judgment should not be disturbed. It is now affirmed.

(161 Pa. St. 41)

DENNISTON et al. v. PHILADELPHIA CO.
(Supreme Court of Pennsylvania. April 9, 1894.)

EMINENT DOMAIN—LOCATION OF GAS-PIPE LINE—COMPENSATION—ELEMENTS OF DAMAGE—LEAKAGE—WITNESS—CROSS-EXAMINATION.

1. In an action by a landowner for damages caused by the construction of a pipe line for conveying gas across his land, injuries resulting from leakage of the main are not proper elements of damage, in the absence of evidence that such leakage was consistent with a proper construction of the line, and not the result of negligence in the operation thereof.

2. Defendant cannot cross-examine plaintiff's witness as to matters of defense foreign to the direct examination.

Appeal from court of common pleas, Washington county; J. A. McIlvaine, Judge.

Action by William and Thomas Denniston against the Philadelphia Company to recover damages caused by the location and construction of defendant's gas-pipe line on plaintiffs' land. From a judgment for plaintiffs, defendant appeals. Reversed.

A. M. Todd and J. A. Wiley, for appellant. Thomas M. Marshall, Sr., Mr. Boyd, and E. E. Crumrine, for appellees.

McCOLLUM, J. The defendant company has the power of eminent domain for the

purposes for which it was incorporated. In the exercise of this power it entered upon the plaintiffs' farm, and dug a ditch there about 124 rods long, from 30 to 36 inches wide, and about 40 inches deep. In this ditch it placed and covered a wrought-iron pipe, 20 inches in diameter, and in so doing raised the dirt over the pipe from 10 to 15 inches above the natural surface of the ground. The pipe so laid constituted a part of the company's large main for the conveyance of gas from its wells in the Linden field to the city of Pittsburgh. About a year after the pipe was laid through their farm, the plaintiffs commenced proceedings for the recovery of the damages they sustained by the company's appropriation of a part of it in the manner, and for the purpose, already referred to. The principal inquiry on the trial of the case in the court below was, how much, if any, was the market value of their farm reduced by such appropriation? To enable the jury to answer this question intelligently, it was proper to introduce evidence showing how the farm was affected by the location and construction of the pipe line upon it. It appeared from the evidence submitted for this purpose that the most serious injuries complained of, such as the destruction of the grass and other crops along and on both sides of the line, and of a valuable spring in the vicinity of it, were traceable directly to leaks in the main. The evidence, however, did not furnish any basis for determining whether the leakage was attributable to the negligence of the company in the construction and care of its line, or came in spite of the employment of the best-known skill and appliances to prevent it; but it is clear that the leakage and its consequences were taken into consideration by the jury in forming an opinion in respect to the depreciation of the market value of the farm by reason of the location of the pipe line upon it. One-half of Joseph Estep's estimate of the depreciation was based on the leakage, and two-thirds of the estimates of the same by Joseph Pierce and W. F. Morrison rested upon it. Indeed it is apparent that the estimates made by most of the plaintiffs' witnesses were materially affected by the leakage which they discovered on their examination of the line a year or more after its completion. As these estimates, and the evidence on which they were formed, were for the consideration and assistance of the jury in ascertaining the depreciation in the market value of the farm, it is probable that the verdict was affected quite as much by the leakage and its consequences as the opinions of the witnesses were. It could not well be otherwise, because, although the learned court instructed the jury that injuries to the property resulting from a negligent operation of the line could not be considered in a proceeding for the assessment of damages occasioned by the location and construction of it, the evidence descriptive of the leakage

failed to assign the cause of it. Was the leakage shown by the evidence consistent with skill in the construction and care in the operation of the line, or was it due to the negligence of the company in both or either? A satisfactory answer to this question must have something more substantial to support it than conjecture; it must be founded upon evidence. If the leakage was the result of negligence, it was not an element to be considered in this issue. Hence there should have been evidence in the case which would have enabled the jury to find the cause of it; but there was none. To the extent, therefore, that the verdict was founded upon the evidence of the leakage and its effects, it was a mere guess.

In obtaining, transporting, and distributing the product of the gas fields, skill and care are required in order to minimize the risks to persons and property incident to the business. The inconveniences and injuries caused by the location of a skillfully constructed and carefully operated pipe line may be considered in a proceeding for the assessment of damages to the land through which it passes, but such as are produced by the careless construction and operation of it cannot be. The former are the natural and ordinary consequences of the location, construction, and use of the line, and terminate only with the abandonment of it, while the latter are exceptional, and may be prevented by the use of the best-known appliances and skill, and the observance of due care in the prosecution of the business, and they constitute an independent cause of action. In this case the plaintiffs were entitled to be compensated for the depreciation in the market value of their farm, due to the location and construction of the pipe line, but not for injuries caused by the negligent operation of it. In considering their claim we must not lose sight of the fact that their right to damages accrued on the location and construction of the line, and that it was in no sense enlarged or abridged by subsequent occurrences. Nor did their delay in the enforcement of their right affect, in any degree, the amount of the damages recoverable on account of the appropriation of the land. We must therefore regard the case as if they had brought and tried it before there was any leakage of gas along the line. If they had done so, would they have been permitted to show that there might be a leakage which would render useless a strip of land from 30 to 50 feet in width along the entire line, and destroy a valuable spring in the neighborhood of it? We think not, unless it appeared that such would be the natural and ordinary result of the appropriation. It is of the first importance to the parties that the evidence in cases of this nature should be restricted to matters proper for consideration in ascertaining the depreciation in the market value of the land. Matters which may be so considered must be introduced, if

at all, on the trial of the action for damages caused by the location and construction of the line, because the landowner cannot be compensated for them in a subsequent suit. An injury which is or may be produced by negligence in the operation or care of the line is not such a matter. It may be that the leakage complained of in the case before us was due to the company's negligence, and that a continuance of it may be prevented by proper repair and careful operation of the line. If so, the learned court below erred in admitting and allowing the jury to consider the evidence of it. There was no attempt to show that it was inseparable from, or a natural and ordinary consequence of, the location and construction of the line; and yet it may have affected the verdict, as it did the estimates of the witnesses. In the absence of affirmative evidence that it was at least consistent with a proper location, construction, and operation of the pipe line, it was not an element to be considered in this case. We therefore sustain the first and second specifications of error.

The third specification is misleading. It does not quote correctly the offer, the objections, or the ruling of the court. It appears from the record that the offer was to prove, on cross-examination, a matter which was foreign to the examination in chief, and that it was objected to and rejected on that ground. The offer was in violation of the well-settled principle that the defense cannot be introduced on a cross-examination of the plaintiff's witness. For this reason the objection to it was properly sustained. It follows that the other specification of error must be overruled. Judgment reversed, and venire facias de novo awarded.

(161 Pa. St. 118)

BIRCH v. CONROW et al.

(Supreme Court of Pennsylvania. April 9, 1894.)

ABUSE OF PROCESS—INTERPLEADER—DAMAGES.

1. Though the sheriff, having levied on goods claimed by a third person, promptly obtains interpleader, and the claimant voluntarily appears, and files his bond and narr., the claimant is not barred of his action against the plaintiff for abuse of process.

2. Though claimant was not deprived of the goods levied on, nor hindered in selling them in the regular course of business, he is entitled to damages for any injury to his credit.

Appeal from court of common pleas, Philadelphia county; Biddle, Judge.

Trespass by Lewis M. Birch against Howard F. Conrow and David Pangoast, Jr., trading as Conrow Bros. & Co., for abuse of process. Verdict and judgment for plaintiff. Defendants appeal. Affirmed.

Following is the charge of the court below (Biddle J.):

"This action, as you have heard, is an action to recover damages from the defendant for the malicious use of a civil process. The

allegation of the plaintiff in this case is that Mr. Conrow, the defendant here, had been carrying on business with his father, Mr. Birch, Sr.,—had been selling him goods from time to time,—and that Mr. Conrow held the notes of Mr. Birch, Sr., for the goods Mr. Conrow had sold to the father; that the father had written to the defendant here (Mr. Conrow) that he had sold out to his son, and, subsequent to that time, Mr. Conrow issued execution upon the son's property for his father's debt. But Mr. Birch, Jr., contends, in this case, that it was done maliciously, and without probable cause. Unless he satisfies you of both those facts, he has no case at all. He must show that it was done maliciously, and without probable cause. The plaintiff himself admits that if the object of Mr. Conrow, in issuing the execution, was to test the truth of the allegation that the property had been sold, then he would have no cause of complaint, because the law permits you, where that allegation is made, to levy upon the property of the man whose goods you really believe they are, and he is enabled to make a defense, and give security; and the case comes before a jury, like yourselves, to test the question whether the goods belonged to the father or to the son. That, undoubtedly, was done in this case; and all the parties here admit that, if it was honestly and fairly done, there is no cause of complaint. The plaintiff, however, contends that it was maliciously done, and without probable cause, and founds that mainly upon the fact that the father had written this note asserting it, and that they waited a considerable length of time before they issued the execution after the note had been received, and that, shortly subsequent to the note being received, they themselves had sold goods to the young man, and that the goods that Mr. Conrow had sold to the young man were in the store, and that after these goods got into the store they subsequently made a levy, and that, therefore, they knew perfectly well that these goods were not the goods of the father, but were the goods of the son. Therefore, they allege that it was malicious, and they ask you to give them damages for the injury their credit sustained by this levy upon their property. They were not prevented from selling, it is true, but the sheriff's officer was there for nine days, and they contend that was a blow to their credit. Two gentlemen appeared before you, who, they contended, refused to trust them, and they have testified that that affected their credit. Therefore, they ask you to give them damages. Now, in answer to that, the defendant says that he did nothing whatever, except what any reasonable, cautious man would do; that he had no reason to believe this was a bona fide arrangement. It was true the father had written to him that this had been done. But subsequently, when the father visited them,

and they asked him to pay them some money that he owed them, he said that he was not able to pay it, when they said to him: 'Why, you have just written us that you have sold out to your son for a certain amount of money. Why can't you give us some of that money you got from your son for the sale of the goods?' When he said, 'Why, that was a sham.' If not in those words, practically that,—that it was a sham, and that he did it to protect the goods from some creditor who he was afraid was going to levy upon him; that he did not get any money at all, and therefore was not able to pay. That is the answer of the defendant on that point,—that the father wrote to him, but that then the father came, and stated what was the very reverse of what he had written. And so, of course, their disposition then was to go on, instead of stopping, he having practically withdrawn the letter he had written. Then, there were allegations about their waiting a length of time to issue the execution, when this judgment was procured in July, in regard to which they say that they waited because they desired to see their counsel. And there were some other points I will not elaborate, because they have been elaborated by counsel, both for the plaintiff and for the defendant. Then, as to the subsequent sale of goods to this young man. Their explanation of that is that the first bill was really a bill of the father, whose name was on it, but whose name has been taken off that bill,—that it was really a bill of the father's, and that the other bills were cash sales, that they knew nothing about; the allegation being that, when anybody came in and bought goods for cash, the firm would know nothing about it, one way or the other, as to who bought them, as they were not entered upon the books. You have heard the explanation on both sides about that, and you must decide what views you will take of them. Then, in addition to that, the defendant makes another defense, which is a conclusive defense, if you think it has been made out. The law in these cases is that if you go to counsel, reputable counsel, and state all the facts of the case honestly, and upon his advice issue execution, it is a complete bar of recovery on the part of the plaintiff. If you believe that these gentlemen honestly stated to Mr. Wain all the circumstances of the case, and that he advised the issuing of this execution and the levy upon these goods, that is an end of the plaintiff's case, because it proves that there could be no malice or want of probable cause, both of which must exist. If you go to a respectable attorney, and give all the facts, and he gives his honest advice, that is a complete refutation of the charge of malice, or want of probable cause. Those are the main facts in this case. There is no question for you to decide as to whom the goods belong. The question is whether you think that Mr. Conrow had probable cause to be-

lieve that they were not the goods of this young man. If you think that, it would also be an end of the case.

"I think I have covered most of the points, but the following points have been presented to me by the attorney for the defendants: 'First. The records in the case of *Conrow & Co. v. Sanford Birch*, C. P. No. 1, June term, 1888 (No. 364), offered in evidence by the plaintiff in this case, *Lewis M. Birch*, together with his testimony, show that he voluntarily appeared in said case under the sheriff rule for an interpleader, and voluntarily filed his narr. and bond in said case, and went to trial; and as there is no evidence in this case that the sheriff delayed unnecessarily in making application for the rule of interpleader, and no evidence that the plaintiff was deprived of the use of his goods in any way, or that he was prevented from selling said goods, your verdict must be for the defendants.' That I refuse. 'Second. In order to entitle the plaintiff to recover in this case for the alleged malicious use of a civil process, the plaintiff must allege in his statement, and prove, both malice and want of probable cause. If the jury believe from the evidence that the defendants made an honest statement of the facts to an attorney at law, who thereupon advised the defendants to issue an execution, and levy on this property, to test its ownership, and that the levy was made in pursuance of said advice, it is sufficient to rebut any inference of malice or want of probable cause, and your verdict must be for the defendants.' That I affirm. 'Third. If the jury believe that *Sanford R. Birch*, at the time of, and before, the alleged sale of these goods to his son, was largely indebted to the defendants in this case, and to other persons, and that the plaintiff in this case knew of that indebtedness, and that the said *Sanford Birch*, after the alleged transfer to his son, informed the defendants that the transfer was made to prevent one of his creditors from selling him out, and was not a bona fide sale, the defendants were justified in making a levy upon that property in their judgment recovered against *Sanford Birch* in case of *Conrow v. Birch*, C. P. No. 1, June term, 1888 (No. 364).' That I refuse, in the terms in which it is put. 'Fourth. The measure of damages in this case is the value of goods of which plaintiff was deprived. If the jury find that the plaintiff lost no goods by reason of the defendants' levy, and that the plaintiff continued to carry on his business and sell goods after the levy, the same as before, your verdict must be for the defendants.' That I refuse, in the terms in which it is put. 'Fifth. The mere fact that two persons with whom the plaintiff dealt and was indebted refused to sell the plaintiff any more goods after the levy, and after the plaintiff had filed voluntarily his narr. and bond in this case, does not entitle the plaintiff to recover any damages.' This I refuse, under the terms in which it is put.

"Sixth. Under all the evidence, your verdict must be for the defendants." That I refuse."

S. Morris Waln, for appellants. Wm. C. Gross and Thos. F. Gross, for appellee.

PER CURIAM. This case depended on questions of fact, which were exclusively for the consideration of the jury. To them they were fairly submitted by the learned trial judge, in a clear and concise charge, in which there appears to be no substantial error. The only inference that can be fairly drawn from the verdict is that the controlling facts were found in plaintiff's favor. It follows, therefore, that the judgment entered on the verdict should not be disturbed, unless there is error in the instructions complained of in the specifications. We have considered the several questions therein presented, and are not convinced that there is any error in either of the answers to defendants' points for charge recited in said specifications. Judgment affirmed.

(161 Pa. St. 79)

Appeal of RITTER.

(Supreme Court of Pennsylvania. April 9, 1894.)

LIMITATION—WHAT CONSTITUTES ACKNOWLEDGMENT.

On distribution of an estate the statute of limitation was pleaded in bar of a claim on a note, due one year after date, "with interest," in favor of decedent's mother. Claimant had taken a like note from each of her two other sons for money given them. No interest was to be paid, and the principal was to be paid only in case she demanded it. No interest was paid, and no demand of the principal was made of decedent. The latter once said to claimant's agent: "This interest should be paid or wrote on the note. * * * There should be a new note made, or the interest marked on the old one. If mother should die, and M. get hold of it, we would have to pay the interest to date." *Held*, that the statement was insufficient to take the case out of the operation of the statute.

Appeal from orphans' court, Montgomery county; H. K. Weand, Judge.

Audit and distribution of the estate of William J. Ritter, deceased, on which Anna M. Ritter presented to the auditor for payment a note executed by deceased. From a judgment dismissing exceptions to and confirming the report of the auditor disallowing such claim, Anna M. Ritter appeals. Affirmed.

Chas. Hunsicker, for appellant. John W. Bickel, for appellee.

FELL, J. The claim before the auditor was on a promissory note made by William J. Ritter to the order of the appellant, Anna M. Ritter, for \$1,750, dated April 1, 1883, due one year after date, with interest. William J. Ritter died April 9, 1891, and the question was whether recovery was barred by the statute of limitations. William J. Ritter was one of three children of the appellant. She had given each of her children \$1,750, taking their notes at the time; and there was an under-

standing that no interest should be paid, and that the principal should be repaid only in the event that she needed and demanded it. No interest was paid, and no demand of the principal was made of the decedent. The evidence relied on to take the case out of the operation of the statute is that the decedent said to his brother-in-law, who we may assume was at the time the agent of the appellant, although it is by no means made clear: "This interest should be paid or wrote on the note. If my mother should die, Morris McCaslick might make a bad case of it. * * * There should be a new note made, or the interest marked on the old one. If mother should die, and McCaslick get hold of it, we would have to pay the interest to date." The auditor held that this testimony was insufficient to remove the bar of the statute, and his finding was sustained by the learned judge of the orphans' court. We think that the judgment was clearly right. There was neither a promise to pay the principal of the note, nor an acknowledgment of it as an existing indebtedness consistent with such a promise. A promise to give a new note is not of itself sufficient. *Hartranft's Estate*, 153 Pa. St. 530, 26 Atl. 104. What was said in regard to the interest was in restriction of the decedent's liability. There was doubtless a family understanding that the money given by the appellant to her children was in the nature of advancements to them, and, as these advancements were made at different times, the decedent feared that in the end he would be charged with interest, which it was not the intention of his mother or himself should be paid. For this reason he expressed a desire to have the interest credited on the note, or a new note made, which would not carry back interest. As was said in the opinion of the learned judge confirming the auditor's report: "While the evidence might sustain an admission that the debt still existed, it was not sufficient to show an express or implied promise to pay, or an admission consistent with a promise to pay." The decree is affirmed, at the cost of the appellant.

(161 Pa. St. 63)

NAYLOR et al. v. BETHLEHEM IRON CO. (No. 181.)

(Supreme Court of Pennsylvania. April 9, 1894.)

SALE—CONTRACT—CONSTRUCTION—DISPATCH MONEY.

A contract for the sale of foreign iron ore, to be delivered in Pennsylvania, provided that the price was based on a freight rate of 11 shillings per ton, "the buyers to receive or pay any differences; such differences to be settled by their paying or receiving actual differences between 11 shillings and the rate of freight paid on delivery to them." *Held*, that the buyers were not entitled to the dispatch money provided for in the charter party, and received by the sellers.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Assumpsit by Naylor & Co. against the Bethlehem Iron Company on a contract for the sale of iron ore. From a judgment for plaintiffs, defendant appeals. Affirmed.

Francis I. Gowen, for appellant. John G. Johnson and Samuel Dickson, for appellees.

FELL, J. This case comes directly within the ruling in *Ennis v. Steel Co.*, 154 Pa. St. 138, 26 Atl. 362. The plaintiff in each case agreed in writing to sell iron ore, to be shipped from Mediterranean ports and delivered free on board cars in this country; and in both the prices were based on freight charges, and the forms of charter parties, showing what commissions and allowances the charterer was entitled to receive, were incorporated in the contracts. The controversy in that case, as in this, related to the right as between the buyer and the seller to the dispatch money, and was to be determined by the written agreement between the parties. In the case of *Ennis v. Steel Co.*, supra, the contract provided: "It is understood and agreed that the steamers to load under this contract are to be furnished by buyers on the basis of nine shillings sterling per ton, usual present gross form of London steamer iron-ore charter; any variation to be for buyer's account; sellers, *Ennis & Co.*, to attend to the chartering." In this it reads: "The above price is based upon a rate of ocean freight of eleven shillings per ton; conditions as per *Naylor, Benzon & Co.*'s usual form of charter party; the buyers to receive or pay any differences; such differences to be settled by their paying or receiving actual differences between eleven shillings and the rate of freight paid on delivery to them." In one case it was agreed that any variation in freight was to be for the buyer's account, and in the other that the difference in rate of freight was to be settled by the buyer receiving or paying the difference. There is no substantial difference between these contracts. In construing the *Ennis* contract it was decided that the words "any variation" meant any variation in freight, and not any variation in the actual cost of transportation; and in the contract in this case the words "such differences" refer to differences in the rate of ocean freight, as freight, and not to freight charges, as diminished by dispatch money. The controlling thought of the contract in this regard is that the seller is to deliver at Philadelphia or Perth Amboy, and to assume all expenses and all risks except the risk of "freight," strictly so called. If this clause had been omitted from the contract, the buyer would have paid the exact price stipulated, without deduction or addition, and the seller's profit would have been the profit on that price, increased by dispatch money or lessened by demurrage. That the actual cost of transportation would vary from the rates of ocean freight was almost certain in the delivery by vessels of 160,000 tons of

ore, and extending over a period of two years. There was danger of ruinous charges for demurrage, and the earning of dispatch money depended upon the energy and foresight of the seller. There was but a chance of doing this, and there could be no reasonable expectation that it would ever be more than a chance, unless the party whose skill and vigilance could improve it would be benefited thereby. When, therefore, the parties stipulated for a price based on a rate of ocean freight of 11 shillings per ton, and gave the buyer the benefit or burden of the difference, they meant the "freight rate," strictly so called, and not the net cost of transportation. The freight rate would be diminished by dispatch money or increased by demurrage; but these were unknown quantities, upon which nothing could be based. They were risks which might result in gain or loss, but to the extent to which they were not purely chances they depended upon the action of the seller. It is conceded that the plaintiffs would have borne the burden of demurrage charges, and they are entitled, under the contract, to the benefit of the dispatch money. The judgment is affirmed.

(161 Pa. St. 63)

NAYLOR et al. v. PENNSYLVANIA STEEL CO. (No. 164.)

(Supreme Court of Pennsylvania. April 9, 1894.)

Appeal from court of common pleas, Philadelphia county. Arnold, Judge.

Assumpsit by Naylor & Co. against the Pennsylvania Steel Company on a contract for the sale of iron ore. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. H. Wintersteen and Wayne Mac Veagh, for appellant. John G. Johnson and Samuel Dickson, for appellees.

FELL, J. The appeal in this case presents only the questions decided in *Naylor v. Iron Co.* (No. 181, July term, 1893) 28 Atl. 1011, and, for the reasons therein stated, the judgment is affirmed.

(161 Pa. St. 57)

MEDARY v. CATHERS.

(Supreme Court of Pennsylvania. April 9, 1894.)

CONTRACTS—EXECUTION—PAROL EVIDENCE—LEASES.

1. When execution of the instrument on which suit is brought is not denied in the answer, nor notice given that proof of execution will be required, it is no error to admit the instrument without such proof.
2. Exception cannot be taken to the court's refusal to enter a compulsory nonsuit.
3. Evidence that defendant agreed with the tenant to guaranty the lease, if full possession under it were given at once, is incompetent against the landlord suing on the guaranty.
4. The fact that after the term had begun the landlord stayed on the premises, occupying some rooms with the tenant's consent and approval, worked no change in the lease so as to discharge the surety.
5. The landlord is under no implied obligation to make ordinary repairs.

Appeal from court of common pleas, Montgomery county; Aaron S. Swartz, Judge.

Action by Sarah C. Medary against Sarah Ann Cathers on the guaranty of a lease. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

Following is the opinion of the court below (Swartz, P. J.), overruling motion for new trial:

"The plaintiff rented her farm to one George W. Beans, at an annual rental of three hundred dollars, payable half yearly. The defendant was the security for the faithful performance of the contract on the part of the tenant. Suit was brought against the tenant, and a final judgment was obtained against him for all the rent claimed to be in arrears. The money was not paid, and this suit was then instituted against the surety. Under *Giltinan v. Strong*, 64 Pa. St. 242, we held that the judgment against the tenant could not be given in evidence against the surety. The surety offered to show that certain representations were made at the time she signed the surety stipulation. The offer was rejected, because the landlady had no knowledge or notice of these conversations between the tenant and surety. She offered to show that she refused to be liable for any rent unless the landlady was compelled to remove from the premises. The lease contained no stipulation against subletting, and the landlord was not aware of the request made by the surety for the landlord's removal. Stipulations between the principal and his surety in the absence of the plaintiff, and of which he had no knowledge whatever, cannot be given in evidence to discharge the surety. *Johnston v. Patterson*, 114 Pa. St. 398, 6 Atl. 746. The defendant further contends that there was such a change in the contract between the landlord and tenant as to relieve the surety from all liability. For two months the landlord remained, and occupied part of the house. We instructed the jury that if the landlord refused to give up full possession the surety was relieved from her contract, but if she was willing to leave or remove at all times, and only remained because of the assent of tenant, or because he desired her to remain in the house, then there was no such alteration in the contract as to relieve the surety. The jury must have found under the evidence that the plaintiff remained in the house because the defendant desired her to do so. The relations between landlord and tenant were friendly during all this time, and during her stay she was engaged in making repairs and improvements that were beneficial to the tenant. The tenant had the right to sublet, and if he saw fit to have the landlord remain we do not see why the surety should complain, at least we do not see what standing she has to object to the arrangement. We told the jury they could charge the plaintiff a reasonable sum for the use of the rooms she occupied. This part of the charge, we think, was as favor-

able to the defendant as the facts warranted. The jury, however, found that the relationship between the parties was of such a character that there was no intention to pay, nor any right to exact payment. In submitting the question of damage for failure to build new fencing we used the word "defendant," when we should have said "tenant," but we do not see how the jury could have been misled by this slip. Counsel might have called our attention to the mistake before the jury retired. The defendant claimed there was an eviction, and we told the jury, if they found there was an eviction, the rent would stop from that time. In this there may have been error, but it was without injury, for the jury found there was no eviction. Upon a careful consideration of the case we are convinced that there was no evidence upon this point that ought to have been submitted to the jury. The testimony is clear and uncontradicted that the tenant put Craven in possession before the end of the year. The landlord distinctly told the tenant that if Craven went into possession it must be done under the tenant's direction and permission. We think there is no merit in the defendant's case, and we cannot disturb the verdict."

George N. Corson, for appellant. Isaac Chism, for appellee.

FELL, J. This case is of interest only to the parties to it. To the professional mind it involves no question that was not supposed to have been finally set at rest. The defendant was sued on a contract of suretyship, and at the trial took advantage of every ground of defense that was open for her principal on the merits, and of every technical objection that could be interposed by a surety. In this she was given the fullest opportunity, and she succeeded only in showing what has been so well established by experience,—that the position of a surety is not a desirable one when the day of settlement comes. To sustain the first assignment of error we should be required to hold that it is incompetent for a court to make a rule allowing a written instrument on which suit is brought to be admitted in evidence without proof of execution, when the execution has not been denied, or notice given that such proof would be required; and thus overrule *Reese v. Reese*, 90 Pa. St. 89, and *McGovern v. Hoesback*, 53 Pa. St. 176. The sustaining of the second assignment would overturn the decisions in *Scranton City v. Barnes*, 147 Pa. St. 461, 23 Atl. 777, and *Borough of Easton v. Neff*, 102 Pa. St. 474, and the line of cases to which these belong, and establish a new rule that an exception can be taken to the refusal of a court to enter a compulsory nonsuit. The third assignment is to the refusal to allow the defendant to testify to a statement made by her when the lease was signed. This testimony was intended to vary the written instrument. No ground was laid

for its introduction, no representation had been made by any one to induce her to sign, and the purpose of the offer was to introduce a statement made by the defendant to one not the agent of the plaintiff, and never communicated to her. There would be little left of either principle or decision upon the subjects involved if this specification of error were sustained. The remaining assignments are equally without merit. There was no implied obligation on the owner to make ordinary repairs, and the fact that she occupied part of the premises for a portion of the year with the consent of the tenant, no change having been made in the contract, did not release the surety. The points were properly answered, and the jury carefully and accurately instructed in a charge to which no fair objection can be made by the defendant. The judgment is affirmed.

(161 Pa. St. 92)

COMMONWEALTH ex rel. RYAN, District Attorney v. HAESELER.

(Supreme Court of Pennsylvania. April 9, 1894.)

SCHOOL-DISTRICT OFFICERS — ELIGIBILITY — QUO WARRANTO — JURISDICTION OF COURT OF COMMON PLEAS.

1. Under Act Feb. 17, 1859, providing that in Schuylkill county no person shall hold more than one school-district office at one time, no person can hold at the same time the office of school treasurer and school director in such county.

2. The court of common pleas has jurisdiction of a quo warranto proceeding to oust a person from the office of school-district treasurer.

Appeal from court of common pleas, Schuylkill county; Cyrus L. Pershing, Judge.

Quo warranto by the commonwealth at the relation of James W. Ryan, district attorney, to oust Francis S. Haeseler from the office of school-district treasurer of the borough of Pottsville, Schuylkill county. There was judgment for relator, and respondent appeals. Modified.

A. W. Schalck and Guy E. Farquhar, for appellant. James W. Ryan, Dist. Atty., and R. H. Koch, for appellee.

WILLIAMS, J. The purpose of the act of 17th of February, 1859, is clearly expressed in its title, which is, "An act to secure a stricter accountability of certain public officers in Schuylkill county." It enumerates and lays additional requirements upon the township, county, and school-district officers concerned in the levy, collection, safe-keeping, and disbursement of public money. A proviso in the sixth section declares that "no one person shall be eligible to hold more than one township, borough or school district office at one time, except the offices of township treasurer and collector as herein provided." The proviso is limited in its operation to the officers reached by the provisions of the statute, viz. such as are concerned in the levy,

collection, safe-keeping, and disbursement of the county, township, and school moneys. The provisions of the school law are therefore unaffected, except as to the eligibility of a school director to hold at the same time the office of school treasurer. This is distinctly forbidden in the act of 1859, so far as the county of Schuylkill is concerned. The president of the school board is necessarily a director, and his selection to preside at the meeting of the board gives him no additional control of the school funds. The same thing is true of the secretary. He records the action of the board, but his office does not change in any manner his relation to the school funds, whether arising from taxation or from state appropriations. The treasurer, on the other hand, is, by virtue of his office, the custodian of all moneys belonging to the district. The directors authorize the drawing of orders upon him as treasurer, and they audit and settle his accounts. If he is a member of the board of directors, he has a voice in the settlement of his account. He is the accountant, and a part of the body to which he accounts. This was possible under the general school law, but it is prohibited by the act of 1859.

The next question raised is that of jurisdiction. The appellant contends that the court of common pleas has no authority over the officers of a school district upon the writ of quo warranto. It is unnecessary to examine and expound the statutes to show that the jurisdiction exists, for the question has been repeatedly decided. In *Field v. Com.*, 32 Pa. St. 478, the title of the county superintendent of common schools was in question, and the jurisdiction of the common pleas to determine the title on quo warranto was distinctly asserted. In *Gilroy's Appeal*, 100 Pa. St. 5, the controversy was over the title of persons claiming to be school directors. The proceeding was by bill in equity. The court held that the remedy by quo warranto was not only an adequate, but the exclusive, one, and that equity would not take jurisdiction in such a case. The same doctrine was again asserted in *Gilroy v. Com.*, 105 Pa. St. 494. The question cannot now be considered an open one. The appellant was therefore in the proper court, and upon proper process; and the court correctly ruled that he could not lawfully hold at the same time the offices of school director and treasurer of the school district. If the act of 1859 had made him ineligible to appointment while holding office as a director, the appointment made in violation of the law would have conferred no authority, and the judgment of ouster would result necessarily from such a state of facts. But the prohibition of the act of 1859 is against the holding of both offices at the same time. The appointment was not void, but when it was made it became the duty of the appointee to determine which place he would resign. He had the right to hold either, but not both. In *De Turk's Case*, 129 Pa. St. 151,

18 Atl. 757, this principle was recognized. De Turk was a postmaster. While holding the office he was elected to the office of county commissioner. The two offices were incompatible. De Turk made no election, but continued to discharge the duties of both offices, until the writ of quo warranto was served upon on them. He then elected to hold the office of commissioner, and accordingly resigned the post office. In his answer he set up these facts, and we held that he had the right to elect, and, having made his election before judgment of ouster, he could rightfully hold the office of county commissioner. In this case no election was made, because, under the advice of counsel, it was believed that the offices were not incompatible. When that question was determined against him, we think the appellant should have been allowed to elect which of the incompatible offices he would resign. If he declined or neglected to make such election, it would have been the duty of the court to determine which he should be compelled to relinquish. No other error appears upon this record except that in the form of the decree, and this can be corrected without injury to the right of either party at this time. We accordingly enter the decree that should have been made by the court below. This case came on for final hearing upon petition and answer, and was argued by counsel, when, upon consideration thereof, it is ordered, adjudged, and decreed: First, that in the county of Schuylkill the same person cannot hold at the same time the offices of school treasurer and school director; second, that the respondent, who has heretofore claimed the right to hold both of said offices at the same time, is required to elect forthwith, upon notice of this decree, which of said offices he will hold, and file his election with the prothonotary; third, that thereupon judgment of ouster shall be entered herein in accordance with such election; fourth, that upon the neglect or refusal of the respondent to make such election, judgment of ouster be entered in accordance with the petition of the relator,—the costs to be paid by the respondent. The record is remitted that the foregoing decree may be entered.

(161 Pa. St. 73)

RIGHTER v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 9, 1894.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS —DAMAGES.

Where one dedicates land for a street, with the same effect as if the street had been opened by legal proceedings, he cannot afterwards maintain an action for damages resulting from the grading; the opening and grading having been done at the same time, and in conformity with a pre-existing plan.

Appeal from court of common pleas, Philadelphia county.

Action by Richard Righter against the city

of Philadelphia to recover for injuries to his property caused by the grading of a street. From a judgment for plaintiff, defendant appeals. Reversed.

Chas. F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellant. L. H. R. Nyce, for appellee.

FELL, J. In 1889 the plaintiff and others joined in a deed conveying to the city of Philadelphia so much of their lands as were included within the lines of Wood street, in the Twenty-First ward. Wood street had been for many years laid out on the official plan of the city, and its grade had been established, differing from the natural grade, but it had not been opened. The conveyance was "forever, for a public street or highway, and for no other purpose, but to the same extent and with the same effect as if the said street had been opened by a decree of the court of quarter sessions upon proceedings had for that purpose under the road laws of the commonwealth." The consideration named was "the advantage to them accruing, as well as for divers considerations affecting the public welfare, which they seek to advance." In 1890 the city opened and graded the street thus dedicated. As a result of the grading the plaintiff's remaining land was left some feet above the surface of the street, and this action was brought to recover damages for injuries alleged to have been caused thereby. The case is here upon an exception to the overruling of a demurrer to the statement, and involves the single question whether a party who dedicates his land for the purpose of a street, with the same effect as if the street had been opened by legal proceedings, can afterwards maintain an action for damages resulting from the grading; the opening and grading having been done at the same time, and in conformity with a pre-existing plan. The plaintiff's contention is that prior to the conveyance, in 1889, he had two possible future claims against the city, entirely separate and distinct in their nature,—one for the value of the land when the city should appropriate it for street purposes, and the other for any damages which he might suffer as to his remaining land by reason of the actual establishment of the grade,—and that each of these claims might be separately asserted if the city first opened the street, and afterwards graded to the established line, and that the first of these claims, only, was abandoned by the dedication.

It is true that claims for opening and for grading a street may be enforced at different times and by different remedies, when the opening and the grading are distinct municipal acts, and are so far separated in time that the damages for the grading cannot be included in those for the appropriation of the land. For the opening the statutory remedy is by proceedings in the quarter sessions;

and if no grade line has been established, or, if established, the grading has not been done, the recovery would necessarily be confined to the injury then inflicted,—the taking of the land. If subsequently the physical grade is changed to conform to a line established either before or after the opening, or to a changed line, the remedy is by action in the common pleas. In *re L St.*, 143 Pa. St. 414, 22 Atl. 673. But where the jurisdiction of the quarter sessions has once attached, as in the case of opening a street, it will determine the whole case, including damages for change of grade. In *re L St.*, supra; *Pusey v. City of Allegheny*, 98 Pa. St. 523. It was said in the latter case: "The property owner not only may, but must, submit his whole claim to the viewers and the court; and that part of it which he neglects so to submit must be taken to have been waived, and no second process can be had for its recovery."

In 1889 the parties to this proceeding stood in this relation: Wood street was on the city plan, and its grade, as well as its lines, had been officially fixed. The plaintiff thus had notice both of its location over his land, and of the change which would be made by grading. In making improvements on his abutting land, he was bound to take notice of the location and plan of the street. *Groff v. Philadelphia*, 150 Pa. St. 594, 24 Atl. 1048. To promote the opening of the street before the time when the advance of improvements would affect it, and as an inducement, he presented his land to the city for street purposes, "to the same extent and with the same effect as if the same had been opened by a decree of the quarter sessions upon proceedings had for that purpose under the road laws of the commonwealth." Within a year the street was opened, and at the same time graded. If no dedication had been made, and the city had done precisely what she did,—opened and graded the street at the same time,—the plaintiff's action for the opening would have included his damages for the grading. Had the opening and grading been done at different times, his action for the one might have been distinct from his action for the other. It is upon this bare chance that it is claimed his right to recover rests, and it might be a sufficient answer, in this case, to say that the sequence of events decided the chance against him. The question here, however, is one of intention, to be gathered from the deed, with the aid of the circumstances surrounding the parties. It is a mistake to assume that the plaintiff, before the conveyance, had two distinct claims against the city, one of which he reserved, while he surrendered the other by the deed, and in this assumption is the error of the very ingenious and able argument of the appellee's counsel. Before the conveyance his possible future claim against the city was for the depreciation in the value of his land,—the difference between the value of his

whole land before the taking and the value of what would remain after the taking. The market price of the land taken, the condition in which the rest would be left as to street lines, the result of the elevation or depression of the natural surface, would all enter into the computation of loss and advantage, but they would not be separate claims. This was one distinct claim, and one only. If the plaintiff eliminated from his claim only the value of the land, and can now recover for injuries caused by the grade, he may with equal propriety demand compensation for damages arising from the manner in which his land has been affected by the course of the street lines. The surface line is as essentially a part of a street as its lateral lines. When the deed of dedication was made and accepted, both parties thereto knew where the street would be laid out, and how it would be constructed. There were elements of advantage and disadvantage to both, equally apparent to both; and proper effect is given to the language used by holding that the dedication was made subject to, and in full conformity with, the official street plan, both as to location and as to grade. We are therefore of opinion that the demurrer should have been sustained. The judgment of the court of common pleas is reversed and set aside, and judgment is now entered on the demurrer for the defendant.

(161 Pa. St. 171)

KOENIGSBERG v. LENNIG.
(Supreme Court of Pennsylvania. April 16, 1894.)

GUARANTY—CONSIDERATION—ALTERATION OF
NOTES—RELEASE.

1. A guaranty of notes in consideration of the release by the payee of all right of lien to which he was entitled on a building and machinery is not without consideration because such release was executed 15 days before the contract of guaranty was made.

2. Where a guaranty of two notes, of \$1,600 each,—one due in one month and the other in two months,—provides that no extension shall release the guarantors, the fact that one note for \$3,200, due in two months, was taken by the obligee, instead of such two notes, does not affect the liability of the guarantors.

Appeal from court of common pleas, Philadelphia county.

Action by Joseph Koenigsberg against Charles F. Lennig on a contract of guaranty. From a judgment for plaintiff for want of sufficient affidavit of defense, defendant appeals. Affirmed.

The statement of claim averred that the appellee had constructed for the Philadelphia Packing & Provision Company a certain refrigerating plant, for which, on or about the 10th November, 1892, said company was indebted to him in the sum of \$21,000; that the buildings and lot of said company were subject to a lien in favor of the appellee for payment of said indebtedness; that the appellant was at that time interested in the

company's affairs, as a stockholder, and was desirous that the appellee should release his right of lien; that the appellant, with others likewise interested in the company, entered into an agreement in writing (which will be summarized later); that afterwards, in accordance with the terms of said agreement, and at the request of the appellant, the appellee released his said lien, and did all the things agreed by him to be performed; that about the 18th day of May, 1893, the refrigerating plant having been completed, and a satisfactory test having been made, the company delivered to him its promissory notes; that, at the request of the company and of the appellant, he extended the time for the payment of the first and second of said notes by taking one note therefor of \$3,200, at two months; that the company had become insolvent, and that a receiver had been appointed; and that certain of the notes had fallen due and were unpaid. The agreement referred to in the statement of claim recited an indebtedness of said company to the appellee, in consideration of the erection of said refrigerating plant, in the sum of \$21,000, and the duty under the original agreement of construction, on the part of the company, to pay the same by notes to be given after the satisfactory completion of a 80-days trial, as follows:

The first of said notes is to be payable one month after date thereof, for.....	\$1,500
The second, falling due 3 months after date thereof, for.....	1,600
The third, falling due 3 months after date thereof, for.....	1,500
The fourth, falling due 4 months after date thereof, for.....	1,000
The fifth, falling due 5 months after date thereof, for.....	1,000
The sixth, falling due 6 months after date thereof, for.....	1,500
The seventh, falling due 7 months after date thereof, for.....	1,500
The eighth, falling due 8 months after date thereof, for.....	1,000
The ninth, falling due 9 months after date thereof, for.....	1,500
The tenth, falling due 10 months after date thereof, for.....	1,500
The eleventh, falling due 11 months after date thereof, for.....	1,000
The twelfth, falling due 12 months after date thereof, for.....	3,400
Total.....	\$21,000

The agreement further witnessed that: "For and in consideration of Joseph Koenigsberg's releasing all right of lien upon the building and the machinery so to be erected under the said contract with the Philadelphia Packing and Provision Company, we, the undersigned directors and stockholders of the said Philadelphia Packing and Provision Company, do, each of us, severally guaranty a ratable part of the payment of the above-recited notes upon the dates upon which the same shall, respectively, become due; that is to say, we do hereby severally covenant to protect and keep harmless the said Joseph Koenigsberg from the nonpayment of the said notes upon the times and dates above specified: provided, and it is hereby expressly understood, that each of us shall only be bound for the payment of a pro rata part of

such of the said notes as remain unpaid by the said Philadelphia Packing and Provision Company. And it is further understood and agreed that no extension of the said notes shall in any way affect or release the liability under this guaranty." The original agreement, recited in the guaranty agreement, provided, as has been shown, that the first note for \$1,600 was to be payable one month after date, and the second for \$1,600, two months after date. One note for \$3,200, falling due two months after date, was taken, instead of two notes, each for \$1,600, one falling at one month and the other at two. The suit was upon this \$3,200 note, and upon two other notes, each for \$1,600, one at three and the other at four months. The affidavit of defense set up that the appellee continued as a director of the company until the 20th January, 1893, owning one-tenth of the shares of its capital stock; that the plaintiff was continuously a director up to the time of the suit, and had also been continuously an owner of a large quantity of the company's capital stock; that, when the guaranty agreement was entered into, it was believed by the appellant that the company was indebted to the appellee in \$21,000, for which the latter had a right to file a lien against the company's property. The affidavit denied any request or knowledge on the part of the appellant of the fact of delivery of one note at two months in place of two notes, one at one and the other at two months. It denied any request subsequent to the agreement by the appellant to the appellee to release this lien. It claimed that the appellant was never notified in any way, after signing of the guaranty agreement, that the latter had signed it, or had accepted it, or had released his lien. It denied all knowledge of any such acceptance, or subsequent release of lien. It denied the averment in the affidavit of a request to release. In a supplement to the affidavit it was set out that, after his execution of his guaranty agreement, the appellant had learned that prior thereto there had been a release of lien executed and delivered by the appellee, of which fact he was ignorant at the time of such execution. It was claimed, further, that by the original agreement, of whose terms he was ignorant, between the appellee and the company, it was provided that the appellant should "preserve the premises aforesaid free and clear of and from all liens and incumbrances arising out of claims for work done."

John G. Johnson, for appellant. E. O. Michener and Preston K. Erdman, for appellee.

PER CURIAM. In his supplemental affidavit of defense the defendant admits and asserts that the plaintiff had already, to wit, on the 25th day of October, 1892, executed a full release of liens on the property in question before the date of the contract of guaranty, which was November 10, 1892. The consider

ation for the contract of guaranty was the releasing by the plaintiff of all right of lien upon the building and machinery of the packing and provision company. At the very moment, therefore, when the defendant signed the guaranty, he had received the consideration for which he gave the guaranty. We cannot see why he should not perform his contract. There was no occasion for any notice of acceptance. The circumstance that one note for \$3,200, at two months, was given in the place of two notes for \$1,600 each, at one month, is of no importance. The liability was precisely the same in amount, and an advantage of a month in the time of payment of one of the notes given by the packing and provision company was no disadvantage to the defendant, as guarantor. The contract of guaranty distinctly provided that no extension of the notes should in any way affect or release the liability of the guarantors. The enlargement of the time of payment of one of the \$1,600 notes for one month was nothing more than an extension of that note. Judgment affirmed.

(161 Pa. St. 175)

MOORE v. GARDINER.

(Supreme Court of Pennsylvania. April 16, 1894.)

LANDLORD AND TENANT—ABATEMENT OF RENT—CONDITION OF PREMISES.

It is no defense to an action for rent for an unexpired term, against a tenant who has vacated without giving the required notice, that the house was not sufficiently heated in winter, where at the time he left it it was in a habitable condition, and where, notwithstanding the defective heater, he became tenant for another term after the expiration of the first.

Appeal from court of common pleas, Philadelphia county; Reed, Judge.

Action by Joseph C. Moore against William H. Gardiner to recover rent. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph S. Goodbread, for appellant. E. O. Michener, for appellee.

PER CURIAM. When the defendant remained over in possession of the leased premises after the end of the first year, he thereby became a tenant for another year, under the express terms of the lease. He remained in possession for several months of the second year, and then abruptly left, without giving any notice of his intention to do so, as was required by the lease. He could not relieve himself of his liability for rent during the remainder of the second year in that manner. Nor will it be of any avail to allege certain verbal communications between the parties prior to and at the time of the execution of the lease. They were not incorporated into the lease, and there are no facts in evidence which would justify the alteration of the lease so as to include them. Moreover, the defendant lived in the house

through the first winter, and until the end of the year, on February 10, 1891, and paid all of the rent for that year. He continued to live in the house throughout the second winter, and until May 10, 1892, and paid all the rent for that time. His whole complaint is that the house was not properly heated; but he admitted that at the time he left it was not too cold, and there was nothing to prevent his living there, so far as the heater was concerned, after that date. The house was certainly not untenable when he left it, and, if it had been before, he condoned it all by paying the rent. The case of *Wolfe v. Arrott*, 109 Pa. St. 473, 1 Atl. 333, is so entirely different from this in its facts that it has no application. The case of *Hollis v. Brown*, 159 Pa. St. 539, 28 Atl. 360, is much stronger in its facts than this in favor of the tenant, and yet he was held liable. Judgment affirmed.

(161 Pa. St. 204)

In re FISHING CREEK LUMBER CO.

Appeal of KEELER et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

EXECUTION—DISTRIBUTION OF PROCEEDS.

Where a fund arising from a sheriff's sale of property is referred to an auditor, though his report after confirmation nisi is lost, the court may inquire into the nature of the distribution proposed thereby, and determine exceptions thereto, without recommitting the case to the auditor.

Appeal from court of common pleas, Columbia county.

In the matter of the distribution of the proceeds of a sheriff's sale of the real estate of the Fishing Creek Lumber Company. At a hearing before an auditor, the E. Keeler Company presented a claim on a mechanics' lien, and asked that the sum of \$800 be impounded, to await the result of the trial on the sci. fa. on the mechanics' lien. The auditor made report refusing to impound the money as requested, and the E. Keeler Company filed exceptions to the report. Thereafter, the report and exceptions disappeared, and the court, from admissions, and the testimony of the auditor, supplied the missing record, and confirmed the report absolutely. From the judgment of confirmation, E. Keeler & Company appeal. Affirmed.

Candor & Munson and C. W. Miller, for appellants. Grant Herring, Henry C. McCormick, and Seth T. McCormick, for appellee.

PER CURIAM. The court below had power to make distribution without the aid of an auditor. The fund was referred, however, to an auditor, who heard the parties and made a report. After confirmation nisi the report seems to have been mislaid or lost. This, however, did not prevent the hearing of the exceptions to the report, and a final decree in accordance with the distribution made by the auditor. The court had the

power to inquire into the nature of the report, and to determine the validity of the exceptions taken to the distribution proposed. It was not necessary to recommit the case. The judgment is affirmed.

(161 Pa. St. 121)

DOWNEY v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. April 16, 1894.)

STREET CARS—CROSSING TEAMS—NEGLIGENCE.

1. Defendant, contending that plaintiff did not stop at the right place to look and listen, has the burden of showing that there was a better place.

2. When the negligence charged is the unusual speed of an electric car, the court cannot say that plaintiff, driving a pair of spirited horses to a long, heavy, market wagon, having stopped to look and listen, and only seen the car coming on the further track when his horses were on the near one, was negligent in whipping them up to cross ahead of it.

Appeal from court of common pleas, Allegheny county; S. A. McClung, Judge.

Action by John Downey against the Pittsburgh, Allegheny & Manchester Traction Company for damages for injuries to himself and property. Judgment for plaintiff. Defendant appeals. Affirmed.

A. M. Neeper, for appellant. Marshall & Sproul, for appellee.

MCCOLLUM, J. The sole contention of the appellant company is that the injuries to the person and property of the plaintiff were occasioned by his own negligence. It rested its motion for a compulsory nonsuit distinctly upon this proposition, and its argument in this court was devoted exclusively to the maintenance of it. It certainly cannot successfully contend that under the evidence in the case the court should have instructed the jury to render a verdict in its favor on the ground that there was no negligence on its part, because, if the plaintiff's witnesses were believed, the collision was chargeable to the extraordinary speed of its car, and the failure to give the usual signals in approaching the crossing. We are therefore warranted in concluding that its third point was based on the same ground as its motion for a nonsuit. It may be conceded that if it plainly appeared in the plaintiff's evidence that he was guilty of negligence in crossing the tracks when and in the manner he did, and such negligence was responsible in any degree for the injuries for which he claims compensation from the appellant company, this point should have been affirmed. But, unless it so appeared, the presence of evidence on the part of the company showing that his negligence concurred with its own in producing the injuries would not have justified its affirmation. In other words, when the negligent defendant sought to escape liability by

showing concurring negligence on the part of the plaintiff, it raised a question which involved the credibility of witnesses, and was necessarily for the consideration and decision of the jury. The plaintiff testified that before crossing the tracks he stopped, looked, and listened, and that he could not see a car on either of them, nor hear anything to indicate the approach of one from either direction; that he then started to drive across the tracks, and while he was in the act of crossing them he saw a car coming on the down track. Referring to his position when he first saw the car, he said: "I couldn't go back. I had to go forward. My horses were under headway at a good rate of speed, and I would have had to stop them, and back and turn around. I would have lost more time, and it certainly would have killed the horses, or killed me and the horses both, because it would have hit the horses, or hit in about the doubletree. I didn't think they were going really so fast as they were." John Mangan and James Hamilton were riding with him, and his testimony descriptive of what he did before he attempted to cross the tracks and of his position when he first saw the car was fully corroborated by them. In view of his position when he discovered the car, and of the fact that he was driving a team of spirited horses, hitched to a long and heavy market wagon, it is by no means certain that he could have adopted a better method than he did of extricating himself from the peril in which he appears to have been placed without fault of his own. At all events, it was not for the court to say that the effort he made to avoid the danger to which he was exposed constituted contributory negligence. But the appellant company contends that the plaintiff did not stop in the right place to look and listen before he attempted to cross the tracks. It is proper to say, in connection with this particular contention,—and we think it is a sufficient answer to it,—that there was no evidence tending to show there was any place where he could have obtained a better view of the tracks without driving upon them. *Carson v. Railway Co.*, 147 Pa. St. 219, 23 Atl. 369, and *Ehrisman v. Railway Co.*, 150 Pa. St. 180, 24 Atl. 596, are plainly distinguishable in their facts from this case. Carson did not look to see whether a car was approaching before he drove on the tracks, and Ehrisman was driving along the street on which the railway was located, and in the same direction the car was running. He looked and listened at a point about 60 feet from the place where he turned to cross the tracks obliquely, and while he was crossing them in that manner the collision occurred. We think this case was fairly and correctly tried in the court below, and we therefore overrule the specifications of error, and sustain the judgment entered there. Judgment affirmed.

(161 Pa. St. 151)

In re COULSTON'S ESTATE.**Appeal of JARMAN.**

(Supreme Court of Pennsylvania. April 16, 1894.)

EXECUTORS AND ADMINISTRATORS — CLAIM — FINDING OF ORPHANS' COURT — REVIEW.

Where both the auditing judge and the orphans' court reject a claim against an estate because the proof fails to make a prima facie case, the finding is as conclusive as that of a jury.

Appeal from orphans' court, Philadelphia county; William B. Hanna, Judge.

Audit and adjudication of the account of George W. Coulston and John W. Coulston, executors of the estate of Jesse O. Coulston, deceased. From a judgment dismissing exceptions to the disallowance of a claim by Annie E. Jarman for services rendered deceased as his housekeeper, claimant appeals. Affirmed.

Walton & Andre, for appellant. D. Stuart Robinson and W. Alex. Robinson, for appellees.

PER CURIAM. It is so entirely incredible that a domestic servant, having no other means of support but her wages, would or could remain in such service for three and a half years and receive only \$100 on account of her service, that both the auditing judge and the court in bank rejected the claim of the appellant as being insufficiently proved. The auditing judge heard the witnesses, and had the opportunity of observing the manner and character of their testimony. He rejected the claim because the proof in its support failed to make out a prima facie case. In this conclusion he was confirmed by the decree of the orphans' court, and we regard this finding as we would the verdict of a jury, or the report of a master or auditor upon questions of fact,—not to be disturbed except upon very clear proof of mistake. We find no such proof in the case; on the contrary, we agree that the proof is far short of the kind that is required to sustain such a claim. Decree affirmed, and appeal dismissed at the cost of the appellant.

(161 Pa. St. 145)

SULLIVAN v. STRAUS.

(Supreme Court of Pennsylvania. April 16, 1894.)

WILLS — RESIDUARY CLAUSE — PRECEDING DISINHERITANCE.

Testator, as "the most unpleasant part of my work," willed "the disinheriting of my youngest son, J.,"—that he was "to have no interest in any part of my estate whatever," and "no claim whatever on anything which I leave." In the next sentence he stipulated that "all of my estate belongs to my children and grandchildren." Held, that J. was excluded from the class mentioned.

Appeal from court of common pleas, Philadelphia county.

Amicable action as of assumpsit by James J. Sullivan, in his own right and as executor of the will of John Sullivan, deceased, against Joseph E. Straus. Judgment for plaintiff: Defendant brings certiorari. Affirmed.

A. S. Arnold and Mayer Sulzberger, for appellant. J. B. Townsend, for appellee.

GREEN, J. The testator did not content himself with a mere omission of his son John as a legatee under his will, but he particularly and especially excluded him by express words from any participation in his estate. His words are: "I now come to the most unpleasant part of my work; that is, the disinheriting of my youngest son, John Russell Sullivan, in consequence of his disobeying my wishes. I wish him to have no interest in profit or principal of any part of my estate whatever if he should be employed by my sons. My son James, who has charge of all my estate, will do right by him. He shall have no claim whatever on anything which I leave." Of course, if this clause of the will had followed the residuary clause, there would not have been the slightest question that John would have taken nothing under the will. It is only because the residuary clause follows the clause of disinheriting that there is any occasion for any question as to the intent of the testator. But it is the intent of the testator which must prevail, and, if that be clearly apparent, the order of the testamentary clauses is of little moment. What, then, was the testator's intent as to his son John? The language of the will above quoted excludes John from any, even the slightest, participation in the testator's estate. It was so intended. The testator says it was so intended. He calls it "the most unpleasant part of my work." What was it that was so very unpleasant? He explains it himself in immediate sequence, thus: "That is, the disinheriting of my youngest son, John Russell Sullivan, in consequence of his disobeying my wishes. * * * He shall have no claim whatever on anything which I leave." After this language it is altogether impossible to hold that the testator intended, or was even willing, that John should take any part of his estate. Of course, if after that he had expressly given a legacy to this son by name, he would take the gift, because it was expressed subsequently to the exclusion. But it cannot be done by a mere implication, even when the subsequent gift is to a class which would include John. We therefore hold that when the testator said in the very next sentence of the will, "It must be perfectly well understood that all of my estate belongs to my children and grandchildren," he did not mean to include John or his children within the designated class. Any other construction of this residuary clause would simply nullify the immediately preceding clause of the will, which expressly excluded him. We do not see any

occasion for any refinement of reasoning upon the subject. The testator has said in unmistakable language that John is to have no part of his estate, and these words can only be enforced by holding that in the succeeding clause he meant his children other than John. Judgment affirmed.

(61 Pa. St. 197)

OAKLAND CEMETERY CO. v. BANCROFT.

(Supreme Court of Pennsylvania. April 16, 1894.)

FIXTURES—ORNAMENTAL MONUMENT OF CEMETERY COMPANY.

A cemetery company erected on its grounds, for the purpose of ornamentation, a monument consisting of a stone foundation extending below the frost line, a marble base, surmounted by a marble shaft, and a statue surmounting such shaft. The whole structure was cemented together, and constituted a solid mass. *Held*, that such statue and other parts of such monument, including the curbing, were a part of the realty, and passed by a conveyance of the land.

Appeal from court of common pleas, Philadelphia county.

Figned issue under sheriff's interpleader act, in which the Oakland Cemetery Company is plaintiff and Henry B. Bancroft is defendant, to determine the ownership of certain copings, base, and marble statue levied on as the property of the Mt. Auburn Cemetery Company, under execution issued on a judgment against it in favor of defendant, Bancroft, and claimed by plaintiff under a sheriff's deed executed pursuant to a foreclosure sale of the land on which such monument was erected, and constituting the grounds of such Mt. Auburn Cemetery Company. From a judgment entered on a verdict directed by the court in favor of plaintiff, defendant appeals. Affirmed.

Jay R. Grier and James R. Grier, for appellant. Robert T. Corson and J. Howard Gendell, for appellee.

PER CURIAM. We think it too plain for argument that the articles levied upon in execution in this case as personal property are fixed in the realty, and are a part thereof, and can in no sense be regarded as personal property. While the Mt. Auburn Company was the owner of the cemetery, a burial lot was inclosed by a stone curbing, and a monument was erected on the ground, consisting of a stone foundation extending down below the frost line, and upon this foundation a marble base was placed, surmounted by a marble shaft, and upon the shaft the statue in question was erected. The whole of the structure was cemented together, and constituted a solid mass. The entire work, including the curbing, was built by the cemetery company for the ornamentation of the grounds, and manifestly was intended to be a permanent part of the cemetery property. In no sense can it

be regarded as a trade fixture. As this subject was the controlling feature of the contest, its determination ends the case. Judgment affirmed.

(161 Pa. St. 124)

DUNSEATH et ux. v. PITTSBURGH, A. & M. TRACTION CO.

(Supreme Court of Pennsylvania. April 16, 1894.)

STREET RAILROADS—NEGLIGENCE—QUESTION FOR JURY—INSTRUCTIONS.

1. In an action for the death of plaintiff's child, caused by being struck by defendant's street car at a street crossing, several witnesses for plaintiff testified that the car was running very fast; that no bell was rung, or brake applied to stop the car, till after the accident. A witness for defendant testifies that it "seemed to be going pretty rapidly,—eight or ten miles an hour,"—and that it ran on about 35 feet after striking the child. *Held*, that the question of defendant's negligence was properly submitted to the jury.

2. Instructions assuming as proved matters in dispute are erroneous.

Appeal from court of common pleas, Allegheny county.

Action by Robert Dunseath and wife against the Pittsburgh, Allegheny & Manchester Traction Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

A. M. Nepper, for appellant. Wise & Miner, for appellee.

McCOLLUM, J. This is an action by parents to recover the money value of their child's life, which they allege was taken on the 22d of February, 1892, through the negligence of the appellant company in running its car at an unusual and dangerous rate of speed, and without giving proper signals, at or near the intersection of Franklin and Bidwell streets, in Allegheny City. The trial in the court below resulted in a verdict in favor of the plaintiffs for \$399. If there was evidence sufficient to justify a finding that the boy's death was caused by the negligence of the appellant company, and the learned court below did not err in refusing to hold that the negligence of the parents contributed thereto, the company cannot reasonably complain of the verdict, because the amount of it does not indicate that the jury were affected by sympathy or prejudice in rendering it. In a clear and concise charge, the learned judge carefully limited the jury to such matters as were proper for their consideration in ascertaining the damages; and the verdict, in this particular, fairly conformed to the instructions. We turn, then, to the evidence, to see if it was sufficient to support the plaintiffs' contention that the death of their child was due, wholly or partially, to the company's negligence; and, if we conclude that it was, to inquire whether there was anything in it which would have justified the learned judge in holding that their own negligence in caring for the child

was responsible, in some degree, for the sad occurrence. It appears from the evidence produced by the plaintiffs that at the time of the accident the car was running at a high rate of speed, and that the brake was not applied to check its progress, nor the bell rung to give notice of its approach, until the boy was struck by it. Mrs. Hartman testified that she was standing about 25 feet from the place where he was struck, and that, when she first saw the car, it was a square and a half away from her, and "coming very fast;" that the brake was applied and the bell rung after, but not before, he was struck. In her statement respecting the speed of the car and the ringing of the bell, she was fully corroborated by the testimony of M. C. Golden and Mrs. Owsten. The latter said: "I saw the car coming down very rapidly, as though it had broke away, or something. It looked to me like it had broke away, and was uncontrollable, the way it went." These witnesses either resided upon, or in plain view of, the street on which the railway track was located, and were accustomed to seeing the cars running upon it. The speed of this car was so great that their attention was particularly attracted by it before the occurrence of the accident; and it ran about 35 feet after the boy was struck by it, before it could be stopped. Their testimony in relation to the speed of the car, and the distance it ran after the boy was struck by it, was corroborated by that of McClelland, the company's only witness, who testified, *inter alia*, that he was standing in the car, and saw the accident; that it was crowded, and "seemed to be going pretty rapidly,—eight or nine miles an hour;" that it struck the boy at or near the crossing; and that, after it struck him, it "slid along thirty-five feet" before the motorman could stop it. Surely, this evidence authorized an inference that the car was running at an unusual and dangerous rate of speed at the time of the accident, and required that the question of the company's negligence in connection with it should be submitted to the jury.

We cannot assent to the proposition that the court should have taken the case from the jury on the ground that the presence of the boy on the street, under the circumstances shown, constituted negligence on the part of the plaintiffs which contributed to his death. It is contended by the appellant company that the boy was on the street by permission of his parents, or that they failed to take proper precautions to prevent his going there, and it bases its contention in this particular on the testimony of his mother and Miss Algeo. It is not necessary to include their testimony, or any portion of it, in this opinion. We have carefully read and considered the whole of it, and are clearly satisfied that the question of the alleged contributory negligence of the plaintiffs was for the jury, and not for the court,

to decide. It seems to us that there is a striking resemblance between this case and *Railroad Co. v. Long*, 75 Pa. St. 257. In that case, as in this, the plaintiffs claimed that their child's death was attributable to the company's negligence, while the latter contended there was no negligence on its part, and that there was contributory negligence on the part of the parents. In that case, Chief Justice Agnew, delivering the opinion of this court, said: "To suffer a child to wander on the street has the sense of 'permit.' If such permission or sufferance exist, it is negligence. This is the assertion of a principle. But whether the mother did suffer the child to wander is a matter of fact, and is the subject of evidence, and this must depend upon the care she took of her child. Such care must be reasonable care, dependent on the circumstances. This is a fact for the jury." The resemblance between the two cases in respect to the questions involved, and the evidence relied on to decide them, is so close that the language we have quoted applies to this case with the same pertinency and force as to the case in which it was used. The appellant company's second point was inartificially drawn, and somewhat obscure; and, as we think it admitted of a construction which assumed that there was negligence on the part of the plaintiffs which caused or contributed to the death of their child, we cannot say there was error in the answer to it. The specifications are overruled. Judgment affirmed.

(161 Pa. St. 189)

NATIONAL STATE BANK OF CAMDEN v. LINDERMAN et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

CHECKS—ORAL PROMISE TO PAY.

Under P. L. 1881, p. 17 (Purd. Dig. p. 188, pl. 2), declaring that no one shall be charged as an acceptor of a bill, draft, or order for over \$20, unless his acceptance be in writing, where, on presentation of a check for a greater amount, the president orally promised payment if the holder retained it a few days, he has no action against the bank.

Appeal from court of common pleas, Philadelphia county.

Action by the National State Bank of Camden against William T. Linderman and another, partners as William T. Linderman & Co., on notes. Defendants set up as an offset a check drawn on the bank by A. C. Lamar to their order. The offset was disallowed, and defendants appealed. Affirmed.

Joseph L. Tull, for appellants. John Weaver and John Sparhawk, Jr., for appellee.

PER CURIAM. Admittedly no right of action against the bank was conferred upon the defendants by the mere presentation of the check for \$201.54, and its refusal of payment. But the affidavit of defense alleges that the president of the bank substan-

tially accepted it, and promised to see it paid, if the holder would retain it for a few days. We are clearly of opinion, however, that the act of May 10, 1881 (P. L. 17; Purd. Dig. p. 188, pl. 2) applies to that aspect of the case, and defeats any right of action. The act expressly declares that no person within this state shall be charged as an acceptor of a bill, draft, or order for the payment of money exceeding \$20, unless his acceptance shall be in writing, signed by himself or his lawful agent. In *Maginn v. Bank*, 131 Pa. St. 362, 18 Atl. 901, we held that the act of 1881 was a flat bar to a recovery upon a bank check which had been presented for payment and refused, and one of the officers had told the holder it would be payable in seven weeks, for the explicit reason that the check was not accepted in writing. That case covers every feature of this. In this case there was at most nothing but the verbal promise of the president of the bank. The cases of *Saylor v. Bushong*, 100 Pa. St. 23, and *Chase v. Bank*, 66 Pa. St. 169, are inapplicable, as they were decided upon different facts. Moreover, in both of these cases the transactions occurred before the act of 1881 was passed. Judgment affirmed.

(161 Pa. St. 185)

ROBERTS v. SHARP.

(Supreme Court of Pennsylvania. April 16, 1894.)

JUDGMENTS—RENDITION.

Act May 31, 1893, providing that, where an affidavit of defense is filed to a part of the claim sued for, plaintiff may take judgment for the amount admitted to be due, and proceed to trial for the balance, applies to any action in which part of the claim is admitted to be due, irrespective of how the amount is ascertained or the balance computed.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Action by Percival Roberts against John M. Sharp, owner and contractor, to enforce a mechanic's lien. Defendant admitted a part of the claim, and the court gave judgment for plaintiff for the amount admitted to be due, and allowed him to proceed to trial for the balance. From such judgment, defendant appeals. Affirmed.

E. Cooper Shapley, for appellant. John G. Johnson, for appellee.

PER CURIAM. The very object of the act of 1893¹ was to enable judgment to be entered for the amount admitted to be due without prejudice to the plaintiff's right to proceed to trial for the recovery of the balance of the demand. No distinction between, or separation of, items of the demand

¹ Act May 31, 1893, provides that, where an affidavit of defense is filed to a part of the claim sued for, plaintiff may take judgment for the amount admitted to be due, and proceed to trial for the balance.

was within the language or proper meaning of the act; and as it provides that judgment may be taken for the amount admitted to be due, and authorizes a trial for "the balance of the demand," we consider that it is of no consequence to determine how the amount is ascertained or how the balance is composed. Judgment affirmed.

(159 Pa. St. 496)

In re TREVOSE MODEL BRICK MANUF'G CO.**Appeal of GIBB.**

(Supreme Court of Pennsylvania. Jan. 22, 1894.)

INSOLVENT CORPORATIONS—CLAIMS OF DIRECTORS—LIABILITY OF ASSIGNEE.

1. A claim by a director against the estate of an insolvent corporation will not be disallowed on the ground that the debts of the company were in excess of the capital stock, where the auditor reports that there was no evidence to show such fact other than the amount of the claims presented, some of which were contingent, and resulted from the failure of the company.

2. Where an assignee in good faith, and under advice of counsel, refuses to offer for sale property in relation to which a writ of estrepement had been served, being advised by counsel that the writ was valid, he will not be surcharged for negligence.

Appeal from court of common pleas, Philadelphia county.

Adjudication of the accounts of George H. Becker, assignee of the Trevese Model Brick Manufacturing Company. From the judgment dismissing exceptions to the report, J. McGregor Gibb appealed. Affirmed.

The assignee put up the real estate of the insolvent at auction, receiving as the highest bona fide bid an offer of \$23,000, which he did not accept, and proceeded to sell the machinery and fixtures in parcels. The proceeds of the sale of the personal property amounted to \$3,000, a part of which was paid to the assignee in cash, when, on account of a writ of estrepement served upon him, forbidding him to sell the fixtures, he returned the money, and, under advice of counsel, did not again offer the property as a whole. It was afterwards sold by the sheriff under foreclosure for \$22,000, the personal property not passing by the sale. Among the claims presented against the company were those of certain of the directors. They were resisted on the ground that the debts of the company were in excess of the capital stock.

A portion of the auditor's report is as follows: "(11) The claims of B. Trautmann, George H. Becker, N. M. Kueny, and B. F. Baer should not be allowed participation in the assets of the assigned estate, because they were directors of the company, and caused an indebtedness by the company in excess of the amount of its capital stock paid in, and have never paid in such excess; and because they did not file with the recorder of deeds, or have recorded, the certificates

required by the act of assembly. The auditor cannot agree to the foregoing proposition. In the first place, he finds himself utterly unable to state that the directors did, during their term of office, contract a larger indebtedness than the amount of the capital stock of the company. The means for such an investigation were not presented to him, nor was any evidence offered tending to show the same, other than the amount of claims against the assigned estate, some of which, it must be borne in mind, were contingent, and resulted from the failure of the company to carry on its operations. Nor can the auditor see how the distribution of the assets of the assigned estate could be made the forum in which questions of such character could be determined. The finding of the auditor in this respect, if favorable to the contention of counsel for the creditors, would involve a personal responsibility upon the directors for a dereliction of duty without giving them a proper day in court; and, while the act of assembly in question is by no means explicit, it is hardly conceivable that such liability was to be ascertained without a trial by jury, or at least the filing of a bill in equity, in which the whole question at issue could be determined. Suffice it to say that, even if this was the duty of the auditor in stating this account, and this was the proper forum for the presentation of such a claim by the creditors as against the directors, it is an undeniable fact that no evidence was presented before him by which such an issue could be raised or eventually determined."

The appellant excepted to the allowance of the claims of Trautmann and others, and also to the refusal to charge assignee with loss occasioned by not exposing the entire plant for sale.

Preston K. Erdman, for appellant. Jacob Singer and Emanuel Furth, for appellee.

PER CURIAM. Twenty-five exceptions to the learned auditor's report were filed in the court below, all of which were dismissed except the sixteenth and twenty-fourth. They were sustained, and distribution of the fund was decreed in accordance with the schedule thus revised. The specifications charge that the court below erred in dismissing 13 of said exceptions, recited therein respectively. Some of these relate to findings of fact, and others to conclusions of law. We have examined the record with special reference to the questions thus presented, and find no error, either in the findings of fact or in the conclusions drawn therefrom, that requires a reversal or modification of the decree. The auditor's findings are in accordance with the evidence, and his legal conclusions, as qualified by the action of the court in sustaining the sixteenth and twenty-fourth exceptions, appear to be correct. They are all so fully set forth in his elaborate

report that it is unnecessary to refer to them in detail. Neither of the specifications of error is sustained. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(160 Pa. St. 273)

LEEDOM v. LEEDOM.

(Supreme Court of Pennsylvania. March 12, 1894.)

EVIDENCE—DECLARATIONS OF HUSBAND—CROSS-EXAMINATION.

1. Declarations of a husband, made in the absence of his wife, are not admissible to affect the title of his wife to personal property.

2. Defendant cannot, on cross-examination of plaintiff's witness, attempt to draw out evidence to contradict plaintiff, when the matter has not been gone into on the direct examination.

Appeal from court of common pleas, Berks county; James N. Ermentrout, Judge.

Action by Maggie Leedom against George W. Leedom. Judgment for plaintiff. Defendant appeals. Affirmed.

The first, second, and third specifications of error were based upon the refusal to admit testimony of a conversation between plaintiff's husband and her brother-in-law when she was not present. The sixth specification is based on a refusal to allow defendant's counsel to ask one of plaintiff's witnesses whether a signature to a certain paper was hers, the purpose being to contradict the plaintiff as to some testimony she had introduced. The charge of the court is as follows:

"The plaintiff, Maggie Leedom, brings her action to recover from the defendant the sum of \$800 of her money, which she alleges that this defendant, George W. Leedom, received. It would appear from the evidence in this cause that on the 4th of February, 1888, a check for the plaintiff's money was received from the building association, and that that money was loaned by her, as she alleges, to her husband, E. J. Leedom; that he said that he would invest it for her; and that the check offered in evidence bears the indorsement of E. J. Leedom, which would indicate that the money was drawn by him, and was in his hands. As to the fact of E. J. Leedom having received the check, that is conceded by counsel on both sides of this case. Mrs. Maggie Leedom now alleges that about the middle of February, in the year following, \$800 in money was paid back to her; that she kept that money in the house until some time in March,—the 1st of March, 1890,—when the \$800 passed into the hands of the defendant. I do not propose to read the entire testimony in this case, as the facts of the case are for the jury. Substantially, she says in her testimony: That on the 1st day of March, 1889, there was some talk in the parlor about her husband going to Philadelphia to Dr. Mitchell to be treated. That this money, \$800,

was brought down to the parlor, and there counted. That whilst they were doing that the doorbell rang, and George Leedom, the defendant, entered. That, when he came in, this matter of going to Philadelphia for treatment was spoken of. That George said, in speaking of the doctor in Philadelphia: 'No; all he wants is your money. He cannot cure you.' That the husband said: 'I will go. I have my wife's money in my pocket.' That he was excited. That he drew it out, and said to the defendant: 'Here! hand it to her. It belongs to her.' That then he walked out into the garden, and she followed him,—the defendant having taken the money. That she was out some twenty minutes, and when she returned the defendant had gone, taking the \$800 with him. Some time in April, 1889, she alleges that, whilst the defendant was at her house, the money was talked about; that the defendant told her that, if not in need of it, he would take care of it, and keep it for her; that in the fall of 1889 there was a further conversation with reference to this money, whilst her husband was lying sick in bed; that at that time, in talking about this money, it was spoken of, and that the husband told him to 'give Maggie her \$800,' that it belonged to her, and that he said he would,—he should not worry about it; that that was said in answer to what her husband said whilst upon this sick bed. She further alleges that, her husband having died some time about the 19th of November,—the jury will recollect the exact dates,—she then asked about the money, and that this defendant said, 'We will talk it over, and we will fix the matter between us.' She also alleges that some letter was written about the subject, and that, not having received this money back from the defendant, this suit is brought. And she now asks a verdict at your hands. In corroboration of her testimony, she produces her daughter, whom she claims heard what took place in the parlor. You have also heard her testimony, so far as it related to the subject-matter in controversy. In addition to that, the plaintiff offers, also, the deposition of the grandmother (the plaintiff's mother). The deposition was read in your hearing, and you will remember what she states in corroboration.

'Now, gentlemen, if that story, as given by the plaintiff and corroborated by the daughter and the old lady, is correct, then this plaintiff would be entitled to a verdict for the sum of \$800, with interest from the 1st of March, 1889, to the present time; the 1st of March, 1889, being the time when she alleges that the defendant received this money. In answer to that testimony, the defendant is placed upon the stand. He denies the story told by the plaintiff, by her daughter, and by her mother, from beginning to end. He says, emphatically, that he never received any money; never had any conversations as detailed by them; that he nev-

er received the money and promised to give her back the money; never had any of her money. He also says, further, that the first notice he received of any claim made by the plaintiff upon him for money was when he got a letter from Alderman Griesemer, and that was after the death of his brother. In corroboration, as they allege, of his story, they have given in evidence the transaction with regard to this loan which is alleged to have been made, and they contend that the check received by the husband went into the bank, that check being for \$824.86; that the check was received on Saturday, the 4th of February, drawn on the 6th of February, and that on that same day there was a deposit of \$825 in the First National Bank. And they ask you to infer that that is the same money, and that upon the bank account of E. J. Leedom the check for this loan was drawn, and that her money was not that loan; not paid back until after the alleged date of this occurrence. And they contend all the acts and circumstances surrounding the transaction are in corroboration of their story and their contention. The credibility of witnesses is always for the jury, and, in passing upon the evidence, the jury will consider it as intelligent men, and will carefully look over it, from beginning to end. It is admitted that both stories given here cannot be true. As one of the counsel remarked, somebody must have told a story about this occurrence. The statements of these two parties are directly contradictory, and it will be for the jury to say where the truth lies. On the one side, the plaintiff points to the deposition of the grandmother, and the evidence, in corroboration of her story. On the other side, they point to the evidence of the defendant, and the corroboration of the acts and conduct surrounding the transaction of this loan. If you find from the testimony, after a careful consideration of it, that at this time—on the 1st of March, 1889—this money got into the hands of this defendant, that demand was made upon him for the repayment of it, and that he failed to pay it, then the plaintiff would be entitled to a verdict for \$800, with interest from the 1st of March, 1889, up to the present time. If you find the story told by the defendant to be true,—that there was no money received by him,—then you will return a verdict for the defendant. The whole question is one for the jury to pass upon. The court cannot give you any aid. Patiently, conscientiously, and intelligently sift and compare the evidence, make up your mind which party has told the truth, and find accordingly. (Exception for the defendant)."

G. B. Stevens, J. H. Jacobs, and H. P. Keiser, for appellant. Cyrus G. Derr, for appellee.

PER CURIAM. This case hinged on questions of fact, which were exclusively for the

consideration of the jury. There is no complaint as to the manner in which said questions were submitted. The assignments of error relate solely to certain rulings of the learned trial judge on questions of evidence. The first, second, third, and sixth specifications allege error in rejecting defendant's offers of testimony therein recited, respectively; and the remaining three complain of the admission of testimony offered on behalf of the plaintiff. We have considered the questions thus presented, and are not convinced that there is any substantial error in either of said rulings. There appears to be nothing in the record that requires a reversal of the judgment. Judgment affirmed.

(18 R. I. 632)

In re WATERMAN'S WILL.

FISKE et al. v. PAINE et al.

(Supreme Court of Rhode Island. April 19, 1894.)

NEW TRIAL—DISQUALIFICATION OF JUROR.

Where a will leaving property to a town for the support of its poor has been sustained by verdict, a new trial will not be granted for disqualification of a juror because his father paid 80 cents a year poor tax in said town, nor because he did not disclose such fact when asked if he was related to the executors, the heirs, or the town.

In the matter of the will of Horatio N. Waterman, deceased. Contest by William A. Fiske and others, tried to a jury. Verdict for defendants George T. Paine, the executor, and others. Contestants petition for new trial. Dismissed.

O. J. Arms, for petitioners. E. K. Parker, for respondents.

STINESS, J. At the September term, 1892, of this court, in the county of Kent, the appellants contested the validity of the will of the late Horatio N. Waterman, of Coventry. A verdict was rendered sustaining the will, which gave the residuum of the estate to the town council of Coventry, in trust for the support of the poor of said town. The appellants now petition for a new trial upon the ground that the foreman of the jury was the son of a taxpayer in said town, and so disqualified; by relationship, from serving as a juror, which disqualification entitles them to have the verdict set aside, as for a mistrial. The argument is based upon the assumption that the father, as a taxpayer in Coventry, was a party in interest to the suit, because the bequest will relieve him from a portion of the taxes which he is now obliged to pay for the support of the poor of the town, and, being a party in interest, he would be incompetent as a juror, and his son equally so, by reason of relationship. Such an assumption in this case, however, is, to say the least, a doubtful one. A gift to the poor does not necessarily mean a gift to paupers. There are many poor people, worthy of aid, who are

not a charge upon the town. It does not follow, therefore, that the administration of the trust will reduce taxation for the support of the poor. Indeed, bequests of this kind have been construed not to apply to persons receiving public aid, for the reason that, if so applied, they would simply ease taxes, and so benefit the property owners, rather than the poor. Attorney General v. Clarke, 2 Amb. case 221, p. 422; Tyssen, Char. Bequests, p. 141. A gift for an educational institution or a hospital might, to some extent, relieve a town in its duty to provide sufficient schools, or to care for the poor, and yet it can hardly be claimed that a taxpayer of the town would on that account, in all cases, be disqualified to serve as a juror. Out of abundant caution, he might properly be excused, but it is quite another thing to say that he is absolutely disqualified. It is a very different case from that of a suit for damages, which must be paid by a tax, and some portion of it out of the taxpayer's pocket. But, as this question has not been fully argued, we will not decide the petition upon this point. We are impelled to refer to it, lest silence might be taken as an authoritative implication that the assumption which has been made is correct, and that the town is to be regarded as the real beneficiary under the will, by administering the trust solely for its own relief in the support of its paupers. Assuming, then, for the purposes of this case, that Turner Kent, the father of the juror, is to be regarded as having an interest in the result of the suit, the question comes whether, under the circumstances, there was a mistrial because Herbert H. Kent, his son, sat as a juror in the trial of the cause. The elaborate briefs which have been presented show that cases have been numerous in which questions of this kind have been made, and that decisions have been various. Some courts have seen the color of interest in remote shadings, and have applied the rule of consequent disqualification very strictly. Others have held that, after full trial, a verdict will not be disturbed, unless it appears from the circumstances of the case that some injustice has been done by reason of an interest of which the party complaining did not know, and which, by reasonable diligence, he could not avert. We think the better reason is with the latter class of cases. Interest on the ground of taxation is nowadays, at any rate, more of a theoretical than practical disqualification. Municipal requirements are so large that money saved in one way is usually expended in another, and individual interests are so small that it would be a very peculiar case which would make any appreciable difference to the taxpayer. But two principles are involved,—one affecting the parties, that they should have a fair and impartial trial; another affecting the public, that after such trial there should be an end to litigation. If the rule as to relationship is to be strictly fol-

lowed in all cases, we must go, according to the common law, to the ninth degree; and 3 Chit. Pr. 795, note c, says even beyond that. Now, in these days, when taxable interests are so widely spread, if every trial must be set aside in which a juror related to a taxpayer of an interested town has participated, although the relationship may have been so remote, or the interest so small, as not to occur to him at the trial, such a rule will be both inconvenient and obnoxious. The administration of public justice does not demand it, but rather demands the contrary; and the right of the party does not demand it, if he has had a fair and impartial trial. This was the substance of the decision of the court in *State v. Congdon*, 14 R. I. 458. See, also, *Cole v. Van Keuren*, 51 How. Pr. 451; *Simmons v. McConnell's Adm'r* (Va.) 10 S. E. 888; *Spicer v. Fulghum*, 67 N. C. 18; *Woodward v. Dean*, 113 Mass. 297. The petitioner claims that a distinction should be made between disqualification propter defectum, e. g. alienage, nonresidence, nontaxpaying, and the like, and disqualification propter affectum, e. g. relationship, interest and the like, which go to the impartiality of a juror. While these terms are highly descriptive, they are also purely technical. They should not be taken to mark an arbitrary line, on one side of which a mistrial lies, but on the other side not. The court should consider whether the right of a party to a fair and impartial trial has been prejudiced, and decide accordingly,—whether the alleged disqualification be proper defectum or proper affectum. Such was the course in *State v. Congdon*, where, after conviction for manslaughter, the court refused to grant a new trial on the ground of relationship of a juror to the deceased, which was remote, in the sixth degree, and which was not shown to the satisfaction of the court to have been known to the juror at the time of the trial. The court laid down the rule that a petition for a new trial, on the ground that a juror was disqualified by relationship, is not granted as of course, but is addressed to the discretion of the court; and, if this be the rule in a criminal case, it should certainly be applied in a civil case. The decisive test is the fact of a fair trial. One of the elements of such a test is the directness and extent of the interest alleged. In this case the interest is of the most indirect and infinitesimal character. It is that of a man who does not live or pay taxes in the town involved in the suit, and whose father's tax, at the time, for support of the poor,—if it were to be wholly canceled by the bequest,—amounted to only 80 cents per annum. We cannot bring ourselves to think that any juror could be affected by an interest so remote and trifling. Another element is the opportunity of a party to avoid the difficulty; for, if one forbears inquiry until after he has taken the chance of a trial, he cannot then be permitted to say that the trial, on that account, was not fair.

In this case the usual inquiry was made, whether the jurors were related to the parties; naming the executor, the heirs, and the town of Coventry. The appellants argue that the juror Kent was guilty of misconduct because he did not disclose the fact that his father was a taxpayer in Coventry. We do not think that the juror is to be blamed because it did not occur to him to state that fact. In an experience of 30 years at bench and bar, the members of the court do not recall a case where the inquiry of interest has been pressed to this extent. It probably would not have occurred to either of them at the trial, and much less should it be expected of a juror. Nevertheless, the appellants had full opportunity to make the inquiry of the jurors called, if they had deemed it to be material; and, having failed to do so, it is not now a ground for a new trial. The return of jurors was filed in the clerk's office nearly six weeks before the trial, giving them ample time for investigation, although this was hardly necessary, when the matter could have been determined by a simple question. For authorities on this point, it is sufficient to cite the following: *Ryan v. River Side & O. Mills*, 15 R. I. 436, 8 Atl. 246; *State v. Cosgrove*, 16 R. I. 411, 16 Atl. 900; *Daniels v. City of Lowell*, 139 Mass. 56, 29 N. E. 222; *Wassum v. Feeney*, 121 Mass. 93; *Harrington v. Railroad Co.*, 62 N. H. 77; *U. S. v. Baker*, 3 Ben. 68, Fed. Cas. No. 14,499; *McDonald v. Beall*, 55 Ga. 288. It is impossible to review the exhaustive and respectable array of authorities cited by the appellants. It is enough to say, for the reasons already given, that those which hold that the fact of any interest in a juror necessarily works a mistrial, we do not agree with; and those where the courts, in their discretion, have granted a new trial because of an interest of such a kind as to show or to raise a presumption of prejudice on the part of a juror, are not controlling in this case, because that kind of an interest does not appear. The bare fact of the alleged interest does not raise the presumption. We have no record of the testimony adduced, and, for aught that appears, the evidence may have been overwhelmingly in favor of the will. At any rate, we have no right to presume that it was not sufficient. The petition for a new trial must therefore be dismissed.

(18 R. I. 551)

HAHN v. BILLINGS et al.

(Supreme Court of Rhode Island. April 16, 1894.)

APPEAL—QUESTIONS OF FACT—WAIVER OF JURY.

When a jury is waived, and the case tried before a judge, his decisions as to the questions of fact on conflicting evidence are not reviewable.

Assumpsit by Isaac Hahn against Billings Bros. Judgment for plaintiff. Defendants petition for new trial. Overruled.

Wilson & Jenckes, for plaintiff. Francis Colwell and Walter H. Barney, for defendants.

TILLINGHAST, J. This is a petition for a new trial on the grounds that the judgment of the court below is against the evidence and the weight thereof, and that the amount of said judgment is excessive. The action was assumpsit, and was brought to recover damages sustained by the plaintiff, who was a tenant of the defendants, by reason of the making of alterations and repairs to the building occupied by the plaintiff, whereby his business was interrupted and injured; the declaration alleging that the defendants, in consideration that the plaintiff would permit them to enter upon the premises and make said alterations and repairs, promised to pay him any and all damage or loss which he might sustain by reason of the making thereof. The case was heard and tried before Mr. Justice Rogers, in the court of common pleas, at the June term thereof, 1892, jury trial having been waived, who rendered the following decision, viz.: "There is a great conflict of testimony in this case, and I am not satisfied that the plaintiff, by a preponderance of proof, is entitled to recover on account of the ventilator for alteration. In regard to the damage caused by the removal of the roof and the erection of additional stories, however, I am satisfied, from a preponderance of evidence, both that the defendants promised, and that the plaintiff sustained damage from injury to stock by water, from consumption of extra gas, and from stoppage of, and injury to, machinery. Judgment for plaintiff for \$908.12 and costs."

In this state of the case, plaintiff's counsel takes the point that this court will not review the findings of the court below, and, no question of law being involved, that the petition for new trial should be dismissed. We think the point is well taken. The practice of this court has uniformly been to refuse to disturb the judgment of the court of common pleas in cases of jury trial waived, where there is any evidence to support the finding. By submitting their case to the court in this way the parties voluntarily select their tribunal,—a tribunal, which, by reason of its training, skill, and experience, is specially fitted to carefully weigh and consider all the evidence offered; and, having so selected it, we see no reason why they should not be bound by its decision as to questions of fact. Such submission practically amounts to a reference, so far as the finding of facts is concerned, and it is well settled that the findings of a referee as to all matters submitted to him without reservation are binding and conclusive upon the parties. *Outler v. Wall*, 9 R. I. 264. But counsel for defendants contend that the same rule ought to prevail in a case where the court hears and determines questions of fact as obtains in a case where the ques-

tions are submitted to a jury; and in this connection he argues that the court below cannot be assumed to be infallible as to its findings of fact, when its findings of law can be reviewed and reversed; and hence the party against whom its decision is rendered upon questions of fact should also have the right to the judgment of another tribunal upon the sufficiency of the testimony. There are cases which hold that the decision of a judge upon questions of fact in cases where jury trial is waived should have the same weight in the appellate court as the verdict of a jury, and no more. See *Pearson v. Minturn*, 18 Iowa, 36; *Handlan v. McManus*, 100 Mo. 128, 18 S. W. 207; *Robertson v. Cloud*, 47 Miss. 208; *Dixon v. Cook*, Id. 220. In Wisconsin, under chapter 264, Laws 1860, it is held that the findings of fact by the court are not equally as conclusive as the verdict of a jury, and that the appellate court is required to review questions of fact, as well as of law, when the trial has been had before the court below without a jury, and proper exceptions have been taken to the findings of fact. *Swift v. Agnes*, 33 Wis. 245; *Paige v. McMillan*, 41 Wis. 337. *Osborn v. Marquand*, 1 Sandf. 458, cited by defendants' counsel, is also based on a statute of New York, which provides that the finding of the judge "shall in all respects have the same effect as a verdict of a jury thereon, and no other." But the verdict of a jury is conclusive when the evidence is conflicting. *Ritter v. Cushman*, 7 Rob. (N. Y.) 297-299. Under Rev. St. U. S. 1878 (2d Ed.) § 649, the finding of the circuit court upon the facts has the same effect as the verdict of a jury. See *Insurance Co. v. Folsom*, 18 Wall. 237; *Lehnen v. Dickson*, 148 U. S. 72, 13 Sup. Ct. 481. But the verdict of a jury in that court settles all questions of fact (*Lancaster v. Collins*, 115 U. S. 222-225, 6 Sup. Ct. 33), the supreme court looking into the evidence only to see whether there was error in the rulings below. *Riley v. Boyer*, 76 Ind. 152, cited by the defendant's counsel, was a case where the court, sitting without a jury, rendered a judgment which was not only not sustained by any evidence offered, but was against the uncontradicted testimony of six witnesses. The supreme court reversed the judgment, as it was clearly its duty to do, there being no evidence upon which to base it, the judgment below being, therefore, the mere arbitrary exercise of judicial power. But, independent of statutes regulating this matter, the decided preponderance of the authorities is to the effect that the finding of the court in this regard is not reviewable. See *Inhabitants of Sheffield v. Inhabitants of Otis*, 107 Mass. 282; *Backus v. Chapman*, 111 Mass. 386; *Shelton v. French*, 33 Conn. 496; *Blackford v. Gaslight Co.*, 48 N. J. Law, 438; *Crocker v. Crocker*, 43 Me. 561; *Association v. Warren* (N. J. Err. & App.) 27 Atl. 932; *Dimock v. Bank* (N. J. Err. & App.) 25 Atl. 926; *Pettengill v.*

Shoenbar (Me.) 24 Atl. 584; Riley v. Riley (Colo. Sup.) 23 Pac. 326; Ward v. Morrison, 25 Vt. 598; Watts v. Julian (Ind. Sup.) 23 N. E. 698; Giffen v. Johnson (Kan.) 23 Pac. 954; Tuten v. Stone, 12 Rich. Law, 448; Sawin v. Izard, 26 Ark. 371; Murray v. Wells, 57 Iowa, 26, 10 N. W. 288; Gest v. Kenner, 7 Ohio St. 75. In Illinois the court is prohibited by statute from re-examining controverted questions of fact in cases of this sort. Cable Co. v. Lathrop, 131 Ill. 579, 590, 23 N. E. 583; La Salle Co. v. Milligan (Ill. Sup.) 32 N. E. 196. In Pennsylvania, under a statute which provides for the submission of civil cases, by agreement of the parties, to a referee learned in the law (Laws Pa. 1874, p. 166), under which act the parties may also submit cases to the decision of the court in the same manner as was done in the case at bar, it has been many times held that the findings of fact by the court or referee are not reviewable where there is any evidence to sustain the same. Jamison v. Collins, 83 Pa. St. 359; Lee v. Keys, 88 Pa. St. 175; Brown v. Dempsey, 95 Pa. St. 243; Com. v. Lehigh Val. R. Co., 104 Pa. St. 89; Bradlee v. Whitney, 108 Pa. St. 362; Com. v. Hulings, 129 Pa. St. 323, 18 Atl. 138. But, whatever the law may be elsewhere, we see no reason for departing from the well-established practice in our own state, which is to regard the findings of fact of any member of this court, when sitting as the court of common pleas, as binding and conclusive upon this court if there is any evidence to support such finding. See White v. White, Index, MM., 54, 27 Atl. 506; also, the unreported case of Peck v. Goff (decided at the April term, 1893) infra. If either party desires a trial by jury, he may have it by simply asking therefor, and, if dissatisfied with the verdict, he may have the evidence reviewed by this court; but, if he waives his right to such trial, he also waives the right to have the findings of fact reviewed. In the case at bar the evidence, which is quite voluminous, is conflicting; the plaintiff and some of his witnesses testifying to facts which fully support the declaration, while the defendant and his witnesses testify to facts which are inconsistent with the plaintiff's claim. The case was evidently tried and considered with much care, and the court having found, upon competent evidence, that the plaintiff was entitled to recover, we have no right to disturb the judgment. Petition for new trial denied and dismissed.

PECK v. GOFF.

(Supreme Court of Rhode Island. July 15, 1893.)

REVIEW ON APPEAL.

The findings of fact of a judge of the supreme court, sitting as the court of common pleas, are conclusive when there is any evidence to sustain them.

On rehearing. For former report, see 25 Atl. 690.

PER CURIAM. This petition is based upon the grounds that the finding of facts by the court below was against the evidence, and that the damages are excessive. Both these grounds depend upon one question of fact. In the opinion in this case (Index L. L. 85, 25 Atl. 690) the agreement upon which the action is based was construed to be a contract by which Goff bound himself to pay the surplus income of the fund to Peck until Peck's claim upon Vaughn should be satisfied. Vaughn was indebted to Peck on promissory notes, and on a balance of book account. The defendant now claims that, as he had no knowledge of any indebtedness except the balance of book account, the measure of his liability was limited by the amount of such balance. The record shows testimony from which the court below might have found that the defendant had knowledge both of the notes and the book account at the time of the agreement, and a supplementary statement of the judge who heard the case states that he did so find upon the question of fact. We cannot, therefore, disturb this finding, nor the amount of damages awarded, which was in accordance therewith.

(95 Vt. 158)

RYDER v. RYDER.

(Supreme Court of Vermont. Windham. April 16, 1894.)

DIVORCE—GROUNDS—CONDONATION.

1. Under Rev. Laws, § 2349, providing that a marriage may be annulled when, at the time of marriage, either party was physically incapable of entering into the married state, it is sufficient ground for divorce that at the time of the marriage the wife was afflicted with chronic syphilis.

2. Such a cause for divorce cannot be condoned, as it exists continuously.

Exceptions from Windham county court; Rowell, Judge.

Petition by William J. Ryder against Cora B. Ryder for divorce. The petition was dismissed, and petitioner excepts. Reversed.

Waterman, Martin & Hitt, for petitioner.

ROSS, C. J. This is a petition for annulling a marriage, upon the grounds—First, that it was procured by fraud; and, secondly, that the petitioner was physically incapable of entering into the marriage state. Rev. Laws, § 2349, provides that "the marriage contract may be annulled when at the time of the marriage either party . . . was . . . physically incapable of entering into the marriage state, or when the consent of either party was obtained by force or fraud." It is found that, "at the time of this marriage, the petitioner had chronic syphilis, which was incurable; that at this

time he supposed her to be chaste; that in about two months she communicated the disease to him; that they then both consulted a physician, who treated them some time, when she got better; that he believed from that time, until the child was born, she had got well of the disease, and would not be troubled with it again; that he did not know she had disease until she communicated it to him; that he voluntarily cohabited with her both before and after he knew of her disease; that a child was born to them about a year and four months after the marriage; that the child was a mass of syphilitic sores, attributable to the condition of the mother, and soon died; that, at the birth of the child and afterwards, the mother was in about the condition of the child from such sores; that he never had intercourse with her after the birth of the child; and that at no time could he have sexual intercourse with her without great danger of contracting the disease." Upon these facts the question is whether the trial court was in error in refusing to annul the marriage. A majority of the court think it was. It is not found that the petitionee was fully aware of her condition at the time of the marriage. This court cannot presume she was, to find error in the judgment of the trial court. It has made no finding on that subject. This court would presume she was not, rather than otherwise, to uphold the judgment of the trial court. If it were found that she was fully aware of her condition, she would have been guilty of a fraudulent concealment, in not disclosing it to the petitioner. It would be an essential fact, entirely within her knowledge, not within his, nor open to his observation nor to his inquiry upon any reasonable principles which do or should prevail in conducting the negotiations which lead up to entering into the contract of marriage. It would be both indelicate and offensive to enter upon such inquiries. In such a case, if she did not care to disclose her condition, she should have declined his advances. While there was no malformation, which rendered complete sexual intercourse impossible, there was a physical condition that rendered her incapable of healthy coition. Every such act, by reason of her physical condition, was attended with great danger of communicating to him incurable disease,—a disease endangering his health and life. Under similar statutes, it has been held that the physical incapacity need not be a total incapacity nor a malformation; that it may consist of such sensitiveness, from whatever cause, on the part of the wife, as would make intercourse endanger her health or life. In *Brown on Divorce* (page 184) it is said: "It is an accepted rule that if, from some incurable, physical, or psychic defect of one party to the marriage, sexual intercourse with the other party is impossible in a complete and natural manner, or impracticable, without the use of violence or dan-

ger to health, and if the defect existed at the date of the marriage, unknown to the complainant, on application and upon strict proof of the facts the marriage will be declared void ab initio, unless there has been insincerity or unreasonable delay." To the same in legal effect is *Devanbagh v. Devanbagh*, 5 Paige, 554, 3 Lawy. Ed. 827, and note; *Id.*, 28 Am. Dec. 448, and note; *Newell v. Newell*, 9 Paige, 25, 4 Lawy. Ed. 596, and note; 1 Bish. Mar. & Div. (2d Ed.) §§ 768, 777, 789. It is frequently said, as in *Brown on Divorce* (page 184), that "impotence is such an incurable sexual incapacity as admits of neither copulation nor procreation." But this language must be taken with limitations, for it is followed by: "It may arise from malformation, or frigidity of constitution, or from any other physical defect in the organs of generation." In the case at bar the petitionee's organs of generation, at the time of marriage, were in an incurably diseased condition, which, while it did not physically render her incapable of copulation, or of bringing into life a child, a mass of syphilitic sores, as good as dead when born, yet did render copulation and procreation on the part of the petitioner impracticable, because the act endangered both his health and life. The facts found bring the case within the reason and essence, if not within the exact language, of the rule. There could be no condonation of such a cause. It existed continuously. There was no unreasonable delay. The petitioner ceased to cohabit or live with her as soon as he was informed of her real condition, and that it was incurable. Judgment reversed, and judgment annulling the marriage.

(66 Vt. 200)

LA FARRIER v. HARDY et al.

(Supreme Court of Vermont. Chittenden.

March 7, 1894.)

LAYING OUT HIGHWAYS — VALIDITY OF PROCEEDINGS.

Under R. L. §§ 2922, 2923, providing that selectmen, when petitioned to lay out or alter a highway, shall give notice of a hearing, and that they shall have the highway surveyed, if, after a hearing and examination, they judge that it should be laid out or altered, such notice is essential, to give the selectmen jurisdiction.

Exceptions from Chittenden county court; Rowell, Judge.

Action of trespass *quare clausum fregit* by Henry La Farrier against John Hardy and others. There was judgment for defendants, and plaintiff excepts. Reversed.

H. F. Wolcott and W. L. Burnap, for plaintiff. H. N. Deavitt and Seneca Haselton, for defendants.

TYLER, J. The controversy was in relation to a strip of land six feet wide, situated on the east side of West street, in the village of Winooski, in Colchester, and claimed by the plaintiff as a part of his house lot.

The defendants had removed the plaintiff's fence, claiming that the strip of land was within the limits of the survey of the street. The plaintiff insisted that it was east of the survey. By Act No. 178, Laws 1866, incorporating the village of Winosaki, substantially the same powers were conferred upon the trustees in respect to the highways of the village as selectmen possess as to highways in their respective towns. It appeared that a survey of several of the streets of the village, including West street, was made in the year 1867, and was known as the "McGregor Survey." In 1871, West street was established by the selectmen according to this survey, and a record thereof was made in the town clerk's office. A map of that and other streets included in the survey was also filed and recorded, and this street was then opened for travel, and has been kept open ever since. It further appeared that in the year 1884 a large number of freeholders petitioned the selectmen to relocate and set stone monuments at the corners of several streets, including West from River street to its northern terminus; representing that those streets were without known boundaries, and that it was inconvenient for residents to erect fences and buildings upon them. Acting upon this petition, the selectmen, in 1885, caused a survey and map of certain streets, including West, to be made by one Nash, placed monuments at the corners and angles of the streets, filed the survey and map in the town clerk's office, and caused them to be recorded. They laid out and established the streets included in the survey, ordered them to be wrought for public travel, and made a report of their doings to the town clerk's office. No question was made but that this land was within the Nash survey, but the defendant claimed that the east line of the McGregor survey was identical with the east line of the Nash survey, and therefore that this land was a portion of the street as established by both surveys. Under instructions from the court, the jury did not return a general verdict, but returned a special one that at the time the fence was removed it stood on the east line of West street as established by the McGregor survey. The plaintiff was entitled to a judgment on the verdict to recover the amount of damages found by the jury, unless the selectmen, in their resurvey of 1885, had authority to widen, and in fact widened, the street by including this land. The selectmen, in the report of their doings to the town clerk's office upon their petition, refer to certain other petitions on file in that office, but they do not state what those petitions contain. So far as the case shows, they widened West street by taking this land upon their own motion, without petition. They were petitioned only to establish the boundaries of the street as originally surveyed. Section 2914, R. L., confers upon selectmen authority to lay out, alter, and discontinue

highways as the convenience of the inhabitants and the public good require, and they may act without petition. This was so held in *Brock v. Barnet*, 57 Vt. 172. Therefore it is unnecessary to presume that the selectmen had a petition to widen the street. It was said by Redfield, C. J., in *Kidder v. Jennison*, 21 Vt. 108, that this might be presumed, because all reasonable presumptions are made in favor of judicial and other analogous proceedings. It is clear that they might act without a petition.

The exceptions state that there was no evidence whether the selectmen did or did not appoint a hearing, give notice, and consider claims for damages. As they did not intend to widen the street by taking the plaintiff's land, it is not presumable that they gave notice to him. But the act of selectmen in laying out or altering a highway is not void by reason of their omission to give notice to landowners that they may be heard upon the question of damages. This was held in the case above cited, when the law required, as it now does, that the selectmen should give notice to all parties interested of a time and place of hearing upon the petition, and to all persons owning or interested in lands of a time and place of hearing upon the subject of damages. Rev. St. c. 20, § 10; R. L. §§ 2921, 2922. In that case the court said that the statute was intended as a direction to the selectmen in their duty, and perhaps to impose an obligation upon them, which, if they did not perform when they might, should form the ground of an action in favor of any one aggrieved, but nothing more. When selectmen have taken the other steps pointed out by the statute, and laid a highway open to public travel, their omission to give notice to landowners of a hearing upon the question of damages does not render their proceeding a nullity. In such case the landowner is not without remedy. He may have commissioners appointed to appraise his damages, under R. L. § 2932 et seq., or, under section 2940, have commissioners appointed to revise the entire proceedings of the selectmen. The omission of selectmen laying a highway to specify a time for the land owned to remove his fences, timber, etc., so that the road may be wrought, will not render their act invalid. This was held in the same case, under Rev. St. c. 20, § 24, which is identical with R. L. § 2926.

The selectmen were petitioned to resurvey the street under section 2920, R. L. They intended to resurvey it, and re-establish the McGregor survey, and made report that they had acted "agreeably with the foregoing petition." Being under a mistake as to where the east line of that survey was, and supposing it was six feet further east than it was in fact, they located the east line of the street six feet east of the former survey, taking the land in question. These were uncontroverted facts. Do they, with the record of the action of the selectmen, the map on file, and the

monuments erected, amount to an appropriation of the plaintiff's land to public use? The fact that they intended to resurvey the street and establish its original boundaries could not affect what they in fact did. The record of what was done must control, and not their intention, as subsequently expressed. The defendants insisted at the trial in the court below, as one ground of defense, that the last survey was identical with the first, though they claimed that the Nash survey established the east line of the street, whether it was the same as the former survey or not. The statute (R. L. § 2922) in direct terms requires that the selectmen, when duly petitioned to lay out or alter a highway, shall appoint a time for examining the premises and hearing the parties interested; that they shall give notice to one or more of the petitioners, and shall also give notice to persons owning or interested in lands through which the highway may pass of such time, and also of the time when they will consider claims for damages. The next section provides that if, after examining the premises and hearing the parties, they judge that the public good or the necessity or convenience of individuals requires such highway to be laid out or altered as claimed in the petition, they shall cause the same to be surveyed. There is no occasion to give notice that they will consider claims for damages, unless they decide to lay the road, and cause it to be surveyed. This court has not held that the action of selectmen in laying a highway would be valid without notice to landowners, so that they might be heard upon the primary question whether the public good or the necessity of convenience of individuals required the taking of their lands. At first view, *Kidder v. Jennison* seems to hold this. It was an action of case for alleged injury by the defendants to the plaintiff's reversionary interest in certain lands. The defendants offered in evidence a copy of the record of a survey bill of the road in question, made by them as selectmen, etc. The plaintiff objected to this evidence, for the reason, among others, that it did not appear that any notice was given to the plaintiff of the doings of the selectmen, so that he could appear and claim his damages for laying the road through his land. The point was not made that he had not had notice to appear and be heard upon the question of laying the road, and that question was not passed upon. The first question to be decided by the selectmen is whether the public good or the necessity or convenience of individuals requires the laying of the road, and they are to decide it upon an examination of the premises, and a hearing of the persons interested,—the petitioners and others interested to have the road laid, and the landowners who may have an interest to keep their lands intact. The laying of highways often requires the removal of buildings and the taking or inconveniently dividing

valuable lands, and landowners have a right to appear before the selectmen with witnesses and counsel, and contest the petition, and show, if they can, that there is not such a public or private occasion for the road as will warrant the injury to their property. It is not enough that the law makes ample provision for them to secure their damages after the road has been laid. They have a right to appear, and oppose the condemnation of their lands to public use. In *Haynes v. Lassell*, 29 Vt. 159, the question was whether a highway could be discontinued without notice to landowners. Redfield, C. J., in discussing the question, said: "The condemnation of land for the use of a highway is in the nature of a judgment *inter partes*, to the validity of which, notice, actual or presumptive, is indispensable." Every species of property which the public needs may require, and which government cannot lawfully appropriate under any other right, is subject to be seized and appropriated under the right of eminent domain. Land for the public ways; timber, stone, and gravel with which to make or improve the public ways; buildings standing in the way of contemplated improvements,—are liable to be thus appropriated. The right to appropriate private property to public use lies dormant in the state until legislative action is had, pointing out the occasions, modes, conditions, and agencies for its appropriation. *Cooley*, Const. Lim. §§ 527, 528. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price, and even this is an extension of power which the legislature indulges with caution. 1 Bl. Comm. 139. Every requisite of the statute conferring the power to exercise the right must be carefully observed, and the rules strictly followed; otherwise the property is not effectually taken, and the proceedings are void. *Ang. Highw.* 75, note. In *Adams v. Clarksburg*, 23 W. Va. 203, the court said: "The taking of private property for public use, without the owner's consent, can only be justified for the uses, in the modes, upon the conditions, and by the agencies prescribed by law for its appropriation. Whenever the private property of an individual is to be so divested by proceedings against his will, a strict compliance must be had with all the provisions of law which are made for his protection and benefit, or the proceeding will be ineffectual. Those conditions must be regarded as conditions precedent, which are not only to be observed and complied with before the right of the property owner is disturbed, but the party claiming authority under the adverse proceeding must show affirmatively such compliance. All the authorities concur in holding that, as private property can be taken for public uses, against the consent of the owner, only in such cases and by such proceedings as may be specially prescribed by law, and as these proceedings are contrary to the course of the common

law, and in derogation of common right, they are to be strictly construed, and the party who would avail himself of this extraordinary power must fully comply with all the provisions of the law entitling him to exercise it." It is not in accordance with the spirit of our constitution and laws that citizens should have no opportunity to be heard before judgment is rendered against them or their property. We hold that notice to the plaintiff was necessary to give the selectmen jurisdiction of the subject-matter of laying the street. No notice was shown to have been given, and none can be presumed in the circumstances of the case; therefore the taking of the land was without authority, and the defendants were trespassers. Judgment reversed, and judgment on the verdict.

(66 Vt. 223)

WILLIS v. ADAMS.

(Supreme Court of Vermont. Windham.
March 5, 1894.)

VENDOR AND VENDEE.—BONA FIDE PURCHASERS—
TROVER—WHEN MAINTAINABLE.

1. Plaintiff conveyed land to a partnership on condition that the proceeds of timber thereon should be applied to the payment of a note. Defendant purchased one member's interest in the partnership, and took and retained plaintiff's deed to it. *Held* that, though the deed had not been recorded, defendant had notice of, and was bound by, its terms.

2. When a deed conveys land on condition that the proceeds of timber thereon shall be applied to the payment of a note, if the vendee claims title to the logs, and repudiates the condition, the vendor becomes entitled to the possession of the logs, and may maintain trover therefor. *Ross, C. J., dissenting.*

Exceptions from Windham county court; Munson, Judge.

Trover by E. H. Willis against Frank L. Adams for certain logs. Heard on the report of referee. Judgment for plaintiff. Defendant excepts. *Affirmed.*

Haskins & Stoddard, for defendant. Waterman, Martin & Hitt, for plaintiff.

TAFT, J. On October 31, 1883, the plaintiff was the owner of land in Stratton, from which the logs in controversy were cut. On that day he conveyed it to Shipman & Brown, partners, by deed of warranty, with a condition that "the proceeds of the hardwood timber thereon shall be applied to the payment of a seventy-five dollar note of even date," etc. "All said timber, and the proceeds thereof, to be mine [plaintiff's] until said notes are paid." At the same time a mortgage deed of the premises was given by Shipman & Brown to secure the note in question, with other notes, with a consent to the condition in the warranty deed. The deeds were never placed on record. December 20, 1883, the defendant purchased Shipman's interest in the partnership, and the property thereof, except the Stratton land was conveyed to him by Ship-

man, but Shipman, Brown, and the defendant understood that Shipman's interest in the land passed to the defendant, or, in other words, as the parties termed it, the defendant "stepped into Shipman's shoes." At the time of the defendant's purchase, the latter took the deed from the plaintiff to Shipman & Brown, and since that time has kept it. The referee was unable to find that he read it, or had knowledge of the condition contained in it, until the plaintiff demanded of him the logs in suit. The defendant, for himself and partner, Brown, cut the logs, and disposed of them to their own (not the plaintiff's) use, and claimed, when the plaintiff demanded them, that he and Brown had title to them, as against the plaintiff. The defendant insists that the sale to Shipman & Brown was a conditional sale of personal property, and, it not being shown that the writing evidencing it was recorded, he (defendant) is a subsequent purchaser without notice, and the lien, as against him, invalid. The defendant had no title to the timber, except what he acquired under his contract with Shipman; and having the deed evidencing Shipman's right in his possession, we think he had constructive notice of the state and condition of the latter's title, the same as if the deed had been of record. The law charged him with notice. The record would have been no more effective as notice than the deed itself. The defendant claims under rights derived from the plaintiff, and is bound by everything stated in the conveyances constituting his claim of title. Whether the property in the timber was of such a nature as to require a record of its sale, under R. L. § 1902, we are not called upon to decide, for, if it was, the defendant had constructive notice of it.

The defendant further insists that, under the arrangement between the plaintiff and Shipman & Brown, he (the defendant), as vendee of Shipman, had license to convert the timber into money, and therefore trover cannot be maintained for the logs. His license was special,—that he should cut the timber, and apply the proceeds upon the note. The only right he had to the timber was upon condition that its proceeds should be applied upon the note, the fair meaning of which is that he could not sell the logs unless the pay or the proceeds should go directly to the plaintiff. The defendant's right to the logs was terminable by any act of his that put an end to the character or right in which he held the timber. The act of claiming the logs as his own, and selling them as his own, was of that nature, and made him a wrongdoer. When the defendant repudiated the lien,—claimed title to the logs in himself,—in utter disregard of the plaintiff's rights, he was a wrongdoer, and the plaintiff became entitled to the possession of the logs, and, having the title, can well maintain trover. The principle here stated was applied in *White v.*

Langdon, 30 Vt. 599,—a case similar to this in its facts,—in an action of trover against the purchaser from the conditional vendee, who had leave to trade off the horse, provided the avails were paid to the plaintiff. The sale in this case was upon condition that the proceeds of the hardwood lumber should be applied in payment of the \$75 note, and the defendant had no right to cut the timber, unless the proceeds were so applied. Judgment affirmed.

ROSS, C. J. (dissenting). To maintain this action the plaintiff must establish that he was entitled to the hardwood logs when he demanded them of the defendant, just before bringing this suit, August 12, 1890. He must establish that he then had a general or special property in the logs, and was entitled to their immediate possession. *Swift v. Moseley*, 10 Vt. 208; *Hickok v. Buck*, 22 Vt. 149. To maintain his title and right of possession, he relies upon the condition in his deed to Shipman & Brown, dated October 31, 1883, and their mortgage back to secure the performance of the condition. The property conveyed was a timber lot in Stratton. Shipman & Brown were manufacturers of lumber. The defendant purchased Shipman's rights in the partnership of Shipman & Brown, and took upon himself Shipman's liabilities in it. The plaintiff's deed was an ordinary warranty deed of the lot of land, with a condition in regard to the timber cut, and to be cut, therefrom. By it the proceeds of the timber were to be applied to the payment of the notes of Shipman & Brown falling due in 1884, 1885, and 1886. The proceeds of the hardwood timber—the logs in controversy—were to be applied to the payment of a note falling due February 1, 1886. The condition closes with these words: "All said timber, and the proceeds thereof, to be mine until said notes are paid." By this the plaintiff reserves the proceeds, as well as the timber. By the deed he gives the grantees the right to enter, and take possession of the lot, cut, remove, and manufacture the timber into lumber, and turn the lumber into money or proceeds. The bailment is not ended until the timber is manufactured, and turned into money or proceeds. The proceeds are to be applied to the payment of the note. Not until the lumber is turned into proceeds is it to be applied to the note held by, and belonging to, the plaintiff. By the terms of the bailment, the money or proceeds are to come into the hands of the defendant, as much as the timber or lumber. In all these stages, it is the property of the plaintiff; but he has no right to the possession of it until it becomes money in the hands of the defendants, or in a condition to be applied to the payment of a note,—a money obligation. Such, I think, is the construction to be placed upon the language of the condition. It could not have been the intention of the parties to the deeds

that the defendants should sell the lumber, so that the money coming from such sales should be paid by the purchasers to the plaintiff, and unless the payment was so made the sale was illegal and unauthorized. In that case the defendant would have had nothing to do with the proceeds. Such proceeds could never come into his hands. If such had been the intention, different and more appropriate language would have been used by the parties to the deed. It would have been specifically provided that the money coming from any sale of the lumber should be paid to the plaintiff. But, without so specifying, the plaintiff provided that the defendant, when he had the hardwood logs converted into money or proceeds, should hand enough of it to him to liquidate the note. On this construction,—which, to my mind, is the proper one,—the plaintiff was not entitled to the hardwood logs, either when he demanded them, or at any time, because the terms of the bailment were not ended until the logs had been turned into money. Then the plaintiff had a right to have that identical money paid to him, so far as was necessary to liquidate the note. In my judgment, on any proper construction of the language of the condition, when applied to the facts,—that the property was a timber lot conveyed to manufacturers of lumber, to have the timber taken off, manufactured and sold by them, to meet the demands of customers, and the money received applied to the payment of the note,—this case cannot be brought within *White v. Langdon*, 30 Vt. 599, where it was found that McLeran's only authority to sell the horse was on condition that the avails should be paid to the plaintiff. He sold the horse without complying with the condition, and therefore wrongfully. If my construction of the condition of the deed is the correct one, the defendant and his partner lawfully sold the lumber coming from the hardwood logs demanded, and cannot be made liable for them in this action.

(36 Vt. 216)

FOOTE v. WOODWORTH.

(Supreme Court of Vermont. Addison. March 28, 1894.)

SALE OF GOODS — BREACH OF WARRANTY — EVIDENCE — DAMAGES — VERDICT — CORRECTION BY JURY.

1. On an issue whether the ruinous condition of certain jars was caused by defects in manufacture, or by being stored several years in a dirty condition, a piece of white paper which had been rubbed on the inside of the jars was inadmissible to show that they were not stored in a dirty condition, it not appearing when the examination was made, or that the jars were then in the same condition, in this respect, as when stored.

2. In an action on a warranty of certain jars, which became useless after a few years' use, plaintiff alleged defects in manufacture, while defendant alleged that they were not properly handled. *Held*, that it was proper to instruct that plaintiff could recover only for

the damages caused by defendant's negligence, and not for those caused by his own.

3. Where the jury go out of their province, and award costs, there is no error in permitting them to correct their verdict in that regard.

Exceptions from Addison county court; Tyler, Judge.

Action by Henry S. Foote against F. Woodworth for breach of warranty. From a judgment for defendant, plaintiff excepts. Affirmed.

The plaintiff sued on an implied warranty of 400 stone jars furnished by the defendant to the plaintiff for the packing and storing of butter. The first exception relied upon by the plaintiff was stated in the bill of exceptions as follows: "The plaintiff relied on and introduced evidence tending to show the fact that while using them for the purpose aforesaid, the first season after receiving them, some few, of said jars showed a little flaking of the glazing; that he used them the next season, and then packed them up in the storage house, where they remained for three or four years, without inspection; that when he inspected them again they were practically worthless, and in a ruinous condition, because of the flaking of the glazing and the falling to pieces of the jars in handling. This was the defect complained of, and the plaintiff introduced evidence tending to show that the said defect was caused by the improper burning of said jars in the process of manufacture. The defendant did not controvert the plaintiff's evidence as to the condition of the jars, but claimed that it was not due to any fault in the manufacture, and relied on and introduced evidence tending to show that the jars in question were put up and stored by the plaintiff in so negligent a manner as to cause the flaking, the glazing, and the breaking of the jars, especially claiming, and introducing evidence tending to show, that the damage was due to the dirty and greasy condition in which the jars were put up and stored by the plaintiff. The plaintiff denied that said jars were put up and stored in such a condition, and in rebuttal introduced as a witness one George Hammond, who testified as follows: 'Q. You testified that you had been up and examined these jars? A. Yes, sir. Q. Did you examine these jars with regard as to whether they were greasy or not? A. Yes, sir. Q. Will you state to the jury what? A. I had some white paper in my pocket, and rubbed it around on the inside of them, and I thought they were a very clean lot of jars for the amount of time they had been standing. Q. Have you got the paper with you? A. There was so many different jars, I rubbed it around two or three times on the inside of the jars.' The plaintiff's attorney offered this paper in evidence, to which the defendant objected, and it was excluded by the court. To this ruling the plaintiff excepted."

The plaintiff excepted to the following part of the charge: "It has been claimed that the plaintiff's own negligence in the care of these jars might have contributed to producing their condition. If you should find that he was wanting in the care of these jars, why, then, you will say how much his want of care contributed to this condition, and, if he is entitled to damages, how much less should be received than he would have received if he had used proper care over them; and your minds are directed to whatever evidence there is in the case as to any want of care,—whether this was a suitable place to store them, or whether this evidence discloses any want of care on his part in storing them, putting them away in a proper condition; whether there is any negligence shown on his part in the matter of caring for these jars." The jury, after having considered the case, returned the following verdict: "In this case the jury say that the defendant did not assume and promise in manner and form as the plaintiff in his declaration hath alleged, and the defendant paying his own costs." The verdict was read by the clerk in open court, and handed to the presiding judge, who said to the jury that they were evidently laboring under a misapprehension; that the jury had no control over costs, which must follow the event of the suit; and that they might retire, and further consider their verdict. The jury then retired, and after a time returned into court with this verdict: "In this cause the jury say that the defendant did not assume in manner and form as the plaintiff in his declaration hath alleged. They therefore find for the defendant to recover of the plaintiff his costs." This the court received, against the exception of the plaintiff. The plaintiff then filed a motion in arrest, for that the verdict had been improperly taken. The court overruled the motion, and gave judgment on the verdict, to which the plaintiff excepted.

Button & Button, for plaintiff. Hard & Bliss, for defendant.

THOMPSON, J. 1. The issue was whether the ruinous condition of the jars four or five years after the plaintiff purchased them was the result of improper burning in the process of manufacture, or was caused, as claimed by the defendant, by their having been put up and stored by the plaintiff for three or four years in a dirty and greasy condition. To meet this claim of the defendant, the plaintiff introduced Hammond as a witness, whose evidence tended to prove that he had examined the jars in regard to their being greasy or not, and in making his examination had rubbed a piece of white paper around on the inside of some of the jars. The plaintiff offered this paper in evidence, and it was excluded, to which he excepted. The plaintiff's evidence tended to

prove that, after being last used by him, the jars had been packed in a storage house, and had remained there three or four years. To have rendered the paper admissible, it must have appeared that the jars to which it was applied were then in substantially the same condition, in regard to being dirty and greasy, as they were when packed. There was no offer to show that such was the fact, or to show when Hammond made his examination. It cannot be presumed that there was evidence in the case which made the paper admissible, for that would be to presume error, when the presumption is to the contrary, unless it is shown affirmatively by the record. We think the true rule is that, to assign legal error in the exclusion the exceptions must show affirmatively that, in the then present aspect of the case, the evidence excluded was admissible, without an offer to introduce other evidence which would make it admissible. Again, it does not appear that the paper would have tended to prove any fact beneficial to the plaintiff. It may have been perfectly clean, or it may have been discolored by dirt and grease, or it may have been in some other condition. There was no error in excluding it. *Foster's Ex'rs v. Dickerson*, 64 Vt. 233, 24 Atl. 253; *Roach v. Caldbeck*, 64 Vt. 593, 24 Atl. 989; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 438.

2. The extract from the charge to which the plaintiff excepted does not purport to be all that the court said on the subject of damages, and it is to be taken that the general rule in respect to the measure of damages in a case like this was correctly stated. The plaintiff claims that the jars were then practically worthless, and that the defendant was responsible for their being in that condition, while, on the other hand, the defendant contended that their condition was not the result of his fault, but of the plaintiff's negligence. By this part of the charge the jury were, in effect, told that if they found the defendant was liable, yet if the ruinous condition of the jars was in part caused by the negligence of the plaintiff, he could not recover for such damages as he had sustained by reason of his own negligence, but only for such as he had sustained by reason of the defendant's fault. This was a proper caution in view of the respective claims of the parties. It was not reversible error to thus charge.

3. There was no error in permitting the jury to correct their verdict in respect to costs. The jury went out of their province in awarding costs, and the court might, in the first instance, have treated that part of the verdict as surplusage. The motion in arrest of judgment was also properly overruled. *Montgomery v. Maynard*, 33 Vt. 450; *Germond's Adm'r v. Railroad Co.*, 65 Vt. 126, 26 Atl. 401; *Grotton v. Glidden*, 84 Me. 589, 24 Atl. 1008; *Allen v. Aldrich*, 9 Fost. (N. H.) 75; *Tucker v. Cochran*, 47 N. H. 54;

Lincoln v. Hapgood, 11 Mass. 358; *Harrison v. Jaquess*, 29 Ind. 208; *Hill New Trials*, 108, 118. Judgment affirmed.

(65 Vt. 206)

RUGG v. COMMERCIAL UNION TEL. CO.

(Supreme Court of Vermont. Franklin.

March 29, 1894.)

ERECTION OF TELEGRAPH LINE—DAMAGES.

Where it does not appear, in erecting a telegraph line along a highway, that it would be inexpedient to erect it without inconvenience in traveling, or making repairs of the highway, nor that it was erected along the streets of a village, or in front of or near a dwelling, nor that it became necessary to cut or injure trees, selectmen have no power to award damages to an abutting landowner, under R. L. § 3637, providing that the selectmen of a town shall appraise the damages caused by the erection of a telegraph line.

Appeal from chancery court, Franklin county; Start, Chancellor.

Bill for an injunction by Benjamin F. Rugg against the Commercial Union Telegraph Company. From a decree dismissing the bill, orator appeals. Affirmed.

The orator was the owner of a farm situated just outside the limits of the village of St. Albans. Through this farm the selectmen of the town of St. Albans had laid a highway which was called "Thorpe Avenue," and which connected with one of the streets of the village. The orator's land upon either side of Thorpe avenue was suitable for building lots, and it was his intention to utilize it for that purpose, but no buildings had been erected. The defendant, against the protest of the orator, constructed its telegraph line along Thorpe avenue. Thereupon, the orator applied to the selectmen of the town of St. Albans, who awarded him \$500 damages. This bill was to enjoin the use of this line across the land of the orator until the award of \$500 was paid.

Farrington & Post, for orator. Wilson & Hall, for defendant.

START, J. The orator seeks to recover the sum of \$500, awarded to him by the selectmen of the town of St. Albans as damages on account of the erection of a telegraph line in and along a public highway adjacent to his lands. R. L. § 3633, provides that persons associated together to erect a line of telegraph wires in this state may set, erect, and maintain the posts and other necessary fixtures therefor in and along any highway; but the same shall be done so as not to interfere with the public convenience in traveling on such highway, or in repairing the same. R. L. § 3634, provides that if it is found inconvenient or inexpedient to erect such telegraph wires, agreeably to section 3633, the selectmen of the town where such difficulty arises shall determine, on application, where and in what manner such wires shall be erected, giving notice to the parties interested, and shall

certify their decision, and cause the same to be recorded in the town clerk's office. R. L. § 3635, provides that, if it is found desirable to erect such line of telegraph in and along the streets of a village, or in front of and near residences of any persons, and such persons object thereto, they may apply to the selectmen of such town, or officers of such village, who shall determine through what streets that same shall pass, or in what manner, if at all, such objections may be obviated; and such decision shall be final, notice being given as required in section 3634. R. L. § 3637, provides that when, in the erection of a telegraph line, the owner or occupant of lands or tenements sustains, or is likely to sustain, damages thereby, the selectmen of the town shall appraise such damage, and the same shall be paid before the line is erected. Without deciding what rights telegraph companies have, under these enactments, we think it clear that the legislature intended that they should have the right to erect and maintain telegraph lines in and along any highway without obtaining consent to do so from any one, provided the convenience of the public in traveling, and the repairing of the highway, are not thereby interfered with, and the same are not erected in and along the streets of a village, or in front of or near a residence. *Telegraph Co. v. Bullard*, 65 Vt. 684, 27 Atl. 322. Selectmen are not given authority or jurisdiction in respect to such lines, and, if they have power to make a valid assessment of damages, such power is limited and restricted to such lines and parts of lines as come within the exceptions provided for in these enactments, viz. highways, where it is found inconvenient or inexpedient to erect such lines without interfering with the public travel, or the repairing of the highway, and when objections are made to erecting lines in and along the streets of a village, or in front of or near a residence. Section 3633, as amended by No. 32 of the Acts of 1888, provides that telegraph and telephone companies, in constructing and maintaining their lines, shall not cut or injure any tree without the written consent of the adjoining landowner or occupant, unless the selectmen of the town, or trustees of the village, or aldermen of the city, where such tree is situated, shall decide, after due notice to the owner or occupant of the time and place of hearing, that such cutting or injury is necessary; and they shall pay such damages as said selectmen, trustees, or aldermen shall award for the same. From this enactment, it would seem that the legislature did not understand that selectmen were authorized to award damages to owners or occupants of land, except in those cases where they are given jurisdiction to locate the line. If they had general authority to award damages in all cases to adjoining owners or occupants of lands, then this enactment, so far as it relates to the assessment of damages, was

unnecessary. The more reasonable construction to be given to these enactments is that section 3637 does not authorize selectmen to assess damages to owners or occupants of adjoining lands or tenements, except in those cases where it becomes inconvenient or impracticable to erect a line without inconvenience in traveling upon and repairing a highway, and where it becomes desirable to erect the line in and along the streets of a village, or in front of or near a residence, and objections are made. Section 3637 must be construed in connection with preceding sections, which relate to the power and jurisdiction of selectmen in the location of telegraph lines; and, when so construed, it is clear that the legislature considered that there might be places upon highways where it would be impracticable to erect a telegraph line without interfering with the traveling public and the repairing of the highway, and that there might be valid objections to erecting a line along the streets of a village, or in front of or near a dwelling house; and, for such cases, it provided that selectmen or village officers should be called upon to locate the line, and determine how objections could be obviated, and that selectmen should assess damages. Whether these provisions are sufficient to authorize selectmen to make a valid assessment of damages in the exceptional cases provided in these enactments, we do not decide. The orator's case does not fall within any of the exceptions. It does not appear that, in the erection of the line in question, it became inconvenient or inexpedient to erect it without inconvenience in traveling or in making repairs, nor does it appear that the line was erected in or along the streets of a village, or in front of or near a dwelling, or that it became necessary to cut or injure trees. The burden was on the orator to show that the selectmen had jurisdiction to make the award they did make. This he has not done. Therefore, it must be held that the selectmen acted without authority, and that the award made by them is void. The decree of the court of chancery is affirmed, and cause remanded.

THROPP v. KNIGHT.

(Court of Chancery of New Jersey. Jan. 6, 1894.)

CHATTEL MORTGAGES—VALIDITY AS AGAINST CREDITORS—AFFIDAVIT BY MORTGAGEE.

Under Revision, tit. "Mortgages," §§ 39, 40, making void, as against creditors, chattel mortgages not accompanied by immediate delivery, and followed by actual and continued change of possession, unless the mortgage, with an annexed affidavit of the holder, stating the consideration, and, as nearly as possible, the amount due and to become due, is recorded, an affidavit stating the consideration to be the indorsement of certain notes of the mortgagor, but failing to give the name of the payee or holder, the amount and date of each note, or to show that they were ever put in circulation and are still outstanding, is insufficient.

Bill by William R. Thropp against Howard Knight for an injunction. Preliminary injunction granted.

W. D. Holt, for complainant. A. H. Dawes, for defendant.

BIRD, V. C. An order to show cause was allowed in this case because of the doubt which forcibly presented itself to the mind upon the reading of the affidavit annexed to the chattel mortgage—as to its sufficiency—which the complainant seeks to have postponed to his judgment. The affidavit is in these words: "Barclay Knight, being duly affirmed according to law, upon his oath deposes and says that he is the holder of the foregoing mortgage; that the consideration of said mortgage is the indorsement of notes by deponent for the accommodation of the mortgagor, the above-mentioned Howard Knight, and such indorsements as he may hereafter make for the accommodation and benefit of the said Howard Knight, and any liability or obligation assumed by the deponent for the benefit of the said Howard Knight, now existing, or which may hereafter exist; that this deponent is now liable on promissory notes for the benefit and accommodation of the said Howard Knight to the amount of four thousand two hundred and eighty dollars and thirty-two cents, and that the amount due and to grow due on the said mortgage is such sum as deponent may be compelled to pay by reason of any indorsement, security, or assumption undertaken or incurred for the benefit of the said Howard Knight, not exceeding the sum of four thousand two hundred and eighty dollars and thirty-two cents, and such further sum or sums for interest on the said notes which this deponent may be compelled to pay."

The language of the statute¹ is: "That every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder or holders of said mortgage, his, her or their agent or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act." It may be said that the language of the statute is very general. True, it is, but also very comprehensive. It is so comprehensive as to include every possible case. Detail was wisely avoided, because of the impossibility of anticipating the necessities or exigencies which the multitudinous forms or devices of

men, in the transactions of their affairs, are constantly creating. It was not intended that the skillful or ingenious should say, "I have escaped the statute." A reasonable amount of certainty is required; if not so full as in pleadings, yet so far approaching thereunto as to guide the inquirer to that which is certain. Information as to the nature of claims or demands of one who makes an assertion of right, as against others, is insisted upon in every code or system of pleading. Considering the subject from this standpoint, how absurd it would be to insist that a declaration or a complaint were sufficient, if it were only to state that the defendant was liable upon the indorsements made or to be made to the extent of \$100 or \$1,000. A preliminary injunction will be advised.

The only defect which appears to me to be serious is the absence of all reference to any particular note or notes, or to the names of any holder or holders, or to the amounts of each of such notes, or whether any note or notes have so been issued as to possess vitality. The affidavit states the whole amount of the contingent liability of the mortgagee, but in no sense does it apprise creditors of the persons to whom the mortgagee is so liable, nor the amount which may be due to creditors separately. It does not state to whom the notes were given, nor when they were given, nor the amount of them, severally. My impression is that, to comply with the statute, it is necessary to show the amount of each note, and the date thereof, as near as may be, and also the name of the payee or holder. I think the creditors are entitled to some certainty in these respects. If the affidavit, as it now stands, should be regarded as sufficient, it certainly leaves a very wide door for the manufacture of a case to suit the necessities of the parties in interest. If the object of the affidavit be in any sense to give useful information to creditors and others who may become interested, in order that they may pursue such inquiries as their interests may suggest, this affidavit offers them not the slightest aid, but leaves them as wholly in the dark as though there were no affidavit attached. It may be that these promissory notes (if the liability as indorser be upon promissory notes) are in the possession of the mortgagor. There is nothing in the case to lead to any other conclusion. It seems to me the language of Vice Chancellor Van Fleet in the case of *Ehler v. Turner*, 35 N. J. Eq. 69, viz.: "The legislature, I think, meant to compel the mortgagee to commit himself to a statement or disclosure of his debt or claim, when he made his mortgage a matter of public record, sufficiently precise and explicit to afford the creditors of the mortgagor, in case fraud was suspected, a fair opportunity to ascertain, by investigation or otherwise, whether the mortgage was an honest security, or a mere fraudulent cover,"—is applicable here. It has occurred to me that the absence of any proof

¹ Revision, tit. "Mortgages," §§ 39, 40.

or statement in the affidavit showing that the notes which it may be presumed have, according to the affidavit, been indorsed by the affiant, were ever put in circulation, or are in the hands of a bona fide holder for value, presents an insurmountable obstacle. For aught that appears, he may have indorsed a note for \$1, \$100, or \$1,000, and it still remain in the hands of the mortgagor, and, for the purposes of a scheme to defraud creditors, may have been executed contemporaneously with the execution of the mortgage. In other words, there is nothing to show that the supposed commercial papers have been so put in circulation as to create any liability upon the part of either maker or indorser. It may also be well said that if such supposed commercial paper was ever issued, and had such vitality as imposed a legal liability upon the parties whose names appear in connection therewith, there is nothing to show that it is still outstanding, and that any of such parties are liable. It will not do to say that these objections are met by the general statement of the mortgagee in his affidavit that he is liable for indorsements. I do not think that any court, when called upon to determine such questions, depends for its judgment upon the conclusions of the witnesses. In every such case the witness is required to state the facts as they actually exist, from which the court determines the legal or equitable rights of those concerned. In making this observation, I am aware that the affiant, in stating his conclusions as to his liability, says that he is liable upon his indorsements, from which it may be said the inference is inevitable that he has indorsed certain commercial paper, but this only brings out prominently the difficulties and objections above presented. What paper—what note or notes—has he indorsed? When did he indorse any notes? To whom were such notes made payable, and for what amounts? When were they made payable, and are they still outstanding? Since these questions are not responded to in the affidavit annexed to the chattel mortgage in question, it cannot stand in the way of honest creditors. I will advise accordingly.

(56 N. J. L. 474)

STATE (AVIS, Prosecutor) v. MAYOR, ETC., OF VINELAND.

(Supreme Court of New Jersey. March 27, 1894.)

CONSTITUTIONAL LAW—ORDINANCE—REMOVAL OF GROWING TREES.

1. An ordinance of the borough of Vineland, passed under Borough Act 1878, p. 407, declaring healthy growing trees, which had been planted over 25 years ago, by the owner of land, on or near the edge of the roadway of a street in that borough, a nuisance and obstruction, and directing their removal as such, *held void*.

2. Quære, as to powers of borough under Act 1883, p. 96, and as to fact of dedication of street cum onere in this case.

(Syllabus by the Court.)

Certiorari by the state on the relation of A. B. Avis, prosecutor, against the mayor and common council of the borough of Vineland, to review an ordinance. Ordinance set aside.

Argued February term, 1894, before DIXON and ABBETT, JJ.

Howard Carroll and Chas. K. Landis, Jr., for prosecutor. Royal P. Tuller, for defendant.

ABBETT, J. The writ of certiorari in this case removed into this court an ordinance passed by the mayor and council of the borough of Vineland, May 9, 1893, entitled "An ordinance for the removal of obstructions from Landis avenue, and to declare what are nuisances therein, between Eighth street and East avenue, within the borough of Vineland." This ordinance declared that certain trees on the northern and southern border of Landis avenue, between Eighth street and East avenue, and the grassy portions of said avenue on each side, were obstructions and nuisances in said avenue, and the road committee was directed to remove the same May 18, 1893. The borough claims the right to pass this ordinance and remove the trees and grass plots in question under paragraph 2, subd. 1, of section 12 of "An act for the formation of borough governments," approved April 5, 1878, Laws 1878, p. 407 (Supp. Revision, p. 46, § 14, par. 1). This paragraph gives the mayor and council of said borough power to pass, enforce, alter, or repeal ordinances to take effect within the limits of said borough for the following purposes, to wit: "(1) To declare what shall be considered nuisances in the streets, roads, lots, and places in said borough, and to prevent and remove all obstructions, incumbrances and nuisances in and upon any street, road, lot, sidewalk, inclosure or other place in said borough." This language does not authorize municipal authorities to declare anything to be a nuisance which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience. *State v. Mayor, etc., of Jersey City*, 29 N. J. Law, 170, 175. An ordinance passed without notice to the prosecutor, directing a committee to remove certain objects upon lands which had been occupied by the prosecutor for 25 years, because they were encroachments upon a street, *held void*. The power to prevent and remove all encroachments in or upon any street is only a police power, and does not extend to cases of a doubtful or uncertain nature, and which require to be first lawfully determined. *Dawes v. Mayor, etc. of Hightstown*, 45 N. J. Law, 127, 129. See, also, *Railway Co. v. Hunt*, 50 N. J. Law, 308, 314, 316, 12 Atl. 697. The power to declare what is to be considered nuisances in streets, and to remove encroachments and nuisances from highways, is a police power, ministerial in its nature, and designed to relieve the public from such obstructions in streets as are apparent or readily ascertainable, without the necessity

of adjudication. The power is capable of exercise only to the extent that the right is clear or reasonably known, and not so as to invade rights which, from their doubtful or uncertain nature, require a lawful determination. *Dawes v. Mayor, etc., of Hightstown*, 45 N. J. Law, 501, 503, 504. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him pro tanto of the enjoyment of such property. To find conclusively against him that a state of facts exists, with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The right to abate nuisances, whether we regard it as existing in the municipalities or in the community or in the land of the individual, is a common-law right, and is derived in every instance of its exercise from the same source,—that of necessity; but the necessity must be present to justify the exercise of the right, and, whether present or not, must, in ordinary cases, be submitted to a jury under the guidance of a court. The finding of a municipal body can have no effect whatever for any purpose upon the ultimate disposition of a matter of this kind. It is for the courts. *Hutton v. City of Camden*, 39 N. J. Law, 122, 130, 131. A thrifty tree in a public highway, the fee of the soil of which is in the abutting landowner, belongs to the abutting landowner (unless it has been planted by the public authorities), and he may have trespass against any person who cuts down any such trees growing on the side of the road, and left there for shade or ornament; for the freehold remains, subject only to the easement or right of passage in the public. Nothing is more common everywhere in our villages and agricultural districts than for the owners and occupants of the soil to have fruit, shade, and ornamental trees along the line of the public roads, sometimes in the line of the roads, sometimes on each side of the line; and it has been held that a road overseer cannot arbitrarily cut them down, and, if he did it in an improper case and maliciously, he was held liable to exemplary damages upon suit of the owner of the fee of the soil. *Winter v. Peterson*, 24 N. J. Law, 524, 527, 529, cited with approval in *Wuesthoff v. Seymour*, 22 N. J. Eq. 63, 70; *Bloom v. Stenner*, 50 N. J. Law, 59, 60, 11 Atl. 131. These standing trees were part of the inheritance, and a sale of them would have been a sale of an interest in land under the statute of frauds. *Slocum v. Seymour*, 36 N. J. Law, 138. If these trees were nuisances, trespass would not lie for their destruction by municipal authority. It is clear that these thrifty, ornamental shade trees are neither obstructions nor nuisances to Landis avenue, and the attempt to abate them as such is an exercise of arbitrary power, unwarranted in law, under the act invoked by the borough authorities.

There is also a serious question in this

case as to the extent of the dedication of that part of Landis avenue referred to in the ordinance. Charles K. Landis, the owner of lands at Vineland, and its founder, laid out the lands in question (with other lands), and he testifies that his surveys and survey books show the line of shade trees and grass plots, and the lands show it, as they have been in use for about 30 years in that section. He says that the trees sought to be removed are fine, handsome trees that have been growing there for 25 years or more. That they were set out in accordance with stipulations under which he sold the property, and that his surveyors, under his directions, gave the stakes to each settler where trees should be planted in accordance with the general system. That Landis avenue was of the width of 100 feet, to wit, a double row of shade trees upon that portion of Landis avenue. That the reason why he laid the avenue out 100 feet wide was not to have the whole 100 feet used as a roadway, but that it might serve the purpose of beauty and ornamentation; and that the central part only, which he dedicated for a roadway, should be used for that purpose. That his contracts for the lots in this section stipulated for the planting of a double row of shade trees on the sides of the road at proper distances apart. That the width of the avenue which he dedicated to the public, under the restriction mentioned, is 100 feet. The map on file in the county clerk's office appears to have been filed by Landis township, and not by Landis himself. When Marcus Fry, surveyor, was examined, a map or plan was put in evidence. He testifies that this map or plan was made from actual surveys; that these trees were planted according to the agreement under which these lands were sold; that the roadway has always existed as it is now, between these two rows of trees; that the map offered in evidence shows the measurement of the streets, the sidewalks, and the position of the grass plot and trees; * * * that on the original survey of Landis avenue there is something showing the dedication as shown on the map or plan offered in evidence; that the original surveys show that the trees were to be set out as shown on this plan. Dedication of a street must arise from some act of the owner of the land, and may be made cum onere. *State v. Society, etc.*, 44 N. J. Law, 502; *Ayres v. Railroad Co.*, 48 N. J. Law, 44, 48, 3 Atl. 885; *Id.*, 52 N. J. Law, 405, 410, 20 Atl. 54. The public cannot get anything more than he gives; and if he dedicates a street 100 feet wide, subject to the restrictions and use as mentioned, the public takes subject to the restrictions. The filing of a map and selling lands thereby would be evidence of a dedication, but, if he did not file the map, and did not adopt it, by reference thereto in his deeds, the filed map would not be conclusive evidence against him; and, if the map he made and sold lots by showed the trees set out to be as testified to by the

surveyor, it would be a question of fact to be determined by judicial authority as to whether this dedication of Landis avenue was not subject to the setting out and existence of these trees in accordance with Mr. Landis' scheme of ornamentation and use of this avenue. See *State v. Society, etc.*, 44 N. J. Law, 504, 507, as to existence of these trees from the beginning, as evidence of the making of dedication, and acceptance thereof, subject thereto. These trees are 16 feet apart; are all live and thrifty trees, from 20 to 40 feet high and from 6 to 20 inches in diameter (page 13); they do not interfere with the road way, or obstruct any of the passage ways on the avenue. It cannot be claimed with any show of reason or justice that these trees, under these circumstances, are nuisances or obstructions in Landis avenue which may be summarily removed as such by the borough authorities.

It is not meant to intimate in this case what power is given to the borough under the act entitled "A supplement to an act entitled 'An act for the formation of borough governments,' approved April 3, 1878," approved March 13, 1883. Laws 1883, p. 96 (Supp. Revision, p. 49, § 30). That act gives the borough authorities "general supervision, management, and control of the streets, avenues, roads, public places and sidewalks within the borough." The destruction of these trees as nuisances or obstructions cannot be justified under this act. Should the borough attempt to exercise absolute control over Landis avenue under this act, the question will then properly arise as to whether or not the dedication of Landis avenue was not a restricted dedication, contemplating the existence of these trees as part of the design and plan of the dedicatior. If the dedication was thus restricted, it would then be a question as to whether any such change in the street in removing these trees is not a taking of property, for which the owner of the soil is entitled to damages. The ordinance is set aside, with costs to the prosecutor.

WARE v. SUPREME SITTING OF ORDER OF IRON HALL.

(Court of Chancery of New Jersey. April 6, 1894.)

ANCILLARY RECEIVERS—TRANSFER OF FUNDS.

Where the rules of a foreign mutual benefit order provide for the control of the reserve fund of its local branches in other states by the supreme lodges, after a receiver is appointed therefor, and an ancillary receiver appointed for branches in another state, equity will decree that the reserve fund in such local branches in the hands of the ancillary receiver be turned over by him to the general receiver.

Petition by Charles F. Ware against the Supreme Sitting of the Order of the Iron Hall to have local receivers pay over the money to the general receiver. Petition granted.

Law 2, § 1, of the Order of the Iron Hall, v. 28A.no.17—66

upon which the decree is based, provides that the reserve fund of local branches shall be the property of, and under the control of, the Supreme Sitting, at all times.

Howard Carrow, for petitioner. Wm. J. Lewis, for respondent.

BIRD, V. C. The mutual benefit association known as the Supreme Sitting of the Order of the Iron Hall became organized by the adoption of the constitution and by-laws. The constitution provided for the creation of certain officers and a place of meeting for the transaction of the principal business of the association. Provision was also made for the creation of separate districts and local branches throughout the entire country. Many of these were created in most, if not all, of the states of the Union. The payments to be made by the different individuals who became members, and other conditions of membership, were also very explicitly laid down. The place of meeting of the Supreme Sitting of the Order of the Iron Hall was decided upon in the constitution, or fundamental charter, to be at Indianapolis, in the state of Indiana. After this association had been organized, and had been doing business for a number of years, a receiver was appointed to wind up its affairs, upon the allegation that it had become insolvent. At the time of the appointment of this receiver, there were a large number of the "local branches," as they are termed, in New Jersey, having a membership of about 4,000. Soon after the appointment of the receiver in Indiana, application was made to the court of chancery of New Jersey for the appointment of a receiver. A receiver was appointed, and ordered to collect and receive all the funds pertaining to such associations in the hands of the various local branches in this state. He has collected about \$72,000, and will probably be in receipt of several hundred dollars more. A petition has been filed by one of the members of the association living in New Jersey, asking for an order upon the receiver to pay the moneys now in his hands, and which shall come to his hands, to the receiver in Indiana. An order was made, directing the receiver to show cause why he should not be required to make payment accordingly. As many of the members of the local branches as could be reached within a reasonable time were notified of the time and place when the hearing would be had. Certain members have employed counsel on their own behalf to resist such order. They claim that it will be greatly to the benefit of the members in New Jersey for the court to order the receiver here to make distribution of the funds which he has, and which he shall receive, among the members of the various branches in this state. A very large number of other members, who are represented by counsel, urge the court to make the order prayed for.

Not only to judges, but to all ordinary busi-

ness men, and especially to most of those of the class which usually become members of such associations, the question here involved is exceedingly plain, and easy of solution. None are more susceptible of what is fair and just between men in their transactions than those last referred to. They are actuated, in the very inception of the undertaking, from an innate or heartfelt desire, not only to be benefited, but to benefit others. They realize as much satisfaction from the latter as from the former. The great majority of them engage in such enterprises without the thought of deception or intrigue; and, having entered into the enterprise from the highest motives, all they ask is to be saved from the intrigues and machinations of others, in whom they have confided. What, therefore, is the duty of the court, under the circumstances? I have said that the solution of the question presented is exceedingly simple and easy. So it is. It is simply such a question as arises almost daily in the execution of contracts. Nothing more, nothing less. What, therefore, was the contract? The object of the association was to create what is called a "benefit fund." Every person becoming a member, and complying with the conditions prescribed, was entitled to the benefits enumerated. One of the conditions was that all of the moneys paid in, except 20 per cent., should be forwarded by all the local branches in the different states to the Supreme Sitting of the Order of the Iron Hall, at Indianapolis; and, on certain conditions, the entire balance of such reserved fund was to be forwarded accordingly. These statements show precisely what the contract was. The members of the various branches throughout the entire country pledged themselves, each to the other, that they would perform or carry out this contract. They also pledged themselves, each to the other, that, in case any member failed to comply with the conditions of the contract, he would, upon certain terms, expressly provided for, forfeit all claim to any future benefits. The court, therefore, being called upon to exercise its authority in the premises, what can it possibly do, otherwise than to observe the terms of the contract, and make a decree accordingly? The court cannot establish a different rule in this case from what has always heretofore governed it. There is nothing to justify it in making a new contract for the parties, and in saying to the different members of the branches in New Jersey, if they have, peradventure, twice the amount of money that they would be entitled to under the contract, that they may retain it. There seems to be no principle which would justify a court of equity in encouraging such a breach of good faith; and I do not believe, for one moment, that any considerable number of the class who honestly enter into these associations would justify the court in participating in such manifest moral and legal wrong. I give them much greater and high-

er credit for just principles of action than is involved in such a supposition. The insolvency of the company does not alter the nature, or limit the extent, of the liability. Every individual member, notwithstanding his local habitation, is entitled to the enforcement of such contract, to the extent of the entire corpus or assets. It is impossible to conceive of a legal principle that would sustain any other proposition. The force of this doctrine is not diminished by what is insisted upon in some quarters,—that the members of the local branches are creditors of the association; for they are also members of the association, and part and parcel of it. They are contractors, as well as contractees; and, before they can claim the benefits which the latter are entitled to, they must perform the obligations resting upon the former. The receiver in Indiana not only represents the creditors of the Supreme Sitting of the Order of the Iron Hall itself, but he stands in its stead. Before he can pay, he must receive; and he has a right to say, "Give, and you shall be given unto." But it is said that, the money being assets of this association within the state of New Jersey, the courts will not direct its transfer to an officer in another state for distribution, but will rather provide for, or take care of, the just claims of its own citizens, in preference to those of any other state or territory. The general doctrine implied in this statement is unquestioned, and of frequent application. But in every such case it will be found that the basis of action lies in the nature of the contract, rather than the mere distribution of the assets. In other words, in such cases it is a contest or a race between different creditors of the same debtor, which creditors are under no obligation to each other, and have entered into no mutual compact. This cannot be said of the case we are now dealing with. Here there is but a single contract, and all the persons interested in these assets are bound, each to the other, by the terms of that contract. This contract provides for an equal distribution of the funds among all those who comply with its terms. This the court is called upon to enforce. For a court of equity to countenance any other rule of distribution than that of perfect equality would subject it to the severest criticism. Besides these principles, taking the statements of the amount of assets in the hands of the receiver in Indiana, and the amount which has come, or will come, to the hands of the receiver in New Jersey, the members in this state will be considerably benefited in case the receiver in this state is directed to pay such funds to the receiver in Indiana. Their share of the distribution of the whole amount of the assets through the Indiana receiver will be very much larger than they will receive if they are only permitted to share in the distribution of the funds in the hands of the receiver in this state. It is plain enough that if they do not

comply with the conditions of the association, and pay their shares of the funds contributed to the receiver in Indiana, he will be fully justified in refusing to acknowledge their claim to any distribution of the funds which he otherwise has control of. It should be borne in mind that this application is not made by the receiver in Indiana, but by a member of one of the branches in this state, and that he is supported by a very large proportion, and, so far as appears, by a large majority, of the members of the order in this state. The receiver in this state should be regarded as auxiliary to the receiver in Indiana. I think the views thus expressed are within the decisions of the courts pronounced in the cases of *Taylor v. Association*, 13 Fed. 495; *Relfe v. Rundle*, 103 U. S. 222; and *Parsons v. Insurance Co.*, 31 Fed. 305, 307. I will advise an order directing the receiver in this state to account to the receiver in Indiana for all the moneys which are now in, or which shall hereafter come to, his hands, less the costs, fees, and expenses which shall be allowed by this court, including the costs of this application.

STATE (ROEBLING, Prosecutor) v. BOARD OF PUBLIC WORKS OF CITY OF TRENTON et al.

STATE (GREEN, Prosecutor) v. SAME.

(Supreme Court of New Jersey. April 18, 1894.)

Writs of certiorari to review a resolution of the board of public works of Trenton authorizing the other defendant to construct an electric motor road. Denied.

W. S. Gummere and W. M. Lanning, for plaintiffs. James Buchanan and G. M. Robeson, for defendants.

VAN SYCKEL, J. Two writs of certiorari were allowed by me, one at the suit of Mrs. Emily W. Roebling, the other at the suit of Mrs. Ellen G. Green, certifying into the supreme court the resolution of the board of public works of the city of Trenton authorizing the Trenton Passenger Railway Company, Consolidated, to construct its road for the use of electric motors on West State street in the city of Trenton. The construction of the road is resisted by the plaintiffs in certiorari, who own lands fronting on said street. No provision has been made for acquiring the rights of dissenting landowners. The court of errors and appeals of this state has recently declared that it is an open question whether, under such circumstances, a passenger railway operated by electricity can lawfully be authorized to use the highway without the consent of the abutting landowners. There can be no question, therefore, that the plaintiffs were entitled to these writs. The Passenger Railway Company does not controvert the propriety of issuing these writs, but has applied for an order

vacating and setting aside the same so far as they operate as a supersedeas, or for an order defining to what extent the writs shall operate as a stay to the said defendant company in the construction and operation of its lines of road. The work of construction was commenced by the company in the night of the 6th of the present month of April. Mrs. Roebling sued out her certiorari between 5 and 6 o'clock in the morning of the 7th of April, and a few minutes before 6 o'clock it was served upon a director of the said company, and also on the superintendent, who was prosecuting the work of construction with a large force of men. The affidavits submitted on this application show that the work was proceeded with by these representatives of the company, in front of the premises of Mrs. Roebling, as if the writ had not been allowed, or served upon them, although they were warned that it operated as a stay. The granting of this application under the circumstances stated might impair the right of this prosecutrix to appeal to the court at bar to exert its power to restore the status quo. If the company had arrested the prosecution of the work as soon as the writ was served, this application could have been entertained, and it would have been entertained with a disposition to relieve the company, so far as it might be done without materially affecting the rights of the plaintiffs in certiorari. The attitude taken by the company constrains me to decline to interpose, and to leave the parties in the position in which the writ places them. What their respective rights are I do not now, sitting as a judge at chambers, undertake to adjudge. The application is denied, with costs.

The counsel for the plaintiffs stated on the argument before me that the writs were not intended to affect any part of the company's lines except that on State street west of Warren street. The company may safely accept this statement, and it may also, if so advised, renew this application at the June term of the supreme court, without prejudice from my refusal to grant it.

(56 N. J. L. 385)

HUDSON COUNTY CATHOLIC PROTECTORY v. BOARD OF TOWNSHIP COMMITTEE OF TOWNSHIP OF KEARNEY.

(Supreme Court of New Jersey. April 2, 1894.)

MUNICIPAL CORPORATIONS — ASSESSMENT OF BENEFITS.

1. A general act providing for the manner in which assessments for benefits derived from public improvements shall be made supersedes and annuls all special and local laws on the same subject.

2. But a general act which simply provides that assessments for the cost of such improvements shall be made upon all land and real estate benefited thereby, will not repeal an exemption from assessments contained in the charter of a private corporation.

3. The charter of a private corporation, which provides that the property and effects of

the corporation shall be exempt from the imposition of any tax or assessment, will exempt such corporation from assessments for benefits derived from public improvements as well as from taxation for purposes of general revenue.

Protestant Foster Home Soc. v. Mayor, etc., of Newark, 36 N. J. Law, 478, followed.

(Syllabus by the Court.)

Certiorari by the Hudson County Catholic Protectory, prosecutor, against the township committee of Kearney township, to review a grading assessment. Assessment set aside.

Argued before DEPUE, VAN SYCKEL, and REED, JJ.

Washington B. Williams, for prosecutor.
Edward Kenny, for defendant.

DEPUE, J. The assessment brought up by this writ of certiorari was made for grading, curbing, flagging, and paving Belgrave drive in the township of Kearney. The prosecutor is a charitable society, incorporated by an act passed April 4, 1872 (P. L. 1872, p. 1182). Section 5 of its charter is in these words: "The property and effects of the said corporation held and used for the purposes contemplated by this act shall be exempt from the imposition of any tax or assessment; provided, however, that the number of acres of land to be exempted shall not exceed twenty acres, and the amount of personal property to be so exempted shall not exceed ten thousand dollars." The assessment was made upon a lot of land containing about 2½ acres, parcel of a tract owned by the prosecutor, containing in all about 12 acres, on which the protectory buildings are erected, all of which is used for the purposes contemplated by the charter. The words "tax or assessment" in the prosecutor's charter include as well assessments for benefits derived from public improvements as taxes levied for general revenue. It was so decided by the court of errors and appeals in Protestant Foster Home Soc. v. Mayor, etc., of Newark, 36 N. J. Law, 478. The assessment, as well as the property on which it was laid, is within the exemption contained in the company's charter. By a special act applicable to the township of Kearney the township committee was authorized by ordinance to lay out and improve the streets, avenues, and public roads in the township, and to cause assessments to be made upon lands specially benefited, to defray the costs thereof, which assessments were to be made by commissioners of assessment, to be appointed, and to proceed in the manner specially pointed out in the act. P. L. 1871, p. 1371. In 1877, and after the constitutional amendments were adopted, a general act was passed, entitled "An act in relation to assessments in townships," approved March 9, 1877 (Revision, p. 1204). This act provided a method of making assessments for improvements in all cases by commissioners appointed by the circuit court, and by a procedure prescribed by the act. This act was amended in one of its sections by an act passed

in 1893. P. L. 1893, p. 379. This later legislation superseded and annulled the special law previously in force in the township of Kearney. Hoetzel v. East Orange, 50 N. J. Law, 354, 12 Atl. 911; State v. Mayor, etc., of Bayonne (N. J. Err. & App.; Feb. Term, 1894) 28 Atl. 713; State v. City of Passaic (N. J. Sup.) 28 Atl. 553. The assessment under review was made in compliance with the act of 1877 as amended in 1893. It was laid upon the lands of the prosecutor upon the assumption that if the later legislation superseded the special act previously in force in the township of Kearney, it also operated to repeal the provision in the prosecutor's charter which exempted its property from taxes and assessments. In this there was error. Under the common-law canons for the construction of statutes, where there were two acts on the same general subject, both expressed in the affirmative, the later act did not repeal the former without words of express repeal, unless there was such inconsistency between the two acts as disclosed a legislative purpose to repeal the former act by implication. The provision embodied in the constitution by the amendments of 1875 which prohibits private, local, or special laws in certain enumerated cases, and requires the legislature to pass general laws in such enumerated cases, established a different rule for the construction of statutes passed upon the enumerated subjects. A statute upon any one of the enumerated subjects, passed after the constitutional amendments became in force, must necessarily operate *ex proprio vigore* to supersede all special and local laws on the same subject, otherwise the later act would be special within the constitutional interdict. Hoetzel v. East Orange was decided upon this rule of construction. The latest cases to this effect are State v. Mayor, etc., of Bayonne (N. J. Err. & App.; Feb. Term, 1894) 28 Atl. 713, and State v. City of Passaic (N. J. Sup.) 28 Atl. 553. Among the cases enumerated in the constitutional provision are acts regulating the internal affairs of townships, which comprise all those acts which provide for making public improvements and laying assessments therefor. Hence the special law in force in Kearney township was annulled by the subsequent legislation without express words of repeal.

A different rule of construction applies in the case of the charter of a private corporation as distinguished from the charter of a municipal corporation. An exemption from taxation contained in a special charter of a private corporation may be repealed by a subsequent general act on that subject, although the latter act does not contain express words declarative of a legislative purpose to repeal private charters. But the intention to abrogate the exemption contained in the charters of private corporations, and to subject such bodies to taxation under a general act, must be plainly deduced from

the language in which the latter act is expressed. *Railroad Co. v. Miller*, 30 N. J. Law, 308, 31 N. J. Law, 521; *State v. Commissioners of Tax'n*, 37 N. J. Law, 228, 38 N. J. Law, 472. A legislative intent to repeal an exemption from taxation contained in the charter of a private corporation will not be inferred from a general act simply declaring that all lands should be liable to taxation, and repealing all acts and parts of acts inconsistent therewith. *State v. Minton*, 28 N. J. Law, 520; *State v. Branin*, *Id.* 484. The distinction between general tax laws which shall operate to repeal exemptions in private charters and those which will not have that effect is pointed out by Mr. Justice Van Syckel in *State v. Commissioners of Tax'n*, 38 N. J. Law, 472-476. The act under which this assessment was made contains no words of express repealer, nor does it contain any language indicating a legislative purpose to subject private corporations having provisions in their charters exempting them from taxes and assessments to assessments for public improvements. It simply provides that the commission in making the assessments "shall assess upon all the tracts or lots of land and real estate benefited by such improvement, such proportion of such costs, damages and expenses as will amount to benefits actually acquired by such lands and real estate," etc. It has been held repeatedly that a general enactment of like effect in a general act will not repeal an exemption contained in the charter of a private corporation. *State v. Minton*, *State v. Branin*, *State v. Commissioners of Tax'n*, *supra*. In the *Foster Home Soc.* Case the society was incorporated in 1849, and the assessment which was set aside was laid under the charter of the city of Newark of 1857. The assessment in that case was laid, as it was in this case, under a law which, in general terms, authorized the municipality to lay assessments for the cost of public improvements upon lands specially benefited. With respect to the construction of the charter of the prosecutor, and also as to the effect of the act under which the assessment was laid, the decision of the court of errors in the *Foster Home Soc.* Case is conclusive. The assessment should be set aside, with costs.

(52 N. J. E. 387)

WOLCOTT v. JACKSON.

(Court of Chancery of New Jersey. March 31, 1894.)

JURISDICTION IN EQUITY—REMEDY AT LAW—NEW TRIAL.

1. A court of equity will not entertain a bill for a new trial in an action at law when the party seeking such relief can obtain it by application to the law court.

2. By the statute of 1885 (Supp. Revision, p. 810) the time within which an application for a new trial may be made to a law court is made coextensive with that within which such

an application may be made to a court of equity.

(Syllabus by the Court.)

Bill by Eseck Wolcott, executor of the will of Eliza Harris, against Ruth Jackson, to obtain a new trial. Dismissed.

James Steen and Robert Allen, for complainant. Frank P. McDermott, for defendant.

VAN FLEET, V. O. The complainant's primary object in bringing this suit is to obtain a new trial on the ground of newly-discovered evidence. The material facts alleged in the bill are: The recovery by the defendant of a judgment against the complainant, in his representative capacity, on the 13th day of June, 1893, in the Monmouth pleas, for a little over \$475, for services rendered by the defendant to the complainant's testatrix. A rule to show cause why a new trial should not be ordered was afterwards on the application of the complainant, alleging, as his bill states, that he had obtained "additional evidence," granted, which, after argument, was discharged. The defense made to the defendant's action was that the testatrix, a few days before her death, settled with the defendant, and paid her in full, and took her receipt, written in testatrix's account book. Though the complainant made diligent search for the book containing this receipt, both before and after the trial, he was unable to find it, or to discover who had taken it, or what had become of it; but he has recently, and about the 1st of December, 1893, and after the discharge of the rule to show cause, discovered evidence which shows that the defendant, between the date when the testatrix died and the date when he took possession of her effects, fraudulently carried this book away from the house where the testatrix died to the house of another person, where it was destroyed by burning. This summary exhibits the complainant's whole equity.

It will be perceived that the newly-discovered evidence on which the complainant's bill rests consists entirely of the alleged abstraction and destruction by the defendant of the book containing the receipt. The defendant, on notice pursuant to paragraph 213 of the rules, moves to dismiss the bill on three grounds. As one of them, in my judgment, disentitles the complainant to maintain this action, that one alone will be considered. It is this: As the law now stands, the complainant has an adequate and complete remedy at law; or stated in another form, if he can establish a case which will entitle him to a new trial, he can obtain it on application to the court which pronounced the judgment against him. And it is manifest that if he can get adequate relief there, there is great propriety in compelling him to seek it there. That court has the prior jurisdiction, and cannot be ousted, according to established principle, except it is

made to appear that full and complete justice cannot be done there. The complainant's newly-discovered evidence does show not an equitable, but a legal, defense. The question which its production will raise is one which the defendant has a right, in the orderly and regular administration of justice, to have determined by the verdict of a jury. Consequently, if this court took jurisdiction, and on final hearing it should appear that the complainant was entitled to a new trial, it is plain that the only just and appropriate relief that could be administered would be to restrain the defendant from enforcing her judgment, unless she consented to a new trial at law. *Railroad Co. v. Titus*, 35 N. J. Eq. 384. To allow the forum of litigation to be changed simply to try the question whether or not a new trial shall be had, when that question can be just as fully and fairly tried by the court, which must try the case on its merits, if a new trial should be ordered, would be, to speak in the words of Lord Redesdale, just as unconscientious and vexatious a proceeding "as to bring into a court of equity a discussion which might have been had at law." *Bateman v. Willoe*, 1 Schoales & L. 201, 208. From the earliest times the cardinal rule of jurisdiction in this class of cases has been that, where the remedy at law is adequate, equity will not interfere; and it is only by a strict observance of this principle that the boundaries of the two jurisdictions can be properly maintained, and vexatious and ruinous litigation prevented. There was a time when the common-law courts of England did not grant new trials. During this period the English court of chancery sometimes arrested the enforcement of a judgment at law for the purpose of inquiring and deciding whether or not a new trial should be had in order to prevent serious wrong, but this power was always exercised with great caution. Since, however, the law courts of England and this country have exercised the power of granting new trials, a part of the original jurisdiction of courts of equity, in this class of cases has become unnecessary and obsolete. The pertinent doctrine now in force in this state was declared by the court of errors and appeals, speaking by Mr. Justice Reed, in these words: "The disuse of bills for new trials results from the fact that since the relaxation by the common-law courts of the rules for granting new trials scarcely any legal ground for a rehearing can now be asserted in a court of equity which may not be asserted with equal effect in the common-law tribunals. As the courts of law have extended their jurisdiction over this subject, courts of equity have in this instance withdrawn theirs, in accordance with the principle that, where a court of law can furnish an adequate remedy, equity will not interfere." *Hannon v. Maxwell*, 31 N. J. Eq. 318, 329. The words in italics have been interpolated, but it is quite evident that

they or equivalent words formed part of the opinion as originally written.

It remains to be shown that the complainant has an adequate remedy at law; in other words, that, if he has discovered new evidence which entitles him to a new trial, he can obtain it by applying to the Monmouth pleas. Formerly it was a rule of practice of all the law courts of this state that an application for a new trial on the ground of newly-discovered evidence must be made within the term at which the trial was had, and not afterwards. While that rule was in force, it was competent for this court to entertain a bill for a new trial in any case where the new evidence made a new trial necessary to the accomplishment of justice, and it was made to appear that the new evidence could not have been discovered, by the exercise of reasonable effort and diligence, in time to have been used on the trial, or on an application to the law court for a new trial. Had equity not assumed jurisdiction in such cases it is evident that a defeated litigant in a suit at law, who, according to the real truth of the case, had right on his side, would have been remediless; and that is a condition of affairs which no enlightened system of jurisprudence will tolerate. But the rule of limitation above mentioned has been abrogated. The period within which a law court may now grant a new trial is quite as unlimited as that within which this court may do so. By a statute passed in 1885 it is enacted "that it shall not be necessary to file a bill in equity to obtain a new trial in an action at law, merely because the term in which the verdict was rendered has expired, but a new trial may be granted by a law court after the expiration of the term." Supp. Revision, p. 810, § 12. There can be no question, I think, that, if the complainant can establish a sufficient case, he can, by force of this statute, obtain a new trial in the Monmouth pleas. The time within which he must make his application is not defined or limited by the statute, but, in order to put an end to the litigation, and to bring about a state of repose, he is required, by general principles of justice, to proceed with diligence, and make his application within a reasonable time. The purpose of this statute, as I think is manifest on its face, is merely to extend the time within which a law court may entertain an application for a new trial, and not to curtail or diminish the jurisdiction of this court; but, as it is a rule of jurisdiction of this court not to interfere in any case where an adequate remedy at law exists, even in cases where this court may exercise a concurrent jurisdiction with the law courts, and a law court has already acquired jurisdiction, it would seem to be entirely clear, in a case of this kind, where a law court already has jurisdiction, and the remedy at law is not only adequate, but more expeditious and less expensive than that which this court can give, that this court

should, in obedience to one of its own principles, decline jurisdiction. The complainant's bill will be dismissed, with costs.

(52 N. J. E. 12)

CONANT et al. v. BASSETT et al.

(Court of Chancery of New Jersey. April 2, 1894.)

CONSTRUCTION OF WILL.—VESTED INTEREST.—POWER TO DEVISE.

A testator gave property which he held by lease for years, to the executors of his will, in trust to manage the same and collect the income thereof, and, after making designated payments, to divide the net income semiannually, share and share alike, between his children,—his son, G., and his daughters, F. and K.,—so long as either F. or K. should live. *Held*, that G. took a vested right to one-third of the net income of the leasehold property until the survivor of his sisters should die, and that upon his death that right passed by his will.

(Syllabus by the Court.)

Bill by Ira M. Conant and Edward F. Anderson, trustees under the will of George W. Bassett, against Fannie D. Bassett and others, to construe the will.

George W. Bassett, of Orange, in this state, died on the 28th of April, 1887, leaving a will, in and by which, among other things, he did provide as follows: "Fifth. I give, devise, and bequeath unto Ira M. Conant, of Bridgewater, Massachusetts, to my son, George F. Bassett, and to my son-in-law, Edward F. Anderson, and to the survivor of them, and to their successors, all my right, title, interest, and leasehold estate in and to four contiguous lots, pieces, or parcels of land, with the appurtenances thereto belonging, and the buildings thereon erected, situate, lying, and being in the city of New York, and known as 'Numbers Fifty-Two and Fifty-Four Park Place and Forty-Seven and Forty-Nine Barclay Street,' in said city,—being the same premises mentioned and described in certain leases made to me by the trustees of Columbia College, in the city of New York,—together with all rights to renewals of said leases, and every right and interest connected therewith, in trust, nevertheless, to and for the following purposes: (1) That they take possession of said property, manage and control the same, collect and receive the rents and income therefrom, pay taxes, ground rents, premiums of insurance, and all other expenses connected with the management of the same; keeping the buildings thereon insured in solvent insurance companies, and rebuilding in case of the destruction of said buildings in whole or in part, using for that purpose any funds which may come to their hands, as trustees or otherwise, belonging to my estate; also keeping the said leases renewed, and doing whatever may be necessary in order to preserve and continue the term and rights granted to me by the said leases, and, generally, to use, manage, and control the said property ac-

cording to their best judgment and discretion, for the interests of my estate, so long as my daughters hereinafter named, or either of them, shall live. (2) That the net income derived from said premises (after the payment of the mortgage thereon as hereinafter directed) be divided and distributed semi-annually, share and share alike, between my three children, namely, my son, George F. Bassett, and my daughters, Frances C. Morrill, wife of Benjamin W. Morrill, and Kate E. Anderson, wife of Edward F. Anderson, for and during the continuance of the lives of the said Frances C. Morrill and Kate E. Anderson, and so long as either of them shall be living; and it is my wish, and I will and direct, that my interest in said property be not sold or disposed of until after the death of both of my said daughters. (3) I direct my trustees, who are also hereinafter constituted my executors, to pay off and discharge, as soon as may be after my decease, the mortgage for forty thousand dollars (\$40,000) upon my said leasehold property in Barclay street and Park place; and, for the purpose of paying said mortgage, they are to use any moneys which may be derived from my estate after setting apart and making due provision for the payment of the legacies hereby bequeathed, using for that purpose, if necessary, the net income which may be derived from the said premises. But the payment of the legacies herein bequeathed shall first be made, or the amounts thereof set apart for that purpose, before any incumbrance shall be paid off, and before any similar expenditure shall be made." "Eighth. All the rest, residue, and remainder of my estate and property, both real and personal, of which I may die seised or possessed, I give, devise, and bequeath to my three children, Frances C. Morrill, George F. Bassett, and Kate E. Anderson, to be divided between them equally, share and share alike; and, in case of the previous death of either of them, the issue of my said children, or the descendant of any deceased issue, shall take the parent's share; and if either or any of my said children shall not be living at my decease, and shall then have no lawful issue then surviving, then the share of such child shall go to my surviving child or children, and to the surviving children of any deceased child; the surviving children of the deceased child, in every case, taking the share which would have gone to his, her, or their parent, if living." "After the death of my said daughters, my said trustees, or their successors, may, in their discretion, sell the said leasehold premises above mentioned, and distribute the proceeds thereof as a part of my residuary estate, in the manner above directed." At the testator's death his three children were all living. Subsequently, on the 21st of May, 1891, the son, George F. Bassett, of East Orange, died, without leaving issue; having made his last will, by which

he devised and bequeathed his entire estate to his widow, Fannie Doremus Bassett, and constituted her the sole executrix thereof. The trustees now ask direction as to whom the share of the net income from the leasehold property designed for George F. Bassett, becoming payable after his death, shall be paid. By their respective answers, the defendants, Fannie Doremus Bassett, on the one side, and Kate E. Anderson and Frances C. Morrill, on the other side, claim it.

E. M. Colie, for complainants. Frederic W. Ward, for defendant Fannie Doremus Bassett. Spencer Weart, for defendant Frances C. Morrill. Francis J. Swayze, for defendant Kate E. Anderson.

MCGILL, Ch. The leasehold interest from which the income in question springs is for years, and is deemed personal estate. 1 Williams, Ex'rs, 674. It is observed that the net income is not made payable to a class, generally,—the testator's children,—so that upon the death of one the survivors will take (*Crane v. Bolles*, 49 N. J. Eq. 373, 384, 24 Atl. 237), but to his three children, nominatim, in defined proportions, so as to clearly import distinctness of interest among the objects of the gift (*Hawk. Wills*, 112; *Mason's Ex'rs v. Trustees*, 27 N. J. Eq. 47, 50; *Post v. Rivers*, 40 N. J. Eq. 21. The gift of the portions of the income is not made subject to a condition or precedent of any kind, and hence they are absolute and vested. *Hawk. Wills*, 223. No provision is made for the disposition of any share in case of the death of its donee during the continuance of the trust. Hence, the quantum of the gift to each donee is one-third of the net income, continuing until the death of both the testator's daughters. The gift of the income does not carry with it the whole or portions of the fund or corpus from which the income is to arise, because the time of enjoyment is not unlimited, but is expressly confined to the period of two lives in being. *Parker's Ex'rs v. Moore*, 25 N. J. Eq. 228, 234; *Hawk. Wills*, 123. Hence, it is neither expressly nor impliedly controlled by any provisions of the will which concern the ultimate disposition of the corpus. Upon this consideration, I am of opinion that, at the death of George F. Bassett, his right to one-third of the net income, payable periodically, as it should arise, so long as either of his sisters should live, was vested in him, and could be disposed of by him by will, and hence, that his widow, who is the executrix of his will, and the sole legatee thereunder, will take it. The complainants will be so directed. The gift of the income, as I have, in substance, said, is not so interwoven with the disposition of the corpus, from which it springs, as to be at all dependent upon that disposition. Its bearing upon the disposition of the corpus may, however, be a mat-

ter for consideration at the proper time. Particular provision for transmission of the corpus is made in the eighth paragraph of the will. The construction of that paragraph has been argued by counsel; but as the present emergency does not require a solution of the questions suggested by that argument, and the bill does not ask such solution, and it is obvious, upon perusal of the eighth paragraph, that, when the time for the disposition of the corpus arrives, parties not now before the court, to be bound by its decision, will be necessary to a complete and beneficial adjudication, I refrain from any expression of opinion at this time with reference to rights in the corpus. *Traphagen v. Levy*, 45 N. J. Eq. 448, 451, 18 Atl. 222; *Bonnell's Ex'rs v. Bonnell*, 47 N. J. Eq. 540, 543, 20 Atl. 895.

(56 N. J. L. 289)

JENNINGS v. BURNHAM.

(Court of Errors and Appeals of New Jersey.
April 6, 1894.)

PROPRIETARY LANDS—PARTITION—TRANSFER OF TITLE—PRESUMPTIONS—EJECTMENT—DEFENSES.

1. The customary practice of setting apart proprietary lands for the several owners who held the same in common was a mere mode of partition, and cannot be used for the purpose of passing title.

2. The proprietors cannot transfer title to their lands to a stranger by the use of a warrant and survey.

3. After a survey has stood upon the records of the proprietors without question for a great lapse of time,—in the present case for nearly 200 years,—it will be conclusively presumed that it had been inspected and approved of by the proprietors.

4. So, under such circumstances, the admission of such a survey as made in favor of a person described therein as the owner of two proprietries, will estop the proprietors from denying the fact that such person was such owner.

5. In ejectment it is not necessary that the defendant should prove title in himself; he will defeat the action by proving that it is out of the plaintiff.

(Syllabus by the Court.)

Error to circuit court, Ocean county; Van Syckel, Judge.

Ejectment by Isaac J. Jennings against William Burnham. From a judgment for defendant, plaintiff brings error. Affirmed.

I. W. Carmichael and B. Gummere, for plaintiff in error. Thomas E. French, for defendant in error.

BEASLEY, C. J. At the trial of this case the jury was instructed to find for the defendant. That result appears to us to be right on either of two grounds, viz.: First, that the plaintiff failed to prove title in himself; and, second, the defendant's proofs showed title out of the plaintiff.

First, with regard to the plaintiff's title. This is exhibited as follows: On May 20, 1884, as appears by the book of records of the proprietors, a warrant and memorandum were entered therein in these words, viz:

"To Charles E. Noble, Trustee of the Board of East New Jersey: (10,000) ten thousand acres of rights of location are hereby ordered by the council to you, as trustee of the board, and for the use of the same, until otherwise ordered." "Memorandum: That the board of inspectors of the eastern division of New Jersey, at a meeting held at the office of the surveyor general, at Perth Amboy, on the 20th day of May, 1884, resolved by unanimous vote that 10,000 acres of rights of location be set off and issued to Charles E. Noble, trustee, to be located and retained for the use of the board." This memorandum and warrant are certified by the register to be true copies "of a warrant ordered by the proprietors of East New Jersey, as appears in book of records." The record further shows a survey made and recorded by the authority thus stated. In addition to the foregoing muniment of title, the plaintiff put in evidence a deed from Charles E. Noble to himself for the premises described and embraced in the survey. It thus appears that the board of inspectors of the eastern division of New Jersey has attempted to convey to a stranger a portion of the land which was supposed at the time to be owned by it. Noble was not a tenant in common with the proprietors represented, it may be, by the board, but was a stranger to them, so far as these lands were concerned. The inquiry, therefore, supervenes, whence this power in the proprietors to convey the title to these premises in the mode thus set forth? As a mode of partition of these lands when held in common by the proprietors or with their grantees, the course of law by warrant and survey has been well known for many ages, and has always been recognized by the courts as a part of the local common law of this state. But this device had no effect upon the title. Its office was purely partitive. It distributed to each owner his quota of the land. It had the operation, and nothing but the operation, of a quitclaim deed made use of for the purposes of partition. This is the doctrine very distinctly stated by Chief Justice Kirkpatrick in *Arnold v. Mundy*, 6 N. J. Law, 1. And it is historically certain that it was by warrant and survey alone that in the western division of the province, from the beginning, these proprietary lands were allotted to each proprietor and each of his allenees, holding as tenants in common, while in the eastern division, before the surrender in 1702, it was the practice additionally to issue patents or grants under the seal of the province. After the surrender in both the eastern and western divisions, partitions of these lands were effected by means of warrants and surveys, without more. This peculiar procedure is set out at large, and with much clearness, in the historical document so widely known as the "Elizabethtown Bill in Chancery," which was filed in the year 1745. This is the view taken of the process in question in the case of *Estell v.*

Improvement Co., reported in 35 N. J. Law, 235: "A survey," it is there said, "under a proprietary title, is not a conveyance. It is an instrument *sui generis*, in the nature of a partition; a customary mode in which a proprietor has set off to himself in severalty a part of the common estate. The methods of proceeding with respect to these lands, have long been a part of the common law of the state, and have been *ex officio* taken notice of by the courts. They can be traced through the reported decisions, which clearly define their legal effect. Chief Justice Kirkpatrick, whose learning on the subject of land titles appears to have been very complete, in *Arnold v. Mundy*, 6 N. J. Law, 11, states in perspicuous terms the mode in which this description of property was distributed among the several owners. 'The proprietors of New Jersey,' he says, 'are tenants in common of the soil. Their mode of severing this common right is by issuing warrants, from time to time, to the respective proprietors, according to their several and respective rights, authorizing them to survey and appropriate in severalty the quantities therein contained. Such warrant does not convey a title to the proprietor; he had that before.' This being the use and scope of this abnormal procedure by warrant and survey, it appears to follow in logical sequence that the plaintiff in the case before the court altogether failed to show a right to sustain his action. His immediate grantor, Charles E. Noble, was not vested with title by virtue of the warrant and survey made under the authority of the board of proprietors, inasmuch as he was not a tenant in common with them.

The second topic for discussion relates to the title exhibited on the side of the defendant. This contention involves, as a fundamental proposition, that one Daniel Cox was at one time the owner of the premises in dispute. In order to evince this essential fact, a survey, certified as copied from the proprietary records, was produced. It is in the common form, signed by the surveyor of the proprietors. It begins by describing its own nature in these terms, *viz.*: "By warrant from the Proprietors of East New Jersey, dated May 20, 1690. Surveyed and laid out for Doctor Daniel Cox (in right of two proprietries), two thousand four hundred acres of meadow and upland at Barnegat, in two tracts." Then follows a description of the tracts surveyed, and included among them are the lands now in litigation. It is deemed of vital importance to settle with accuracy the legality and force of this alleged muniment of title, for the entire defense rests upon that inquiry. The objections to this part of the proof of the defendant's title were two in number. The first was that in those early times to which this transaction relates, in order to validate a survey of this character, it should have been inspected and approved of by the board of proprietors, and it

is insisted that there is no evidence in this case that this entry was thus sanctioned. We think the conclusive answer to this contention is that, after the lapse of over 200 years, it is a plain, legal presumption that every act and formality that were necessary to validate entries of this character were, in point of fact, performed. Bearing in mind that these surveys could not be made except by the order of the proprietors, that they were made exclusively by their own officer, and that they were entered on their own records by their own register, it is manifest the existence of such entry would per se and at once give rise to the inference, running close to demonstration, that it had the approval of those whose officers had made it, and entered it, and whose records contained it. In point of substance the record in question was made by the proprietors themselves; and if it had been made so late even as yesterday, the reasonable, and, indeed, the legal, conclusion would have been that the proprietors were privy to it, and that it had been sanctioned by them. And, if such an inference from so recent an act were disputable, most assuredly no jurist can doubt that, after such an entry has remained upon such a record, without challenge from any source whatever, for over two centuries, the legal presumption in favor of its authenticity is conclusive and absolute. In regard to ancient transactions, the well-known legal principle is that they are presumed to have been regularly performed if the contrary be not shown. This doctrine, in a concrete form, is exemplified in the case of *Improvement Co. v. Kerrigan*, reported in 31 N. J. Law, 13. There the inquiry was with respect to the legal sufficiency of the certificate of the acknowledgment of a deed which had been made and recorded before 1799. The act then in force prescribed that deeds might be recorded which had been acknowledged before certain officers, and the official certificate in that instance was that the grantor "had signed, sealed, and delivered the within deed in the presence of me, P. H., one of the judges of the court of common pleas, have perused the same, find no erasures or interlineations, and allow the same to be recorded." The court held that the certificate should be deemed sufficient, and that, if a verbal acknowledgment under the statute were necessary, it ought now to be presumed to have been made." In *Jackson v. Gilchrist*, 15 Johns. 89, a similar result was reached, the certificate in that instance setting forth that the grantor appeared before the judge "to acknowledge the deed," and that it ought to be presumed that he did acknowledge it." *Hunt v. Johnson*, 19 N. Y. 279, is an authority to the same effect. Numerous illustrations of the rule will be found in the notes in Whart. Ev. § 1318. By virtue of this doctrine, so useful that it is one of the necessary outgrowths of experience and common sense, it must be con-

clusively presumed that, with respect to the survey in hand, *omnia esse rite acta*; in other words, it is to be treated as a record entry duly inspected, made, and approved of by the board of proprietors.

With respect to the second contention, that at the time that this survey was made, and previous to the surrender of the proprietary government to Queen Anne, it was customary, in making partitions of this property, held in common by the 24 proprietors or their grantees, to supplement a warrant and survey with a formal patent or grant, it seems to the court sufficient to say that the history of this species of titles shows in the most conclusive manner that such patents were not deemed essentials of the partition act. From the first settlement of the western division of the state the shares of the common property were allotted by the use of the warrant and survey alone, and since that event such has been the practice in the eastern division as well as in the western. It is obvious that if a patent was an indispensable part of the partition of these lands before the surrender, similarly, afterwards, the property could not have been separated without its co-operation. Since the year 1703 the complete efficaciousness of warrants and surveys duly recorded as a mode of partition in this class of cases has been established by uniform practice, and has on many occasions received judicial recognition. If the doctrine required corroboration, such force has been imparted to it by the weighty sanction of Mr. Justice Bradley sitting in the circuit court of the United States in the case of *Baeder v. Jennings*, 40 Fed. 204. The conclusion of the court is that the survey before us effected the partition in question, unless it was deprived of its force by circumstances existing at the time, as is alleged, and to which it is for a moment necessary to advert. We have seen that these proprietary lands were divisible among the several tenants in common by means of these warrants and surveys; that the entire effect of such a process was to allot the land, in severalty, to the various owners; and that the title could not be transferred by its use. On the assumption of the correctness of this theory, the counsel of the plaintiff insisted that the survey before us was inoperative and void, on the ground that Daniel Cox, in whose favor the above-mentioned survey was made, was not a co-owner of these proprietary lands, and, consequently, this method of proceeding in question was inapplicable and inefficacious. In elaborating this point, counsel at great length criticised the various conveyances which went to make up the title of Mr. Cox, and, as a result, contended that it was not sufficiently shown that he was a tenant in common with the other proprietors, the corollary being that the attempted partition had nothing to operate upon. But I have not found it necessary to enter upon the discussion alluded to,

as it seems to me obvious that it is entirely irrelevant to this case in its present attitude upon this record. This conclusion has its basis in the fact that the plaintiff, as the grantee of the board of proprietors, does not occupy a position which gives him a right to challenge the title in question. He is estopped from raising up such a contention, because the board of proprietors are so estopped. It will be remembered that the survey above expounded is prefaced with a declaration in these words, viz.: "By warrant from the Proprietors of East New Jersey, dated May 20, 1690. Surveyed and laid out for Doctor Daniel Cox (in right of two proprietries), two thousand four hundred acres," etc. A propriety was the one twenty-fourth part of all the undivided proprietary lands in the eastern division, so that the proprietors, by a formal entry on their own records, admit that Mr. Cox, at the time in question, was the owner of the one forty-eighth part of such lands; and, acting on this admission, they set off to him a part of his share in severalty. After such an admission and such action, and especially after the lapse of nearly two centuries, it is deemed indisputably clear that this plaintiff is precluded from denying the legal existence of the title so conceded. It will be observed the posture of affairs is this: In 1703 these grantors of the plaintiff admitted on their records that Mr. Cox owned two proprietries, and on that admitted state of facts they set off to him, among other tracts, the premises in question; and now, after the passage of over a hundred and ninety years, it is sought to be shown that the admission in question was a mistake, and that the act of partition founded on it was likewise a mistake. Such a position is conspicuously futile on two grounds: It is founded on the erroneous assumption that a mistake of the kind alleged can be corrected after such a great lapse of time, and that it can be corrected in a court of law in an action of ejectment. This branch of the defense must be rejected on the ground just stated. So it is deemed it is equally unavailing by force of the statute of this state enacted June 5, 1787. The third section of this law enacts "that any survey, made of any lands, within either the eastern or western division of the proprietors of the state of New Jersey, and inspected and approved of by the general proprietors, or counsel of proprietors of such division, and by their order or direction entered upon record in the secretary's office of this state, or in the surveyor general's office in such division, shall, from and after such record is made, preclude and forever bar such proprietors and their successors from any demand thereon, any plea of deficiency of right or otherwise notwithstanding." In the case already referred to of Baeder v. Jennings, Mr. Justice Bradley expresses the opinion that this act is retrospective in its operation,—a view that is considerably fortified by the

fact that the statutory preamble declares that one of the legislative purposes is to quiet claims and secure titles. Although the statutory language is somewhat ambiguous on the subject, I incline to concur in the construction thus expressed, being influenced in considerable degree by the consideration that the section just recited is in reality an affirmation of the common law; for these surveys, as we have seen, are validated and made conclusive by the principles of that system.

Another subject that was elaborately discussed in the briefs of the counsel of the plaintiff will be disposed of in a word, as it also is deemed irrelevant to the inquiry before the court. The theme alluded to was a consideration and criticism of the various links of the defendant's title between the above-named Daniel Cox and himself. It is undeniable that if the defendant proves a title out of the plaintiff he succeeds in defeating this action, and, consequently, when he exhibited a title in Daniel Cox to these premises in severalty by force of the survey above discussed, it became of no importance whether that title was devolved according to law upon him or not. Let the judgment be affirmed.

(52 N. J. E. 539)

CHADWICK v. CHADWICK.

(Court of Chancery of New Jersey, April 7, 1894.)

DIVORCE—GROUNDS—PLEADING AND PROOF.

In an action for divorce by the wife for cruel treatment, where the only cruelty charged is the use of abusive and filthy language, gross abuse of marital rights is not available.

Petition of Armenia Chadwick for a decree of limited divorce from Albert F. Chadwick. Decree for defendant.

J. H. Reynolds and Eugene Emley, for petitioner. Wood McKee and John W. Griggs, for defendant.

GREEN, V. C. The marriage of these parties was no love romance. He was a widower, 40 years of age, with 4 children, whose ages ranged from 11 to 3 years. She was a spinster, 32 years old, who had for some years maintained herself by her occupation of stenographer and typewriter. Their wooing consisted of negotiations carried on through a matrimonial agency in New York City, and resulted in their marriage in Brooklyn, March 24, 1892. It could scarcely be expected that their union, having its inspiration in such methods, would be at once characterized by the loving devotion or cheerful self-sacrifice which so largely contributes to married happiness. He was the principal of a public school in Paterson, and did not think his salary justified him in a certain style of living, which his wife says she had every reason to expect. It is evident that her disappointment was keen when she real-

'zed the responsibilities of the household, and the care of her husband's small children. After a short season of comparative harmony, there were occasions of disagreement, more or less violent in character. The defendant's mind, from some cause, became affected, and, after examination by physicians, he was, about April 30, 1892, a little over a month after his marriage, sent to the State Insane Asylum, at Morris Plains, as suffering from an "acute attack of primary dementia." He remained at the asylum until about the 2d of July following, when he left there, and went to a relation's, where he remained five weeks, and returned home the last of August. From this time on there is complaint by the wife of unkind treatment, with occasions of abuse, culminating in a serious quarrel on December 23, 1892. Each charges the other with the blame for this outbreak, and claims to have been more or less injured by the other. This is the only occasion, so far as the evidence shows, when she suffered physical injury from his violence. On Christmas day following, however, they came to an agreement with references to their differences, and mutually signed a compact as to their future conduct towards each other and the children. This was followed by a resumption of marital relations, and the incident of the reconciliation and its accompanying cohabitation must be regarded as a condonation of previous offenses of a violent character. The petition is for a limited divorce and alimony, on the ground of extreme cruelty. To warrant such a decree in this case, it must appear that the defendant, after condonation, was guilty of some matrimonial offense which was sufficiently aggravated to be a cause itself for limited divorce, or of such character and degree as to revive the offense condoned.

No specific charge of physical violence between December 23, 1892, and March 7, 1893, when Mrs. Chadwick left her husband's house, is made in the petition. It avers that for a time after Christmas day his conduct was more quiet and peaceable, but that he soon again fell into his habits of abuse by degrees, and became more and more violent in his language, and used vile and filthy language against her, in the presence of the children; that the violence increased until the 7th of March, when she became so shattered in health, and so much in fear of physical violence, that she could endure his cruel treatment no longer, and that she thereupon left his house; that, for four months prior to her leaving her husband's said house, she was in constant fear of physical violence, so that her nerves were shattered, her health was impaired, and she could neither eat nor sleep. It will be noted that there is here no specification of any attempt or threat of personal violence, and she states no acts which led her to fear such injury. Whether such fears were well founded or not we have no means of knowing, other than she says

that she experienced them. The only direct charge of any kind of cruelty during this period is that he used abusive language to her. She does say, however, that, from this constant dread, her nerves were shattered, and her health impaired, so that she could neither eat nor sleep. In her testimony she says that his treatment affected her nervously, and broke her down, resulting in disease of the uterus, for which she has since been treated. She is, of course, competent to speak of the state of her health and nerves, but it is very questionable if she is competent to testify as to the causes of their condition. She says, further, that after Christmas he treated her a little better, but gave her no assistance in the house, and that the abuse complained of on almost every occasion or three quarters of the occasions came from her reluctance or refusal to gratify his sexual desires, and that on such occasions he called her vile names and used opprobrious epithets. It is only due to him to say that he explicitly and emphatically denies the latter charge. I am forced to the conviction that her testimony in this regard is much exaggerated. The defendant is a man of education and culture and of seeming refinement. There was nothing in his conduct or appearance on the stand to indicate that he would indulge habitually in the vile and violent language attributed to him. The above, however, is the only specification of cruelty in the interval between Christmas and her leaving that she gives in her testimony. The other incidents spoken of do not, it seems to me, justify any fear of personal violence. Her testimony, as well as that of her physician, Dr. Unger, and the fact that there was but one occasion when she suffered from his violence, develops, in my judgment, the true reason for not only her condition of health, but for her leaving her home, and that is the excess—it may be the abuse—by the husband of his marital privileges. Dr. Unger says that she was suffering from enteritis and vaginitis, and she attributes such condition to undue sexual intercourse. Gross abuse of marital rights is a ground for a divorce *a mensa et thoro* for extreme cruelty (*Moore v. Moores*, 16 N. J. Eq. 275; *English v. English*, 27 N. J. Eq. 71, 579); but it is not available under a general charge of cruelty, and, if so given, must be disregarded as irrelevant (*Moore v. Moores*, supra). There is stronger reason for these rules when the only specification of cruelty charged is the use of vile and filthy language. On the first attempt by counsel to introduce evidence of the abuse of marital rights, defendant's counsel objected, and the objection was sustained, except so far as it might relate to the occasions when physical violence was charged in the petition. These were all before the condonation. There is no evidence, in my opinion, of conduct on the part of the husband after December 25, 1892, on which

to base a decree, on the ground of extreme cruelty, or which would revive the matrimonial offenses condoned, as I think the evidence of his having employed abusive and vile language is very much colored. Nor, in my judgment, did the wife leave her husband's house on March 7th from any fear of personal violence at his hands, or for any reason other than an aversion to gratify his carnal desires. The incidents of her leaving, her visit to his school, her promise to return shortly, her promise to come back if he would treat her differently, as well as various later occurrences, show that she was in no fear of his injuring her physically by angry and cruel treatment. Neither of these parties is without blame. Each was, as is usual in cases where marriage is the result of negotiation, rather than affection, deceived as to the other's means. She manifested on the stand, as a witness, her disappointment, not only with the home surroundings she found, but with her husband's ideas of economy and duty. He, on his part, whether from his mental misfortune or not, manifested, particularly in his letters, an exacting and complaining disposition, making serious charges with reference to trivial acts, and posing as a master, rather than as a husband. But if the cause of this separation, as I gather it from the whole case, is to be considered, there is no evidence that until this trial he knew as a medical fact, from professional sources, that his wife's physical condition could be attributed to his marital excesses. I am not prepared to say that, had he had such knowledge, he would not have restrained his indulgence, and that a resumption of their relations might not be had with entire safety to the wife's health. Separation from bed and board is mainly as a protection against future probable acts of cruelty, this probability being based upon the former conduct and the character and disposition of the parties. *English v. English*, supra. They have both acted in a most foolish and reprehensible manner, not only in their personal treatment of one another, but also in their correspondence, but each professes a certain amount of affection for the other, possibly as much as under existing circumstances could be expected; and I do not think the court should, by its decree, now legally separate them for a definite time, or until they mutually apply for its rescission, the husband in the meanwhile maintaining the wife, living away from him and his home.

(53 N. J. E. 447)

GREENWOOD v. HENRY et al.

(Court of Chancery of New Jersey. March 31, 1894.)

WITNESS—TRANSACTIONS WITH DECEDENT.

Suit for specific performance of a contract dealing with both real and personal estate, brought by one party against both the personal representative and the heir at law, who is also

sole next of kin of the other party to the contract. On the trial the heir at law was offered and sworn as a witness, and testified to transactions with, and statements by, the deceased party. *Held*, that thereby the complainant was made a competent witness under the act of February 25, 1890 (P. L. p. 52), and the canon laid down in *McCartin v. McCartin*, 17 Atl. 809, 45 N. J. Eq. 265.

(Syllabus by the Court.)

Bill by William M. Greenwood against Adelaide H. Henry and another for specific performance. Decree for complainant.

R. V. Lindabury and W. H. K. Davey, for complainant. Robert E. Chetwood and F. M. Voorhees, for defendants.

PITNEY, V. C. This is a bill for specific performance of a written contract, in these words: "Lorraine, March 9, 1892. Know all men by these presents that William M. Greenwood agrees to work faithfully for Mrs. Eliza R. Thompson as a general manager of all her business, to do any kind of work that he may be called upon to do, for the period of her lifetime. In consideration of the services to be performed, the said Eliza R. Thompson agrees to that William M. Greenwood is her sole heir to all my real estate and personal property. We have signed as above dated. Eliza R. Thompson. W. M. Greenwood." Mrs. Eliza R. Thompson, one of the parties to the contract, died on the 19th of July, 1892, intestate; leaving the defendant, Mrs. Adelaide H. Henry, her only heir at law, and sole next of kin. Administration of her estate was granted to the defendant Ogden, and on the 28th of September, 1892, this bill was filed against Mrs. Henry, as heir at law, and Mr. Ogden, as administrator, setting out the contract; alleging its performance on the part of the complainant, and that the deceased died seised of real estate in both New Jersey and New York,—that in New Jersey being described by metes and bounds,—and also possessed of personal property of considerable value, which had come to the possession of the defendant Ogden, as administrator; praying specific performance of the contract, and that the complainant may be adjudged and decreed to be entitled to all the property, real and personal, of which Mrs. Thompson died seised and possessed, and that Mrs. Henry may be decreed to convey to the complainant all the real estate of which Mrs. Thompson died seised, and that the defendant Ogden be required to pay and deliver to the complainant the personal estate of Eliza R. Thompson which may remain in his hands after settlement of his accounts. Both the defendants answered, denying the execution of the contract by Mrs. Thompson, and also its performance by the complainant. At the hearing the defense mainly relied upon was that the signature of Mrs. Thompson to the contract in question was not genuine, but was forged by the complainant, or by his procurement.

The defendant Mrs. Henry was offered as a witness on behalf of the defendants, and testified to conversations and transactions with the deceased, and between deceased and the complainant. Subsequently, the complainant was called in his own behalf and was permitted, subject to timely objections made by the defendants, to give evidence upon the whole case, including conversations and transactions with the deceased, the question of the admissibility of the evidence being reserved for the final hearing.

I conceive it to be convenient to determine this question of competency at the start. The objection raised by the defendants was, of course, based upon the fact that the administrator is sued in a representative capacity, and was not sworn as a witness. On the other hand, the claim for the competency of the evidence is based upon the ground that Mrs. Henry, the heir at law and next of kin, is also sued in a representative capacity, viz. as heir at law, and was offered and sworn as a witness in her own behalf, and testified as above stated; and hence it is claimed, under the canon laid down in *McCartin v. McCartin*, 45 N. J. Eq. 265, 17 Atl. 809, the complainant, as the opposite party, is rendered competent to give testimony on all subjects. If this suit had been confined to a recovery of the realty, and Mrs. Henry was, as well she might be, the only party defendant, the complainant's position would have been above dispute, for Mrs. Henry would have found herself in this dilemma: If she was not sued in a representative capacity, then complainant was clearly competent. If she was sued in a representative capacity, she had rendered him competent by offering herself as a witness, and testifying in her own behalf, within the interdicted range. The real merits of the question are not changed by the fact that complainant, by his suit, claims the personal estate, as well as the realty, and makes the personal representative a party, since Mrs. Henry is sole next of kin, as well as heir at law, and is the only person in the least degree interested adversely to the complainant in any part of the estate. The amount of the indebtedness of deceased was but trifling, as compared with the amount of the personal estate; so that Mrs. Henry, as sole next of kin, was clearly master of the suit, and entirely responsible for being called as a witness. Nevertheless, the bar of the statute against the evidence in question remains, unless Mrs. Henry was sued in representative capacity, and its competency must be determined accordingly. The precise question arose in *Colfax v. Colfax*, 32 N. J. Eq. 206,—an exactly similar case,—and it was there decided by Chancellor Runyon that the heir was sued in a representative capacity, and that the complainant, who stood precisely as does the complainant here, was not a competent wit-

ness, unless made so by the action of the defendant. The same rule was laid down by the supreme court in the very recent case of *Joss v. Mohn* (N. J. Sup., June 1, 1893) 26 Atl. 987. That was an action brought upon contract for money loaned, against the devisee of the original borrower, and it was held that the defendant was sued in a representative capacity, and that the plaintiff was not competent. That decision renders it unnecessary for me to consider whether or not the intervening cases of *Hodge v. Coriell*, 44 N. J. Law, 456, on error 46 N. J. Law, 354; *Palmateer v. Tilton*, 40 N. J. Eq. 555, 5 Atl. 105; and *Crimmins v. Crimmins*, 43 N. J. Eq. 86, 10 Atl. 800,—can be reconciled with the earlier case of *Colfax v. Colfax*. The defendant Mrs. Henry being thus sued in a representative capacity, and having been offered and sworn as a witness in her own behalf, and having testified to conversations with and transactions by her ancestor, she thereby, under the canon laid down in *McCartin v. McCartin*, rendered the complainant competent to give testimony on all subjects. Notwithstanding my opinion as to the competency of that part of the evidence of the complainant which was objected to, I shall consider the case, at first, as if the evidence had been excluded; so that, in case it should be held, upon appeal, that I am wrong in my conclusion as to its competency, the court may have the benefit of my views upon the effect of the evidence, other than that which was objected to.

Mrs. Thompson, the decedent, was born in Cincinnati, Ohio, according to Mrs. Henry, in 1827, and was, on that assumption, about 65 years of age at the time of her death. Her counsel, Mr. Chetwood, stated her age at 62. Her husband was also a native of Cincinnati, or its vicinity; and they spent their youth, and were married, and lived there until some time previous to the Civil War, when they removed to the east, and the husband engaged in business in New York City. They at first lived in Brooklyn, but removed to New Jersey some 25 years ago, and had lived most of that period in the house where they both died. It was situate at a place called Dark Lane, a little over two miles from Elizabeth, and near Roselle, on the Central Railroad. They never had any children. Mrs. Henry was the half-sister of Mrs. Thompson, and some six or seven years, at least, older than she, having been born in 1821. Mrs. Thompson's husband died in 1888. The complainant was also born and bred, and always lived, in Cincinnati, and was a cousin of Mr. Thompson; and, according to his evidence, there was great intimacy between the families, Mr. Thompson and Mrs. Thompson being frequent visitors at complainant's father's house during complainant's childhood. At all times, as complainant swears, both Mr. Thompson and Mrs.

Thompson manifested a great liking for him, and he frequently expressed a desire to adopt him as his own child. After Mr. Thompson moved to the east, he and his wife made frequent visits to Cincinnati, where all their relatives resided, and on those occasions he repeated his expressions of desire to adopt the complainant; and, after complainant had arrived at manhood, he several times visited Mr. Thompson at the east, the last visit being made while he was on his deathbed. Mrs. Thompson was a woman of rather vigorous intellect, not very thoroughly developed by education, and with some capacity for business,—sufficient to enable her to look out tolerably well for her own interests,—but not enough to enable her to feel that she could do without the advice of a competent business man. She had a small farm surrounding the house in which she lived, at Dark Lane, and a year or two before her death a Mr. A. D. Thompson, who was no relative of her husband, conceived the idea of developing the neighborhood into a suburban town, and establishing a railway station there, and purchased property for that purpose,—among others, the greater part of Mrs. Thompson's farm. She also bought of him some new houses, with lots, in the neighborhood. This increased her care of looking after her property, and she continually sought the advice and assistance of others. A Mr. Silas D. Drake, a real-estate agent of Elizabeth, who was associated with Mr. Thompson in the development of the new town at Dark Lane, now called Lorraine, was consulted by her frequently,—almost daily. She occupied so much of his time, and with so little compensation, that the affair became irksome to him, and he suggested that she should get somebody else to act as her adviser. In the fall of 1891 she told him that the only relative she had was a cousin, naming the complainant, who lived in Cincinnati, and that she had written to him to come east, and live with her, and look after her affairs, and that he was coming as soon as he could arrange his business. She mentioned this to Mr. Drake on more than one occasion. Another acquaintance whom she consulted about her affairs was a Mr. Samuel Lewis, a carpenter and builder in Elizabeth; and she also stated to him and to his mother, who visited her socially, that she had written to Mr. Greenwood, the complainant, and expected him to come on and live with her. Mrs. Thompson was addicted to drink,—not daily, but by “spells,”—and carried it so far as to be subject to attacks of delirium tremens. There is no proof that she ever had such an attack before her husband's death; but Dr. Pierson, a respectable practitioner of the neighborhood, swears that she was seriously intoxicated on the occasion of her husband's death, and that he had attended her, between that time and her own death, some three or four times, for delirium tremens, and had also, on a few

other occasions, given medicine to a serving man, for her, for the same symptoms. This weakness of Mrs. Thompson was known to a few, only, of her neighbors. Neither Mr. Drake nor his son, who saw her frequently, nor Mr. Lewis, ever saw her when they thought she was intoxicated. It would seem that there was nothing in her appearance to indicate that she was the victim of this habit, and it did not affect her mind or general business capacity. Her family, after her husband's death, consisted of herself and a mulatto named John Smith, and, for the greater part of the time, her half-sister, Mrs. Henry. When Mrs. Henry was not with her, she may, at times, have kept a female servant. When Mrs. Henry was with her, she acted as such; and Mrs. Thompson did not introduce her to her friends as her sister, but stated, to some of them, at least, that she was a mere servant in the house. The evidence tends to show that she had no fondness for her sister. She was addicted to gusts of passion, and, on the occasion of one of them, drove her sister out of the house, and kept her away for a considerable time; and it is a fair inference from the evidence, both of Mrs. Henry and of Mr. Greenwood, that she felt obliged to support her, either by keeping her at her house, or paying her board when she was at Cincinnati. The mulatto, John, occupied an equivocal position in the house. He had a room, and took his meals, there; paid no board, but did the night and morning work about the house and barn, took care of the horse and cow, and carried in fuel, and so forth, as an offset to his board. In the daytime he worked for the neighbors, and received his pay for it; and, according to his story, when he worked for Mr. and Mrs. Thompson at other work than the chore work about the house and stable, he received payment in cash for it. Mrs. Thompson expressed a strong desire to be rid of John from her house, but was afraid to turn him away, lest he might set fire to her buildings. He had brought forward a large claim for services in years gone by, the payment of which he demanded as a condition of his leaving. He, too, was addicted to drink. In the latter part of January, 1892, during the absence for several weeks of Mrs. Henry, Mrs. Thompson—probably, while intoxicated—happened to fall and break a rib. Dr. Pierson was called in, and found her intoxicated, and with this rib broken. That was on the 28th or 29th of January. He got her to bed, and bandaged her person, and sobered her up. On January 31, 1892, while in bed with the broken rib, but after, as I understand the doctor's evidence, she had substantially recovered from her intoxication, the complainant and his younger brother, Charles W. Greenwood, made their appearance. Mrs. Henry had been sent for, and had returned to the house. Charles says he came on with his brother, understanding that his brother had been in-

vited to come by Mrs. Thompson to stay and live with her, and take charge of her affairs, and also says that Mrs. Thompson, on their arrival, so expressed herself to him. He further says that Mrs. T. inquired why he had not come sooner, and expressed satisfaction at his arrival, and, in the course of the conversation, stated that she and her husband had desired to adopt William as their child, when a baby; and that she offered to pay the traveling expenses of both for the journey, and, upon its being declined, remarked that it made no difference, as Will would get it all when she was gone. Charles stayed a day or two, and left his brother there. From that time on until Mrs. Thompson's death, on the 19th of July, the complainant lived with her, and devoted his whole time and attention to the care of her business and grounds, and horse and cow, and so forth; attended to the tearing down of an old barn, and the building of a new one; took care of her garden; advised her about her affairs; and in fact did everything that could be done by any man for her. So that the evidence satisfactorily establishes the performance by Mr. Greenwood of his part of the contract set out in the bill, after it was made, if it ever were made.

Mr. Robert E. Chetwood, of Elizabeth, had been Mrs. Thompson's counsel for years, had done all her legal work, and had the greater part of her securities and papers in his possession. A few weeks or months before she died, her attention had been called to the value of a house and lot upon which she had taken a mortgage to secure a loan of \$1,500, which business had been transacted through Mr. Chetwood; and her information was that the security was very scanty for that loan, and she learned that he had received a commission of \$50 from the borrower for his services in the affair. This displeased her, and caused her to distrust Mr. Chetwood, and she went to Mr. Davey, and consulted with him about taking her papers out of the hands of Mr. Chetwood; and while the affair was in that situation she died, suddenly,—so suddenly that there was no time for the attendance of a physician. Mr. Chetwood, who was supposed by the mulatto, John, to be still her counsel, was notified, and came to the house about 2 o'clock,—a few hours after she died. Before entering the house, he met Mr. Greenwood, and had a conversation with him, in which Mr. Greenwood told Mr. Chetwood that there was a will; and, in reply to a question as to its contents, Mr. Greenwood said that its contents would appear when it was produced, and that it would be produced. This is Mr. Chetwood's account. Mr. Chetwood, with Mrs. Henry, proceeded to search the house that afternoon for a will, and found none; and he made a further search with Mr. Davey two weeks later, and found none. The very day of, or the day after, Mrs. Thompson's death, Mr. Greenwood called, on an er-

rand, upon the undertaker who had charge of the remains, and was to conduct the funeral, and showed him a paper in the nature of a will, purporting to be signed by Mrs. Thompson, and the signature to which was looked at and recognized by the undertaker as the signature of Mrs. Thompson. It was unwitnessed, and Mr. Greenwood asked the undertaker's advice about it, and he advised him to go to a lawyer with it. The same or the following day, and before the funeral, Mr. Greenwood called upon Mr. Davey, his present solicitor. He knew that Mr. Davey had been consulted by Mrs. Thompson with regard to her affairs, as hereinbefore stated, and he was present at her interviews with Mr. Davey. He told Mr. Davey that he had papers to show that he was entitled to Mrs. Thompson's estate, and produced a testamentary writing, which I am satisfied is the same he had previously shown to the undertaker, and stated at the time he produced it that he had another paper at home, which he had not brought. Mr. Davey examined it, told him that, as it was not witnessed, it was of no value, and asked him to bring his other paper. This he did in a day or two. I infer it was the day of, or the day after, the funeral; and he then produced and showed to Mr. Davey the contract above set forth, upon which this suit is founded. Mr. Davey has had possession of it ever since, until it was offered in evidence. It has a creased and worn appearance, and Mr. Davey testified that it had the same appearance when it was handed to him, and did not appear to have been recently written. His evidence in this respect I conceive to be entirely reliable, and it is supported by a photograph which he himself took of the paper shortly after it was handed to him. The contract has already been set out. The testamentary writing is in these words:

"Lorraine March 21
1892

"To all whom it may concern I Eliza R. Thompson do here state as hereinto affixed and being in sound mind and worthy of good credit, I sincerely declare to be true that my horse Jenny and my Cow Dasey for their subsistence, for as long as they may live \$100 00-100 each and every year as long as Jenny the horse and Cow Dasey may live, and as to Fox the Dog and Rover the Dog, say \$50. 00-100 a year or as long as they may live and as to my two Cats Blackey and Stripey I promise for the subsistence for one year or as long as they live \$25 00-100 together for the two Cats as mentioned above and as to Mrs. A. H. Henry formerly of Cincinnati Hamilton Co Ohio, I do bequeath for her subsistence for one year \$500 00-100 Dollars or as long as she may live and in case Mrs. A. H. Henry should die her allowance of \$500 00-100 Dollars will go to my young cousin Charles W. Greenwood

of Cincinnati Hamilton Co Ohio, now at Pittsburgh Pa and all that is left I do hereby certify that on the day of the date hereof, I personally declare that all my real estate Bonds or any thing I have or may have an interest in I bequeath to my cousin William M. Greenwood, as though he was a child of my own flesh and blood and further more the said William M. Greenwood is my sole heir to all my Real estate Bonds and mortgages and all my personal effects what ever they may be, and as to the bequests heretofor mentioned, William M. Greenwood is to look to and see that they are all fulfilled, according to his best judgment and kindness, In faith and testimony whereof, I the said Eliza R. Thompson do declare that I have affixed my signature to this will, as if I was personally before you and to be here under put this 21st day of March 1892

"Witness

"Eliza R. Thompson"

The genuineness of the signature of Mrs. Thompson to both these instruments is attacked by the defendants. Their theory is that both instruments were forged after the death of Mrs. Thompson,—the will first; and, this being found of no value, the forging of the contract was resorted to. They rely, first, upon the circumstances under which they were produced; and, second, upon the evidence of Mr. Ames, the celebrated expert in handwriting. No witness who had ever seen Mrs. Thompson write, or who had in any wise become familiar with her handwriting, was called by the defendants,—not even Mr. Chetwood himself, who had been her counsel for so long a time. Mr. Ames relied upon a comparison of the questioned signatures with the body of the contract and the testamentary writing, both of which are admitted to be in the handwriting of Mr. Greenwood, and a comparison of the same signatures with 4 standards produced and chosen by him out of 50 or more. He says, indeed, that he did look at the other standards, but his comparison was mainly made with the four standards in question; and he expressed the opinion that the signature to both the contract and the testamentary writing, or "will," as it was called, and will be hereafter called, was forged. Now, I stop here to say that I put a high value upon the evidence of a competent expert, so far as that evidence points out differences and similarities, and other grounds upon which a juryman, or a judge acting as such, may form a judgment as to the genuineness of the signature. In this case the evidence of Mr. Ames was of great assistance to me. I sat by his side while he gave it, attended carefully to every word he said, and to every gesture he made, and followed each item of his evidence as he went along. I have since gone all over his evidence with the same care, spending a great deal of time upon it, and examining with the utmost care the dis-

puted signatures, and the standards used by him, and many other standards not used by him; and, without going into details, I will say that he has not satisfied me that the signatures are forged. I place little or no value upon his judgment expressed under oath, for the simple reason that it was not formed under such circumstances as to be impartial. He knew which signatures were suspected when they were submitted to him for examination, and he also knew what judgment would be agreeable to his employers, and experience has shown that in such case the mere sworn judgment of an expert is of little value. The evidence of forgery, so far as there is any, is greater as to the signature to the will. But I find no peculiarity in either of them, upon which the expert relied to distinguish them from the standards which he used, which is not found in one or more of the mass of standards submitted which I had before me; and the few points of similarity between the signature to the contract and the handwriting of Mr. Greenwood, as shown in the body of the contract and will, is easily accounted for by the fact that all were written with a half stub pen, and that the pen was held by Mrs. Thompson, in signing the contract, in a position a little different from that in which she was in the habit of holding it.

But, in coming to the conclusion that the similarities and dissimilarities above referred to are not sufficient to establish forgery, I feel bound to say that the fact that I find no sufficient evidence of forgery in the character of the handwriting of the signatures themselves does not relieve my mind on this part of the case from the effect of the other ground of defendants' contention, viz. the history of the papers, as related by Greenwood, and the suspicious circumstances attending their production; for I have myself, recently, had a case before me where a signature was forged six times with such consummate skill that the same distinguished expert who assisted me here was unable to point out any difference between the signatures and the standards in that case, and yet the forgery was established beyond all peradventure, and so strongly and clearly that the counsel who supported their genuineness substantially threw up his brief, and the utterer has since been convicted of the crime. The evidence on the part of the complainant in support of the genuineness of the documents consists of the testimony of persons familiar with the handwriting of Mrs. Thompson, cashiers and tellers of a bank, and other business men, who express a decided opinion that the signatures are genuine; but I am not aware that their evidence is of any more value, in that respect, than my own inspection of the documents, and comparison of them with the standards. That inspection and comparison, alone, would lead me to the conclusion that they are genuine.

Now, with regard to the circumstances: Mr. Charles W. Greenwood, who lives in Pittsburgh, Pa., and who came with his brother to Mrs. Thompson's house on the 31st of January, 1892, visited her again on or about the 1st of April; and he swears that at that time he was in Mrs. Thompson's room with his brother, talking as relatives do, and that she asked William, the complainant, whether he had shown to Charles, the witness, "that paper," and he said "No." She then requested William to produce it, read, and show it to Charles; and thereupon William produced the contract in question, read it aloud, and handed it to him (Charles), and that he (Charles) then read it silently, and handed it to Mrs. Thompson, and she read it over, and, as the witness recollects, handed it back to William, though of this he is not sure. Charles Greenwood swears that on the same occasion, but not in Mrs. Thompson's presence, his brother William showed him a draft of a will which was in William's handwriting, and which William swore was the draft of the one produced, and which he had afterwards destroyed, and told him that Mrs. Thompson had signed such an instrument. Mr. Silas D. Drake swears that on one occasion he desired to sell or trade to Mrs. Thompson some real estate, and asked her to look at it, and she did, and that she requested him to show it to Mr. Greenwood; that he at first declined, but that she insisted upon it, and stated, as her reason, that all she had would, at her death, belong to Mr. Greenwood. Mr. Drake is very positive in his recollection that that was the substance of what she said, and he repeated it several times on the stand. If the evidence of these two witnesses is reliable, it goes very far towards establishing the genuineness of the contract. But let us look at the circumstances attending the production of these documents. The theory of the defendants' counsel, as already stated, is that the complainant, immediately after the death of Mrs. Thompson (which, as I have already stated, was entirely unexpected, and not at all anticipated or to be expected from anything in her age or outward appearance), forged the will, and took it to Mr. Davey; then, finding that it was of no value without witnesses, he forged the contract. Now, it will hardly be contended that he forged it during the few hours which elapsed between her death and the arrival at the house of Mr. Chetwood. He had neither time nor opportunity to do it. Yet he told Mr. Chetwood at once, on his arrival, that there was a will. He must, then, according to defendants' theory, have instantly, upon Mrs. Thompson's death, conceived the idea of forging a will, and have felt a consciousness of his ability to closely imitate her handwriting; and then there must have arisen in his mind the question of witnesses, and he must have anticipated his ability to overcome that difficulty; and then, between the time Mr. Chetwood left and the time complainant

called on the undertaker, he must have written the document. Then we meet the difficulty of successfully imitating Mrs. T.'s handwriting. Complainant is not a skilled penman. The case presents no circumstances which render it probable that he had been practicing to imitate her signature. Had she been in feeble health, indicating a very short life, there might have been some inducement for him to prepare for such a contingency. Then the character of the writing itself. Is it possible to believe that Mr. Greenwood would have forged such a will? What possible inducement or object could there have been for him to insert all those bequests in favor of the horse, cow, dogs, and cats? I thought at first that it might have been done to give an air of genuineness to the document; but, upon reflection, I am unable to adopt that view. There is nothing in the case, outside of Mr. Greenwood's evidence, to show that the deceased ever, during her lifetime, manifested any disposition to make any such foolish provisions, and I cannot bring myself to believe that he would have forged such a will. But I can readily understand that if she had signed such a testamentary paper, and left it in his hands, he would have felt bound, although he presumed it was probably of little value, to have shown it, delivered it, and handed it to the lawyer whom he knew to be the counsel on whom she relied at the time of her death, and that he would not produce his contract until after he ascertained what, if any, value there was in the will, or whether there was any will so executed as to be entitled to probate. He did not show himself to be a man of any great intelligence or business capacity. His habits and occupation have not, apparently, been such as to very much develop him in that direction. But it seems to me not to have been unnatural for him to have desired to know whether a will had been duly executed before he produced his contract. Then, again, he had little or no opportunity between the time of her death and the production of these papers to Mr. Davey either to practice imitating her handwriting, or to go abroad and procure an expert to do so. The contract itself does not seem to me to have been unreasonable, at the time it purports to have been made,—the 9th of March. Mrs. T. is shown to have been a healthy person, with a more than ordinary expectation of life, and seems to have been under no obligation to anybody in the world, except her half-sister; and that was one purely of blood, and not of affection. She would naturally expect to survive her half-sister, and to be able to provide for her during her lifetime by her own hand. The contract did not prevent her from doing so. It left her in full use of, and with power of present disposition of, all her property during her lifetime, which was quite enough to support her and her sister during their lives. With her chances good for several years of life, the faithful services of a trusted relative would

be valuable to her, and might become quite arduous, and, if faithfully performed, well worth her whole estate. In her lonely condition, she might well feel willing to give it all for the aid and society of a faithful relative during her declining years. The evidence fails to show that she had been drinking, or was in a drunken bout, at the time the contract was executed. Dr. Pierson made her 15 visits, in all. Five of those were made on five consecutive days, commencing with the 28th or 29th of January, and running into the 1st or 2d day of February. Five more were made in the same month, and five more in March, the last one being towards the last of the month. The exact dates are not given. He says that at none of his visits, after his first visit, did he see any signs of drinking by Mrs. Thompson; that he kept her in the house, and quiet, for four weeks or more, until the broken rib was joined; and that it healed, and was joined, with the usual rapidity. There is some evidence on the part of the defendants that, during the latter half of the month of March, Mrs. Thompson did indulge in intoxicants, and she may have been somewhat intoxicated at the date of the testamentary writing of March 21st, and that may account for its peculiar provisions. But, as before remarked, the evidence tends to prove affirmatively that she was not intoxicated at or about the date of the contract. Taking, then, all the evidence, except that part of the complainant's evidence which was objected to, I come to the conclusion that the decided weight of it is in favor of the genuineness of these documents. I cannot say that the proof is absolutely conclusive, but I feel that the danger of error would be much greater in holding them forged than it would be in holding them genuine. The evidence of complainant, when we come to include that in our consideration, sustains his case throughout. He explains the writing of the will as follows: He had on several occasions expressed himself to Mrs. T. as placing little value upon her horse, which was old, or upon her cow, which was vicious and restive when being milked, and had also expressed his dislike of her dogs. On one occasion one of them accompanied him on a visit to Elizabeth, and caused him trouble, so that on his return he had threatened to kill him. This excited Mrs. T., and she asked him if that was the way he intended to treat her pets, and he replied "Yes,"—that he would get rid of all of them,—whereupon she declared she would make her will, protecting them, and it was done, with the result already stated. He says that the provision for Mrs. Henry was inserted at his suggestion. He further says that, after she had signed the will, she handed it to him to keep, and after a few days took it from him, and that for several weeks it was sometimes in his possession, and sometimes in hers, and was on several occasions the subject of mention between them; that she seemed to be contemplating

some changes in it, and expressed an intention of having it redrawn by a lawyer, and properly executed, and took it with her on one occasion when she went alone to the city; and that he inferred from what she said on her return that she had procured it to be copied, and had properly executed it. Finally, she handed it to him to keep, and said she believed she would let it remain as it was, without change. He declares that he fully believed at her death, and even up to the hearing, that she had duly executed a will which was a substantial copy of the paper she signed and left with him. He further says that this belief, together with the distrust which he knew she felt, and which he also felt, for Mr. Chetwood, prompted his conduct in his interviews with him just after her death, and his going to the undertaker and to Mr. Davey. He says, in effect, that he really did not know what might be the value of the document, but felt it to be his duty to show it to counsel. Taking into consideration the complainant's degree of intelligence, his mental peculiarities, in connection with all the circumstances, I think his conduct just after Mrs. T.'s death quite consistent with the genuineness of these documents.

I will recur to one other question which I have already mentioned. I have said that Dr. Pierson's evidence tends to show that Mrs. T. was not in one of her so-called "rackets" at the time of the execution of the contract. His visits at that time, however, were infrequent, and she may have been somewhat intoxicated on the occasion of the execution of the contract without his knowing it. Mrs. Henry and the mulatto, John, and one of the neighbors, swear she was habitually intoxicated after complainant came there, and charge him with unduly yielding to, and in fact encouraging, her appetite for spirits. The manner of Mrs. Henry and John on the stand was such that I cannot place much, if any, reliance upon their evidence; and several other disinterested witnesses, who saw no signs of her having indulged in drink, and the effect of Dr. Pierson's evidence, as already remarked, is decidedly against the probability of her being at all disabled by drink at the date of the contract. Complainant frankly admits that he did, at her request, procure for her intoxicants from time to time, in small quantities, but that she did not drink to excess, and that she was not at all under the influence of liquor when the contract was executed; and this is corroborated by what occurred when his brother made his visit, about April 1st. Moreover, complainant swears that the written contract was a mere writing out and signing of what had been talked over daily, and understood between them, from the day of his arrival. Upon the whole, then, I come to the conclusion that the contract is valid and binding on Mrs. Thompson's heir at law and next of kin.

It remains to consider what effect, if any,

the so-called "will" may have upon it. It is impossible to read the evidence of the complainant, and fail to come to the conclusion that Mrs. Thompson looked upon that paper as a modification of the contract, and equally binding on complainant, and that he assented verbally to it, and promised to carry out its provisions. This he need not have done. He had, at its date, worked only 12 days under his contract, so that it was then, substantially, unexecuted on his part. He might have said to her that he was unwilling to execute his part of the contract unless he was to have its fruits in full, but he did not do so. He did not protest, but, as I have said, in substance, promised to fulfill the terms of the so-called "will." And this, be it remarked, he might well do, for the only serious part of the document was the provision for Mrs. Henry and his brother. Judging from appearances, and taking into consideration the respective chances of life of the two females, Mrs. Thompson would outlive Mrs. Henry; and as he knew, as he declared, that Mrs. Thompson would be obliged to support Mrs. Henry, the cost of such support would probably and naturally come out of Mrs. Thompson's personal estate; and if, by chance, Mrs. Thompson should die first, or soon, then his labor in fulfilling his part of the contract would be so much the less, and he could well afford to support Mrs. Henry for her life. If he had protested against this testamentary disposition, Mrs. T. could have broken her contract, by discharging him, and have paid the damages by reason of such breach, which must have been small. These considerations lead me to the conclusion that it was the duty of complainant to protest against this testamentary disposition, if he did not intend to observe it; and having not only failed to protest, but having, as already remarked, substantially promised to carry it out, and permitted Mrs. Thompson to suppose that he would do so, he came under a corresponding obligation in equity. It is proper to add that, when this aspect of the case was pressed upon the learned and cautious counsel for the complainant, he very frankly conceded its strength, and substantially assented to the view above expressed.

I will advise a decree in accordance with the above views. The provision in favor of Mrs. Henry will be enforced, upon condition that she shall place at the disposal of the court the title to the real estate in New York state, free and clear of any incumbrance put upon it by herself. I have not considered what rights Charles W. Greenwood may have under the so-called "will." He is not a party to these proceedings. Unless the parties can agree upon some arrangement, the appointment of a trustee, and the establishment of a fund, will be necessary, to raise the annuity for Mrs. Henry. I will hear counsel as to the details of the decree, and the question of costs.

(77 Md. 423)

TEXTOR v. SHIPLEY.

(Court of Appeals of Maryland. March 15, 1894.)

BILL TO QUIET TITLE—TITLE AND POSSESSION.

Where the lien on land for taxes existed at the time plaintiff became possessed of the reversionary interest therein, the fact that the tenant attorned to him, under the lease, does not give him such title and possession as will support a suit to set aside the proceedings to enforce the tax liens, but his remedy is ejectment.

Motion for rehearing. Overruled.

For prior report, see 26 Atl. 1019.

ROBINSON, C. J. *Steuart v. Meyer*, 54 Md. 454, relied on in support of the motion for reargument, cannot be said to be in conflict with the principles on which this case was decided. In that case *Steuart*, as trustee of his daughter, became the owner of a ground rent, the leasehold of which belonged to Mary Haschert. The fee simple was subsequently sold for city taxes, and the sale was duly ratified by the circuit court of Baltimore City. *Steuart*, upon applying for the installment of ground rent due in October, 1876, learned for the first time that the property had been sold for taxes, and thereupon he filed a petition alleging that the sale was void for want of jurisdiction, and praying for leave to file a bill of review for the purpose of having the matters re-examined, and the order of ratification annulled and set aside. Leave being granted to file a bill of review, *Meyer*, the purchaser, appealed from the order, and *Steuart* then appealed from the final order of ratification. Pending these appeals, receivers were appointed to take possession of the property and to collect the accruing rents. Both of the appeals were dismissed. 48 Md. 423. When the cause was remanded, the court rescinded the order granting leave to file a bill of review, and dismissed the petition of *Steuart*; and from this order he appealed. Pending this appeal, *Steuart* filed an original bill, alleging that the proceedings in the tax sale were irregular and void, and that the purchaser acquired no title thereunder, and prayed that the alleged tax sale be declared null and void, and that *Meyer*, the purchaser, be enjoined from taking possession of or setting up any title thereto, and that the receivers be enjoined from delivering possession to him. In invoking the jurisdiction of the court of equity, under the circumstances, the complainants allege that they have no adequate remedy at law; that they could not resort to the ordinary remedy by ejectment against *Meyer* as a disseisor, for the reason that he was not in possession of the property, but the same is still in the possession of the receivers; and that, the complainants being owners of the reversion, they had no present right to the possession. It was in view of these facts that the court said, referring to the complainants: "They are not entitled

to the possession, and could not, therefore, sue in ejectment for the recovery of the property. Under the circumstances of this case, without resort to a proceeding like the present the parties would be without adequate remedy for relief against the effect of the prima facie title in the purchaser."

In sustaining the jurisdiction of the court, under the peculiar circumstances of that case, in which the possession of the property was in the hands of receivers appointed by the court, we did not mean to question the general rule laid down in *Polk v. Pendleton*, 31 Md. 124, that "those only who have a clear legal and equitable title to land, connected with the possession, have any right to claim the interference of a court of equity to give them peace or dissipate the cloud on title." On the contrary, in *Meyer's Case* the court refers to *Crook v. Brown*, 11 Md. 158, in which it was said: "Nor can the amendments be sustained upon the doctrine of bills quia timet. The complainants have not the legal title, and are not in possession, which we take to be essential facts in such cases." And such is the rule recognized by the supreme court in *Orton v. Smith*, 18 How. 285. It is clear, therefore, we think, as a general rule, that the jurisdiction of a court of equity cannot be maintained to remove a cloud from title unless the party has the legal title and the possession. If the possession is in another, his remedy is by an action of ejectment. Motion overruled.

(79 Md. 142)

BRADY et al. v. EVANS.

(Court of Appeals of Maryland. March 14, 1894.)

CONSTRUCTION AND EFFECT OF DEED.

A deed which, after referring to the conveyance to the grantor, conveyed "all the grantor's estate, right, title, interest, term of years to come, property, claim, and demand, both in law and in equity," conveys the property as fully as it was conveyed to the grantor, and, the conveyance to the grantor giving him the property in fee, the grantor's conveyance vests the fee, even though the word "heirs" does not appear, in the granting clause, and though the deed was executed when the common-law rule relating to conveyances was in force.

Appeal from circuit court of Baltimore city.

Bill by Edward Brady & Sons against James E. Evans. From a decree for plaintiffs, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Aug. Paper, for appellant. Saml. J. Harman, for appellees.

PAGE, J. The bill in this case was filed by the Bradys (appellees) for the specific performance of a contract of sale of certain property situated in Baltimore city. The

appellant refuses to perform his part of the agreement because he alleges the appellees cannot make him a good and marketable title. It is contended by him that, in the chain of title, the deed from Mary Hixon and husband to Henry Ewing does not convey a fee, because of the omission of the word "heirs" in the granting clause. Prior to the act of 1858, c. 154 (Code, art. 21, § 12), the rule of the common law prevailed, and, to create an estate in fee simple in a natural person, the conveyance must contain a limitation to such person and his heirs; and, subject to a few well-recognized exceptions, this was an unbending rule, which would not allow of the use of equipollent words. *Handy v. McKim*, 64 Md. 570, 4 Atl. 125. The deed now referred to was made in 1829, and, being anterior to the passage of the statute, is subject to the rule of common law. By reference to the deed itself, we find it first sets out the fact "that Thomas Curtain, by indenture of deed bearing date on or about the fifth day of August, eighteen hundred and twenty-six, and recorded among the land records of Baltimore county court, in Liber W. G., No. 182, folio 98, for the consideration mentioned, did convey unto Mary Randles, now Mary Hixon, her executors, administrators, and assigns, all," etc. (here follows a description of the property), "being the same parcel of land heretofore conveyed by Christopher Walker to the said James Long by indenture bearing date the 10th of May, 1806, and recorded among the lands records, in Liber W. G., No. 89, folio 606," etc., "and are the same * * * mentioned and described in a certain deed of conveyance bearing date 22d January, 1812, and thereby granted and conveyed by William Willson and Joseph G. J. Bond, executors of the last will and testament of James Long, to the said Thomas Curtain, and recorded among the land records of the county aforesaid, in Liber W. G., No. 118, folio 476, and reference therewith being had, will more fully and at large appear." And the said Mary Hixon and husband, then, in consideration of \$900, convey unto "Henry Ewing, his executors, administrators, and assigns, * * * all that before described parcel of ground, together with, all and singular, the buildings," etc., and "all the estate, right, title, interest, term of years to come, property, claim, and demand, both in law and in equity, of the said Mary Hixon and Joab Hixon, of, in, unto, and out of the same, or to any part or parcel thereof." The deed of Thomas Curtain, thus referred to, grants to Mary Randles (now Mary Hixon) the property in fee. The habendum clause is as follows: "To have and to hold, the said described premises, with the appurtenances thereunto belonging, unto the said Mary Randles, her heirs and assigns, to the only and proper use and behoof of the said Mary Randles, her heirs and assigns, forever." It is apparent, upon an inspection of Mary

Hixon and husband's deed to Ewing. that the intention of the parties, in making and accepting it, was to convey to Ewing the entire estate that was then in Mary Hixon; and it is our duty so to expound it, unless to do so will violate some well-established principle of law. *Budd v. Brooke*, 3 Gill, 234. Now, in *Hofsass v. Mann*, 74 Md. 406, 22 Atl. 65, while it is laid down as an unbending rule that, to create an estate in fee simple in a natural person, the conveyance must contain a limitation to the heirs. in direct terms, yet it is said the omission of the word "heirs" may be cured by reference to some other instrument which does contain the word "heirs." The counsel for the appellant contends that this point did not properly arise in that case, and this utterance was merely an obiter dictum. It is not necessary for us to inquire whether this was so or not, for we find the principle there stated to be well sustained by the authorities. In *Preston on Estates* (volume 2, p. 2) the rule is stated as follows: "Words of direct and immediate reference will suffice. The word 'heirs' or 'successors' need not be in the identical deed of grant, or other mode of assurance by which the estate is granted or conveyed. Thus, when one to whom lands have been granted in fee does, after reciting the grant, or without any recital, grant the lands to another as fully as they were granted to him, or where a man grants two acres to A. and B., to hold one acre to A. and his heirs, and the other acre to B., in form aforesaid, or where a man seised of land in fee enfeoffs another in fee, and continues in possession of the lands, claiming to hold them at the will of the feoffee, and the feoffee enfeoffs the person by whom he was enfeoffed, in these terms: 'You have given me these lands [naming them]; as fully as you have given them to me, I assure them to you,'—in these and like instances, the fee simple will pass without limitation to the heirs in express terms. The fee passes by reason of the words of direct and immediate reference. These words are effectual under the rule that 'verba relata hoc maxime operantur per referentiam, ut in eis inesse videtur.'" *Shep. Touch.* 101; *Com. Dig.* tit. "Estate" (A 2). And again in 4 *Kent, Comm.* 5: "The limitation to the heirs must be made in direct terms, or by immediate reference." Now, in this case, the deed from Hixon and wife to Ewing, after making reference to the deed from Curtin to Randles as the instrument under which she held title, conveys all the grantors' "estate, right, title, interest, term of years to come, property, claim, and demand, both in law and in equity, of the said Mary Hixon and Joab Hixon," etc. Such language is, in effect, equivalent to granting the property as fully as it was granted to them; and, inasmuch as the terms of the grant to them are fully set out in the same deed, we think the case is fully within the rule we have

cited. It follows, therefore, that we find no error in the decree of the court, and it will, accordingly, be affirmed. Decree affirmed.

(79 Md. 75)

GARRISON et al. v. HILL.

(Court of Appeals of Maryland. March 14, 1894.)

WILLS—CONSTRUCTION.

W. devised property in trust for the separate use of E. for life, remainder to her children, should she have any; if not, remainder to E.'s brother. The brother died before E., and she died without issue, having devised all her property to her mother. *Held*, that the property passed to the heirs of the brother alive at the death of E. without issue, and did not descend to E. at his death, and pass by her will to her mother, in that, as such contingency did not occur till after the brother's death, she could not be heir, or transmit any interest.

Appeal from court of common pleas.

Ejectment by Mary De Charms Garrison and another against Thomas Hill. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Attorney General Poe, W. B. Trundle, and Hyland P. Stewart, for appellants. Tho. Ireland Elliott, for appellee.

BRISCOE, J. This is an appeal in an action of ejectment. The property sought to be recovered is real estate situate on Lexington street, in Baltimore city, together with its rents and profits.

The main questions for our consideration arise upon a construction of the fifth item of the will of a certain Maria E. Weise and the will of a certain Emma M. C. Johnson. By the fifth clause of the will of Maria E. Weise she devised as follows: "All the rest, residue, and remainder of my estate, effects, and property of every kind and description whatsoever, inclusive of my house and lot of ground on Lexington street, I give, devise, and bequeath to Thomas Hill, of city of Baltimore; in trust and special confidence, however, for the separate use and benefit of my cousin, the said Emma Maria C. Johnson, for and during the term of her natural life, so that she during that period be permitted and suffered to have, receive, take, and enjoy the rents, issues, and profits of said residuary estate and property, free from the control, power, or disposal of any future husband she may marry; and, from and after the death of said Emma Maria C. Johnson, in trust that the said residue shall go and become the property of any children of the said Emma Maria C. Johnson, their heirs and assigns, absolutely; but, in case the said Emma Maria C. Johnson should depart this life without leaving a child or children, or descendants of a child, living at the time of her decease, then the said trust property and premises shall go to my cousin,

the said William Worthington Johnson, absolutely." The will was dated April 12, 1880, and was duly executed to pass real estate. The testatrix died December 7, 1881, unmarried and without issue. Emma Maria C. Johnson executed her last will and testament on the 23d of August, 1887, and died April 22, 1891, unmarried and without issue. By her will she devised and bequeathed, after the payment of her debts and funeral expenses, all her property to her mother, Maria M. Johnson. After the death of the testatrix, the life tenant, Emma M. C. Johnson, received the rents and profits of the property until her death. William Worthington Johnson, the remainder-man under the will, died on the 14th October, 1886, intestate, unmarried, and without leaving issue, but left an only sister, Emma M. C. Johnson, and Maria M. Johnson, his mother. The latter died in January, 1889. Upon this state of facts, the question, then, is, do the heirs at law of William Worthington Johnson, the remainder-man, take the interest in the property which he would have taken had he survived the life tenant, Emma, or did it descend to his sister Emma, who was living at the time of his death, and pass under her will to her mother, Maria M. Johnson?

Here there is, first, a life estate given to Emma Johnson, and a remainder is limited, with a double appeal: if she left children, then to them in fee; if she left none (which contingency actually happened), then the devise is to William Worthington Johnson. It is well settled that contingent estates of inheritance will pass by descent, and are also devisable. *Reid v. Walback*, 75 Md. 206, 23 Atl. 472. But while this is true, and it is unnecessary to refer to the cases or to discuss the principles upon which they rest, yet it is also clear that those, only, can take who were in esse at the time when the contingency happened and the estate fell into possession. Justice Story, in the cases of *Barnitt's Lessee v. Casey*, 7 Cranch, 456, states the rule thus: "It is very clear that contingent remainders and executory devises at common law are transmissible to the heirs of the party to whom they are limited, if he chance to die before the contingency happens." It was held in that case that those who were heirs of the remainder-man on the 12th of February, 1808, the date of the happening of the contingency, were entitled to the estate, though he had died in 1802, six years before the contingency happened. And to the same effect are the cases of *Spence v. Robins*, 6 Gill & J. 512; *Snively v. Beavans*, 1 Md. 222; *Buck v. Lantz*, 49 Md. 444; *Demill v. Reid*, 71 Md. 190, 17 Atl. 1014; *Goodright v. Searle*, 2 Wils. 34. Applying, then, this well-established doctrine to the facts of the case now under consideration, we are clearly of the opinion that as the contingency—the death of the life tenant, Emma, without children—did not occur until five years after the death

of the remainder-man, she could not be heir, or take or transmit any interest in the estate by will or otherwise. She was not in esse when the contingency happened and when the estate fell into possession. Being dead, she could neither inherit nor devise it. The property, therefore, passed to those of William Worthington Johnson's heirs alive at the happening of the contingency, viz. the death of Emma M. C. Johnson, unmarried and without issue. The plaintiff's prayers were therefore properly rejected. The first prayer was defective because it proceeded upon the theory that when the remainder-man, William, died on the 14th of October, 1886, his contingent interest passed to his sister Emma, and, uniting with her life estate, created a fee which was transmitted by will to her mother, and passed from her to the plaintiffs. This, for the reasons we have given, was error. The second prayer involves the proposition that the estate devised to the trustee was executed by the statute of uses, the life tenant, Emma M. C. Johnson, being an unmarried woman; that thereby the said Emma became the owner of the legal life estate therein, and the fee was vested in the heir at law of the testatrix, Maria E. Weise. This prayer, for the reasons we have assigned, was also erroneous.

The first, second, third, and fourth prayers of the defendant were properly granted, and contain the correct propositions of law bearing upon the case.

The fifth prayer granted on behalf of the defendant instructed the jury that there was no legal sufficient evidence in the case to entitle the plaintiff to recover. This prayer was correct, and was properly granted under the facts of the case.

The judgment below being for the defendant, and finding no error in the rulings of the court, we shall affirm the judgment. Judgment affirmed.

(79 Md. 146)

BLACK v. HERRING et al.

(Court of Appeals of Maryland. March 14, 1894.)

WILLS—AMBIGUITY—PUNCTUATION.

1. Testatrix devised to two daughters certain premises, in trust to hold and collect the rents and pay the expenses, and after paying out of the net proceeds \$100 to H., "of Grafton, West Virginia, should they think proper so to do to pay over from time to time the net income" to testatrix's son for life, remainder in fee to his children. Held, that the omission of the comma after the phrase "so to do" could not affect the obvious sense, and leave it optional with the trustees to retain the income from their brother.

2. A beneficiary does not violate the injunction of the will by contesting or seeking to thwart its provisions, when he files a bill to construe and enforce those provisions.

Appeal from circuit court of Baltimore city.

Bill by Calvin H. Black against Annie Herring and others to construe parts of

the will of Elizabeth W. Black, deceased. From the decree of the circuit court, complainant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, MCSHERRY, FOWLER, ROBERTS, and BOYD, JJ.

J. J. Wade, for appellant. C. D. Barnitz, for appellees.

ROBERTS, J. This case comes here on appeal from the decree of the circuit court No. 2 of Baltimore city on a bill filed by the appellant against the appellees to obtain the true construction of certain provisions of the last will and codicil thereto of Elizabeth W. Black, late of said city. The chief controversy arises out of the proper construction of the fourth clause of the original will, which reads as follows: "I give, devise, and bequeath all that lot, property, and premises situate on the south side of Lexington street, which by deed dated the tenth day of July, 1868, I acquired from William W. McKaig, to my daughters, Mary E. Derringer and Annie M. Herring, and the survivor of them, and their successor in the trust, and executors, administrators, and assigns, the subreversion and subground rent in the back of the above-mentioned lot being included in this bequest; in trust and confidence, however, to hold the same, and to collect and have collected, receive, and receipt for, the rents, income and proceeds thereof, and to pay all taxes, ground rents, insurance, and other expenses therein (including a commission of five per cent. for their services), and, after paying out of the net proceeds of said property and premises, the sum of one hundred dollars to Mrs. Holmes, of Grafton, West Virginia, should they think proper so to do to pay over from time to time the net income and proceeds of said property to my said son, Calvin H. Black, for and during the term of his natural life, and to hold the same in further trust that upon the death of my said son, that then the said property and premises shall go to and become the property and estate of his children and descendants then living, share and share alike, per stirpes." This controversy is certainly a very narrow one, and depends solely upon a question of punctuation. We are called upon to determine the meaning and effect of the particular location of the comma in that part of the above clause which reads as follows: "And after paying out the net proceeds of said property and premises, the sum of one hundred dollars to Mrs. Holmes, of Grafton, West Virginia, should they think proper so to do to pay over from time to time the net income and proceeds of said property to my said son, Calvin H. Black, for and during the term of his natural life," etc. It is contended by the appellees that the comma appearing after the word "Virginia" invested the trustees with discretionary power over

the trust fund, and authorized them "to pay over from time to time the net income or proceeds of said property to my son, Calvin H. Black," etc., or not, as they might think proper so to do. This, we think, would be giving to a mere matter of punctuation a controlling force in the construction of wills never yet, so far as we are aware, sanctioned or recognized in any authoritative statement of the law. This court, in *Weatherly v. Mister*, 39 Md. 629, has said that punctuation may perhaps be resorted to when no other means can be found of solving an ambiguity, but not in cases when no real ambiguity exists except what the punctuation itself creates. In such cases it will not be allowed to confuse a construction otherwise clear. It is conceded that if the comma had followed or been located at the end of the phrase, "should they think proper so to do," then the discretion to be exercised by the trustees would have related solely to the payment of the \$100 to Mrs. Holmes. But we think the intent and meaning of the testatrix is clear beyond question, and the language used ought to be given its ordinary meaning, without regard to the location of the comma. If she did not mean that the rents of said trust property were to be for the benefit of her son, Calvin, would she not have made some disposition of them? We think it is a fair inference to be drawn that she would. This trust was not certainly created for the benefit of Mrs. Holmes, and, as the testatrix had already provided for her two daughters, it was but reasonable that in making a final disposition of her estate she would in some way remember her only son, even though unworthy. He might have forgotten her; but the converse is seldom ever true,—that the mother forgets the son,—unless improperly influenced by interested parties. So far as we have been able to discover, there is very little in the record, if anything, which reflects upon his character as a son. We think the language of the will is sufficiently clear to enable us to say with certainty that it created a trust for the benefit of the son, and we must here state that the trustees have signally failed to recognize and discharge their duties in the premises. They have allowed more than seven years to pass since the death of their mother without accepting either horn of their dilemma. They have neither paid Mrs. Holmes nor their brother one farthing.

The next question presented by this appeal relates to the true construction of the first and second clauses of the codicil. By the first clause of the codicil, the testatrix revokes and annuls the devise of the lot on the south side of Lexington street, which is the same lot mentioned in the fourth clause of the original will, and then provides that "the subreversion in the lot of ground on the rear of said Lexington street lot, which, by deed made by myself and husband, was subleased to Ann Bouldin, wife of Randolph Bouldin,

at the rent of twenty-five dollars per annum, and also the said rent reserved, exempt from any liability or charge for or on account of the original rent payable out of the whole lot (the payment of the original rent it is intended shall be a charge upon the front or residue of said lot alone), I give and bequeath to my daughter Annie M. Herring, for and during her life, in the same manner and estate as the property situate on the north side of West Fayette street, which I acquired from Cyrus Gault; and at her death I will that the said yearly subrent of twenty-five dollars and subversion shall pass to the same persons in the same manner and estate as is expressed and directed in regard to said property on north side of Fayette street, the bequest of this property to be in all respects the same as that." She then further provides that "should it be necessary, in administering my estate, to sell any of my leasehold property whatsoever, in order to obtain money to meet debts, liabilities, costs, or charges incident to the settlement of the same, I will and direct that the residue or balance of the said Lexington street property be first sold, and that the net proceeds thereof shall be used for that purpose; and I hereby authorize the sale of said property therefor, and, after satisfying thereout all of said debts, costs, charges and liabilities, should any balance of said proceeds remain, I will and direct that such balance or residue of proceeds of said property shall be invested in safe and productive bonds, stocks, or ground rents; and I will and direct that such residue as invested, and however invested, shall go and pass to the same persons, and be held in the same manner and estate, in the same trust, to the same trusts and uses, and in every respect pass and be held as the entire property (on Lexington street) is directed by my said will to pass, be held and enjoyed." It is apparent that the effect of these provisions of the codicil upon the fourth clause of the will has been to give to Mrs. Herring the subrent on the rear part of the Lexington street lot, and to this extent the corpus of the trust estate created by said fourth clause of the will has been diminished; and also to charge the front part of the same lot with the payment of any debts which she might owe at the time of her death, and all costs incident to the settlement of her estate, which her assets, other than the leasehold property, failed to pay, and, in the event of any such deficiency, the Lexington street front is directed to be sold for the payment of the same. She then proceeds, as stated in the codicil just quoted, to direct how the residue of the proceeds of sale shall be disposed of. But the emergency upon the happening of which the Lexington street lot was to be sold has never occurred; and the personal estate having been finally settled, the defendant trustees by their answer admit that on the 4th of October, 1886, the said lot was in pursuance of an order of the orphans' court of said city

transferred to the defendant trustees by the executrix, acting in pursuance of the terms of said will, and they continue to hold the same, and have, since the date of said transfer, collected the rents therefrom, paid the expenses thereof, and kept an exact account of both. No necessity has, therefore, arisen requiring the sale of the Lexington street front, and it must, in its present form, be considered as the corpus of the trust, and said trustees must account for the rents or accretions of said property, and settle their account in the court below in accordance with the views herein expressed.

There yet remains to be disposed of the contention of the appellee, that by the provisions of the second clause of the codicil the appellant, by his conduct in filing this bill, has placed himself in conflict with the provisions of said clause and of the original will, and forfeited all claim to participation in the benefactions of said testamentary papers. It is a mistake to assume that the appellant, in filing this bill, by which he seeks only the true construction of said will and codicil thereto, and the enforcement of his rights thereunder, is seeking to thwart the designs of the testatrix, or in any manner to interfere with the due execution of her wishes as expressed in her testamentary papers. It would be an anomaly in the law, and a very unjust restriction, if such a contention could be upheld. It follows from what we have said that the decree of the court below must be reversed, and the cause remanded, that further proceedings may be had in accordance with this opinion. Decree reversed, with cost, and cause remanded.

(79 Md. 183)

MERGENTHALER v. KIRBY.

(Court of Appeals of Maryland. March 14, 1894.)

DANGEROUS PREMISES—TRESPASSING CHILD.

Defendant's factory was among open lots, a block away from the nearest house. It was built on three sides of a square yard, in which was a box of scrap lead. A boy of 12, while in said yard for the sole purpose of stealing lead to sell, was scalded by steam and water which the engineer happened at that moment to blow off through a discharge pipe near the box. Held, that defendant was not liable.

Appeal from court of common pleas

Action by William H. Kirby against Ottmar Mergenthaler for damages for personal injuries to plaintiff's son, a minor. Judgment for plaintiff. Defendant appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

Charles W. Field, for appellant. Wm. B. Jenkins and H. J. Broening, for appellee.

FOWLER, J. The defendant is a manufacturer of typesetting machines, and his factory is located in Baltimore city, about 300

feet south of Fort avenue, and about half that distance from the southern extremity of Burroughs street. On the east and west of the factory for several hundred yards there are open lots or commons. The nearest house is one block distant, at the foot of Burroughs street. To the south are the Baltimore & Ohio Railroad tracks and the river. It is apparent from the description that the defendant's factory is not in a built-up or densely populated part of the city. Howard Kirby, a boy about 12 years old, together with two companions, aged respectively 14 and 16, went upon the premises just mentioned, without the authority or knowledge of the defendant or of any of his agents or employees, for the purpose of getting type metal or lead scrap which was in a box near the factory wall, which metal had a value of eight cents per pound, and had been placed there by the defendant's orders. His employees had directions always to pick over the contents of this box, and to save the metal for use in the factory. One of the boys testified that he had before sold the lead scrap to a junk dealer, and intended to make the same disposition of what he secured, or expected to secure, the day Kirby was injured. While the boys were thus engaged in trespassing on the defendant's premises and purloining his property, the engineer in charge of the engine "blew the boiler off, to ease the pressure on it, for reasons of safety." Of course, it is not suggested that there was any intention of injuring the boys, for their presence was unknown to the engineer. But while they were standing between the scrap box and the end of the pipe the water and steam rushed out, and the boy Kirby was unfortunately scalded. However, if, instead of running as he did, between the mouth of the pipe and the wall of the factory, he had passed on the other side, he would have been uninjured. The defendant testified that "there was room enough between the box and the coal bins for the boys to run behind the pipe instead of in front of it, if they had chosen to do so." The evidence is that the pipe came out from under the south wall of the engine room, and ran southerly under ground about 15 feet alongside of and 4 or 5 feet from the west wall of the factory. A joint or elbow about three feet long was screwed on the end of the pipe, and tilted over at an angle towards the wall of the factory. The factory yard in which the pipe was located was inclosed on three sides by the engine room, the factory, and the coal bins. The defendant was sued by the father of the injured boy to recover damages arising from injury to his son, and for the amount expended for medicines and medical attention. Several prayers were offered on both sides, but the controlling question is whether, in any aspect of the case as presented, the plaintiff was entitled to a verdict. The jury found in favor of the plaintiff, and the defendant has appealed.

In our opinion, the case should have been taken from the jury. One of the fundamental rules governing all cases of this kind is that the plaintiff cannot recover unless he establishes "a right on his part, a duty on the part of the defendant in respect to that right, and a breach of that duty by the defendant, whereby the plaintiff has suffered injury." *Maenner v. Carroll*, 46 Md. 212. In the case just cited, the plaintiff, as here, was a trespasser, and, "having no right to be on the lot, the injury which he suffered by falling into an excavation the court held must be attributed exclusively to his own fault." As we understand the contention of the appellee, it is that it was a neglect or breach of duty on the part of the defendant to use the pipe in question as it was used,—for the purpose of emptying the surplus water and steam into the yard in the rear of his factory, which yard, as we have seen, is inclosed on three sides. We know of no principle of law which will justify such a proposition. On the contrary, to hold an owner liable under such circumstances would, as was said in *Frost v. Railroad Co.*, 64 N. H. 221, 9 Atl. 790, be an unreasonable restriction of his enjoyment and use of his land. None of the cases cited by the appellee sustain, as we think, the position he is here contending for, and, if they did, we could not assent to them. In *Stone v. Railway Co.* (N. Y. App.) 21 N. E. 712, the child was injured on a public street, where it had a right to be. In *Works Co. v. Orr*, 83 Pa. St. 332, several children were injured by the falling of a trap door or inclined way, and the court say: "The gate and passageway opened out upon a public and much-frequented street, where persons were passing and children playing. Unlike an ordinary private alley, this passage was often open, and therefore liable to the incursions of children, and even grown persons, from thoughtlessness, accident or curiosity. Now, the inclined way, which did the injury, was a dangerous trap. * * * When not lowered it stood upright against the wall, leaning so little beyond the center of gravity that a jar or slight pull would cause it to fall forward." In this case a verdict against the defendant was sustained, but the court was careful to distinguish it from a case like the one we are considering, and said "that, where no duty is owed, no liability arises," and that when one enters a private yard, and is injured by falling into an open well or otherwise, he can have no action against the owner, unless he were present, and could have prevented the injury. The person injured "had no business there, and the owner owed him no duty." *Barry v. Railroad Co.*, 92 N. Y. 289,—another case relied on by the appellee, but not sustaining his view,—was where a child 10 years old was injured at a public crossing, and the defendant was held liable. But the opinion of the court is based upon the principle that, the crossing being public,

the defendant was apprised that it is attended with danger, and it was held that the character of the crossing imposed a duty upon the defendant in respect of persons using the crossing. There is also a line of cases like *Railroad Co. v. Stout*, 17 Wall. 657, in which the owners of property have been held responsible for injury to children caused by dangerous machinery easily accessible and attractive to them. But these cases we think have no application here, for, according to the evidence, the boy was injured while attempting to unlawfully take the defendant's property. And it will be found that most of the many cases cited by the appellee are similar to one or other of the four cases we have just referred to, none of which, as we have shown, sustain the contention of the appellee in this case; for here the injured person was not only a trespasser, but, perhaps without fully realizing it, was engaged in a criminal act when injured, and he had no right, therefore, to demand protection from the defendant. In the case of *Frost v. Railroad Co.* (decided in 1887) 64 N. H. 221, 9 Atl. 790, in which it appears that a boy seven years old was injured while playing upon a turntable, it is said that: "The turntable was required in operating the defendant's road. It was located on its own road, so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers." And the same principles are announced by this court in the case of *Maenner v. Carroll*, 46 Md. 193, and in the more recent case of *Benson v. Traction Co.* (not yet officially reported). See 26 Atl. 973. It follows that the judgment must be reversed. Judgment reversed.

(161 Pa. St. 201)

PHILADELPHIA & R. R. CO. v. SNOWDON et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

JUDGMENT FOR WANT OF SUFFICIENT AFFIDAVIT OF DEFENSE—REMEDY—APPEALABLE ORDERS.

1. Where judgment is entered for want of sufficient affidavit of defense, the remedy is by appeal, and not by motion to strike it off.

2. The refusal of the trial court to set aside a return to a writ of foreign attachment and to quash such writ is not an appealable order, since it is not a final judgment.

Appeal from court of common pleas, Philadelphia county.

Action in attachment by the Philadelphia & Reading Railroad Company against W. H. Snowdon on a claim for unpaid freight charges against Snowdon & Rau, the payment of which was guaranteed by defendant, in which Frank C. Schaefer was summoned as garnishee. From a judgment for plaintiff for want of sufficient affidavit of defense, defendant and garnishee appeal. Appeal quashed.

On December 13, 1892, the Philadelphia

& Reading Railroad Company commenced an action in common pleas No. 1 of March term, 1893, No. 10, against W. H. Snowdon, to recover the amount of the said default of Snowdon & Rau, by issuing a writ of foreign attachment against certain real estate of the said W. H. Snowdon, he being a resident of New Jersey. To this writ the sheriff made the following return: "Attached as within commanded, December 17th, 1892, at 10 a. m., certain real estate, described in a certain paper hereto annexed, and marked 'A,' by going to Dillwyn and Willow streets, and then and there, in the presence of R. Henry, a creditable person of the neighborhood, attaching and declaring that I attached the said real estate, and also all the goods and chattels, moneys, credits, legacies, and interests of the within-named defendant in the hands, possession, or control of Frank C. Schaefer, and summoned on the same day, and at this same time, the said Frank C. Schaefer, as garnishee, by giving to him a true and attested copy of the within writ, and making known to him the contents thereof; said Frank C. Schaefer being the tenant in possession of premises described in said paper as No. 1 and 2, and holding under the defendant. A description I have filed in the office of the prothonotary, December 21st, 1892, and nihil habet as to defendant; also nihil habet as to Sarah R. Snowdon, 'garnishee,' so answers. Horatio P. Connell, Sheriff. Allan A. Pancoast, Deputy Sheriff." Upon February 23, 1893, the defendant therein entered a rule on the plaintiff to show cause of action, and why the foreign attachment should not be dissolved. Upon March 2d an affidavit of the cause of action was filed, and, after argument, the rule was, upon March 10th, discharged. Upon May 27th a general appearance was entered for the defendant, and upon July 6th the plaintiff filed his statement of claim. Upon July 15th the defendant entered a rule to set aside and quash the foreign attachment, which rule was, upon July 22d, revoked, and thereupon defendant, on same day, filed an affidavit of defense. On September 18th a rule was taken for judgment for want of a sufficient affidavit of defense, which was made absolute on September 23d, and damages assessed. On November 20th a *fi. fa.* was issued against the real estate attached, and the garnishee, upon December 1st, entered a rule to show cause why the judgment should not be set aside, and the *fi. fa.* quashed. On the hearing of the rule on December 23, 1893, the court permitted the rule to be amended by adding, "Foreign attachment quashed, and return set aside," and the rule, as thus amended, was, on December 28, 1893, discharged.

James Rich Grier, for appellant. John G. Lamb and Thomas Hart, Jr., for appellee.

PER CURIAM. A judgment having been entered against the defendant for want of a

sufficient affidavit of defense, the proper remedy of the defendant was by appeal, and not by a motion to strike it off. We cannot go into the merits of the contention upon such a motion. Presumably that subject was duly considered by the court below before the judgment was entered. Under the procedure act of 1887 it is a grave question whether an affidavit of defense may not be required after the proceeding by foreign attachment has been converted into an action of assumpsit by a general appearance for the defendant. But, whether it is or not, the remedy is by appeal. Motions to strike off a judgment ordinarily are not allowed, unless the record shows that the judgment was irregular or void. The refusal of the court below to set aside the return to the writ of foreign attachment and to quash the writ is not a final judgment, and is therefore not the subject of an appeal. The truthfulness of the sheriff's return of service of the writ of foreign attachment cannot be inquired into in this proceeding when the return is regular on its face, as it is here. If the return was false, the remedy is by an action for a false return. Appeal quashed.

(161 Pa. St. 155)

MERCANTILE LIBRARY CO. OF PHILADELPHIA v. TAYLOR, Receiver of Taxes, et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

TAXATION—EXEMPTION—LIBRARY BUILDING.

Where a building is exempt from taxation while used and occupied for library purposes, such part as is rented for other purposes is taxable.

Appeal from court of common pleas, Philadelphia county; Arnold, Judge.

Suit by the Mercantile Library Company of Philadelphia against John Taylor, receiver of taxes, and the city of Philadelphia, to enjoin the collection of taxes on complainant's building, which was by Act April 14, 1868, exempt from taxation so long as it should be used and occupied for library purposes. Decree for defendants. Complainant appeals. Affirmed.

The opinion of the court below was as follows: "The board of revision of taxes has assessed the library building of the plaintiff at \$125,000, and exempted \$110,000 thereof, thus leaving \$15,000 subject to taxation. It appears by the affidavit of Mr. Perot, president of the library company, to be found in the answer of the defendants, that the meeting room on the first floor is rented to the board of trade at \$1,000 per annum. On this state of facts we think the board of revision was right in subjecting the building to taxation upon so much thereof as is rented and produces a revenue. The other reason assigned by the defendants, that the library company charges a price for the use of its books when they are taken out,

and annual dues for its members, is not a legal reason for taxing the property. *Donohugh v. Library Co.*, 86 Pa. St. 303. But, as long as any part is rented for profit, that part is subject to taxation. The case is the same as that of *Association v. Donohugh*, 7 Wkly. Notes Cas. 208, in which it was held that such portions of a building owned and occupied by a charitable association as are occupied by lessees paying rent are not exempt from taxation. Injunction dissolved, and plaintiff's bill dismissed, with costs."

Charles Henry Hart and F. Carroll Brewster, for appellant. Charles F. Warwick, City Sol., and E. Spencer Miller, Asst. City Sol., for appellees.

PER CURIAM. The decree in this case is affirmed, on the opinion of the learned court below, and on the decision of this court in the case of *City of Philadelphia v. Barber*, reported in 160 Pa. St. 123, 28 Atl. 644.

(161 Pa. St. 123)

In re LEVY'S ESTATE.

Appeals of ALTEMUS et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

WILL—GIFT OF "MONEY"—WHAT INCLUDED.

Testatrix, whose estate amounted to over \$150,000, principally undrawn income due her from her deceased husband's estate, gave any "sum" of money "I may have by me" to her daughters; and again directed that "if any money not disposed of in my name is to my credit" it should go to them. *Held*, that such devise gave to such daughters only what was literal money.

Appeals from orphans' court, Philadelphia county; Penrose and Hanna, Judges.

Judicial settlement of the account of Medora L. Altemus, administratrix with the will annexed of the estate of Mary Ann Levy, deceased. From a judgment dismissing exceptions to a finding that deceased died intestate as to the larger part of her estate, Medora L. Altemus and Mary A. Tumbleston, who claim as devisees under the will, appeal. Affirmed.

Mrs. Mary Ann Levy, the testatrix, died February 6, 1891, leaving a will in writing, dated November 1, 1890, in which no executor is named. Deeming that the testatrix gave the bulk of her property to her three daughters, the register of wills granted letters of administration c. t. a. to one of them, Mrs. Medora L. Altemus. Whether this construction of the will is correct, or whether there is an intestacy respecting the great part of the estate, was the only question raised on the settlement of her account. The will is written on four separate sheets of paper, of which, speaking in a general way, but by no means with entire accuracy, one sheet relates to the gifts to each of her four children,—a son, Edmund L. Levy, and

three daughters, Medora L. Altemus (the accountant), Annie E. Childs, and Mary A. Tumbleston. She disposes of her furniture, horses, and household belongings with great care, going over the whole house, room by room, and in one or two instances, where she found that she had overlooked an article, returning to the subject. She then, near the end of each of the four sheets, disposes of her "money," specifying it variously as "money to my credit," "money I may have by me," and "money by me," giving it to her three daughters equally; first, however, charging it with legacies to servants, amounting together to \$1,000. At the time of her death she had no actual cash whatever on hand. She kept no bank account, and, while she received at intervals considerable sums from her husband's estate, she used them at once in the payment of servants' wages and household bills incurred, and divided any balance among the three daughters. She was not in the habit of including the son in making these gifts, for he had been amply provided for by his father, as herein-after stated. After deducting the bills, which were paid instantly, there would not be enough money on hand, even temporarily, to pay the legacies, and she would have no substantial sum, except for a very few days at a time. In aid of the court in construing the will, other circumstances surrounding the testatrix were shown substantially as follows: Mrs. Levy was the widow of John P. Levy. Her entire estate consisted of household furniture and her horses and carriage, disposed of serially by the will, and her interest in her husband's estate, which was the entire net income remaining after paying certain annuities and charges. She had no ready money, and kept no bank account. Her larger bills were usually paid by the check of Neafie & Levy, in which the estate had a one-half interest; but for direct and immediate personal and household use she received at intervals a check which she immediately had cashed and used as above stated. Her husband died late in December, 1867, leaving him surviving the widow and four children already mentioned; and having made a will, dated September 11, 1867, which was duly proved, and letters testamentary thereon granted on January 7, 1868. He was a member of the shipbuilding firm of Neafie & Levy, having a one-half interest therein, which, under the provisions of his will, was continued by his executors. He possessed other property, the income of which was about sufficient to pay the expenses of administration and certain annuities, etc., leaving the income derived from the business as the substantial equivalent of the income of his residuary estate. Under the terms of the will his widow was entitled to the entire residuary estate for her life, but to determine the net amount reference must be made to a provision of the will by which Mr. Levy directed that his son,

Edmund L. Levy, who is one of his executors, should represent his estate's interest in the business, and for this service receive one-third of the estate's share of the firm's profits. It thus came about that the income from other sources was applied to expenses of administration, annuities, etc., while Mrs. Levy's bills and the moneys given into her own hands were paid by the firm's check. These payments were charged against the estate in the firm's accounts; but it may be said that substantially, although not technically, her income was composed of two-thirds of the estate's half of the profits of the firm, the other third being paid to Edmund L. Levy. The firm of Neafie & Levy was very successful, the one-half of the profits coming to the estate of John P. Levy in the twenty-two years subsequent to his death aggregating over \$1,000,000, of which amount Edmund Levy drew his one-third, or, in round figures, about \$854,000. Mrs. Levy did not withdraw her full share of the profits. She did draw, however, in round figures, about \$470,000. Strictly speaking, she would have been entitled to have withdrawn in round figures about \$708,000. By the adjudication of the eleventh account of the executors, filed after Mrs. Levy's death, it was found that, after deducting a considerable number of payments on her account, the expenses of audit, etc., there was a balance of undrawn income, to which she was entitled, amounting to \$155,885.11. Most of this still remained in the firm in the shape of undrawn profits, appearing in their accounts, in the form in which they were kept, to the credit of the estate.

The opinion of the majority of the court below is as follows: "There are undoubtedly cases where, under wills declaring or manifestly indicating an intention to dispose of the entire estate of the testator, a gift of 'money' will pass his personal property generally. *Smith v. Davis*, 1 Grant, Cas. 158, is an illustration; and, as was there said by Judge Woodward, the 'word "money" * * * may be construed to mean cash, or may stand for the whole personal estate, as the intention of the testator, deduced from every part of the will, may seem to require.' *Jacob's Estate*, 140 Pa. St. 268, 21 Atl. 318, goes still further, and, the intention to exclude the heir in that case being apparent, the proceeds of sale of lands, acquired after the date of the will, were awarded to the residuary legatee under a gift of 'the remainder and residue of my money.' These cases, however, are exceptional, and the general rule, as stated in *Williams on Executors* (Perkins' Ed. 1877, p. 1286), is that 'the word "money" does not extend beyond what is literally "money," unless the context requires it.' But even in a will manifestly disclosing a purpose of complete testamentary disposition, if the gift of money is accompanied by qualifying words, such words cannot be disregarded, if a meaning

can be given to them, especially if, understood in their natural sense, they serve to prevent the exclusion of one to whom a share of the estate would pass under the intestate laws; and such qualifying words are found in the will now before us. It is true that the gift to the daughters of the testatrix of 'money;' but it is of money in one case referred to hypothetically,—'if any money not disposed of in my name is to my credit,'—and in the others as 'any sum of money I may have by me.' Moreover, there is an entire absence from the instrument of anything evincing an intention to dispose of her whole estate, or her belief that she was so disposing of it. She does not even declare that the paper's which she signs compose her last will, but says simply that, to the extent mentioned in them, 'these few lines will make my wishes known, and I feel sure my dear children will be agreeable to them, and see that they are faithfully carried out,'—a feeling she would scarcely have entertained if she intended that one of her children should have no share in the most considerable part of her estate. It would, in any case, be an undue straining of the meaning of the expression, 'any sum of money I may have by me,' to make it embrace moneys in no sense 'by her' at all, but coming to her, under future settlements of accounts of the executors of her husband's estate, from a partnership continued after his death, under the provisions of his will, for her benefit for life, and at her death to his children, etc. The words, 'if any money * * * is to my credit,' might, it is true, include whatever, upon the settlement of such accounts, should be found due her; but the gift is only of such money 'not disposed of,' or 'not disposed of in my name,' and when she died there were no such undisposed-of moneys,—the partnership moneys having, with her consent and direct participation, within a month after the execution of the will, been converted into the stock of a corporation; and moneys to which she was entitled under previous settlements having, also with her consent and participation, been applied for the improvement and repair of real estate in which she had a life interest. If, therefore, it be conceded that the testatrix, when she wrote the 'few lines' making known the wishes which she knew would 'be agreeable' to her children, had in her mind anything else than moneys such as she had been in the habit of sharing with her daughters, actually paid to her, and unexpected at the time of her death, or moneys due her for commissions as one of the executors of her husband, it is clear that she has included in her gift nothing but 'money' in its literal sense, for nothing else could be money 'not disposed of,' or money 'by' her; but, as the auditing judge has so well shown, there is no reason to doubt, both from the language of the instrument and the light afforded by surrounding circumstances, that, not ques-

tioning the right of her husband to withhold from her the power of disposing by will of income not actually used or required by her while she lived, she made no attempt to dispose of it; and hence, though after her death the invalidity of the restriction was judicially determined, the income thus unconsumed passed to all her children under the intestate laws. See *De Silver's Estate*, 142 Pa. St. 74, 21 Atl. 882; *Howe's Appeal*, 126 Pa. St. 233, 17 Atl. 588. The exceptions are dismissed, and the adjudication confirmed absolutely."

M. Hampton Todd and J. Howard Gendel, for appellants. R. C. McMurtrie and John G. Johnson, for appellee.

PER CURIAM. We find it impossible to believe that the testatrix intended to dispose of her whole estate by the use of any of the words which are claimed to have such an effect in the four testamentary papers signed by her. Those words did not purport to include anything but money, and the immediate context in each instance is of such a character as to preclude the possibility of attributing to her any other intent than to make a gift of money distinctively as such. The great bulk of the estate to which she was entitled at the time of her death had in it no money at all. It consisted of a number of items of property, not one of which was money in any sense. While it is perfectly true that the word "money" may, when so intended by the testator, include any kind of property, even land, it can never have that effect when the text of the testament clearly shows it was not so intended. We concur with the opinion of the majority of the court below, and substantially for the reasons there expressed we affirm the decree. Decree affirmed, and appeals dismissed, at the cost of the appellants.

(161 Pa. St. 143)

POOR DIST. OF DALLAS TP. v. POOR DIST. OF EATON TP.

(Supreme Court of Pennsylvania. April 16, 1894.)

POOR LAWS—SETTLEMENT—PAYMENT OF TAXES.

Payment of taxes such as, if made for two years, gains the payor a settlement (Act June 13, 1886, § 9, subd. 2), is not accomplished by a political committee's unauthorized and unratified payment of a person's tax, to enable him to vote. *Overseers of Lawrence v. Delaware Overseers*, 23 Atl. 1124, 148 Pa. St. 380, followed.

Appeal from court of quarter sessions, Wyoming county; John A. Sittser, Judge.

Petition of the poor district of Dallas township for a rule on the poor district of Eaton township to show cause why it should not reimburse petitioner for expenditures in behalf of Lucy Taylor, a pauper, deceased. Petition dismissed. Petitioner appeals. Affirmed.

Michael Cannon, for appellant. Charles M. Lee, for appellee.

WILLIAMS, J. Lucy Taylor was the minor daughter of Harry Taylor, and became a charge upon Dallas poor district by virtue of an order for relief properly issued on the 12th day of March, 1892. She died during the month of October following. The overseers of Dallas are now seeking to charge the district of Eaton with the expenses of her sickness and burial, on the allegation that her father was legally settled in that township. Whether this is the fact is the question on which this appeal depends, for, if he had a settlement in Eaton, his minor daughter was properly chargeable upon that poor district. In the court below, the plaintiff's case rested upon the payment of taxes by Harry Taylor. He was assessed with taxes in Eaton township for the years 1889, 1890, and 1891. The taxes for 1891 were exonerated because of his death, so that the years of 1889 and 1890 are those on which the question of settlement depends. In 1889 Taylor was assessed with a tax of 15 cents. This was paid, without Taylor's knowledge, by a political committee, and on the morning of the election day the receipt was handed to him, to enable him to vote. The tax for 1890 he paid. The payment of taxes for two successive years was not shown therefore, unless the payment of the taxes for 1889, without his knowledge, by a political committee, was a payment by him, within the meaning of the poor laws. This question was distinctly raised and determined in the recent case of *Overseers of Lawrence v. Delaware Overseers*, 148 Pa. St. 380, 23 Atl. 1124. It was said in that case that the payment of taxes must be the act of the person charged, by himself or his agent; and that payment by a member of a political committee, without his authority or knowledge, and for the purpose of qualifying him to vote, is not enough. To this it would be proper to add that such unauthorized payment may be ratified and adopted by the return of the money so paid, or an undertaking to repay it, and that such ratification would be equivalent to a precedent authority, so far as the question now before us is concerned. In this case the evidence shows the absence of a precedent request or authority from Taylor, and of any word or act of ratification after the payment was brought to his attention. Following the case cited, above, we must hold that the taxes of 1889 were not paid by Taylor, and, as a consequence, that he had no settlement in Eaton township resulting from being charged with and paying "his proportion of any public taxes or levies for two years successively." It was not alleged that he had acquired settlement in any other manner, although some circumstances appear in this

case that distinguish it from the cases cited on the argument. He had lived in Eaton township between two and three years before his death. He had maintained himself by the proceeds of his labor and by his pension, without becoming a public burden. He had aided his son-in-law in his unsuccessful effort to purchase a home by a gift of \$50 paid upon the purchase money. But he had neither purchased or leased real estate, as required by the poor laws, nor held a public office, nor complied with any other provision of the law made necessary to his settlement in Eaton township. Upon the single point presented in the court below, the ruling was right, and the order appealed from is affirmed.

(161 Pa. St. 181)

In re HALE'S ESTATE.

Appeal of COMMONWEALTH.

(Supreme Court of Pennsylvania. April 16, 1894.)

DEVISES—LAND IN ANOTHER STATE — DIRECTION TO CONVERT AND REINVEST — COLLATERAL INHERITANCE TAX.

Where one domiciled in Pennsylvania devises land in another state to his wife for life, with remainder over, with direction to his executors to sell at the wife's death, and invest in real-estate mortgages in the other state, it is not subject to a collateral inheritance tax in Pennsylvania, even if the interests of the parties in remainder vest in them, at testator's death, as personalty.

Appeal from orphans' court, Philadelphia county; Ashman, Judge.

In the matter of the estate of Samuel Hale, deceased. The claim of the commonwealth of Pennsylvania for collateral inheritance tax on that part of deceased's property which consisted of the proceeds of real estate in other states, sold by his executors, and invested in real-estate mortgages in St. Louis, under the direction of deceased's will that on the death of his wife his executors should sell his property, and so invest the proceeds, and pay the income arising therefrom to certain collaterals, and on their death divide the principal among their children, was disallowed, and the commonwealth appeals. Affirmed.

The opinion of the court below was as follows:

"We do not think it necessary to discuss the question of conversion which was raised at the argument. The testator was domiciled in this state at his death, and the real estate which he directed by his will to be sold is situate, part of it in New Jersey, and most of it in Missouri. The direction to sell covered these lands, but it was operative only at the death of the widow,—an event which has now happened. If, during her life, the lands retained, as against the commonwealth, their original character, they were beyond the reach of the taxing power of this state. *Com. v. Coleman's Adm'r*, 52 Pa. St. 468. If the direction to sell had

¹ Act June 13, 1836, § 9, subd. 2.

been immediate, as in *Williamson's Estate*, 153 Pa. St. 521, 26 Atl. 246, or, which is the same thing, if the exercise of the power was extended at the discretion of the executor, and in the interest of the estate, for three years after the death, as in *Miller v. Com.*, 111 Pa. St. 321, 2 Atl. 492, then, under the rulings in both of those cases, the estate which passed from the testator would be personalty, and would be liable to the tax. In the case in hand the estate which passed under the will was a freehold, and its situs was beyond the commonwealth, and neither its character nor its situs was possible of change during the life of the first taker. In its character as realty, it was subject to any collateral inheritance tax or other tax which the legislature of the situs might choose to impose; and it was exempt on the other hand, from any extraterritorial taxation. It was argued that the intervention of the life estate did not affect the result as to the parties in remainder, but that their interests vested at the death of the testator, and vested as personalty. *Allison v. Wilson's Ex'rs*, 13 Serg. & R. 330; *Morrow v. Brenizer*, 2 Rawls, 185; *Burr v. Sim*, 1 Whart. 252; *McClure's Appeal*, 72 Pa. St. 414. If this be conceded, there still remains in the case an element which is wanting in those which have been cited. The fund in *Williamson's Estate* and *Miller v. Com.*, supra, was to be brought within this jurisdiction, and it had become literally, in the words of the act, an estate passing from the testator within the commonwealth. The direction here is that it shall be withheld from transmission into this commonwealth, and shall be invested in mortgages and real estate in St. Louis. It can hardly be said, in the face of this unqualified injunction of the testator, that the fund follows the person of the owner, and, while it is secured upon real estate in Missouri, is nevertheless, by a legal fiction, transferred into Pennsylvania. To accede to this would compel us to hold that the substance of property may be taxed in one state, and its shadow in another,—a species of phantom legislation which, we believe, has not yet been recognized by the courts. It was within the power of the local tribunals to compel accounting in St. Louis, and to approve or disapprove the investments made by the executor, wholly regardless of what might be decreed in the premises by the courts of Pennsylvania. It follows from all this that, whether it bears the impress of realty or personalty, the estate is not subject to the imposition of the tax. The exceptions are accordingly dismissed."

W. U. Hensel, Atty. Gen., and Page, Allison & Penrose, for the Commonwealth. John H. Sloan and R. O. Moon, for appellee.

PER CURIAM. We agree entirely with the views expressed by the learned court below in this case, and we affirm the decree for the reasons stated in the opinion.

(161 Pa. St. 157)

In re MILLWARD-CLIFF CRACKER CO.

Appeal of PHILLER et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

CORPORATIONS—NOTES—IRREGULAR EXECUTION.

1. Act April 29, 1874, § 5, declares the by-laws of a corporation to be its law (subject to the charter and general law), and requires them to prescribe, inter alia, the power and duties of the officers. A by-law required the company's obligations to be signed by the treasurer and countersigned by the president, but, without the knowledge of the directors or stockholders, these officers had been in the habit of issuing notes signed merely by the treasurer. *Held*, that such practice did not abrogate the by-law, nor clothe the treasurer with any apparent authority so to make notes.

2. The treasurer of a corporation has no implied authority to execute notes for the corporation.

3. Since by Act April 29, 1874, § 5, the by-laws are the law of the corporation, and must prescribe the duties and powers of officers, one who discounts a corporation's paper is charged with knowledge of the authority of the signing officers.

4. Unless a course of business is established between a corporation and a bank by which the former's paper, executed not in accordance with its by-laws, has habitually been discounted for its benefit by the bank, the corporation is not estopped to set up such defect to a note fraudulently issued by one of its officers, who converted the proceeds.

5. The fraud of a bank president in contriving and negotiating in his bank fraudulent notes of a corporation, for his own use, imputes knowledge to the bank, and it has no claim against the corporation.

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the Millward-Cliff Cracker Company. Appeal of George Philler and others, committee of the clearing house of the banks of Philadelphia, from a decree disallowing their claims against said estate. Affirmed.

Following is so much of the auditor's report (Joseph De F. Junkin, Esq., auditor) as is necessary to be set out:

"The assignor is a corporation incorporated upon December 31, 1884, under the general incorporation act of 1874, its certificate of incorporation containing nothing beyond the bald requisites of the act. Upon January 12, 1885, the corporation passed the following by-law, among others: 'By-law, section II., Millward-Cliff Cracker Company: The treasurer will give bond in the sum of one thousand dollars, shall receive all money, and make all payments, and furnish a report of the receipts and payments at the monthly meetings of the board of directors. He shall be the only authorized person to sign checks and obligations for the corporation, and no check or obligation signed by him will be good unless countersigned by the president of the corporation. He shall keep a separate account as treasurer in such bank or banks as the board of directors may from time to time designate. He shall also keep the accounts of the corporation, which shall include a set of double-entry books for

the business, with a separate set for the pie department of the business.' Whether any obligations of the corporation had been given prior to that time did not appear, nor, if any were given, what form they took. But it did clearly appear, and your auditor finds, that from that time until the assignment a large amount of money, running into hundreds of thousands of dollars, was obtained by the president and treasurer from various institutions and persons upon notes and indorsements exactly similar in form to those in question, without the counter signature of the president, such money being for the use of the corporation, and the notes being met at maturity, from time to time, with moneys of the corporation. The president and treasurer, also, upon numerous occasions during these years, gave similar notes, which were met at maturity, in liquidation of the corporation's indebtedness; and not until shortly before the assignment did any of the corporation paper contain the president's counter signature, and then only in a few instances. No counter signature of an indorsement was produced.

"Your auditor also finds that during all this time the same president, Ephraim Young, and the same treasurer, Frank H. Brenton, were in office. He also finds that the course thus pursued by the president and treasurer was not called to the attention of the directors of the company, either as a body or individually, and was entirely unknown to the stockholders at large. It appeared that the treasurer would make his stated reports to the board of directors and the corporation of moneys borrowed and paid in the aggregate, and the notes were not produced to them. In other words, it distinctly appeared that, practically from the inception of the corporation business down almost to the day of the assignment, the executive officers of the company had ignored the by-law in the assumption of such corporation obligations, and either carelessly or ignorantly placing their own construction upon it, treated it as a dead letter. Had not the frauds occurred which were discovered and are about to be mentioned, they might be pursuing this same course to this day. The notes for which the company thus received value appear to have been received and discounted in at least seven different banks, and a number of business houses, and a course of dealing was thus established with such banks and houses. But, with the exception of the Spring Garden Bank, attention is called to the fact that none of the parties now claiming, holders of this paper, had had any previous dealings with the corporation or its officers upon paper of this character. There was no course of dealing established with them. Beginning in 1885, it appeared that Francis W. Kennedy, then president of the Spring Garden Bank, induced Ephraim Young, who was a director in said bank, to have Frank H. Brenton, the

aforesaid treasurer of the assignor, execute and deliver to the said Kennedy a series of notes in the form mentioned, without the counter signature of the president, which notes, whether made by the company ostensibly, or ostensibly indorsed by them, were all without consideration passing to the company, and were used by Kennedy and Young in fraud of the company's rights and for their own purposes. The transactions and frauds were long and complicated, and the details are not needed for the purposes of this finding. It is sufficient to say that, by means of the books of the Spring Garden Bank, to each of the notes in question was fastened the fact that it was either an original note or a renewal of a note, the proceeds of which the Millward-Cliff Cracker Company did not receive, but which all went either to Kennedy or Young; and that, so far as the company was concerned, the notes were entirely without consideration. These notes, or series of notes, were all discounted through Francis W. Kennedy's agency as president of said bank. He either discounted them between his board meetings, and subsequently informed the board of the bank, or presented them at a regular meeting. The proceeds of such notes, when discounted, went either into his personal account, or into that of Ephraim Young.

"Such are believed to be the general and salient facts necessary to a correct understanding of the position taken by the corporation assignor; that, as such notes were issued without consideration to it, and in fraud of its rights, they are not valid claims upon this fund, because they are not executed as required by the above-mentioned by-law. They admit that, had consideration passed to the corporation for the same, it would be liable, but they claim that, lacking such element, the corporation is only bound by such obligations as are executed strictly in accordance with its law. * * * Much consideration has brought your auditor, however, to the firm conviction that all of these claims should be rejected, and he finds that none of them are entitled to share in this fund. * * *

"The controlling feature of the situation as between these claimants and the assignor, to the mind of the auditor, is found in the fact that the assignor is a corporation, and is purely a creature of statute. Necessarily it can be governed, controlled, and held responsible only within the enabling and disabling lines of the statute. That it could borrow money, and cause obligations to be executed to secure the repayment of the same, which would be valid as against it, seems obvious from the powers contained in its franchise. Where the proceeds of such obligations went into the treasury of the corporation, and it received the benefit thereof, the form of such obligation would appear to be of little consequence, as such circumstance would estop any technical defense as to form.

But such was not the case here. From the obligations sought to be enforced, this corporation received no benefit, and their defense is simple: 'The obligation is not in the form provided for and required by the law of our existence. We received nothing from it. Therefore we decline to recognize it, although it bears upon its face the name of an agent of ours; such agent, however, not having authority, express or implied, to so bind us.' With great earnestness and ability the learned counsel for the claimants sought to impress upon the auditor that this defense was ill-founded for the following, among other, reasons: First. Because a by-law, such as the one in question, was simply a regulation inter nos—a private agreement, as it were—among the incorporators, which in no way could be binding upon outsiders, and therefore was not effectual here to prevent a recovery, when the paper bore the name of the corporation, placed thereon by one of its duly-elected agents. From the citations handed the auditor it would seem that in some cases the force of certain by-laws has been so restricted, and it is, of course, in the very nature of by-laws that many of them should be applicable only to that extent; and, under the statutory provisions of several of the states with reference to corporations, it is evident that by-laws of corporations of these states are only thus far effective. But under our statute the by-law becomes of the very essence of the corporation life. The words of the statute are express (act of assembly, approved the 29th day of April, A. D. 1874, section 5): 'The by-laws of every corporation created under the provisions of this statute, or accepting the same, shall be deemed and taken to be its law, subordinate to this statute, the charter of the same, the constitution and laws of this commonwealth, and the constitution of the United States. They shall be made by the stockholders or members of the corporation, at a general meeting called for that purpose, unless the charter prescribes another body, or a different mode. They shall prescribe the time and place of meeting of the corporation, the powers and duties of its officials, and such other matters as may be pertinent and necessary for the business to be transacted, and may contain penalties for the breach thereof, not exceeding twenty dollars.' It would be difficult to frame a charter or draft a statute where the *modus operandi* of the corporation life is less defined than under the laws of this state. With the exception of a few trifling provisions, the rights, duties, powers, and responsibilities of the officers are left to be defined by the by-laws. In like manner, to them all matters regulating the methods of dealing with the public are confided; and your auditor is clearly of the opinion that such by-laws, when enacted, in so far as they touch upon the same or kindred matters, become written into the charter, and not only de-

fine and limit the rights, duties, and powers of the officers inter nos, but, so far as those with whom such corporation has dealings are concerned, put such parties upon notice, in treating with such officers, as to the extent of their power and agency, whether the specific by-law has been brought home to them or not. As before said, this seems to the auditor to be clear from the very words of the statute; but common sense and reason fortify such conclusions as well. Were this not the case, all stockholders in corporations would be at the mercy and whim of their officers, and those with whom such officers dealt. Necessarily, the corporation must act through its officers. Is the extent of their powers to bind the corporation to be a matter of implication at the will of those who deal with them, ostensibly for the corporation? The question seems to contain its own answer, and to also answer the second position of the claimants, viz. that there was implied in the rights and duties of the treasurer of a corporation the right and duty to execute and deliver obligations binding upon the corporation *virtute officii*. Your auditor has searched the books in vain for any decided case sustaining such a proposition, and he does not believe that it is sustainable. Not only do the customs of corporations differ radically as to the execution of obligations, but there does not even seem to be anything in the position occupied by a treasurer to give a color of warrant for such a contention. A treasurer is one who holds or keeps the treasury. His duty is to receive and guard its funds, and to expend them, not at his own whim, or upon his own judgment, but as directed by those vested with the authority under its law. While it is possible that a check, drawn fraudulently by a treasurer alone where counter signature of another officer was required, and upon the faith of which some innocent third person had acted to his detriment, might be binding upon the corporation, although your auditor doubts it, yet such a recognition of power in a treasurer is certainly the extreme limit to which this power could be carried by implication. The signing or indorsing of a promissory note binding the corporation is the execution of a solemn contract on behalf of the corporation, which, to the auditor's mind, is entirely beyond purview of a treasurer's duty or power. Such power may be expressly conferred upon him by his constituents, but, until that is done, it should not impliedly extend so far. It is an executive act, and, if any implication could carry such power, it should be vested only by implication in the executive head, the president. The fact that with many corporations the treasurer creates such obligations without express authority, and that the public accepts the same as valid, does not strengthen the argument in favor of the implication. * * * An officer of a corporation is but an agent with limited authority, and, in dealing with him as such,

the public is bound to inquire into and be guided by the reasonable scope of such authority as defined in the law of his constitution, and as in the case of any other principal or agent.

"This brings us to the third and most important of claimants' contentions, viz. that these notes were issued in the exercise of the apparent authority of this treasurer, because of the long-continued issuance of similar notes, which the corporation had duly honored without objection. Upon its face, and at first blush, the position has some strength, but, when closely examined, such strength fades away. As before found, none of the claimants, excepting the Spring Garden Bank, had had previous dealings upon similar notes with this corporation, so that the principle of estoppel, which might be invoked under such circumstances, had no application here. As to rights of the Spring Garden Bank, under the facts, they will be considered hereafter. It was also found that, although the corporation did receive the proceeds of notes so issued in a very large amount, extending over a series of years, yet no one of the other officers or stockholders was ever made aware of the irregularity of such notes, or of what the president and treasurer had been doing. When discovered, the practice was promptly stopped, and measures taken to punish the wrongdoers. It is claimed that such continuous practice amounted to an abrogation of the by-law, and vested the treasurer with an apparent authority to issue notes and give obligations equivalent at law to a real authority. Such contention appears to the auditor as most specious. * * * It is said by claimants that, even had they made inquiry, they would have been told by these fraudulent agents that this was the customary way in which this corporation issued its notes; and would have received a similar reply from those with whom it had had previous dealings. That might or might not have been the result. If inquiry had been made, the truth might have come out. But the fact remains that not one of them did make inquiry, or endeavor to ascertain the extent of this agent's authority to bind his principals. They assumed that he had such authority, and, in your auditor's opinion, in so assuming, also assumed all the risks attendant thereon, and have no one to blame but themselves.

"The claimants further insist—Fourth, that this defense is of the most technical character, raised to defeat honest and just claims, where good money has been parted with upon the credit of the corporation; and that, as the president of the corporation stood by, and was cognizant—indeed, the author—of the frauds, therefore such acquiescence was equivalent to his counter signature, and the corporation should be liable. This thought also, at first blush, seems to contain some force, but its complete answer lies in the

very fact that of necessity the business of a corporation must be conducted along technical lines. Its inception and whole existence is technical, and the only protection which its incorporators have consists in the strict and technical enforcement of the laws of the corporation, which are as open to those who choose to deal with it as they are to the stockholders and officers. As remarked at the commencement of this discussion, the corporation is purely a statutory creature, with its powers and limitations strictly defined, and this fact is or should be as patent to outsiders dealing with it and its officers as to the incorporators themselves. In the ordinary business transactions of every day, no one would dream of charging a personal principal with the act of an agent, where his authority was not either expressed or clearly implied from the character of his agency. And where it was or should be known from the nature of his employment that the extent of the agent's authority must have certain defined limitations, the law casts the burden upon the party seeking to charge the principal of proving the scope of this authority. Such your auditor takes to be the position here. The very fact that the agent is an officer of a corporation, which is required by the statute to have by-laws expressing the extent of his powers, should put all persons dealing with him upon their guard in investigating the extent of his powers. *'Ignorantia legis neminem excusat.'*

"But it is still further insisted upon by these claimants—Fifth, that the enforcement of the equitable doctrine that, where one or two innocent persons must suffer, the party who puts it within the power of the wrongdoer to commit the fraud is the one who should suffer; and that here the corporation, having chosen to put officers in power who perpetrated these frauds, should suffer as between it and themselves. The invocation of this doctrine might prove of service to the claimants were the foregoing considerations out of the way; but, if the observations of your auditor with reference to the corporation and the relations sustained to it by those dealing with it are well founded, it cannot be successfully maintained that these claimants are innocent parties within the principles of this doctrine. They dealt, or are considered at law to have dealt, with these officers with their eyes open. They were charged by law with knowledge of this by-law and its consequences, and are presumed to have known that the notes, to be valid against the corporation, required the president's counter signature. This doctrine is therefore without application here. Your auditor therefore finds that the by-laws of this corporation required that an obligation, to be binding upon it, should be signed by the treasurer and countersigned by the president. That such by-law was valid and subsisting at the time each of the notes in question was executed, and was not abro-

gated by the secret practice of such officers in executing obligations in a different manner. There was no apparent authority conferred upon the treasurer by such secret practice to execute obligations in any other manner, which would be binding upon the corporation. That there is no implied authority in the treasurer of a corporation to execute any obligation binding upon the corporation. And that in this particular case the parties claimant accepted their notes charged with the notice that the obligations of this corporation, to be valid, required execution in a particular way, and that none of the notes presented were so executed.

"The fact has been adverted to before that the Spring Garden Bank's position here differed from that of the other claimants in this: That there had been a long course of dealing between the bank and the assignor, whereby many thousands of dollars' worth of obligations which the corporation had [not] met when they matured, and which were in the very form which the present obligations assume, had been discounted by the bank. Under such circumstances the assignor would clearly be estopped from contesting the bank's claim, were it not for the other controlling fact that the president of the bank, in accepting these notes for discount, knew them to have been executed in fraud of the assignor, and, indeed, procured their execution for his own purposes mainly. It is clear to the auditor that it is impossible to separate the knowledge of Francis W. Kennedy as an individual from his knowledge as such president. The knowledge of the president of the bank necessarily charges his corporation in the fullest manner, and your auditor can conceive of no principle of law or equity which would render the assignor liable under such circumstances. Indeed, the decided cases upon this subject clearly seem to point to the confirmation of the auditor's position. He cites the following to that end: *Holden v. Bank*, 72 N. Y. 292; *Bank v. Town of New Milford*, 36 Conn. 93; *Fishkill v. Bostwick*, 19 Hun. 354."

David H. Stone, Samuel B. Huey, Hood Gilpin, and A. T. Freedley, for appellants, cited:

Railroad Co. v. Clarke, 29 Pa. St. 152; *Mechanics' Nat. Bank v. West Philadelphia P. Ry. Co.*, 5 Wkly. Notes Cas. 290; *Insurance Co. v. Smith*, 11 Pa. St. 120; *Royal Bank of India's Case*, 4 Ch. App. 262; *Fay v. Noble*, 12 Cush. 1; *Credit Co. v. Howe Mach. Co.*, 8 Atl. 472, 54 Conn. 357; 2 Moraw. Corp. §§ 593, 594; *Boisot, By-Laws*, §§ 21-26; 83 Tayl. Priv. Corp. §§ 196, 197, 589; *Leach v. Bard*, 26 Atl. 236, 153 Pa. St. 573; *Loudon Sav. Fund Soc. v. Hagerstown Sav. Bank*, 36 Pa. St. 503; *Wright's Appeal*, 99 Pa. St. 432; *Brooke v. Railroad Co.*, 108 Pa. St. 529, 546; *Express Co. v. Schlessinger*, 75 Pa. St. 246; *Bank of Kentucky v. Schuylkill Bank*, 1

Para. Eq. Cas. 240, 248; *Wills v. Railroad Co.*, 6 Wkly. Notes Cas. 464; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Independent Bldg. Ass'n v. Real-Estate Title Co.*, 27 Atl. 62, 156 Pa. St. 181; *Association v. Benseman*, 4 Wkly. Notes Cas. 1; *Road Co. v. Wysong*, 51 Ind. 4; *Mahoney Min. Co. v. Anglo Californian Bank*, 104 U. S. 194.

William Henry Lex and John G. Johnson, for appellee, cited:

Market Co. v. Jackson, 102 Pa. St. 299; *Atkinson v. Manufacturing Co.*, 24 Me. 171; *Torrey v. Association*, 5 Allan, 329; *Craft v. Railroad Co. (Mass.)* 22 N. E. 920; *Credit Co. v. Howe Mach. Co. (Conn.)* 8 Atl. 479; *Fifth Ward Sav. Bank v. First Nat. Bank* (1887) 7 Atl. 318, 48 N. J. Law, 513; *Wahlig v. Manufacturing Co. (City Ct. N. Y. 1890)* 9 N. Y. Supp. 733; *In re Great Western Tel. Co.*, Fed. Cas. No. 5,740, 5 Biss. 363; *Page v. Railroad Co.*, 31 Fed. 257; *Insurance Co. v. Scot*, 101 Pa. St. 449; *Ridgway v. Bank*, 12 Serg. & R. 263; *Railroad Co. v. Clarke*, 29 Pa. St. 152; *Leiper's Appeal*, 108 Pa. St. 382; *Wood's Appeal*, 92 Pa. St. 379; *Burton's Appeal*, 93 Pa. St. 214; *Association v. Benseman*, 4 Wkly. Notes Cas. 1; *Brooke v. Railroad Co.*, 1 Atl. 206, 108 Pa. St. 546; *Bank v. Christopher*, 40 N. J. Law, 436; *Bank v. Davis*, 2 Hill, 451; *Bank v. Aymar*, 3 Hill, 262; *Bank v. Cushman*, 121 Mass. 490; *Bank v. Paine*, 25 Conn. 444; *Farrell Foundry v. Dart*, 26 Conn. 376; *Bank v. Norton*, 1 Hill, 572; *Bank v. Lewis*, 22 Pick. 24; *President, etc., v. Cornen*, 87 N. Y. 320; *Powles v. Page*, 3 O. B. 16; *In re Marselles Extension Ry. Co.*, 7 Ch. App. 161; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige, 127; *Atlantic Cotton Mills v. Indian Orchard Mills*, 17 N. E. 496, 147 Mass. 268, 273; *Innerarity v. Bank*, 1 N. E. 282, 139 Mass. 332; *Corcoran v. Cattle Co.*, 23 N. E. 727, 151 Mass. 75; *Bank v. Cushman*, 121 Mass. 491; *Smith v. Livingston*, 111 Mass. 342; *Bank v. Cunningham*, 24 Pick. 270; *Bank v. Martin*, 1 Mete. (Mass.) 294; *Sutt v. Woodhall*, 118 Mass. 391; *Barnes v. Gas-Light Co.*, 27 N. J. Eq. 36; *Stratton v. Allen*, 16 N. J. Eq. 229; *Kennedy v. Green*, 3 Myne & K. 699; *In re European Bank*, 5 Ch. App. 358; *Winchester v. Railroad Co.*, 4 Md. 231.

PER CURIAM. We think the learned auditor in the court below has correctly pointed out the distinctions between the cases in which corporate liability is held, and those in which it is denied, in this class of causes. He held that where the corporation received the benefits of the unauthorized action of its officers it was bound. Also that, where a previous course of dealing of the same irregular character had been carried on, a liability arose, notwithstanding the unlawful character of the paper; but that, where there was no such previous course of dealing, no liability arose as to the particular paper in question. And he held that in the case of

the Spring Garden National Bank the fraud of its president in contriving and negotiating the fraudulent paper for his own personal use was with knowledge of the bank, imputed, it is true, but correctly imputed, to his bank; and the paper thus held created no liability on the part of the cracker company. In these several findings we concur. None of the authorities cited for the appellant conflict with these findings where the facts were similar. Without engaging in a protracted discussion, which we think unnecessary, we affirm the decree of the court below, substantially for the reasons stated in the report of the auditor. Decree affirmed, and appeal dismissed, at the cost of the appellants.

(161 Pa. 157)

In re **MILLWARD-CLIFF CRACKER CO.**
Appeal of **HANOVER NAT. BANK OF NEW YORK.**

(Supreme Court of Pennsylvania. April 16, 1894.)

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the Millward-Cliff Cracker Company. Appeal of the Hanover National Bank of New York from a decree disallowing its claim against said estate. Affirmed.

Hood Gilpin for appellant. Wm. Henry Lex and John G. Johnson, for appellees.

PER CURIAM. For the reasons stated in the opinion in Appeal of Philler (filed herewith) 28 Atl. 1072, the decree of the court below in this case is affirmed, and the appeal is dismissed, at the cost of the appellant.

(161 Pa. 157)

In re **MILLWARD-CLIFF CRACKER CO.**
Appeal of **TRADESMEN'S NAT. BANK OF NEW YORK.**

(Supreme Court of Pennsylvania. April 16, 1894.)

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the Millward-Cliff Cracker Company. Appeal of the Tradesmen's National Bank of New York from a decree disallowing its claims against said estate. Affirmed.

David H. Stone, for appellant. William Henry Lex and John G. Johnson, for appellees.

PER CURIAM. For the reasons stated in the opinion in the Case of Philler (filed herewith) 28 Atl. 1072, the decree of the court below in this case is affirmed, and the appeal dismissed, at the cost of the appellant.

(161 Pa. 157)

In re **MILLWARD-CLIFF CRACKER CO.**
Appeal of **NATIONAL BANK OF REPUBLIC OF NEW YORK.**

(Supreme Court of Pennsylvania. April 16, 1894.)

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the

Millward-Cliff Cracker Company. Appeal of the National Bank of the Republic of New York from a decree disallowing its claim against said estate. Affirmed.

William S. Divine and Samuel B. Huey, for appellant. Wm. Henry Lex and John G. Johnson, for appellees.

PER CURIAM. For the reasons stated in the opinion in Appeal of Philler (filed herewith) 28 Atl. 1072, the decree of the court below in this case is affirmed, and the appeal dismissed, at the cost of the appellant.

(161 Pa. 157)

In re **MILLWARD-CLIFF CRACKER CO.**

Appeal of **FISHER.**

(Supreme Court of Pennsylvania. April 16, 1894.)

Appeal from court of common pleas, Philadelphia county.

In the matter of the assigned estate of the Millward-Cliff Cracker Company. Appeal of B. F. Fisher, receiver of the Spring Garden National Bank of Philadelphia, from a decree disallowing his claim against said estate. Affirmed.

David H. Stone, for appellant. Wm. Henry Lex and John G. Johnson, for appellees.

PER CURIAM. For the reasons stated in Appeal of Philler (filed herewith) 28 Atl. 1072, the decree of the court below in this case is affirmed, and the appeal dismissed, at the cost of the appellant.

(161 Pa. St. 134)

PENN NAT. BANK OF READING v. KOPITZSCH SOAP CO.

(Supreme Court of Pennsylvania. April 16, 1894.)

CHECKS—ACTION AGAINST DRAWER—DECLARATION.

Act of 1887 requires the declaration in assumpsit to give a concise statement of plaintiff's demand as provided by Act March 21, 1806, accompanied by copies of all contracts, etc., on which the demand is based. The declaration against the drawer of a check to which plaintiff was not an original party, contained a copy of the check and a common count for money paid for defendant at his request, but neither averred plaintiff's title to the check, presentment to the drawer, his refusal to pay, nor the amount due from him to plaintiff. *Held* insufficient to require an affidavit of defense.

Appeal from court of common pleas, Schuylkill county.

Assumpsit by the Penn National Bank of Reading against the Kopitzsch Soap Company. Judgment for plaintiff for want of sufficient affidavit of defense. Defendant appeals. Reversed.

John J. Clark and A. W. Schalck, for appellant. S. B. Edwards, for appellee.

WILLIAMS, J. The instrument sued on in this case is an ordinary bank check. It was drawn by the company defendant on the Pennsylvania National Bank of Pottsville, Pa., in favor of Abram S. Keiser, for \$479. The plaintiff is not an original party to the instrument. It was necessary, therefore, that the statement should contain some averment of the plaintiff's title or owner-

ship, an averment of presentment to the drawer, and a neglect or refusal to pay on his part, and a statement of the amount claimed to be due to the plaintiff. These are the necessary elements of a "concise statement" of the cause of action, and such statement should be accompanied by a copy of the instrument sued on. The statement filed contains no one of the necessary averments, but does contain a copy of the check and a common count in indebitatus assumpsit for money paid, laid out, and expended for the defendant at his special instance and request. The act of 1887 was not intended to introduce confusion, but clearness, in the statement of a cause of action and the character of a defense, and reduce the range of controversy in all actions *ex contractu* to subjects about which the parties were unable to agree. A declaration with the common counts, only, gives no information whatever about the character of the plaintiff's demand. A plea of non assumpsit is equally indefinite. It became necessary to supplement these forms of pleading with notices and rules to furnish an itemized statement of the claim, or to make disclosure of the special matter relied on as a defense. The act of 1887 sought to put the correct statement of the demand, and the actual facts relied on as a defense, in the foreground in the first instance, so that the real controversy might be outlined at once on the record. Since its passage the common counts have no place to fill in pleading, and they require no answer or affidavit of defense. This will appear by an examination of the provisions of the act of 1887 relating to this subject. They are as follows: "The plaintiff's declaration in each of said actions, viz. the action of assumpsit, and the action of trespass, shall consist of a concise statement of the plaintiff's demand as provided by the fifth section of the act of March 21, 1806, which in the action of assumpsit shall be accompanied by copies of all notes, contracts, book accounts, or a particular reference to the records of any court within the county in which the action is brought, if any, upon which the plaintiff's claim is founded." The section of the act of 1806 referred to requires the plaintiff to state not only the nature of his demand, and the date of the instrument sued on, but also "the whole amount that he, she, or they believe is justly due to him, her, or them from the defendant." This is a necessary part of a statement. It need not be made in the words of the statute, but it must show the amount the plaintiff claims as justly due him. This statement, when the common count is eliminated, contains nothing but a copy of the check sued on. It does not aver ownership of the check, or presentment and demand, or the amount justly due. It was wholly insufficient to put the defendant on a statement of his defense, and for this reason, if for no other, the judgment entered for want of a sufficient affidavit should

be reversed. It is reversed accordingly, and the record remitted for such further action as the case may require.

(161 Pa. St. 225)

ORDER OF SOLON et al. v. FOLSOM et al.
(Supreme Court of Pennsylvania. April 23, 1894.)

BENEVOLENT SOCIETIES—ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION TO SET ASIDE—DECREE—WHEN DISTURBED.

In an action by members of a benevolent society against other members—both claiming to be the rightful officers of the order—to set aside an assignment by the order for benefit of creditors, where the evidence is so conflicting, and the irregularities so great, that it is impossible to arrive at a conclusion with entire confidence, a finding and decree by the trial court that the assignment was illegal, though the persons who made and favor it are the true representatives of the order, will not be disturbed.

Appeal from court of common pleas, Allegheny county; White, Judge.

Bill by the Order of Solon and others against Glenn I. Folsom and others to set aside an assignment for the benefit of creditors of the Order of Solon, executed by some of defendants as the executive committee of the order, to defendant M. G. Clark. From a judgment overruling exceptions to, and confirming, the master's report finding such assignment invalid, and that the persons executing it were the lawful officers of the order, plaintiffs appeal. Affirmed.

J. G. White, L. K. Porter, and James Fitzsimmons, for appellants. Young & Trent, for appellees.

MITCHELL, J. When this case was here before (*Crombie v. Order of Solon*, 157 Pa. 588, 27 Atl. 710), all that was decided was that on the case then before the court, on bill and answer, the injunction and appointment of a receiver could not be sustained, as matter of law, though they might have been—as in fact appears probable, from subsequent events—for the best interests of the order itself, and of all the parties concerned. Subsequently to that decision the difficulties in the affairs of the order appear to have increased, and an assignment for the benefit of creditors was made to one of the present defendants. We have now before us two parties, each claiming to be the rightful officers, and true governing body, of the order. The master and the court below have found and decreed that the assignment was illegal, and must be set aside, though the parties which made and favor it are the true representatives of the order. The evidence is so conflicting, and the confusion and irregularities of the proceedings under contested and disputed by-laws and regulations so great, that it is impossible for any court to arrive at a conclusion with entire confidence. We are not without serious doubt whether we should, on original examination, have reached the

same result as the master and the learned court below, but we are not able to say that they have fallen into error. In this position of affairs, we think the suggestion of the learned court below is eminently wise and equitable; that the whole matter should remain substantially in statu quo until the session of the supreme lodge, in May, when new officers should be regularly elected by the body which is acknowledged by both parties to be the rightful governing head of the order. The decree will therefore be affirmed, but with a direction to the court below to make such further order or modification of its decree as will secure the integrity of the funds of the order until the new election. Decree accordingly.

(161 Pa. St. 177)

In re GIBSON'S ESTATE.

Appeal of FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO.

(Supreme Court of Pennsylvania. April 16, 1894.)

EXECUTORS AND ADMINISTRATORS—CLAIM—REAL-ESTATE AGENT'S COMMISSIONS—SUFFICIENCY OF EVIDENCE.

On the audit of a claim against an estate for commissions for the sale of land for decedent, the evidence showed that claimant first brought the purchaser and decedent together; that when they had their first interview, the former told the latter that claimant had submitted the property to him, and the price he asked; that decedent made no disclaimer of claimant's authority; and that thereafter decedent conducted the negotiations himself. *Held*, that a finding for claimant by the auditing judge, confirmed by the orphans' court, should not be disturbed.

Appeal from orphans' court, Philadelphia county; William N. Ashman, Judge.

Audit and adjudication of the account of the Fidelity Insurance, Trust & Safe-Deposit Company and J. Howard Gibson, executors of the estate of Henry C. Gibson, deceased. From a judgment dismissing exceptions to the allowance of a claim by Samuel G. Diehl for commissions earned as agent for decedent in the sale of certain real estate, the executors appeal. Affirmed.

John G. Johnson, for appellants. Joseph L. Tull, for appellee.

PER CURIAM. After a careful and attentive reading of the testimony in this case, we think the opinion and findings of the auditing judge are sustained; and, being confirmed by the decree of the orphans' court, we regard the decree, so far as the facts are concerned, as we would the verdict of a jury, the question at issue being a question of fact only. It is clear, upon the testimony of Mr. Dechert, and it was so found by the auditing judge, and confirmed by the orphans' court, that the appellee was the person who first brought the buyer and seller together. It is also clearly proved by Mr. Dechert that when he had his first interview with Mr. Gibson he

told Mr. Gibson that the property had been submitted to him by Mr. Diehl and stated the price which Diehl said was asked by Mr. Gibson,—\$125,000. To this Mr. Gibson made no demur or disclaimer of Mr. Diehl's authority to act for him. The negotiation after that seems to have been conducted by Mr. Dechert and Mr. Gibson, but that, under our well-settled cases, does not deprive the broker of his commissions. *Keys v. Johnson*, 68 Pa. St. 43; *Reed v. Reed*, 82 Pa. St. 420. Decree affirmed, and appeal dismissed, at the cost of the appellants.

(161 Pa. St. 207)

COMMONWEALTH v. MATZ et al.

(Supreme Court of Pennsylvania. April 16, 1894.)

WOUNDING—INTENT TO MURDER—NATURE OF WOUND.

Under Act 1860, § 81, providing that if one shall administer poison to another, or "shall stab, cut, or wound any person," or shall by any means cause any person bodily injury dangerous to life, with intention, in any of the cases aforesaid, to commit murder, he shall be guilty of a felony, it is not necessary, where "wounding" with intent to murder is charged, that the wound be shown to be dangerous.

Appeal from court of quarter sessions, Luzerne county; John Lynch, Judge.

Neal Matz and another were convicted of wounding a person with intent to murder, and appeal. Affirmed.

John T. Lenahan and T. R. Martin, for appellants. John M. Garman, Dist. Atty., for the Commonwealth.

PER CURIAM. The indictment in this case was properly drawn, and the defendant was tried for the offense charged. The misrecital by the learned judge of the number of the section of the act of 1860 describing the offense did no wrong to the defendant. We have examined the charge of the court with a special reference to the import of the paragraphs embodied in the assignments of error, and we are unable to see that the defendant has suffered from the manner in which the case was submitted. Counsel for defendant said to the court, during the charge to the jury: "I would like to have the court say that it is incumbent upon the commonwealth to show that the wound is dangerous to life, and that element has not been shown in this case affirmatively." The learned judge declined to say that the wound must be shown to be dangerous to life, presumably because the act of 1860 does not say so. What it does say is that if one shall administer poison to, or cause it to be taken by, another, or "shall stab, cut, or wound any person," with intention to commit murder, such person shall be guilty of felony. The length, depth, position, or character of the wound is not made a part of the definition of the offense. The intent to commit murder is the felonious element, and the overt

act in execution of that intent completes the offense. The act goes further, and declares that if, in any other manner than by poison, or cutting, stabbing, or wounding, one shall inflict any bodily injury upon another, dangerous to life in its character, with the like murderous intent, he shall in like manner be guilty of a felony. But in this case a wounding was alleged, with an intent to commit murder, and the dangerous character of the wound inflicted with a deadly weapon in pursuance of an intent to kill need not be shown affirmatively. The fact that the wound was not as severe as the defendant intended will not serve him as a defense. The assignments are overruled, and the judgment is affirmed.

(161 Pa. St. 128)

MOORE v. JOYCE.

(Supreme Court of Pennsylvania. April 16, 1894.)

LOAN BY HUSBAND—TAKING MORTGAGE IN WIFE'S NAME—ASSIGNMENT—FAILURE OF TITLE—LIABILITY OF WIFE.

Where one loans his money, taking a mortgage in his wife's name, of which she knew nothing till she was called in to sign an assignment thereof to one to whom the husband had sold it, treating it as his own, all of which was known to the assignee, who explained to her that it was necessary for her to sign to make title, she is not a party in fact to the assignment, so as to be liable on any implied warranty of title.

Appeal from court of common pleas, Schuylkill county; Mason Weldman, Judge.

Action by M. J. Moore against Anna A. Joyce to recover by reason of the failure of title of a mortgage assigned to plaintiff by defendant. Judgment for plaintiff. Defendant appeals. Reversed.

J. F. Dolphin and J. W. Ryon, for appellant. Geo. J. Wadlinger, for appellee.

WILLIAMS, J. The appellant is the wife of Thomas J. Joyce. She is sued alone upon an instrument executed by her husband and herself, under the following circumstances: In 1893 her husband loaned \$700 of his own money to Annie and Edward Dolan, taking as security therefor their bond and mortgage, payable in 1890, and made payable to Anna A. Joyce, his wife. She knew nothing whatever of the transaction. About one year later he negotiated a sale of the bond and mortgage to Moore, telling him that he was short of money, and could not conduct his business as he wished to without realizing the money on this loan. The sale was also made without his wife's knowledge. Moore went to the house of Joyce, with an assignment of the mortgage and a check payable to Joyce, for the purpose of closing up the transaction, when he was told that the mortgage stood in the name of Mrs. Joyce, and the check should be made payable to her. A new check was made out, and, when the papers were ready, Mrs. Joyce was called

into the room, shown the assignment, and asked to sign it, so as to make title to Moore, and carry out the arrangement her husband had made with him. She at once signed and acknowledged the assignment, and wrote her name on the back of the check where she was told. Her husband took the check, and obtained and used the money. Moore was present while she was in the room, and explained to her that she had to sign the paper in order to make title to the mortgage. He knew that she had no claim upon the money loaned to the Dolans, and treated with the husband as the real owner of the mortgage from the beginning to the end of the transaction. It now transpires that a creditor of Thomas Joyce had issued an attachment execution against him, and served the Dolans as garnishees, a few weeks before the sale to Moore, and that upon the trial in that case it was determined that the mortgage belonged to Joyce, and not to his wife, and judgment was rendered accordingly against the garnishees for about \$200. The Dolans, when called upon to pay the mortgage to Moore, set up, as a defense pro tanto, the judgment rendered in the attachment execution, and its payment by them. This action is brought to recover from Mrs. Joyce the amount so applied upon the mortgage, on the theory that the assignment signed by her involved a warranty of her title, upon which she is legally liable to her assignees. The learned judge of the court below took this view of the case, and directed a verdict in favor of the plaintiff, saying that under the reasoning of this court in *Bauk v. Swan*, 146 Pa. St. 444, 23 Atl. 242, the liability of Mrs. Joyce was to be determined as if she was a feme sole. We do not think this case is ruled by the case cited. In *Bauk v. Swan*, the question was over the power of a married woman to contract to pay an agent for his services in making sale of her real estate. We held that the power to sell, given to her by the act of 1887, included the power to employ an agent to make the sale for her, and to make a valid agreement to pay him for his services. In this case, upon the undisputed facts presented by the evidence, Mrs. Joyce was not the owner of the mortgage; did not claim to be; did not know that it was payable to her; was not treated with or consulted about the sale of it, but simply signed her name where she was told, in order that the sale already made by her husband could be consummated, and he receive the money therefor. Having full knowledge of her relation to the transaction, the plaintiff cannot claim that he was misled by her; and if she signed the paper at his request, without any previous knowledge of the existence of the mortgage, and without any actual interest, as owner, in it, she had a right to set up these facts as a defense. This point was brought to the attention of the court by the defendant's first point, in which the court was asked to instruct the jury that, as the

defendant was a married woman, her joining in the transfer of the mortgage, "under the evidence in this case," did not raise an implied warranty binding upon her personally. The evidence showed that she had no interest in the money, and no knowledge of the loan, but, as the wife of Joyce, she joined in the transfer of this mortgage at Moore's request, and the request of her husband, in order to carry out her husband's agreement for its sale. If the facts now stated were undisputed, or, being disputed, were found by the jury, then, though a formal party to the assignment, she was not a party in fact; and Moore, having full knowledge of the situation, has not been misled by her, and has no claim upon her personally for any loss he may have sustained. For what purpose Joyce made the mortgage payable to his wife does not appear; but that it was not intended as a gift to her, or to invest her with the control of the money, is apparent from the fact that she was never informed that she was made the payee, and was never consulted about the sale. It was only when her signature was wanted to complete the transaction between himself and Moore that she was called upon, and then for no purpose except to sign her name at a place pointed out to her. She had a right to reply to this action by showing just what her relation to the assignment was, and that Moore knew at the time what it was. The judgment is reversed.

(161 Pa. St. 246)

MCDONALD v. O'NEILL.

(Supreme Court of Pennsylvania. April 23, 1894.)

FRAUDULENT CONVEYANCES — RIGHTS OF PARTIES — ESTOPPEL.

A vendor who, at the purchaser's request, has made the deed to the purchaser's son in order to hinder and delay the father's creditors, cannot afterwards levy on the land for the father's debt to himself.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Ejectment by Patrick G. McDonald against D. L. O'Neill. Judgment for plaintiff. Defendant appeals. Affirmed.

J. L. Lenahan and Q. A. Gates, for appellant. John McGahren and L. H. Bennett, for appellee.

PER CURIAM. The house and lot in controversy belonged formerly to the defendant. He sold it to Michael McDonald; and when the deed came to be made, in 1879, at the request of the purchaser it was made, not to him, but to his son, the present plaintiff, then but eight or nine years of age. In 1887, O'Neill obtained a judgment against Michael McDonald, the father, and caused this house and lot to be seized by the sheriff, and sold as his property. He became the purchaser at sheriff's sale, and got into possession. This action is by the son, the grantee of O'Neill in

the deed of 1879. The defendant seeks now to show that the father was indebted in 1879, and had the deed made to the son to hinder and delay creditors. If this was so, no one of those sought to be defrauded is complaining, and O'Neill is in no position to avail himself of the alleged fraud meditated against other persons, and by which he has neither been injured nor misled. The judgment is affirmed.

(161 Pa. St. 266)

COMMONWEALTH ex rel. HARKINS v. HINKSON, City Treasurer.

(Supreme Court of Pennsylvania. April 23, 1894.)

CITIES—POLICE—PAY OF EXTRA MEN—RES JUDICATA.

1. It is no defense to a policeman's demand for his pay, against funds of the police appropriation still unexpended, that the appropriation was only calculated for the force then existing, that claimant and others were afterwards appointed in addition, and that, if these are paid, the fund will not hold out the year for the old men.

2. When a judgment against a city is not appealed from, the treasurer cannot refuse to pay it because the contract whereon it was rendered was illegal.

Appeal from court of common pleas, Delaware county.

Mandamus on relation of John Harkins to Henry Hinkson, city treasurer of Chester, to pay relator's judgment against the city. Writ granted. Respondent brings certiorari. Affirmed.

Following is the opinion of the court below in *Commonwealth ex rel. Lloyd v. Hinkson*, a case involving the same question, on which opinion the court made its orders in both cases:

"William S. Lloyd, a duly and legally appointed policeman of the city of Chester, unable to secure payment for services rendered said city as a policeman, brought suit for the same before an alderman of said city, and on October 30, 1893, recovered a judgment for \$120.60, from which neither appeal nor certiorari has been taken, and on November 20, 1893, judgment on the transcript of said alderman was entered in this court. Demand for payment of this judgment having been refused by the treasurer of said city, a writ of alternative mandamus issued out of this court on December 5, 1893, to said treasurer, directing him to pay said judgment, interest, and costs, or show cause why the same should not be paid. The treasurer, in his answer, filed January 19, 1894, admits that he has in his hands, as treasurer of said city, the sum of \$3,338.97, and adds that, 'if it be the judgment of the court that part of the said sum shall be paid by him to the relator, he respectfully submits himself to the order and decree of the court in the premises.' In addition to this, two answers were filed, on December 18, 1893, and January 19, 1894, by John L. Hawthorne, comptroller of the said city of

Chester, who by decree of this court, made December 5, 1893, was granted the right, in his own behalf and that of the taxpayers of said city, to intervene as a party defendant in this proceeding. Mr. Hawthorne, in these answers, urges that a peremptory mandamus should not issue for two reasons, viz.: (1) Because the contract of employment made with the relator was illegal; (2) because there are no funds in the city treasury applicable to the payment of this judgment.

"In reply to the first reason, it is sufficient to say that the legality of the contract having been passed upon by a court of competent jurisdiction, and its judgment affirming its legality standing unreversed, and not appealed from, cannot be impeached in this proceeding. In this second reason he does not allege that there are no funds in the treasury, but none applicable to the payment of this debt. By this he means, as we learn from the depositions in evidence, that when the annual appropriation was made for the police department in April, 1893, it was based upon the then existing force of seventeen (17) men; that, in June following, five (5) additional policemen were appointed, one of them the relator; that the appropriation is insufficient to pay the whole force of twenty-two (22) men; that on December 1, 1893, there remained unexpended of the said appropriation \$5,269.68, all of which will be required to pay the seventeen men appointed prior to June, 1893, and who he claims have a prior right to payment out of this fund. As all the policemen on the force were appointed by the same authority, and the appropriation for their pay made in gross, and as no law or ordinance has been pointed out that makes any discrimination between them by reason of priority of appointment, or authorizes any one to make such discrimination, we are unable to comprehend how any preference can be given where all alike perform their duty and earn their pay. Because the appropriation will be exhausted before the end of the fiscal year is no excuse, so long as it lasts, for the nonpayment of those entitled to be paid, and, when exhausted, the city must make provision for the current and future expenses in this as in every other department, when they find they have miscalculated the appropriation necessary, and there is or will be a shortage. Had the city, in June, when the five additional policemen were appointed, deemed it necessary or advisable to have reorganized the department by the appointment of twenty-two entirely new men, the appropriation would not have been sufficient to have paid all; yet how and by what authority could there have been any discrimination made between them in payment for like services performed under like terms of contract? We know of no law that exempts a municipality, any more than an individual, from the payment of its debts; and since it appears that

the city of Chester has over \$5,000 of its police appropriation unexpended, and over \$3,000 in its treasury, we can see no good or valid reason for the nonpayment of the judgment of this relator. And we do therefore order and direct that a writ of peremptory mandamus issue, directed to Henry Hinkson, treasurer of the city of Chester, commanding him to pay the relator, William S. Lloyd, his judgment of \$120.80, together with interest and costs recovered against said city, and of record in this court."

George S. Graham and Washabaugh & Pendleton, for appellant. William B. Broomall, for appellee.

PER CURIAM. Vigilance on the part of all officers intrusted with the disbursement or oversight of public moneys cannot be commended too highly. It is better to err on the side of safety than on that of carelessness or extravagance. In this case we think the comptroller has carried official vigilance beyond the limits of his official authority. The writ of mandamus was properly issued, and the action of the court below is fully vindicated by the opinion of the learned judge who directed the writ. The order is now affirmed.

(161 Pa. St. 262)

CHESTNUT ST. NAT. BANK v. ELLIS.

(Supreme Court of Pennsylvania. April 23, 1894.)

PROMISSORY NOTE — ACTION AGAINST INDORSER — AFFIDAVIT OF DEFENSE — SUFFICIENCY.

In an action by the transferee of a note against an indorser, an affidavit of defense is sufficient where it avers that no consideration was paid, either by the maker or by plaintiff, to defendant; and that plaintiff is a mere transferee without value, and holds the same merely for collection for account of the maker, who is indebted to defendant "much in excess of the amount of said note."

Appeal from court of common pleas, Philadelphia county.

Action by the Chestnut Street National Bank against Amos Ellis on a note executed by W. W. De Saville and indorsed by defendant. From a judgment for plaintiff for want of sufficient affidavit of defense, defendant appeals. Reversed.

Franklin Swayne, for appellant. William S. Stenger, for appellee.

STERRETT, C. J. To entitle a plaintiff to judgment for want of an affidavit of defense, or for want of a sufficient affidavit of defense, the statement of his demand, under the act of May 25, 1887, must be self-sustaining; that is to say, it must set forth in clear and concise terms a good cause of action, by which are meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim. In that respect there is no substantial difference between a special count in a declara-

tion under the time-honored system of pleading and its legislative substitute,—“a concise statement of the plaintiff's demand,” etc.,—as required by the act of 1887. All the essential ingredients of a complete cause of action must affirmatively appear in the statement and exhibits which are made part thereof. As was said in *McKinney v. Crawford*, 8 Serg. & R. 351: “In an action by the indorsee against the indorser of a note, the declaration must aver that the note, on becoming due, was duly presented to the maker, and that he refused to pay, of which the defendant had notice.” The liability of the drawer or indorser of a bill of exchange, or the indorser of a promissory note, is only secondary. It depends on due presentation to the maker, demand of payment at the proper time and place, and notice of dishonor. These are necessary conditions or ingredients of an indorser's absolute liability, unless waived by him; and a distinct averment of one or the other is essential to a good statement of “demand” under the act. The statement in this case contains neither. True, it speaks of “cost of protest, two dollars and five cents,” from which it might be inferred that the note in suit was protested for nonpayment; but when or how it was protested, whether at maturity or on the eve of bringing suit, etc., we are not informed. Averments that are essential to a complete, self-sustaining statement of demand must be so clear, distinct, and positive that resort to anything like mere inference will be unnecessary. It follows that the plaintiff's statement in this case is fatally defective; and, without reference to any of the averments of the affidavit of defense, it is not in a position to demand judgment.

But, waiving all that, the defendant in his affidavit avers, in substance, that no consideration was paid, either by the maker of the note in suit or by the plaintiff bank; that the latter “paid nothing, either for or on account of said note, to any one,” but is a mere transferee without value, and holds the same merely for collection for account of De Saville, the maker, who is indebted to defendant “in large sums of money, much in excess of the amount of said note.” For present purposes, we must assume that these averments of fact are true. If so, they constitute a good, *prima facie* defense to the note in the hands of plaintiff bank. Judgment reversed, and record remitted with a *precedendo*.

(161 Pa. St. 227)

EDISON ELECTRIC LIGHT CO. v. McCORKELL.

(Supreme Court of Pennsylvania. April 23, 1894.)

ACTION ON AN ACCOUNT FOR ELECTRICITY—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In an action on a claim for designated quantities of electricity, at a fixed price per lamp hour, the aggregate of which was ascer-

tained by the number of lamp hours at the price stated, the affidavit of defense alleged that defendant would prove on the trial that the measurement of current to regulate lamp-hour consumption was, during the time sued for, out of repair, and did not register correctly; that the meter for the measurement was plaintiff's property, and under its sole control; that it removed the meter, and defendant had no opportunity to test by a new and correct meter; that, therefore, he could not tell in what sum he was indebted to plaintiff; and that he was willing to pay what was due. *Held*, that the affidavit of defense was sufficient.

Appeal from court of common pleas, Philadelphia county.

Action by the Edison Electric Light Company against J. G. R. McCorkell on an account for electricity. From a judgment for plaintiff, for want of a sufficient affidavit of defense, defendant appeals. Reversed.

David Lewis and William Gorman, for appellant. J. R. Adams and Samuel B. Huey, for appellee.

GREEN, J. The claim of the plaintiff is for designated quantities of electricity, at a fixed price per lamp hour, and the aggregate of the bill is \$169.20, ascertained by the number of lamp hours at the price stated. The defendant alleges in his affidavit of defense that he will prove on the trial “that the measurement of current used is incorrect, and that the meter placed for the measurement of current, and to regulate lamp-hour consumption, was, during the running of the period of time sued for, out of order and repair, and did not register correctly.” While it is true the defendant does not state what the correct measurement of the electricity consumed was, or would have been, he proceeds to state a reason why it is impossible for him to make such a statement. He says the meter for the measurement of lamp hours is the property of the plaintiff, and under its sole control; that it was removed from the premises by the plaintiff, and he had no opportunity to test by a new and correct meter. He avers that because of this reason he cannot tell in what sum he is indebted to the plaintiff for electricity actually consumed, and concludes by saying that he is perfectly willing to pay what is justly due, upon a proper test of the current by a proper instrument. It seems to us that this affidavit discloses a reasonable excuse for not expressing the amount he does owe. The meter being removed from the premises, the defendant would have no opportunity of examining it, with a view of determining the correctness of the quantity registered, or of comparing it with the quantity which he claims it ought to have registered. His allegations of excessive registry are sufficiently positive to constitute the assertion of a material fact in hostility with the claim, and, that being so, he would be entitled to have an opportunity to prove the truth of the facts he asserts before the jury. Judgment reversed, and *precedendo* awarded.

(161 Pa. St. 287)

In re SLOAN'S ESTATE.

Appeal of FENNER.

(Supreme Court of Pennsylvania. April 23, 1894.)

ATTORNEYS—CONTINGENT FEES—CONTINUANCE OF CONTRACT.

An attorney, having agreed with decedent's mother and sole heir to prosecute a claim due decedent for a fee of half of what he should collect, recovered judgment in the name of the mother, as administratrix, which she was not. He also omitted defendant's middle name, and so allowed him to freely dispose of realty from which the judgment could have been made. He did issue execution, but, that being returned nulla bona, contented himself, for over 20 years, with merely reviving the judgment. The mother being dead 18 years, her daughter, having apparently no other notice of the attorney's employment than the docket entries, asked his permission to employ associate counsel. He consented, and said associate counsel obtained administration, suggested the mother's death, issued execution, and effected a favorable compromise of the claim. *Held*, that the attorney was not entitled to half the proceeds, but only to a reasonable fee, and the costs paid by him.

Appeal from orphans' court, Philadelphia county; Ashman, Judge.

In the matter of the estate of Joseph Sloan, deceased. Appeal by George Fenner from the probate court's disallowance of his claim of 50 per cent. fees for collecting a claim due said estate. Judgment for the estate. Claimant appeals. Affirmed.

The opinion of the orphans' court (Ashman, J.) is as follows:

"When a contingent fee of fifty per cent. of the amount of a claim is agreed to be paid, the contract would seem to imply, either that the claim is difficult of proof, or that, if reduced to judgment, it will be difficult of collection. Moreover, if the promise of so extraordinary a compensation was not intended as a stimulus, and its acceptance was not a pledge to more than ordinary effort,—a proposition which, in this instance, need not be laid down,—it at least involved, on the part of counsel, the putting forth of ordinary diligence. A careful review of the evidence satisfies us that the claim in this case was not of the character known as "desperate." The judgment was obtained without difficulty, and its payment might have been compelled in a reasonable time. Without at all reflecting upon the integrity of the claimant, who is a most reputable member of the bar, it is very evident that he allowed himself to be handicapped with the idea that the demand was practically hopeless, and for that reason contented himself with securing judgment, and subsequently reviving it, and with issuing an execution which turned out to be fruitless, when a reasonable search would have shown him that the defendant had property amply sufficient to meet the debt. This, however, is not the whole of the case. The debt sued upon was due to the decedent in his lifetime. After his death, his mother, who was his sole next of kin, engaged the claimant as counsel, and agreed to pay him the fee

which is now in controversy. The claimant thereupon commenced an action in her name, as administratrix of decedent's estate, when, in point of fact, no letters had issued to her, or to any one else. He also made an error in the name of the defendant, which turned out to be more serious than the former, because by it the defendant was enabled to convey, beyond the reach of the plaintiff, certain real estate, which, but for the misnomer, would have been bound by the judgment. It may be said, although nothing of the kind appeared in proof, that the claimant was probably led into these errors by his client. But in some matters a lawyer ought not to permit himself to be misled. He knows that a large percentage of every community, comprising by far the largest class, know nothing of the settlement and devolution of estates, and are more or less careless in designating persons by their full proper names. If a client comes from this class, with a claim, any part of which is founded upon a record, the least which counsel can do is to examine the record. In the present case the client was a woman in humble circumstances, who, in all human probability, could not distinguish the functions of an administrator from those of a deputy escheator. If the counsel had looked at the books of the register, he would have found that the mother of the decedent was not his administratrix, and, if he had looked at the directory, he would have found that the name of the defendant, which she had given, was not the full name. He brought suit in 1871, obtained judgment within three weeks, and in 1892 was as far from realizing the money as ever. In that year, other counsel, at the request of the accountant, were associated with the claimant. They took out letters of administration to the estate of the decedent, suggested on the record the death of the mother, which had taken place eighteen years before, issued execution, and effected a favorable compromise. In all of these acts the claimant took no part. He now claims from the estate one-half of the sum as his contingent fee. We do not reject the demand on the ground that the contract under which it was made was executed by a person who had no power to bind the estate. The estate has reaped the ultimate benefit of the suit. But we do think that a contract of this sort was not intended to last forever. If it bound the mother during her lifetime, it did not bind her descendants to the end of time. It did not bind the estate, towards which the mother, who was named as plaintiff, stood in no other relation than that of distributee. The only possible basis for its allowance would be that the accountant recognized it as a subsisting obligation by asking leave of the claimant to associate other counsel with him in the prosecution of the suit. It was not intended to bring home to her notice that the contract was for a fee to claimant at a rate which would wipe out half of the proceeds, and which, if it was extend-

ed to the pay of his associates, would leave nothing for the distributees. She had apparently no source of information, beyond the docket entries of the suit. These showed the appearance of the claimant as the plaintiff's attorney of record, but they could suggest to her only that he would be entitled to the ordinary compensation which obtains between counsel and client, and which is measured by the reasonable value of the professional service. For the reasons which have been dwelt on, we think that such a compensation is all that the exceptant can properly claim. The auditing judge acted upon this theory, and in addition to the costs, which the claimant actually paid, awarded him a counsel fee of fifty dollars. We cannot say this does not meet the requirements of the case. The exceptions are dismissed."

Alex. Simpson, Jr., for appellant. W. Egbert Mitchell and William W. Montgomery, for appellee.

PER CURIAM. All that is necessary to be said in vindication of the decree complained of will be found in the opinion of the learned judge of the orphans' court dismissing exceptions to the report of the auditing judge. For reasons given by him the decree should be affirmed. Decree affirmed, on the opinion of the court below, and appeal dismissed, with costs to be paid by appellant.

(161 Pa. St. 257)

CLIFFORD v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Court of Pennsylvania. April 23, 1894.)

AMENDMENT IN SUPREME COURT—DESCRIPTION OF PARTIES.

Where A. assigned to C. a life insurance policy as security for a debt, and, after A.'s death, C., as administrator of A.'s estate, obtained judgment on the policy, the supreme court will allow plaintiff to amend, as the trial court might have done, by describing himself as also the assignee of A.

Appeal from court of common pleas, Luzerne county; John Lynch, Judge.

Action by Anthony J. Clifford, as administrator of the estate of Thomas Anderson, deceased, against the Prudential Insurance Company of America, on a life insurance policy issued to deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

B. F. McGovern, for appellant. James L. & John T. Lenahan, for appellee.

PER CURIAM. Thomas Anderson obtained insurance upon his own life in the company defendant in 1890. In 1891 he transferred his policies to Anthony J. Clifford as collateral security for certain debts due by him to Clifford. A few months later,

Anderson died. Letters of administration upon his estate were obtained by Clifford, his creditor, who thereupon brought this suit. The defense taken is that Clifford holds these policies as the assignee of the decedent, and not as his administrator, and for this reason we are asked to overturn the judgment. The court below had, as we now have, ample power to allow such amendment as may be necessary to protect the defendant from further liability on this policy. We are by no means sure that any amendment is needed, but as the plaintiff asks to be allowed to describe himself as also the assignee of Anderson, and as such amendment will remove any possible objection to the judgment, we will allow the amendment, and affirm the judgment.

(161 Pa. St. 346)

BRADY v. CITY OF WILKES BARRE.

(Supreme Court of Pennsylvania. April 23, 1894.)

STREETS—CHANGE OF GRADE—ACTION FOR DAMAGES—AMENDMENT OF DECLARATION.

The grade of two intersecting streets was changed in 1887. In 1888 the owner of property situated at the corner of such streets brought suit for damages caused by such change of grade, but only one street was mentioned in the declaration. In 1892 plaintiff was allowed to amend so as to include the other street. Held, that Act May 18, 1891 (P. L. 75), which provides for the appointment of viewers in such cases, did not prevent such amendment, or deprive the court of jurisdiction.

Appeal from court of common pleas, Luzerne county.

Action by John Brady, executor of the estate of Margaret Brady, deceased, against the city of Wilkes Barre, to recover damages to property caused by the change of grade of certain streets. From a judgment for plaintiff, defendant appeals. Affirmed.

William S. McLean, for appellant. D. L. O'Neill and W. H. Hines, for appellee.

PER CURIAM. The property of the decedent was situated at the corner of Chestnut and Main streets, in the city of Wilkes Barre. The grade of both streets was changed in 1887. This action to recover for the damages sustained by reason of such change of grade was brought in 1888, but Chestnut street, alone, was mentioned in the declaration. In 1892 an amendment was allowed, so as to include Main street in the declaration, and thus cover the entire injury suffered by the plaintiff by reason of the change of grade. The act of May 18, 1891 (P. L. 75), which provides for the appointment of viewers in such cases, did not prevent the amendment, or deprive the court of jurisdiction in this case. The motion in arrest of judgment was rightly overruled, and the judgment is affirmed.

(161 Pa. St. 248)

LONG v. CHERINGTON.

(Supreme Court of Pennsylvania. April 23, 1894.)

CA. SA.—SATISFACTION—RELEASE OBTAINED BY FRAUD.

When defendant, arrested on a ca. sa., is, at his request, taken to his counsel, who denies the regularity of the writ, and so far intimidates the sheriff as that the latter lets defendant go, and departs to consult his lawyer, and returns the writ "Stayed," there is no discharge, and an alias writ may issue.

Appeal from court of common pleas, Columbia county; E. R. Ikeler, Judge.

In the action of Clara Long against William H. Cherington. Appeal of defendant from decree dismissing exceptions to an alias writ of capias ad satisfaciendum, and discharging rule to set the writ aside. Affirmed.

C. E. Geyer, for appellant. Grant Herring, Fred Ikeler, and W. H. Rhawn, for appellee.

PER CURIAM. This appeal is from the refusal of the court below to set aside an alias ca. sa. The allegation is that on a previous writ the defendant had been taken into custody by the sheriff, and afterwards discharged therefrom by that officer. If we look to the record, we find only that a previous ca. sa. was issued, and returned "Stayed." If we look to the evidence, and the findings of the learned judge therefrom, we are equally unable to see any reason for quashing this writ, or staying proceedings upon it. It is true that the sheriff did undertake the arrest of the defendant upon the first writ of capias, and went with him to the office of his counsel, where the regularity of the writ was denied, and the authority of the sheriff to hold the defendant under it was defied. The sheriff was so much intimidated by what was said and done that he did not insist on the arrest, but went to consult his own legal adviser, and the defendant went home. What the effect of this conduct might be, if the plaintiff was complaining of it, is a question not now necessary to consider. It is the defendant himself who is setting up his own success in resisting the authority of the sheriff as a satisfaction of the writ. The judgment is affirmed.

(161 Pa. St. 200)

In re FORNEY'S ESTATE.

(Supreme Court of Pennsylvania. April 23, 1894.)

WILL—CREATION OF TRUST—REVOCATION—ACTIVE TRUST.

1. The sale by testator of his newspaper after making a will creating a trust for the administration and management of his estate, including the newspaper, and the maintenance of his family, does not revoke the will in toto, only pro tanto.

2. A bequest in trust for testator's daughters for their natural lives, the interest and in-

come, alone, of their shares to be paid them, whether covert or discover, is an active trust.

Appeal from court of common pleas, Philadelphia county; William B. Hanna, Judge. In the matter of the estate of John W. Forney, deceased. From the decree rendered on account of W. W. Weigley, executor, Elizabeth M. Forney and others appeal. Affirmed.

S. Davis Page and F. Carroll Brewster, for appellants. W. Horace Hepburn, for appellee James Forney. Sam'l C. Perkins, for appellee W. W. Weigley.

STERRETT, C. J. The solution of the questions involved in this case is plain. In making his will, the testator had the twofold purpose of providing (1) for the administration and management of his estate; and (2) the maintenance of his family. The character and condition of his estate furnish sufficient reasons for the first purpose. It consisted mainly of the Press and Press building, which required competent handling in order to meet testator's very large indebtedness, and at the same time maintain his family. It is conceded that if he had not sold the Press the trust created would have been valid, but it is insisted that that act operated as a revocation of the will in toto. The conduct of the Press was no doubt a strong inducement to the creation of the trust, but it was only part of his scheme. The scheme was modified to that extent, but there were still active duties to be performed. Assets must be collected, and a still large indebtedness paid, in accordance with the declared purpose of the testator. If the trust was valid when created, it must continue operative until his scheme has been fully carried out. This principle is distinctly recognized in both Cooper's Appeal, 4 Pa. St. 88, and Balliet's Appeal, 14 Pa. St. 451, upon which appellants seem mainly to rely. Thus, it was said in the former: "This is not a case where a testator, having himself sold a part of his estate previous to his death, left sufficient remaining to carry his intention into effect, except so far as he had anticipated that intention by arrangements of his own. In such case a sale of land operates only pro tanto." So, in Balliet's Appeal, it was said: "In this case part, only, of the property devised and bequeathed is disposed of. Consequently, those parts of the will which remain are untouched. There is no impossibility, as in Cooper's Appeal, 4 Pa. St. 88, to give effect to the disposition of the will." So, there was no impossibility here to finish the purpose of this testator. There is scarcely a case in which the circumstances of the testator have not, in some respect, changed materially between the date of the will and its operation; and few trusts would survive the application of the doctrine for which appellants contend. Fortunately, the policy of the law is to carry out testamentary inten-

tion, so far as it is possible. If there cannot be whole, there may be partial, execution. When Mr. Forney sold the Press, he disposed of part, only, of the subject, in anticipation of the performance of one of the duties which he had imposed on his trustees, and to that extent rendered the will inoperative; but enough remained to sustain, and require the continuance of, the trust.

The trusts declared for testator's daughters fall clearly within the principle of Dumm's Appeal, 85 Pa. St. 98. The bequest is in trust for their "natural lives;" "the interest and income, alone," of their shares to be paid to them, respectively, whether covert or discover. The intention is clearly indicated to protect them, not only against their own acts, but as against any husband they may, respectively, have,—present or future. The trust was therefore active.

It follows, therefore, that the conclusions reached by the learned court below, and the distribution of May 20, 1893, are substantially correct, and the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by the appellants.

(161 Pa. St. 270)

MULHERN et al. v. LEHIGH VAL. COAL CO.

(Supreme Court of Pennsylvania. April 23, 1894.)

FELLOW SERVANTS—MINES—HOIST ENGINE.

1. A mine owner is not responsible for the death of miners, caused by the negligence of the engineer of the hoist engine, in mishoisting the cage in which they are ascending the shaft.

2. The fact that the engineer had once before made a mishoist would not make the owner liable, unless he had notice of it.

3. The mine law of 1885, requiring a person employed at an engine to be sober and competent, does not change the common-law rule that notice of his insobriety or incompetence must have been brought home to the employer.

Appeal from court of common pleas, Schuylkill county; Green, Judge.

Action by Anne Mulhern and others against the Lehigh Valley Coal Company for damages for the death of Charles Mulhern. Judgment for defendant. Plaintiffs appeal. Affirmed.

Following is the charge of the court (Green, J.):

"One question in this case is whether there is sufficient proof as to the cause of the accident. There is no doubt that the accident was in some way connected with the mishoist of the engineer, but whether the mishoist of the engineer really was the cause of the accident, or not, is a different question. We have no proof,—nothing but mere theory,—on the part of either the defendant or the plaintiff, as to how these men came to lose their lives. If we are to be guided simply by theory (and that is all we have in this case), and not by facts showing how these men came to lose their lives, then one theory presented is that these men were shaken off of the cage by a sudden jerk. The other

theory is that the cage had come to a stop, and that these men stepped off from the cage onto the timber. If they got off in that way, without being shaken off, that would raise the question whether, even if there had been an act of negligence on the part of the engineer, getting off of the cage (where they probably would have been perfectly safe had they remained, nothing about the cage having been broken or injured at all) was not an act of contributory negligence on their part. Is there sufficient proof to show that it was the negligence of the engineer that caused these men to lose their lives? Of course, the mishoist was, somehow or other, connected with the killing of these men, because both happened about the same time; but whether it was the cause of the killing or not rests, not upon the evidence in the case, but upon the theories that may be started in regard to the manner in which these men came to lose their lives. This case assimilates itself very much to a case which we have not been able to lay our hands on, but of which we have a very distinct recollection,—an accident that occurred at Port Clinton (a case tried in this county), where a man lost his life, in some way, attempting to get on the cars. Railroad Co. v. Schertle, 97 Pa. St. 450. It was alleged it was by reason of some defect in the step of the car. There was no other cause assignable for it. There was no positive proof how he came to lose his life, yet the jury were allowed to infer that it must have been by reason of the bad step in getting upon the car, and they found a verdict in favor of the plaintiff. The case went up to the supreme court, and that court, in reversing the lower court, said that there was not sufficient proof as to how the man came to suffer the injury; that there was no presumption that the man lost his life in the manner alleged; that it was a mere theory, and there was no positive proof with regard to it. We think the present case very closely resembles that, in the defective proof here as to how these men really came to lose their lives. It is based upon mere theory. If you adopt the theory that the men jumped from the cage; that the cage had stopped; that they stepped off the cage onto the timbers, and then were thrown off by the subsequent movement of the cage,—even if that were the case, it would raise a question of contributory negligence, and that would be a mere theory, upon which there is no evidence here. For that reason, it seems to us very questionable whether the court would be justified in submitting the question to the jury; whether there is sufficient proof here that it was the negligence of the engineer, and his mishoist, that caused this loss of life. However, the main ground upon which we base our action is on the general principle of the common law, that, where one employé meets with an accident or an injury by reason of the negligence of his coemployé (and there it stands upon a footing different from where it is an outside party that meets

with an accident), the employer is not responsible for the injury arising from the negligence of the coemployé, unless there is proof that the principal who employed him knew that he was employing an incompetent person, or that he, after he had employed him, had received notice, in some way or other, that the party who was employed to do the work was incompetent, and, having knowledge of that fact, still continued him in his employment. Under such circumstances an employer would be held responsible for the negligent act of his employé, even though a coemployé should be the one who had suffered the injury. But in this case there is an absolute want of proof, so far as that is concerned. As we understand it, there is no evidence here of any knowledge on the part of the employer, or on the part of this company, represented by its superintendent, Colonel Brown, that this man was an incompetent person to take charge of this work; no notice to them, by anybody at all, of his incompetency. On the contrary, according to his own evidence and the testimony of others, this man had come to him with the highest recommendations as to character for sobriety, and as to being a careful, painstaking, and industrious man. Even though there may have been a previous occasion when there was a mishap, there is no proof here at all (on the contrary, the proof is the reverse) that the company were in any wise notified of the accident at that time. So that there is no proof that the company had knowledge in any way, either by notice from others, or personal notice on the part of the superintendent, that this man was an incompetent man for this work. That being the principle of the common law, we think that under the common law there could be no recovery. The question, then, would be whether the mine law passed in 1885 has changed the common law in that respect. The mine law, in one of its sections, requires that a person employed at an engine shall be a sober and competent person. Then comes the question whether this company employed him as a sober and competent person, or whether they had knowledge that he was not sober and competent. The uncontradicted proof in this case is that they had no knowledge other than that he was both sober and competent. Under the mine law the question might be raised whether it depends upon the company's knowledge that he was sober and competent or not. We do not think that the mine law of 1885 has changed the common law in that respect; that all that is required of them is that they shall employ a person whom they believe to be sober and competent, unless knowledge or notice is brought home to them of the fact of his incompetency. That view of the mine law of 1885 is strengthened, in our opinion, by the peculiar clause which follows, and is made a subsequent part of the same law, which prescribes that the employer or the owner or the

operator shall be liable for any willful failure to comply with the provisions of the mine law. A 'willful failure to comply with the provisions of the mine law,' to our mind, must mean that there must have been some knowledge that they were violating it; some knowledge which should have induced them not to do what they did do; must have been some knowledge of the fact, for instance, in this case, that Miller was incompetent,—that he was not the kind of man who should have been put in such a place. Otherwise, the word 'willful,' in a clause of that kind in the law, would not have any very special meaning. Our impression is, therefore, that, so far as the act of 1885 is concerned, it does not alter the rule of the common law as to the liability of employers for injury done by one coemployé to another. For these reasons, and under the undisputed facts in the case, and the testimony of all the witnesses, we do not see how there can be a recovery on the part of the plaintiffs, and therefore feel constrained to direct a verdict in favor of the defendant."

F. W. Bechtel, for appellants. S. H. Kaercher, for appellee.

PER CURIAM. We have listened with interest to the earnest argument of the appellants' counsel, but we are not persuaded that there was proof of negligence on the part of the company sufficient to go to the jury. The competency of the engineer who made the hoist at the time of the accident was the controlling question. Next came the question whether, if he was incompetent, the company had knowledge of such incompetency. Upon these questions we concur in opinion with the learned judge of the court below, and affirm the judgment, for the reasons he has so well stated. The judgment is affirmed.

(161 Pa. St. 270)

O'BOYLE et al. v. LEHIGH VAL. COAL CO.
(Supreme Court of Pennsylvania. April 23, 1894.)

Appeal from court of common pleas, Schuylkill county; Green, Judge.

Action by Ann O'Boyle and others against the Lehigh Valley Coal Company for damages for the death of John O'Boyle. Judgment for defendant. Plaintiffs appeal. Affirmed.

F. W. Bechtel, for appellants. S. H. Kaercher, for appellee.

PER CURIAM. We affirm the judgment in this case upon the reasons given by the learned judge of the court below at the trial. It is identical, in all its legal aspects, with *Mulhern v. Coal Co.* (Just decided) 28 Atl. 1087, grows out of the same unfortunate accident, and rests on the same facts. Employers are not insurers. The burden of showing negligence, in cases like that before us, is on the plaintiff; and without such proof of the incompetency of the engineer, and of the knowledge of his incompetency by the company defendant, as would support a verdict, the case of the plaintiff was not made out. The judgment is affirmed.

(66 Vt. 124)

STATE v. HODGSON.

(Supreme Court of Vermont. General Term.
April 15, 1894.)

INTOXICATING LIQUORS—ILLEGAL TRAFFIC—INFORMATION—MOTION TO QUASH—FORMER CONVICTION—MOTION IN ARREST OF JUDGMENT—POLICE REGULATION—DUE PROCESS OF LAW—EXCESSIVE PUNISHMENT—ABRIDGING PRIVILEGES.

1. A motion to quash an information on the ground that the state's attorney "had no legal authority to make and file such information in said cause" does not raise the question of the sufficiency of the information, so as to permit the action of the court on the motion to be reviewed on that ground.

2. Under R. L. § 3806, providing that on prosecutions for illegally furnishing liquor, unless defendant, at the time of pleading guilty, specifies other days on which such offenses were committed, in which case entry thereof shall be made on the information, and become part of the record, the offenses to which he pleads shall be held to have been committed on the days specified in the information, it cannot, in the absence of such entry, be shown that, in consideration of defendant's pleading guilty to the offenses charged, state's counsel agreed that he should not be prosecuted for any offense prior to the conviction.

3. A motion in arrest of judgment in a criminal case cannot properly be made in the supreme court, though the judgment has been reversed by the county court; and R. L. § 1700, provides that, in such case, if, on inspection of the record, the supreme court is of the opinion that judgment ought to be rendered on the verdict, it shall render it, as by section 1699 the province of the supreme court is to review questions of law decided by the county court.

4. Against a motion in arrest of judgment defective allegations or omissions of facts in the information will be cured by verdict where it is to be presumed from the issue joined that without proof of the facts the verdict would not have been directed or given.

5. The law against illegal provision of intoxicating liquors is none the less a police regulation that on conviction for a second offense it requires imprisonment for a month to a year in the house of correction.

6. Under R. L. § 3802, providing that if a person sells, furnishes, or gives away intoxicating liquors contrary to law he shall be fined and imprisoned, within certain limits as to amount and time, selling is not a different offense from furnishing or giving away, the thing prohibited being the illegal providing of intoxicating liquors.

7. Even if charging sale, furnishing, "and" giving away of intoxicating liquor in the same count of an information constitute duplicity, it cannot be reached by motion in arrest of judgment.

8. The legislature having provided a form of information for illegal provision of intoxicating liquor, it may be followed without regard to common-law forms, so long as it does not invade fundamental rights reserved by the constitution.

9. Under R. L. § 3802, providing that if a person, by himself, clerk, or agent, sells, furnishes, or gives away intoxicating liquor contrary to law, he shall be fined and imprisoned, the form of information provided by section 3859, "that _____ of _____, on the _____ day of _____, did at divers times sell, furnish or give away (as the case may be) intoxicating liquor, without authority, contrary to the form of the statute," covers the offense, and informs defendant of the "cause and nature of the accusation," as required by Const. c. 1 (Bill of Rights), art. 10, without any particulars as to kind, quantity, price, and person to

v.28A.no.18—69

whom sold; especially as defendant is entitled to a bill of particulars.

10. The provisions of the liquor law that offenses against it shall stand for trial the first term, that a continuance shall not be allowed without cause shown, that a nolle prosequi or discontinuance shall not be entered without cause, and only with consent of the court, do not invade the province of the court, or prevent a trial being by "due process of law," and "in accordance with the law of the land."

11. The inhibition of Const. U. S. Amend. 8, against excessive bail, fine, and cruel and unusual punishment, is not applicable to prosecutions under state laws.

12. The punishment prescribed for a second conviction for illegal provision of intoxicating liquors, which at most can be one year at hard work in the house of correction, with a fine of \$300, or, in lieu thereof, three years' imprisonment, is not unreasonable.

13. As the provisions of the liquor law against illegal sales apply to all persons alike, they do not violate the inhibition of Const. U. S. Amend. 14, abridging the privileges or immunities of citizens of the United States, or denying equal protection of law.

Exceptions from Addison county court; Taft, Judge.

Edward Hodgson was convicted of illegal furnishing of intoxicating liquors, and brings exceptions, and moves in arrest of judgment. Exceptions overruled, and motion denied.

The information was as follows: "Be it remembered that Frank L. Fish, state's attorney within and for said county, comes here into open court, in his own proper person, and upon his oath of office gives said court to understand and be informed that Edward Hodgson, of Orwell, in the county of Addison, and state of Vermont, on the 7th day of June, A. D. 1892, at Orwell, in the county of Addison aforesaid, did at divers times sell, furnish, and give away intoxicating liquor, without authority, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. And the said state's attorney, on his oath aforesaid, comes and gives said court further to understand and be informed that the said Edward Hodgson, prior to this time, to wit, at the December term of the county court held at Middlebury in and for the county of Addison, on the first Tuesday of December, A. D. 1891, before and by consideration of said court was, as appears of record, convicted of selling, furnishing, and giving away intoxicating liquor against the law in such case made and provided." Before pleading, the respondent filed a written motion that the information be quashed, for that the state's attorney "had no legal authority to make and file such information in said cause." This motion was overruled by the court, and the respondent excepted. On trial the respondent offered to show that at the December term of the Addison county court, 1891, the respondent was convicted of six first offenses upon a plea of guilty, and that, as a consideration for the entering of said plea, it was agreed between him and

the state's attorney that if he would so plead, and would desist from the further illegal furnishing of intoxicating liquor, the state's attorney would not prosecute him for any offense prior in time to that conviction. The evidence was excluded, and the respondent excepted. Judgment and sentence were respited, and the cause passed to the supreme court. In the supreme court the respondent filed for the first time a motion in arrest of judgment.

F. L. Fish, State's Atty. W. H. Bliss, for respondent.

ROSS, C. J. The motion to quash was properly denied. Whether strictly addressed to the discretion of the trial court, and not revisable in this court, or otherwise, the ground of the motion was that the state's attorney had no authority to proceed by information. That ground is not insisted upon now. While held to be addressed to the discretion of the trial court, and not revisable in this court, because it cannot be treated as a matter of right, in *State v. Stewart*, 59 Vt. 273, 9 Atl. 559, in *State v. Keyes*, 8 Vt. 57, *State v. Davis*, 52 Vt. 376, and *State v. Meader*, 62 Vt. 458, 20 Atl. 730, in which, whether the entertainment of such motions is discretionary with the trial court was not raised nor considered, the denial of such motions by the trial court was considered and passed upon in this court. In the case last named the judgment of the trial court on such a motion was reversed, and the complaint was adjudged insufficient, and quashed. But if the question presented by such motion can be entertained in this court, it can be entertained only upon the ground raised by the motion, and passed upon by the trial court. Error in the action of the trial court must distinctly appear. The party cannot be allowed to urge one ground for sustaining the motion in that court, and then, in this court, set up a new ground for sustaining it,—a ground not considered nor passed upon by the trial court. The respondent's counsel contends that by using in the motion the words "such information" he thereby raised the question of the sufficiency of the information; but that is not the ordinary and natural construction to be placed upon the language of the motion. If he really intended to raise the question of the insufficiency of information, we should have expected he would have pointed out wherein he claimed it was insufficient. He should have done so to have raised that question. It is not for the trial court to hunt for some concealed rather than clearly-defined ground for entertaining the motion. For this court to revise the action of the trial court on such motion,—as we think it might if it was shown that the trial court entertained it and passed upon its sufficiency as a matter of law,—the grounds for the motion, as well as the action of the trial court,

should be clearly and fully set forth; otherwise this court will assume that the trial court denied the motion as a matter of discretion.

2. The county court properly excluded the offered testimony of the respondent with reference to his agreement with the state's attorney in regard to what offenses should be covered and merged in his former conviction. The statute is specific (R. L. § 3806) that, "unless the respondent, at the time of pleading guilty, specifies some other days on which such offenses were committed, in which case an entry thereof shall be made upon such complaint, indictment or information, and become a part of the record," the offenses to which he pleads "shall be held to have been committed on the days specially set forth in such complaint, indictment or information." The offered testimony would contradict the record of the former conviction. This is not allowable. *State v. Haynes*, 35 Vt. 565. The record imports verity of the facts stated. If the information, as drawn, did not truly describe the offenses to which he desired to plead guilty, the statute gave him an opportunity to have it amended so that it would. The exceptions are not sustained, and the respondent takes nothing thereby. The county court respited judgment and sentence. The case stands now for judgment and sentence in this court. R. L. § 1700.

3. But the respondent has filed in this court an elaborate motion in arrest of judgment. While such motions are usually allowed to be filed at any time before final judgment, as they present the question whether, upon the record, legal judgment and sentence can be passed, yet, under our system of passing criminal causes from the trial court to this court, it is apparent that it was contemplated that this court should sit only as a court of error in such cases. R. L. § 1699—the only statute on the subject—reads: "Questions of law decided by the county court, arising upon demurrer, or trial by jury, or upon motion in arrest, in prosecution by indictment, or information for a crime or misdemeanor, shall, after verdict of guilty is returned, upon motion of the respondent, be allowed and placed upon the record; and the same shall thereupon pass to the supreme court for final decision." Then R. L. § 1700, is: "If upon the inspection of the record in a cause where judgment, sentence and execution has been respited and stayed, the supreme court is of the opinion that judgment ought to be rendered upon the verdict, it shall render judgment and sentence thereon, and cause execution thereof to be done." From these provisions of the statute we think that a motion in arrest of judgment and sentence cannot properly be filed in this court; that such motions should be filed in and be passed upon by the trial court, and come to this court as matter of error. We might properly dis-

pose of this motion on this ground. But the character of the motion is so far-reaching that this court would, on proper application, remand the cause to the trial court to allow the respondent to file his motion, and have it passed upon there. Such being the case, and, inasmuch as the questions arising on the motion have been fully argued and considered, we have concluded to pass upon the sufficiency of the motion as though it had come regularly before this court. Such motions are somewhat limited in their operation. They do not always reach all defects which would be reached by a general demurrer. They are confined to the record. A general demurrer reaches every material defect in substance. After verdict every reasonable intentment is made in support of the verdict, if there is nothing on the record to prevent it. 1 Chit. Pl. p. 673, note 1. It is there said: "The general principle upon which it depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict." That is, "the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading was proved at the trial; and such an intentment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given." But where no ground of complaint or action is set out, the complaint, indictment, information, or declaration will not be aided by verdict. This subject has been frequently before this court, and been fully elaborated, elucidated, and approved. *Harding v. Cragie*, 8 Vt. 509; *Morey v. Homan*, 10 Vt. 564; *Manwell v. Manwell*, 14 Vt. 14; *Needham v. McAuley*, 13 Vt. 68; *Closson v. Staples*, 42 Vt. 226; and recently *State v. Freeman*, 63 Vt. 496, 22 Atl. 621; *Noyes v. Parker*, 64 Vt. 379, 24 Atl. 12.

Keeping these limitations of the scope of the motion in arrest in mind, we will consider the elaborate objections and contentions of the respondent's counsel. We quite agree with his contention that, with respect to substantial allegations to be contained in the pleadings, this class of crimes is no exception to those required in charging the highest crimes. As said by this court in *State v. Davis*, 52 Vt. 376: "This class of cases is no exception to the generality of criminal cases;" and, in *State v. Haley*, Id. 476: "This class of statutory crime stands for the same consideration, and is subject to the

same rules of law, as any other crime." Under this rule we need not consider whether the crimes charged, and of which respondent was found guilty, are infamous under the laws and the decisions of the United States supreme court, cited by the respondent. That court, and all other courts of final resort, so far as we are aware, have classed offenses against the various laws of the states regulating or prohibiting, unless, in excepted cases, for specific purposes, the sale of intoxicating liquors, as misdemeanors, within the police power of the various states to regulate, restrain, and punish, as the statutes of the several states might provide, unless such statutes invaded some constitutional right secured to the accused. While it is difficult to define and limit in exact terms the police power of the state, it is generally held to extend to all regulations affecting the health, good order, morals, peace, and safety of society (*Butler v. Chambers*, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638, and note; *Thorpe v. Railroad Co.*, 27 Vt. 140, 62 Am. Dec. 625, and note; *Slaughterhouse Cases*, 16 Wall. 62; *Mugler v. Kansas*, 123 U. S. 205, 8 Sup. Ct. 273; *People v. Wagner*, 86 Mich. 594, 49 N. W. 609), and to include the right to regulate and control the manufacture and sale of intoxicating liquors. Article 5 of the bill of rights of this state expressly reserves to the legislature the right to regulate this power. It reads: "That the people of this state by their legal representatives, have the sole, inherent and exclusive right of governing and regulating the internal police of the same." But in exercising this right the legislature cannot deprive a citizen of an essential right secured by the bill of rights or constitution, such as depriving him of the right to be tried by a common-law jury. *State v. Peterson*, 41 Vt. 504. It is further contended that the law under consideration cannot be a police regulation, because it requires the court, on conviction for a second offense, to imprison the convict not less than a month nor more than a year. The statute of Kansas under consideration in *Mugler v. Kansas*, supra, gave the court power to fine or imprison on either the first, second, or subsequent conviction, limiting the time on the first conviction from 20 to 90 days, and the second conviction from 60 days to 6 months, and on every subsequent conviction from 3 months to 1 year. The fines that could be imposed varied from \$100 to \$1,000. Yet this was held by the supreme court of the United States to be a police regulation. Formerly, under this law, in this state, the imprisonment was in the county jail. When only a fine was imposed, the convict was committed to the county jail, to remain until the fine was paid. In the course of time the house of correction was established to take the place of the county jails as a place of imprisonment, both as being better equipped for the confinement of the prisoner humanely, and for affording him an opportunity to

work out his fine. This is within the letter and spirit of chapter 2, § 37, of the constitution. If his offenses are numerous, so that his fine is large, still his imprisonment may be avoided by payment, and if he does not pay the term of imprisonment is limited; whereas under imprisonment in the county jail there was no discharge except by payment. Hence whether the imprisonment is in the house of correction or in the county jail does not affect the law as a police regulation. The statute complained of provides (R. L. § 3802): "If a person by himself, clerk, servant or agent sells, furnishes or gives away, or owns, keeps, or possesses with intent to sell, furnish, or give away intoxicating liquor or cider, in violation of law, he shall forfeit for each offence to the state, upon the first conviction not less than five nor more than one hundred dollars, and may also be imprisoned in the discretion of the court, not more than thirty days; upon a second and each subsequent conviction, not less than ten nor more than two hundred dollars for each offence, and shall also be imprisoned not less than one month nor more than one year." R. L. § 3803, provides that prosecutions may be had before the county court or a justice of the peace on complaint of the grand jurors, or information of the state's attorney. R. L. § 3859, prescribes the form of a complaint or information, the essential of which is "that — of —, on the — day of —, at —, did at divers times sell, furnish, or give away (as the case may be) intoxicating liquor, without authority, contrary to the form of the statute," etc. R. L. § 3860: "Under the foregoing complaint every distinct act of selling, furnishing or giving away may be proved, and the court shall impose a fine for such offence." When this form of complaint or information was first prescribed, some prosecuting officers drew the information with a hundred or more counts for selling, as many for furnishing, and as many for giving away. This only enhanced the costs, and the court held that it was unnecessary; that the separate counts furnished the respondent no additional information except the days on which the offenses were charged were varied; but held that under this complaint the respondent was entitled to a specification, or bill of particulars, setting forth as well as the prosecuting officer was able the claimed offenses for which he should ask a conviction on the trial. *State v. Conlin*, 27 Vt. 323; *State v. Freeman*, Id. 525; *State v. Bacon*, 41 Vt. 532; *State v. Rowe*, 43 Vt. 267; *State v. Davis*, 52 Vt. 376; *State v. Wooley*, 59 Vt. 357, 10 Atl. 84.

In 1858 the legislature provided that but one count should be required and allowed for in the taxation of costs. The court also held that the state must be confined, on the trial, to the offenses specified (*State v. Rowe*, supra), but that the court had the power, when it would work no disadvantage to the respondent, to allow the specifications to be

amended. Under these conditions the trial of these causes has gone on for nearly 40 years without special complaint, inconvenience, or hardship; certainly none which has successfully appealed to the legislature for modification. In administering the law this court held that every traversable fact must be alleged, with time and place, and without such allegation the information was bad. *State v. Kennedy*, 38 Vt. 563; *State v. O'Keefe*, 41 Vt. 691. It also held that, if the words "at divers times" were omitted, but one offense could be shown. *State v. Jones*, 39 Vt. 370. Also that the count prescribed was not bad for duplicity. *State v. Brown*, 36 Vt. 560. It is now contended that these decisions are erroneous; that the prescribed form is in the disjunctive, and authorizes the charging of but one class of offenses,—either a sale, a furnishing, or a giving away. This contention assumes that a sale of intoxicating liquor under the statute is a different offense from furnishing it or giving it away. But this is not true. The thing prohibited consists in providing intoxicating liquor contrary to law. It may be done in any one of the three ways specified. A sale, a furnishing, a giving away of intoxicating liquor, each is the prohibited provision of it aimed to be suppressed by the statute. The quality and magnitude of the offense is the same, the penalty and mode of enforcement the same, in whichever of the three ways it is committed. The form of the prescribed complaint, that the accused "did sell, furnish or give away," etc., indicates that, with the words "at divers times" omitted, but one offense against the statute, committed in one of the ways specified, disjunctively, was intended to be charged, as held in *State v. Jones*, supra. But every transaction violating this law comes within one of these terms. The prosecutor is confined to a single count. He must frame it to meet the working phases of his proof. Without the words "at divers times" it charges but one offense. Whether the complaint charges the sale, furnishing, and giving away conjunctively or disjunctively, if a sale is shown, the other words are surplusage, and vice versa. With the words "at divers times" added, it gives notice that more than one or many offenses may be claimed to be shown at the time and place specified. It is not unlike the common count in assumpsit for goods sold and delivered,—single, but many different sales may be shown under it. But, if double, duplicity is not reached by a motion in arrest of judgment. The respondent availed himself of his right to specifications, and they were furnished. The offenses, whether by a sale, furnishing, or giving away, are of the same degree, whether for first or second conviction, require the same or a similar plea, the same or a similar verdict, and are similarly punished. The fact that they are included in one count does not invade any constitutional or other right,

more than if they were in separate counts. "In criminal proceedings the joinder of different offenses of the same degree in an indictment does not render the proceeding defective, though it is a matter of discretion in the court on motion to quash an indictment so framed." 1 Chit. Pl. 201; *King v. Kingston*, 8 East, 41; *Young v. King*, 3 Term. R. 98. The last case—an indictment for obtaining goods under false pretenses, against the statute, where the sentence was transportation for seven years—was held to be a misdemeanor, and that the indictment need not meet the requirements of the common law, provided it met those of the statute. The constitution of the state, its provision for a legislature to enact laws, the committal to it of the exclusive right and power to govern and regulate the internal police of the state, as well as the statutes of the state, proceed upon the theory that the state has the right and power to change and vary, at its pleasure, both in criminal and civil matters, the methods of procedure, so long as it does not invade the fundamental rights of the citizen reserved by the constitution. It does not, as some seem to think, tie up the legislature to follow common-law methods of procedure, even in criminal cases. But it may be helpful to ascertain what the common law required. It had no different rule as to the definiteness of pleadings in criminal than in civil matters. Says Mr. Chitty (1 Chit. Pl. 213): "The observations of Lord Chief Justice De Grey on the structure of an indictment are very forcible, and equally applicable to the pleadings in civil actions. The charge must contain such a description of the injury or crime that the defendant may know what injury or crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of guilty or not guilty, upon the premises delivered to them; and that the court may see such a definite injury or crime that they may apply the remedy or the punishment which the law prescribes. The certainty essential to the charge consists of two parts,—the matter to be charged and the manner of charging it." This extract is taken from the learned judge's opinion delivered in the house of lords in *Rex v. Horne*, Cowp. 672. It is a celebrated case, which grew out of our revolution, was carefully tried, and thoroughly considered both in the trial court by Lord Mansfield and in the house of lords. The learned judge further says: "As to the matter to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage. * * * Secondly. As to the manner of making the averment. There are cases where a direct and positive averment is necessary to be made in specific terms; as where the law has fixed and appropriated technical terms to describe a crime,—as in murder, burglary and others. It is likewise true that in all cases those facts which are

descriptive of the crime must be introduced upon the record by averments in opposition to argument and inference." Applying these clearly-expressed rules to the case at bar, the offense created by the statute is the provision of intoxicating liquors without the authority of law, either by a sale, furnishing, or giving away. There are no circumstances necessary to be set out to constitute either of these acts an offense. The terms of the statute as clearly import the prohibited offense as any terms can. The offense is neither heightened nor lessened by, nor dependent upon, the kind or amount of intoxicating liquor sold, nor upon the person to whom the sale, furnishing, or giving away is made, nor upon the amount of money received, nor upon whether made by the respondent, or by some one for him. None of these particulars need be set forth to notify the respondent of the offense with which he is charged and called upon to answer, nor to apprise the jury of what they are to convict or acquit him, nor to apprise the court of the sentence which it should impose. The prescribed form covers the offense in the exact and easily understood language of the statute which creates it. This is sufficient. *State v. Daley*, 41 Vt. 654; *State v. Cook*, 38 Vt. 437; *State v. Jones*, 33 Vt. 443; *State v. Matthews*, 42 Vt. 542; *State v. Clark*, 44 Vt. 636; *State v. Benjamin*, 49 Vt. 101; *State v. Higgins*, 53 Vt. 198; *State v. Miller*, 60 Vt. 90, 12 Atl. 526; *State v. Campbell*, 94 Am. Dec. 251 and note; *Bish. Cr. Proc.* 614. Mr. Bishop says: "The allegations must cover so many of the statutory terms as will show a prima facie violation of the written law, and need cover no more." It is not an ancient crime, which has been, from time immemorial, clothed in special terms, which by long use have become the most apt and definite ones to describe the exact crime. The statute sometimes prescribes the punishment of a common-law crime without defining it, or creates an offense and prescribes no form for an information. In such cases it is well held that the common-law requirements in charging it must be met. By statute enacted in 1787, and continued since that time (R. L. § 689), the common law, when applicable to the local situation and circumstances, and not repugnant to the constitution or laws, has been the law in this state, but not otherwise. But by this statute the common law is not in force in charging a statutory crime created in clear, definite terms, with a prescribed form for charging it in the terms of the statute. It is sufficient in such a case to follow the prescribed form. The respondent contends that the prescribed form is defective, in that it does not require the names of the persons to whom sales are claimed to have been made to be set forth; that sales must be made to some person. But this contention is based on the requirements of the common law when applicable. The specifications ordinarily would, and did in this

case, supply this information. Some courts have maintained this contention in regard to the statutes which they had under consideration. Whether the operation of the common law was limited in those states, as it is in this, does not appear. But the decisions of courts of final resort are nearly evenly divided on this subject. This court has held that the names of the persons need not be set forth. *State v. Munger*, 15 Vt. 290; *Bish. Cr. Proc.* § 1037, and note. The author there says: "On both sides they seem supported by a considerable weight of reasoning. * * * Undoubtedly identification may be made sufficiently clear to satisfy the demands of the legal principles without the name." Without doubt the difference in the decisions is controlled, in some degree, at least, by the difference in the language of the statutes creating the offense.

It is also contended that the particulars of the kind of liquor, price, and name of the person to whom sold should be set forth in the information, both to apprise the respondent of the evidence he has to meet, and to have the record protect him from a second conviction for the same offense. It is never necessary for the state to disclose what is merely its proof of the commission of the offense charged in the information. If the record does not itself identify the offense or offenses for which conviction has been had, on the trial of a subsequent prosecution such identification may be made by parol testimony. If these particulars were set out in the information, resort might have to be had to parol proof to identify the offense for which conviction was had. It might occur that the same respondent made more than one sale of the same kind and quantity of liquor to the same person, at the same price, at the same place, on the same day. Besides, by the common law it always has been held that the prosecutor need not set forth the name of the person when unknown. It is sufficient to state that his name is unknown. Thereupon, by the common law, the name is not indispensable. These particulars of the kind, quantity, price, and person to whom sold are seldom known to the prosecutor until revealed by the witness upon the stand. Without these particulars the prescribed form answers every essential requirement of the common law in regard to informations or indictments. The prescribed form sets forth in clear language, easily to be understood, "the cause and nature of the accusation." It meets fully the tenth article of the bill of rights in this respect. By the use of the words "at divers times" on the day named, it notifies him that he may be called upon to meet more than one offense committed in one of the ways named. The prosecution is never confined to prove the offense on the day specified in the information, if the proof is within the time limited for the prosecution of the offense. The accused can of right call upon the prosecutor to specify

more fully what is claimed to be included under these general terms. This is analogous to the common counts in assumpsit in civil cases which grew up under the common law. The defendant in a civil case is entitled to notice of what he is called upon to meet as much as a respondent in a criminal case, and for the same reasons. Under these common counts it has always been held that the plaintiff might show any number of claims of the class described, and for this reason that the defendant was entitled, as a matter of right, to a bill of particulars or specifications, and that such specifications supplied what was lacking by the generality of the count in regard to the particulars and number of similar claims which the plaintiff would call upon the defendant to litigate. In this view the information, aided by specifications, is good by the rules of the common law; but, whether it be or not, the legislature has an undoubted right to change and mold the forms of procedure, so long as it does not deprive the accused of any constitutional right. It has not done so in the case at bar. Further, on a motion in arrest of judgment the information and verdict, which constitute the record, aided by the prescriptive intendments, are ample to uphold a judgment and sentence.

The respondent's counsel further contends that the legislature, in other parts of this law, not brought under consideration by his motion, by enacting that this class of cases shall stand for trial the first term, that a continuance shall not be allowed without cause shown, and that a nolle prosequi or discontinuance shall not be entered without cause, and only with the consent of the court, has invaded the province of the court, so that the respondent under them does not have a common-law jury trial, and for that reason the whole law is unconstitutional. We do not understand that any of these provisions trench upon the province of the court. The legislature is to establish courts, and define their jurisdiction and powers in accordance with the constitution. All cases, unless under some rule of court, which the legislature has either expressly or impliedly authorized the court to make, stand for trial the first term of the court, and cannot be continued or discontinued without the permission of the court. No absolute or discretionary power of the court is taken away by these provisions. This class of cases is not exceptional in their manner of trial. They are proceeded with like all other cases. The selection and impaneling of the jury, the rules of evidence, burden of proof, and procedure in the trial, is the same as in all other criminal cases. What has been said in regard to the scope of the information, aided by specifications, to which the respondent was entitled as a matter of right, and which were furnished to him, and in regard to the order and manner of his trial, makes the respondent's trial a trial by "due process of law," and

"in accordance with the law of the land," within the varying definitions of those general terms as claimed by the respondent's counsel. He was notified in clear and unmistakable language of the offense with which he was charged. He heard the evidence by which it was sought to be established, was given ample opportunity to meet it by counter evidence, and was given an impartial jury to determine whether the charges were established beyond a reasonable doubt. All of the many contentions, objections, and criticisms of the respondent upon this point concentrate—First, upon whether the information, aided by the specifications, sufficiently informed him of "the cause and nature of his accusation;" and, secondly, whether in enacting the law the legislature invaded and took from the trial court some of its essential constitutional prerogatives, both of which have been considered. We need not stop to apply what has been said to each contention in detail.

4. He further contends that the statute is unconstitutional, because it authorizes the requirement of excessive bail, the imposition of fines excessive and disproportionate to the offense alleged, and the infliction of cruel and unusual punishment. The only punishment authorized is fine and imprisonment in the house of correction. The longest time of imprisonment proper for a second conviction is one year, and for failure to pay the fine imposed, however large, and for how many soever offenses, could not exceed three years. No. 78, Acts 1892. This state has no constitutional provision rendering a punishment by fine and imprisonment at hard labor unusual and cruel. Section 87, c. 2, of the constitution of the state is: "To deter more effectually from the commission of crimes, by continued visible punishments of long duration, and to make sanguinary punishments less necessary, means ought to be provided for punishing by hard labor those who shall be convicted of crimes not capital; whereby the criminal shall be employed for the benefit of the public, or for the reparation of injuries done to private persons;" and this is its only provision in relation to such punishments. The statutory provisions in regard to the punishment of this class of offenses is in line with the state constitution.

It is claimed that the eighth amendment of the constitution of the United States is applicable, and that the punishment is cruel and unusual under that. That article has been so far held to be applicable only to punishments under the laws of the United States. *Barron v. Baltimore*, 7 Pet. 243; *Pervear v. Massachusetts*, 5 Wall. 475; *O'Neill v. Vermont*, 144 U. S. 323, 12 Sup. Ct. 693. In the case last named, Justice Blatchford, in the opinion of the court, says: "Moreover, as a federal question, it has always been ruled that the eighth amendment to the constitution does not apply to states." Justice

Field, in a dissenting opinion, holds that the fourteenth amendment has made the eighth amendment applicable to the states; but such is not the holding of the court in that case. In this case the longest term of imprisonment proper could not exceed one year, and the greatest fine could not exceed three hundred dollars, and on failure to pay the fine the imprisonment could not exceed three years. In the *O'Neill* Case the imprisonment proper was one month, but the number of offenses was so large that the fines amounted to a large sum, and, if unpaid, the imprisonment would be over 54 years for him to work out the fine in the house of correction. It was only the aggravation of imprisonment that Justice Field complained of as cruel and unusual. Non constat that he would regard the extreme limit of punishment in this case as cruel and unusual. Considering the magnitude of the evil sought to be restrained, the fact that the only motive for committing the offense is cupidity, or desire of pecuniary gain to be acquired by taking advantage of the weakness of fellow citizens, weighed down, if not overborne, by pernicious habit, we do not think the punishment cruel or unusual. The punishment is graded, and made to depend upon whether the conviction is the first or second. It is of such a nature as tends to take away the inducement to the crime. It is not unreasonable in the length of imprisonment nor amount of fine that can be imposed for a single offense.

5. It is further contended that the statutes under consideration are repugnant to this clause in the fourteenth amendment to the constitution of the United States: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws." This, in terms, applies to the states. No claim is made, nor can be made, that these statutes apply to one class of citizens of this state, or of the United States, more than to all. Whoever, or whatever class, commits the prohibited acts within the state, is an offender, subject to prescribed penalties. We have already considered whether any person under them was, or could be, "deprived of life, liberty, or property without due process of law." What is due process of law is considered at length, and the common-law and state decisions and the prior decisions of the United States supreme court brought together and reviewed, in *Hurtado v. California*, 110 U. S. 499, 4 Sup. Ct. 111, 202. The result there reached is summarized by the court in its opinion in *Leeper v. Texas*, 139 U. S. 462, 11 Sup. Ct. 577, as follows: "That by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive partic-

ular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and, when secured by the laws of the state, the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principle of private right and distributive justice." To like import in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016. In this case it was held that congress might change the burden of proof, and prescribe the testimony required to remove it. The respondent concedes, as in reason he must, that the privileges and immunities of citizens of the United States which the states are prohibited from making or enforcing any law to abridge are the two classes which have already been considered.

Judgment that respondent takes nothing by his exceptions, and that his motion in arrest of judgment is overruled.

(79 Md. 89)

POSNER v. BAY et al.

(Court of Appeals of Maryland. March 13, 1894.)

SALE OF REAL ESTATE — DECREE AGAINST PURCHASER FOR SPECIFIC PERFORMANCE — COSTS — INTEREST — GROUND RENT.

1. Where a contract for the sale of land provides that it is "subject to the annual rent of \$240, title to be marketable and free from incumbrances, adjustment of expenses to be made as of" a date specified, and the purchaser refuses to perform, because of defective title, he must, in case the appellate court holds the title marketable, in an action by the vendor for specific performance, pay the costs of such action, and interest on the price, and ground rent, from the date specified in the contract for performance.

2. A provision in the decree which requires defendant to pay the purchase money, "less the amount of debts and charges, including mortgages and other liens properly chargeable against said property, as of" the date for performance stated in the contract, with interest from such date, is not prejudicial to him.

Appeal from circuit court of Baltimore city.

Action by James H. Bay and Virginia B. Hynson against Samuel Posner for specific performance of a contract for the sale to plaintiff of certain real estate. From a decree requiring defendant to pay ground rent, and interest on the purchase money, from the date specified in the contract for performance, and the costs of suit, defendant appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, PAGE, ROBERTS, and BOYD, JJ.

M. R. Walter, for appellant. A. S. Niles and Oscar Wolf, for appellees.

BOYD, J. This case is before this court for the second time. At the last April term

an appeal from a pro forma decree in favor of the present appellant was heard, and decided against him. *Bay v. Posner*, 26 Atl. 1084. The several objections to the title to the property in controversy were held by this court to be untenable, and the title determined to be marketable, and free from the objections urged. A motion for a rehearing was made by Mr. Posner, which was recently overruled.¹ James H. Bay, attorney in fact of Virginia B. Hynson, sold the property to Samuel Posner, "subject to the annual rent of \$240, for the sum of \$24,000, cash, title to be marketable and free from incumbrances; adjustment of expenses to be made as of January 1, 1893." On April 1, 1893, James H. Bay, attorney, and Virginia B. Hynson filed a bill for specific performance against Posner, in which they set out a contract, allege their readiness, and offer to convey the property in conformity with its terms, and his refusal to comply with the obligation assumed by him under said contract, although often requested to do so. On the same day Posner filed his answer, admitting the contract, but claiming that the title of Virginia B. Hynson to the property was defective and unmarketable. The answer then sets out the particulars in which the title is alleged to be defective. Testimony was promptly taken, and a pro forma decree was passed, overruling one objection urged, and sustaining the others. An appeal was entered by the plaintiffs the same day, and the record transmitted to this court in time for the April term.

As already stated, by our decision in the case of *Bay v. Posner*, above referred to, all of the objections brought to our notice were held to be unwarranted, and the title to the property declared to be good. The vendee was therefore bound by the contract, and was under obligation to comply with its provisions. By its explicit terms, the adjustment was to be made as of January 1, 1893. The purchase money was due and payable then, and, as a consequence, the vendor is entitled to interest from that date. Her title having been declared to be good and marketable, she is entitled to a compliance with the terms of the contract. It would be inequitable, and contrary to the plain meaning of the contract, to withhold from her the interest on the purchase money from the time it should have been paid. The vendee doubtless felt justified in having the title passed upon by the court, but it was at the risk of his being compelled to pay the interest from the 1st day of January, as well as the costs, if he failed to sustain his position. Of course, the vendee is also liable, from what we have said, for the ground rent of \$240 per annum, from January 1, 1893. The record discloses no sufficient reason for requiring the vendor to pay the costs. The contract did not provide for submitting the validity of her title to the court, but it simply required her to furnish a marketable title, not

one to be declared to be marketable by the court at her expense. It would be a dangerous practice to require vendors, under the circumstances of this case, to pay the costs, as vendees might prefer, in all important transactions, to have judicial determination of the validity of titles, if they are to be made at the expense of the vendors.

Objection is also made to the decree because the appellant is required to pay the purchase money, "less the amount of debts and charges, including mortgages and other liens properly chargeable against said property, as of January 1, 1893, with interest from the said 1st day of January, A. D. 1893." The record does not disclose any mortgage or other lien against the property, excepting the annual rent of \$240, to which the sale is made subject by the contract. Nor does the vendee object in the original case to the payment of the purchase money on account of any such liens. But, if there are any, this provision in the decree cannot injure the appellant. He will be entitled to deduct from the purchase money the amount of such liens, including the necessary costs of releasing the same, as they would be "properly chargeable against said property." When property that is to be conveyed free from incumbrances has liens on it when sold, it is usual to pay them out of the purchase money, and the purchaser, for his own protection, sees that it is done. The deed for the property and releases of liens are usually delivered simultaneously, or in such a way as to protect the purchaser. There is no intimation in the record that there are any liens which are not due, or cannot be paid off, and we do not see how the appellant can possibly be injured by this provision in the decree, but, as there may be some ground rent or other charge to be adjusted, it may have been necessary for his protection. "In the event of the parties being unable to agree upon the amount of debts and charges properly chargeable against said property as of January 1, 1893," the decree provides for their being ascertained, and reserves the right to the court to dispose of the costs in thus ascertaining them. If such reference as is provided for in the decree becomes necessary, the court below will doubtless make such order as to the costs as it deems equitable. There can be no valid objection to the decree, under the views expressed above, and it will be affirmed. Decree affirmed, with costs.

(79 Md. 33)

DUNNINGTON v. EVANS et al.

(Court of Appeals of Maryland. March 14, 1894.)

TRUSTS—SALE OF TRUST ESTATE—VALIDITY—PERSONS NOT IN BEING—COLLATERAL ATTACK.

1. A bill for the sale of trust property explicitly alleged that the deed creating the trust gave the trustee power to sell the whole trust es-

tate, and to invest the shares of certain of the beneficiaries. *Held*, that 27 years after such bill was filed, and 13 years after a sale was authorized and ratified, was too late for parties to such suit to bring an action against the purchaser to set aside the sale on the ground that the trust deed did not authorize a sale.

2. Where all persons in being, and having an interest in the trust estate, including the trustee, were made parties to the bill for a sale, and the part thereof which was sold was a leasehold, unborn remainder-men were bound thereby. Acts 1862, c. 156.

3. It is not essential to the jurisdiction of the chancery court to order a sale of a trust estate, and a reinvestment of the proceeds, that the cestuis que trustent, who are parties to an action for such sale, shall have notice of the proposed sale.

Appeal from circuit court of Baltimore city.

Bill by Catharine R. Evans and others against William A. Dunnington to set aside orders authorizing and confirming a sale to defendant of certain trust property. From a decree for plaintiffs, defendant appeals. Reversed, and bill dismissed.

Argued before BRYAN, PAGE, ROBERTS, BRISCOE, BOYD, and FOWLER, JJ.

Tho. I. Elliott, for appellant. Thos. Hughes and L. D. Loney, for appellees.

FOWLER, J. On the 23d April, 1844, John W. Wilson conveyed certain pieces of property situated in Baltimore city to David Stewart, in trust for the grantor, during his life, and after his death in trust for his seven children, who are named, with remainders to them, contingent upon their surviving until the youngest of them shall arrive at the age of 21 years. Upon the arrival of such youngest child at the age named, the trust property was to be distributed among the beneficiaries, "the shares of the sons to go to them absolutely, and the shares of the daughters to be held by said trustee, his heirs," etc., "in trust for said daughters, during the residue of the term of their natural lives, respectively, and, after the death of either of them, in trust for such person or persons as would, by the now existing laws of Maryland, be the heirs of said daughters, respectively, to take an estate in fee simple in lands by descent from them. * * *". In accordance with this provision of the trust deed, on October 3, 1865, the youngest child having arrived at the age of 21, the surviving children of said grantor filed a bill in the circuit court of Baltimore city for the sale of the trust property, and the suit thus instituted is entitled *Wilson et al. v. Clark et al.* All the persons (then in being) having an interest in the trust estate were parties, either plaintiff or defendant; among the latter being James Stewart, the heir at law of David Stewart, trustee named in the deed. The bill alleged, among other things, that the original trustee, David Stewart, was dead; that the property in question, consisting of fee simple and leasehold, had been conveyed to David Stewart in trust for the use of the grantor for life, then in further

trust that the income of said property should be applied to the use of the seven children of the grantor until the youngest living should attain the age of 21 years; then in further trust to sell, and divide the proceeds thereof among such of said children as might then be alive, and the survivors of them, and the heirs "in loco parentis" of such of them as might then be dead, so that the shares of the boys might be paid over to them, and the shares of the girls invested for their separate use, respectively, for life, with remainder to such persons, etc., as provided in the deed of trust. The bill further alleged "that the time specified in said deed for the division of the trust estate had arrived, and that it would be to the interest and advantage of all the parties interested therein that the said property should be sold for division, and that it cannot be advantageously divided amongst them, except by a sale thereof; that, because of the limitation in the said deed in relation to some of the shares, no sale can be effected, except under a decree of a court of equity;" and finally praying that said property "may be sold for division," etc., and the proceeds thereof divided, etc., and for general relief. The deed was filed with, and made part of, the bill; and, the original trustee being dead, a decree was passed, by which T. Parkin Scott was appointed trustee to make the sale, which was by him duly made, and reported to, and finally ratified by, said court. The proceeds of sale were distributed in accordance with the construction given by the court to the terms of the trust, as set forth in the deed,—that is to say, the share of the only surviving son was paid to him, absolutely, and the shares of the daughters were audited to said trustee, and by him subsequently invested, under order of court. The share to which Catharine R. Evans was entitled for life—being the share to which the property here in question is claimed to belong—was, by order of court, invested in Baltimore city stock, and held by the trustee in trust for said Catharine, during her life, and after her death for such person or persons as would be her heirs, etc., according to the terms of the trust. Subsequently, other orders were passed by said court, changing the investment of this and other shares of the trust estate, from time to time, but such new investments were always directed to be held under the same trusts. On the 23d October, 1873, Catharine R. Evans, with another of the equitable life tenants, filed their petition, alleging the death of the trustee, T. Parkin Scott, and asking that John William Wilson be appointed trustee in place of said Scott, with all the powers and authority conferred by said deed. Wilson was accordingly appointed, as prayed, and on the 9th April, 1879, filed his petition, asking for authority and direction to make sale of certain parts of the trust estate, among which was a sub

ground rent of \$108.89, which was sold to the appellant, William A. Dunnington, which sale was duly reported to, and ratified by, the court on the 10th May, 1880. The purchase money was paid in full, and the rent was duly conveyed to the appellant. The trustee, however, proved false to his trust, appropriated the proceeds to his own use, and was removed from his position as trustee on the 18th February, 1884. Thereupon, Henry D. Loney was appointed trustee in the place of said Wilson, with the same power and authority conferred by the trust deed of 1844. On the same day he was appointed, the new trustee was directed to bring suit on the bond of his predecessor to compel settlement of the trust, and also file a bill in equity in said court to set aside the conveyance of said rent to the appellant, Dunnington. All the proceedings we have thus far referred to were had in the case of *Wilson et al. v. Clark et al.*, which, as we have seen, was begun by the bill filed in 1865 for the sale of the trust estate, and the investment of the shares of the daughters. It was not, however, until the 29th December, 1892, that the bill in the case now before us was filed by Mrs. Evans, her husband, children, grandchildren, and Henry D. Loney, as trustee, to set aside the orders passed in the case of *Wilson v. Clark* on the 9th April, 1879, and 10th May, 1880, respectively; the first authorizing, and the second ratifying, the sale of said ground rent to the appellant. The court below vacated and rescinded these orders, and the purchaser, Dunnington, has appealed. We have thus very fully recited the proceedings in the case of *Wilson v. Clark* because we think the facts which thus appear furnish satisfactory answers to the questions presented by this appeal.

1. It was contended on the part of the appellees that no power of sale was conferred upon the trustee by the deed of 1844, by which the trust was created, and the first trustee, David Stewart, was appointed, and that, therefore, neither the original trustee, nor any of his successors, nor the court, could sell, or authorize a sale of, the trust estate, or any part of it. But it is clearly too late now for those who were parties to the case of *Wilson v. Clark* to object to the validity of the sale on this ground. The bill in the case just named was filed 30 years ago, alleging in the most explicit terms that the deed not only gave the trustee power to sell the whole trust estate, but authority, also, to invest the shares of the daughters. This may or may not have been an erroneous construction of the deed, but it was in fact adopted by the court; and, accordingly, the trust property was decreed to be sold. The shares of the daughters, including that of Mrs. Evans, were ordered to be held by the trustee under the deed, and were subsequently invested according to its provisions, as set forth in the bill and construed by the

court. It would seem that the bill of 1865, filed in *Wilson v. Clark*, was filed for the purpose of having the trust estate of *Wilson* administered in a court of equity; and it abundantly appears, from the proceedings we have already referred to, that the circuit court of Baltimore city did in fact assume and exercise jurisdiction over the administration of the trust estate. *T. Parkin Scott*, who was the successor of the original trustee, was authorized to sell, and to hold the proceeds under the deed for investment. He invested, and from time to time, by order of court, changed investments; and, upon the death of *Scott*, *J. William Wilson* was appointed trustee in his place, with the same power and authority, namely, the power and authority conferred by the deed of 1844. The last-named trustee likewise sold, under the orders of court, certain parts of the trust estate, for investment, including the rent in question. Now, assuming that the view of the appellees is correct, and that the construction of the deed set forth in the bill, and adopted by the court in its various decrees and orders, is erroneous, such erroneous construction should have been corrected, if at all, by some direct proceeding, either in this same court, to set the sale aside, or by appeal. The language of *Alvey*, former chief justice, in delivering the opinion of the court in the case of *Long v. Long*, 62 Md. 62, so clearly states and applies this principle that we quote it: "Where there was jurisdiction in the court, the erroneous or improvident exercise of it, or the exercise of it in a manner not warranted by the evidence before it,—whether that be in respect to the construction of written evidence, or deductions drawn from unwritten proof,—the errors, however apparent, are not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from competent jurisdiction. * * * Any other principle would unsettle, and render insecure, the larger portion of the titles of the country." See, also, *Barrick v. Horner* (not yet officially reported) 27 Atl. 1111.

2. While it must be conceded, of course, that the court had jurisdiction of the subject-matter in the case of *Wilson v. Clark*, yet it was contended that it did not have jurisdiction of all of the necessary parties. In the first place, the appellees *Mrs. Evans*, her husband, and their four children then living, were all parties, either plaintiffs or defendants, and are therefore bound by the original decree in *Wilson v. Clark*, as well as by the order passed in the same cause directing the sale of the ground rent in question, unless, as contended by the appellees, this last-named order is void because it was passed without notice to them. This objection we will consider presently, but the important question which presents itself is whether the children of *Mrs. Evans*, and their descendants, not born when the case of *Wilson v.*

Clark was instituted and the decree therein was passed, are bound thereby. The proceedings we are examining were had in 1865, and therefore subsequent to the passage of the act of 1862, c. 156, which was subsequently amended by the act of 1868, c. 273, and is codified as section 198 of article 16 of the Code. But it is apparent that the case made by the bill filed in *Wilson v. Clark* was covered by the act of 1862 in its original form. It provided that "in all cases where one or more persons is or are entitled to an estate for life or years in land and other persons are entitled to a remainder or remainders vested or contingent," etc. " * * * or any other interest vested or contingent in the same land, on application of any of the parties in interest a court of equity may, if all the parties in being are parties to the proceedings, decree a sale or lease," which decree, by the terms of the act, is made binding upon "all persons whether in being or not, who claim any interest in said land under any of the parties to said decree, or under any person from whom any parties to such decree claim." As we have already seen, all of the persons in being, and having an interest in the trust estate, were made parties to the case of *Wilson v. Clark*, and therefore the unborn children and grandchildren of *Mrs. Evans* are, under the very terms of the act itself, equally bound with those who are in esse, and parties to the suit; and they are all so bound, not only by the decree of 1865, but also by the orders of 1879 and 1880, under which the sub ground rent in question was sold by the trustee *Wilson*, and in reliance upon which the appellant became purchaser. But, in addition to this, there is another view, which we think is conclusive, so far as relates to the binding effect of said orders of 1879 and 1880, upon those not in esse. The portion of the trust estate which was sold under these orders, being a sub ground rent, was leasehold; and as was said in *Long v. Long*, supra, "The trustee held the legal estate until the trust was ended by the termination of the lives of the life tenants, and he was the sole representative of that estate. Being a party to the decree whereby the leasehold was ordered to be converted into money, those entitled in remainder, especially as they were not in esse at the time, are bound and concluded by the decree." *Long v. Long*, 62 Md. 68, and authorities there cited.

3. It was urged, however, that the sale of the subrent in question, and the subsequent conveyance thereof by the trustee *Wilson* to the appellant, made under the orders mentioned, are void, not only as against those unborn, but even as against those of the appellees who were in being, and parties to the suit, because made without notice to them. But this view is, we think, based upon a misapprehension or misapplication of the authorities cited to support it. While it may be conceded that ordinarily a court of

equity should not order a sale of trust property without notice to the cestuis que trustent, yet it is equally well settled that under our chancery practice a sale for the purpose of a reinvestment may be ordered whenever, on a full presentation of the facts, the court having jurisdiction over the administration of the trust estate may, in its best judgment and judicial discretion, determine such a course to be for the interest of the beneficiaries. To require an original proceeding by petition or bill against the cestuis que trustent, the appointment of guardians ad litem, the taking of testimony, and in general the same proceedings as on a bill for sale, would not only cause great delay, but unnecessary expense, in making investments by trustees. While there may be many cases in which the court would deem it proper to give the cestuis que trustent notice before ordering a sale for reinvestment, yet we do not think such a course is necessary to confer jurisdiction for such a purpose. In the case we are examining, the sale was made, as we think fully appears by the petition filed by the trustee, for the purpose of getting rid of property not considered a good investment for the reasons set forth in the petition, and for the purpose of reinvesting the proceeds. The court having the authority to order the sale, and reinvestment of the proceeds, all the parties are bound. The result will be that the appellant takes and holds the subrent in question free from the claims of the appellees; and it follows that the decree appealed from, inasmuch as it declared the order under which the sale and conveyance were made to the appellant to be void, will be reversed, and the bill dismissed. Decree reversed, and bill dismissed, with costs to appellant.

(78 Md. 595)

BOWLING v. TURNER, Registration Officer, et al.

(Court of Appeals of Maryland. March 13, 1894.)

ELECTIONS—RESIDENCE OF VOTER — LOSS BY ABSENCE.

Acts 1890, c. 573, § 14, provides that persons who vacate their actual abode in the state, and take up one elsewhere, shall be conclusively presumed to have lost their residence, unless, when they go, they make affidavit before the clerk of circuit court that they do not intend to change their legal residence, but to return six months or more before the next November election. A voter, living in a house rented by the month, in February rented at Washington a furnished house, which he occupied with his family till May 1, when he came back to stay. Meantime he had kept the key of his Maryland house, and left there all his furniture and light clothes. The Maryland house was not lived in, but a neighbor looked round it daily, and fed the poultry. *Held*, that the statute was express, and he had lost his franchise.

Appeal from circuit court, Charles county.

Appeal of Constantine A. Bowling against Thomas Turner, Jr., officer of registration,

and others, for their refusal to strike off from the registry the name of Sydney E. Mudd. At the circuit affirmed by divided court. Mr. Bowling appeals. Reversed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BRISCOE, and BOYD, JJ.

Atty. Gen. Poe, John H. Mitchell, and L. Allison Wilmer, for appellant. Jas. F. Matthews, R. H. Edelen, and Sydney E. Mudd, for appellees.

BRYAN, J. C. A. Bowling made a demand of the proper registration officer that the name of Sydney E. Mudd should be stricken from the registration of voters. On refusal by the registration officer, Bowling took an appeal to the circuit court for Charles county by filing a petition as required by the act of assembly.

Sydney E. Mudd had been a voter in the eighth election district of Charles county since 1884. In February, 1893, he rented a furnished house by the month in Washington, D. C., which he occupied with his wife and four children until May 1st of the same year. Before he occupied the furnished house in Washington, he had been occupying, with his family, a house in Bryantown, Charles county, which he was renting by the month. He kept in the house at Bryantown all his furniture, and his spring and summer clothing, taking with him to Washington his books, desk, office chair, a cot, and an old mattress (for a colored servant), and a map. In February he opened an office in Washington for the practice of law, which he still rents, and in which his office furniture still remains. He kept the key of the house at Bryantown, and employed a colored woman, living in the neighborhood, to go to the house morning and evening, to look around and see if everything was right, and to feed the poultry. On May 1, 1893, he returned to the house in Bryantown, which he has occupied ever since. He has not at any time made the affidavit prescribed by the act of 1890 (chapter 573, § 14). The question of Mr. Mudd's residence must be determined by his removal to Washington in point of fact, and by the intent with which the removal was made. There is usually difficulty in ascertaining a man's intentions. There have been some vagueness and latitude in the methods by which the courts have permitted the question to be investigated. In *Baptiste v. De Volunbrun*, 5 Har. & J. 86, the defendant, being a resident of Saint Domingo, fled from the servile insurrection in that island, and arrived in New York in 1797, and afterwards removed to the city of Baltimore in 1802. The case was decided at June term, 1820, after the defendant had lived 18 years in the city of Baltimore. The question was whether she had acquired a residence in Maryland. The court said it is admitted that she, (the defendant) "has constantly and

uniformly declared her intention to return to her own country whenever circumstances will permit her to do so with safety, and for that reason has never become a citizen, either of this state or any other of the United States. These declarations must be taken as a part of the *res gestae*, and are evidence of her intention, and, with the fact that she has never become a citizen, are conclusive. She is a stranger in the country; an alien, without a fixed home; a sojourner wherever she goes, awaiting some favorable event that may invite her back to the land from whence she has been driven." In other cases a distinction has been drawn between a fixed intention and a floating intention. The legislature has seen fit to avoid the embarrassments and uncertainties attending the investigation of this question by making a change in the rule of evidence in the cases of persons applying for registration as voters. The fourteenth section of the act of 1890 is as follows, so far as this question is concerned: "After the passage of this act all persons who shall vacate and remove from the place of their actual domicile, abode, dwelling-place, or habitation within this state and shall take up a domicile, abode, dwelling-place or habitation out of this state shall be conclusively presumed to have lost their residence in this state, and shall in consequence thereof become disqualified to vote, unless at or about the time of such removal or within ten days thereafter they shall go in person before the clerk of the circuit court for the county from which they shall so remove, or before the clerk of the superior court of Baltimore city, if such removal be from said city, and shall make and acknowledge before him an affidavit declaring that notwithstanding such removal from their domicile, abode, dwelling-place or habitation, they do not intend thereby to change their legal residence but that they have a fixed and definite purpose to return to this state on or before six months preceding the next succeeding election in November." Mr. Mudd did not lose the legal possession of the house in Charles county; it cannot be said that it was a vacant possession in any sense which implied a dereliction of his right of property. He had the right to return to it when he chose, and no one could occupy it against his will, except in the character of a trespasser. But it is certain that he changed his visible dwelling place and habitation when he occupied the house in Washington with his family. In the language of the statute which we have quoted, he took up a dwelling place or habitation out of the state. He no longer inhabited the house in Bryantown; but he vacated it as a dwelling place, and removed from it. These were the palpable and unequivocal facts connected with the departure from Maryland. Now, they could have been explained by showing the intent residing in his own mind when they took place. The statute allowed him

to show by his own affidavit that he did not intend to "change his legal residence, but that he had a fixed and definite purpose to return to the state on or before six months preceding the next succeeding election in November." As he did not make this affidavit, the statutory result must follow; that is to say, he is conclusively presumed to have lost his residence, and is disqualified as a voter. The presumption being made conclusive by law, of course no evidence can be introduced to contradict it. The circuit court, by an equal division, sustained the action of the registration officer. But it seems to us that they ought to have reversed it, and to have ordered Mudd's name to be stricken from the registries of voters. It has not been suggested that this statute is for any reason invalid. We will say, however, that its validity was sustained in *Southerland's Case*, and in *Sterling's Case*, and was fully recognized in *Lancaster's Case* (74 Md. 334, 22 Atl. 139), and in *McLane's Case* (74 Md. 168, 21 Atl. 708).

A motion has been made to dismiss the appeal, on the ground that the bill of exception was not signed until after the lapse of the term. It is stated in the exception, under the hands and seals of the judges, that it was signed and sealed on the 31st day of October, which was during the term. We are bound by the record as it is certified to this court, and cannot permit it to be contradicted by affidavits. If erroneous in any respect, a proper mode of making the correction is provided. On a writ of *diminution*, the court below would have corrected any errors which are capable of being corrected. The docket entries show that the bill of exceptions was filed November 25th, which was after the expiration of the term. It is necessary, except under special circumstances, that the exception should be signed during the term, but there is no rule of practice that it is vacated if not filed within that time. Reversed and remanded.

(78 Md. 806)

HUMPHREYS v. SLEMONS.

(Court of Appeals of Maryland. March 18, 1894.)

EQUITY APPEAL—PRACTICE—ORDER AND ENTRY—TIME OF FILING.

1. An oral order for an appeal in equity, given to the clerk, but not actually entered by him until after the time for appeal has expired, is ineffectual.

2. The filing of an appeal bond, reciting that an appeal had been prayed, does not avoid the necessity of an entry and order of appeal under Code, art. 5, § 30, requiring appeals in equity to be "taken and entered" within two months from the date of the decree.

8. In a suit to enforce a mechanic's lien, a decree in favor of plaintiff will not be disturbed on appeal where it appears that he substantially complied with his contract, and defendant accepted the building.

Appeal from circuit court, Wicomico county, in equity.

Bill by Thomas M. Slemons against Walter C. Humphreys and the Salisbury Permanent Building & Loan Association for the enforcement of a mechanic's lien. From a decree in favor of plaintiff, defendant Walter C. Humphreys appeals. Appeal dismissed.

Argued before ROBINSON, C. J., and PAGE, BRYAN, BRISCOE, BOYD, and FOWLER, JJ.

Jas. E. Ellegood and Thomas Humphreys, for appellant. Toadvin & Bell, for appellee.

FOWLER, J. The decree appealed from was passed and filed in the court below on the 2d day of June, 1893, and more than two months thereafter the following entry was made by the clerk: "Order for appeal verbally made July 27, 1893." This entry is the only evidence that an appeal was taken, except the fact of the filing of an appeal bond within the time limited for entering an appeal, in which it is alleged by way of recital that an appeal had been prayed. Unless the mere filing of this bond had the effect and took the place of an order and entry of appeal, the appeal in this case must be dismissed, because it was not taken and entered within two months, as required by section 30, art. 5, of the Code; for we have held in *Miller v. Murray*, 71 Md. 64, 17 Atl. 939, that where a verbal order for an appeal in an equity case was given to the clerk of the court in due time, but the appeal was not actually entered by him until after the time limited by law, the appeal will be dismissed, the verbal order having no effect. In that case, Bryan, J., delivering the opinion of the court, said: "When an appeal is prayed in open court, and the clerk neglects to note it, the court will, on motion, order the record to be amended, so as to speak the truth. When an application in writing for an appeal is filed with the clerk, this application is considered as part of the record, as much so as the bill or an answer or a plea or any other paper properly filed in due course. But, if an application is made by word of mouth, and the appeal is not actually entered by the clerk, we are at a loss to see on what legal principles it could have effect." Here the decree appealed from was dated the 2d day of June, 1893, and, although a verbal order for appeal was given on the 27th July, yet no appeal was actually entered until the 4th of August, which was more than two months after the date of the decree. It was suggested, however, that the filing of the appeal bond was a sufficient compliance with the requirements of the Code, but we cannot agree to this view. The bond is not a necessary incident of the appeal, which, indeed, if properly taken and entered, would have been perfectly valid without filing of any bond whatever. It cannot, therefore, we think, be said that an act like the filing of a bond, which is altogether a voluntary act on

the part of the appellant, can be made to take the place of an act which the law requires to be done in order to make a prayer for appeal effective. If the law regulating appeals may be satisfied by this act of the appellant, any other act of his, which, in his opinion, may be appropriate, would be equally effective; and the law would thus be nullified. But in this case there is nothing to show that the appellant ever supposed his bond was equivalent to a prayer for appeal, nor that the clerk, when he filed the bond, intended thereby to enter an appeal. On the contrary, it is evident that the bond was offered by the appellant, approved and filed by the clerk, upon the assumption that an appeal had been or would be seasonably taken and entered. It is of great importance that all rules regulating the rights of litigants should be clearly defined and well settled, and since the decision of this court in the case cited there ought to have been no doubt as to the question here involved. The case, however, was fully argued upon its merits, and, if it were properly before us, we should have no difficulty in reaching the same conclusion announced by the learned judge below, for we think it clearly appears from the testimony that the appellee substantially complied with his contracts, and that the appellant, although not entirely satisfied with the work in some particulars, accepted it, and has been for some time occupying and using the building. Appeal dismissed.

(79 Md. 223)

McCANN et al. v. PRESTON et al.

(Court of Appeals of Maryland. April 5, 1894.)
ACTION ON NOTE—PAROL EVIDENCE—LATENT AMBIGUITY—PLEADING AND PROOF.

1. On the purchase of mortgaged land the purchaser gave to the vendors a note for the amount of the mortgage, which was assumed by him; the note stating that it was "to secure mortgage debt" on said property, and bearing on its face the word "duplicate." *Held*, in an action on such note, that evidence was properly received to explain the meaning of the word "duplicate," this word giving rise to a latent ambiguity.

2. The original note secured by the mortgage, and the agreement between the vendor and purchaser, in pursuance of which the note in suit was given, were properly admitted as parts of the *res gestae*.

3. A promissory note is admissible, as between the parties thereto, to support a count for money lent, for money had and received, or upon an account stated.

4. An application for relief from a purchase on the ground of fraud must be made in a reasonable time.

Appeal from circuit court, Harford county, in equity.

Action by James B. Preston and Catharine J. Preston, to the use of Annie Hamner, against Julia E. McCann and James J. McCann, to recover on promissory notes. From a judgment for plaintiffs, defendants appeal Affirmed.

Argued before ROBINSON, C. J., and BRYAN, BRISCOE, McSHERRY, FOWLER, ROBERTS, PAGE, and BOYD, JJ.

C. J. Bonaparte, W. S. Keech, and Tho. H. Robinson, for appellants. Brown & Brume and W. Geo. Weld, for appellees.

ROBERTS, J. This action was originally brought in the circuit court for Baltimore county. It was thence removed, upon affidavit by the plaintiffs, to the court of common pleas of Baltimore city, where it was tried, and a verdict rendered for plaintiffs. In consequence of the sickness and death of the presiding judge, the exceptions taken during the progress of the trial were not signed, and a new trial was accordingly granted. The case was then removed, upon affidavit by the defendants, to the circuit court for Harford county. The trial in Harford county also resulted in a verdict for the plaintiffs. From the rulings of that court this appeal is taken. During the progress of the trial there were four bills of exceptions taken by the defendants, three of which relate to questions of evidence, and the other to the action of the court in granting the plaintiffs' prayers, and rejecting the defendants'. The testimony in the record discloses this state of facts: The plaintiffs were the owners of a leasehold interest in 12 houses on Vincent alley, in the city of Baltimore, each subject to a ground rent of \$30 per annum. On the 21st of February, 1885, plaintiffs obtained from Miss Hamner a loan of \$2,500, to secure the payment of which sum they mortgaged the 12 houses on Vincent alley, and executed and delivered to Miss Hamner their joint and several promissory note for \$2,500, of even date with the mortgage, and payable five years thereafter. Subsequently, on January 4, 1889, John P. Clark, a broker, residing in the city of Baltimore, acting for both the plaintiffs and the defendants, brought Mr. Preston and Mr. and Mrs. McCann together at his office, and succeeded in arranging an exchange of the equity of redemption in the Vincent alley houses for a tract of land in Baltimore county, the property of Mrs. McCann,—one of the defendants. The day before the meeting at Clark's office, a deed had been executed by the plaintiffs assigning their interest in the Vincent alley houses to Mr. McCann, the other defendant. While the exchange was in progress, J. Harry Preston, a lawyer, and a son of the plaintiff James B. Preston, came into Mr. Clark's office to see his father, and, finding him about to conclude the exchange of properties just mentioned, he examined the deed which the plaintiffs had the day before executed, and ascertained that it contained no assumption by the defendants of the mortgage debt due from the plaintiffs to Miss Hamner, and thereupon he objected to his father concluding said exchange without such an assumption by the defendants. This

they agreed to do, and, as the deed already executed did not accord with the terms of the exchange, it was necessary either to rewrite it, making it conform to the terms agreed upon, or to supplement it with such a writing as would accomplish the purpose. Accordingly, an agreement was prepared, which was signed and sealed by the defendants, whereby they assumed the payment of said mortgage debt, and provided therein the mode by which said assumption should be accomplished. By the terms of the agreement, the defendants assumed the payment of said mortgage debt, and contracted to deliver to the plaintiffs "their promissory note for twenty-five hundred dollars, and then two interest notes for seventy-five dollars each; the principal note payable February 23rd, 1890, and the two interest notes to be paid in six and twelve months, respectively, from the 23rd of February, 1889." Accordingly, the defendants passed to the plaintiffs three notes, as required by the agreement. The note for the principal sum, which is in controversy here, reads as follows: "\$2,500.00. Baltimore, Feb. 23rd, 1889. One day after date, we jointly and severally promise to pay to the order of James B. Preston and Catharine J. Preston twenty-five hundred dollars. Note to secure mortgage debt on twelve Vincent alley houses. Duplicate. Value received. Julia E. McCann. James J. McCann. No. ——. Due ——" The defendants having failed to pay at maturity the above note, suit was brought on the same on the 29th of October, 1890. The declaration contains the six common counts in assumpsit, and a special count on the note. On March 2, 1891, general issue pleas were filed, and on the same day the suit was entered to the use of Annie Hamner, the payee in the note to secure which the mortgage had been given. Additional pleas, on equitable grounds, were subsequently filed; but it is conceded there was no sufficient evidence to sustain them, and they require no further attention.

The first question which this appeal presents for our consideration relates to the admissibility in evidence of the note sued on, of the note delivered by the plaintiffs to Miss Hamner contemporaneously with the mortgage, and of the written agreement by which the defendants assumed the payment of the mortgage debt. In the first instance, it is contended that the use of the word "duplicate" in the note sued on indicates that it is not the only original, but is an original secondly signed, in like manner as foreign bills of exchange are drawn. There can be no doubt as to the well-recognized rule respecting foreign bills of exchange, that in such case "the bill must be produced at the trial in all the parts or sets in which it was drawn." But this rule can have no force in a case where the note is not drawn in sets, and is not a duplicate, in the sense just adverted to. The testi-

money in the record shows, beyond controversy, that the note in question was not executed in sets, but was the sole original executed by the defendants in compliance with the terms of the agreement, which they had signed and sealed at the time the note was given, and which fully explains the whole transactions. The only purpose, if any, which the plaintiffs could have had in writing on said note the word "duplicate," was, manifestly, not for their own benefit, but for the protection of the defendants, as, in this form, it was out of the usual line of inland paper, and well calculated to suggest inquiry. If, however, the note of Miss Hamner could be regarded, in any sense, as the original, and the one marked "duplicate" was, for any particular reason, intended to be treated as a duplicate thereof, the plaintiffs, having produced and offered in evidence both notes, thus strictly complied with the rule "that the bill must be produced at the trial in all the parts or sets in which it was drawn." But, when we consider the testimony in the record pertaining to this subject, which we think legally admissible to explain the manner in which the word came to be written on the note, all doubts are removed. It is, however, claimed that this view violates the established doctrine that parol proof cannot be admitted to vary or contradict the terms of a contract. But this rule finds no application here, since the testimony neither directly nor remotely varies or contradicts the note, but simply explains the meaning of a word which, standing where it does, bears a doubtful relation to the other parts of the note, and falls to express with certainty its meaning. The word "duplicate," as used in this case, cannot be regarded as performing a similar office to that in which it is generally employed in foreign bills of exchange. It is only necessary to refer to the language of the note itself to be convinced that the word was never intended to refer, as it does in some instances, to notes drawn in sets or parts. It is, according to its express terms, "a note to secure a mortgage debt on 12 Vincent alley houses." Mr. Justice Bryan, delivering the opinion of this court in *Farrell v. City of Baltimore*, 75 Md. 494, 23 Atl. 1096, says: "It is the duty of the court, in construing written instruments, to ascertain their meaning, and this must be done even if it is necessary to depart from the literal meaning of the terms employed." Judge Story mentions a case where a person signed a paper in these words, "Borrowed of J. S. fifty pounds, which I promise not to pay," and it was held to be a good promissory note, and that the word "not" ought to be rejected. Story, *Prom. Notes*, § 12. "Here the meaning was evident upon the paper, as it stood, without any change. It was not necessary to reform the instrument, because the court construed it to mean what the parties must have intended, al-

though in direct opposition to the words used." There is a latent ambiguity in the word, as here used, and the court below was unquestionably right in admitting parol proof to explain its true meaning.

We think the court below was clearly right in admitting the two notes and the agreement in evidence as parts of the *res gestae*, and as explaining the manner in which the plaintiff came into possession of the note of the defendants, and the purpose which it was to accomplish in the matter of the exchange of the properties. It is admitted that the defendants assumed the payment of the interest notes, but it is contended that they did not assume the payment of the principal note for \$2,500. But the terms of the agreement, and the testimony of the plaintiffs' witnesses, leave no ground open for theory or speculation as to the meaning of both parties.

It has been earnestly contended that there is substantial variance between the pleadings and the proof offered by the plaintiffs to sustain the several counts in the declaration. As hereinbefore stated, the narrative contains the first six common counts in *assumpsit* (Code, art. 75, § 23), and a special count on the note of the defendants. The note forms no part of the agreement under seal, by the express terms of which the defendants agreed to deliver to the plaintiffs the note sued upon, and it was accordingly so delivered. The defendants having failed to pay the same at maturity, plaintiffs brought suit thereon, as hereinbefore stated, and entered the same to the use of Miss Hamner, and thus restricted the application of the proceeds of said note, when collected, to the discharge of the mortgage debt. Whether the note sued on was negotiable or not can have no possible bearing in the determination of this case. The note never passed from the hands of the original payees, the plaintiffs, and if any legal objection existed to its admissibility under the seventh count, which is the special count on the note, it was clearly admissible under the third, fifth, and sixth of the common counts. A promissory note, between the immediate parties thereto, has been repeatedly held to be good evidence to support a count for money lent, for money had and received, and upon an account stated. *Waynam v. Bend*, 1 Camp. 175; *Bayley, Bills* (6th Ed.) 362. It is laid down by Chitty on *Bills of Exchange*, supported by many other authorities, that it is not necessary to declare on a promissory note, between the original parties to it, but in an action for money lent the same may be given in evidence. St. 3 & 4 Anne, c. 9, which enables the holder to declare on the note, has been construed as conferring only an additional or cumulative remedy. *Beck v. Thompson*, 4 Har. & J. 536, 538.

There remains one other question which we deem it necessary to consider. It is contend-

ed by the defendants that "they understood perfectly all about the exchange of properties, and agreed to make the exchange, that they also understood themselves to have assumed an obligation to pay the interest on Miss Hamner's mortgage, and they signed papers which they were led to believe contained or carried out this understanding, but that they never agreed to sign, or signed knowingly, any papers by which they became bound, personally, to pay the principal of the mortgage debt, and that their signatures to such papers were obtained by misrepresentations of facts." This proposition, however, is not sustained by any evidence legally sufficient for that purpose. There is not to be found in the testimony of either of the defendants—and they are the only witnesses who testified in their own behalf—a single representation made by the plaintiffs, or either of them, or by any one acting for them, which was proximately or remotely calculated to deceive or mislead them. Their testimony was of the most vague and unsatisfactory character, and entitled to but very little consideration as tending to establish fraud. Mrs. McCann, one of the defendants, who could read and write, and seemingly a fairly intelligent person, says, if she had known that she was signing the note for \$2,500, she would not have done so. Yet she acted of her own free will, without any representation on the part of the plaintiff, save only she heard Mr. Clark, the broker, say, "There are interest notes that ought to be signed." "He put them on the desk, and showed me where to sign them. None of them were read. Nothing more was said. Mr. Clark said 'interest notes,' or something, and got them out." Mr. McCann, the other defendant, testified that at the same time witness and his wife were requested to sign some interest notes, and signed them, but witness recollected nothing about his having signed any other papers whatever. Yet Mrs. McCann admitted in her testimony that both she and her husband had signed, not only the note sued on, but also the agreement offered in evidence. Clark's statement as to the interest notes was not a misrepresentation, but, in every respect, essentially accurate. There is nothing in this case which exempts it from the control of the principles of the law usually applied in the consideration of questions of the character now presented for our determination. Fraud, like any other fact, must be established by satisfactory proof. It will never be presumed, for it is a maxim well recognized in the law that "*odiosa et inhonesta non sunt in lege praesumenda.*" It is not only necessary to prove fraud, but the fraud practiced must have worked an actual injury to the defrauded party. *McAleer v. Horsey*, 35 Md. 453. You will look in vain through the pages of the record for the slightest evidence of actual injury to these defendants. Their desire to give up the Vincent alley houses,

and then refusal to have anything further to do with them, do not constitute proof of injury. Nor is there any testimony in the record for which the jury were at liberty to have awarded damages resulting from actual injury.

If the defendants desired to rescind the contract because of its fraudulent character, they should have done so within a reasonable time. In this case there is no evidence even of dissatisfaction until after the expiration of more than a year. It may be that the defendants have not profited by the exchange which they made, but it by no means follows, as a legal result, that they can now ask the law to relieve them from the consequences of a bad bargain. In what we have said, we must not be understood as intimating that there has been the slightest evidence of unfair dealing on the part of the plaintiffs. The proof in the record established no such fact.

Considerable stress has been laid upon the conveyance of the Vincent alley houses to Mr. McCann, instead of his wife, Mrs. McCann, who was the owner of the property given in exchange for the Vincent alley houses. But we have, by a careful examination of the testimony, failed to discover any misconduct on the part of the plaintiffs in connection with the execution of the deed. Mr. McCann, who appears, more than his wife,—yet mostly in her presence,—to have actually participated in the negotiations for the exchange, admits in his testimony that no instruction had been given as to how the deed should be prepared. It was by him immediately placed upon record. If this location of the title was not in accordance with the wishes of the defendants, as they seem to have been of one accord respecting the same, a complete remedy yet remained within easy reach. Mr. McCann could, with but small expense, have assigned the equity of redemption to Mrs. McCann. Most certainly, this circumstance contributes nothing in aid of the defendants' contention.

Without having treated seriatim all the questions arising on this record, yet, in what we have said, we have passed upon such of them as we have considered necessary to be determined on this appeal. It results from what we have said that we find no error in any of the rulings of the court below, and the judgment must, accordingly, be affirmed. Judgment affirmed.

(79 Md. 27)

FRAZEE v. FRAZEE et al.

(Court of Appeals of Maryland. March 13, 1894.)

MARRIED WOMAN—VALIDITY OF CONTRACT—ESTOPPEL.

1. A married woman's contract, except in regard to her separate estate, is absolutely void, whether entered into by herself or on her behalf by her husband.

2. A married woman is not estopped to de-

ny her husband's authority to contract for the sale of her real estate by the fact that she was aware that the purchaser was in possession of the land and was making improvements thereon.

Appeal from circuit court, Garrett county, in equity.

Bill by Jonas Frazee against William H. Frazee, Felicie Frazee, his wife, and Winfield S. Friend, to enjoin proceedings in ejectment by Felicie Frazee, and to compel specific performance by William H. Frazee and wife of a contract executed by William H. Frazee to W. S. Friend for the sale of all his right, title, and interest in and to the land in controversy. A temporary injunction was granted, as prayed for by plaintiff, and, from an order dissolving the same, plaintiff appeals. Affirmed.

Argued before ROBINSON, C. J., and BRYAN, McSHERRY, FOWLER, BOYD, and BRISCOE, JJ.

Gilmor S. Hamill and Tho. J. Peddicord, for appellant. John W. Veitch and Robt. H. Gordon, for appellees.

BRISCOE, J. The bill in this case is for an injunction to restrain proceedings in an action of law by way of ejectment, and for a specific performance of an agreement to sell certain real estate, and for general relief. The bill charges that one of the defendants, Mrs. Felicie Frazee, was the owner of a lot of ground in Garrett county, and sold the same to Winfield S. Friend, through her husband as her agent; that the purchaser entered into possession without having paid the entire purchase money, and without having received a deed, but had made improvements on the property; that shortly afterwards the purchaser's interest was sold at sheriff's sale to the plaintiff, and he was put in possession by virtue of a writ of habere facias; and that the vendors had instituted an action of ejectment to dispossess the plaintiff. The court granted the injunction, but, after hearing of the case on bill, answer, and proof, afterwards dissolved it, and dismissed the bill. This appeal is from that order.

The allegation of fraud which is made by the bill is denied and traversed by the answers. There is also a denial on the part of the defendants that Mrs. Frazee, the wife, was a party to the contract of sale, or had any knowledge of it until a long time after it had been made. It is admitted that the land belongs to the wife, she having obtained it by deed from her brothers and sisters, and that it was recorded on the 5th day of April, 1883, among the land records of Garrett county. The contract of sale is dated the 25th of February, 1885, and is set out in the record. It is not signed by the wife, nor does it make mention of the wife's interest in the property, but specifically agrees to convey only the right, title, and interest of the husband, W. H. Frazee. The material part of the agreement is as follows:

"This agreement, made between William Henry Frazee, of the first part, and Winfield S. Friend, of the second part, witnesseth: The said William Henry Frazee, of the first part, doth sell to the said Winfield Scott Friend, of the second part, for and in consideration of \$405, all his right, title, and interest in and to the following property." We have carefully examined the testimony, and find it confirmatory of the written agreement. The witness W. S. Friend testified that when he bought the land he thought it belonged to Henry Frazee, the husband; that he had no dealings with the wife whatever in regard to the land; and that he did not know that Mrs. Frazee owned it until 1890. There was also proof that the wife had no knowledge of the sale until a long time after it had been made. It is clear that those who claim through W. H. Friend, the purchaser, can take no greater interest than he purchased, and, as the property belonged to the wife, her title did not pass under the sheriff's sale.

But, apart from this, the common-law disability of the wife still exists in this state, except in the cases, and to the extent, that the legislature by statute has thought proper to remove it. Our statute prescribes the mode for the conveyance of the statutory or general estate of a feme covert, and this is by the joint deed of herself and husband (Code, art. 45, § 2); or she can authorize an agent or attorney to sell and convey the same by a power of attorney, executed jointly with her husband (Acts 1890, c. 394). Except in regard to the separate estate of a feme covert, or where she is empowered by statutory authority to act as a feme sole, all her covenants, contracts, and agreements in courts of law as well as of equity are absolutely null and void, and she is under no obligation, and cannot be compelled, to perform them, whether entered into by herself or on her behalf by her husband, with or without her consent. But it is insisted upon the part of the appellant that Frazee acted as agent for his wife in the sale, which sale she ratified, and is therefore estopped from denying his authority. But there is no testimony to warrant even the inference of a sale on her part, and the question how far a married woman would be estopped in pais we do not find it necessary to pass upon in this case. The testimony, taken in its strongest light against her, simply discloses a knowledge of the purchaser's possession of the land and certain improvements made by him thereon. Her title to this property was on record, and was by law notice to the plaintiff of the estate sold to him. It is well established that, where a party's rights in property sufficiently appear of record, mere silence upon his part is no violation of duty, and he is not estopped to assert his rights against others dealing with the property as another's.

So far as the claim to a mechanic's lien is concerned, we need only say that no notice was given, as required by the mechanic's

lien law of this state. Code, art. 63, § 10. There was no personal notice served upon the wife of his intention to claim a lien. *Conway v. Crook*, 66 Md. 292, 7 Atl. 402. We shall therefore affirm the order appealed from. Order affirmed.

(161 Pa. St. 230)

GRAEFF v. PHILADELPHIA & R. R. CO.
(Supreme Court of Pennsylvania. April 23, 1894.)

CARRIERS—INJURIES TO PASSENGERS—NEGLIGENCE.

1. A carrier is not responsible for injuries to a passenger, resulting from the act of an intending passenger, who, being about to pass through a car door, pushed it open violently, causing it to injure the passenger.

2. The carrier cannot be deemed negligent because the door was not all glass above the middle, so that persons could see each other coming to the door.

3. The presence of a screw eye on the inner side of the door, about five feet from the bottom, and projecting nine-sixteenths of an inch, and used to hold back the door, is not evidence of negligence in the construction of the door, though the passenger was injured by contact with the eye.

Appeal from court of common pleas, Philadelphia county.

Action by Norah Graeff against the Philadelphia & Reading Railroad Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Gavin W. Hart, for appellant. Wm. C. Gross and Thos. F. Gross, for appellee.

GREEN, J. The act which caused the plaintiff's injury was not the act of the defendant, nor of any of its agents or employees. It was exclusively the act of a total stranger, over whom, or whose actions, the defendant had not the slightest control. Moreover, his action was not the usual, customary conduct of an intending passenger, about to pass through the door in question; but it was rude, impatient, and unusual. The plaintiff herself thus describes the manner of her injury: Having said she was just about going out of the door, and had her hand up at the door, and her left foot on the pavement, she was asked: "Q. Where was the right foot? A. On the step; and going out there was a gentleman walked in, or came running, to make the train, and as he ran in he knocked the door against my head. Q. Where did he hit your head? A. He struck me right there, on the forehead." The plaintiff's witness Emma Bettker, being the only other witness who described the manner of the injury, testified as follows upon the same subject: "As we were going out of the door, Norah put her hands up to the door, to go out, while two gentlemen came a rushing in, and threw the door on Norah, and we were still going to pass out, when there was a gentleman, coming from the depot, says: 'Why, Miss, he has broke the skin. You had better go in.' The foregoing is the whole of

the testimony descriptive of the injury, except the plaintiff's cross-examination, which is substantially similar to the testimony in chief. It is manifest, therefore, that the plaintiff's injury was exclusively the result of the unusual, rude, and hasty act of a stranger. Dealing with just such a question as this, in the case of *Ellinger v. Railroad Co.*, 153 Pa. St. 215, 25 Atl. 1132, we held that a common carrier is not bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. A woman is not entitled to recover damages from a railroad company for personal injuries, where it appears from her own testimony that, when she was about to descend from the lower step of a car to the ground, she was jostled off by another passenger rudely pushing by her to enter the car. Our Brother Williams, delivering the opinion, said: "She had reached the lowest step, and was in the act of stepping from it to the platform, when an impatient man, desiring to take the train at that station, stepped upon the step she was leaving, and in so doing crowded or jostled her, and she fell. The immediate cause of her fall was the act of the impatient man, in his efforts to get upon the car. * * * But protection against bad manners is not, so far as I am aware, one of the duties owing by a carrier to its passengers. Rudeness is a breach of no positive law. The ordinary cars are, and must be, open to the masses, among whom there will be different degrees of intelligence and politeness; differences in physical vigor and temperament. There is therefore, necessarily, a certain amount of rudeness, of haste, of selfish disregard of the nerves and of the comfort of others, to be met with wherever men and women congregate,—whether upon railroad trains, in places of amusement, or upon the streets of a city. Unless such conduct amounts to a breach of the peace, the officers of the law can take no cognizance of it; and carriers are not bound to prevent it, or liable in damages for its appearance about their stations or trains. The plaintiff was the victim of an act of rudeness." All of this language is precisely applicable to the present case. An impatient traveler, in a hurry to make a train, rushes ahead heedlessly, pushes the door open violently, and causes the door to strike the plaintiff with force, and injures the plaintiff. It was an act of rudeness, of which the plaintiff was the victim. That the stranger was responsible for his act there can be no doubt, but that the defendant shall be made to suffer in damages for such an act is intolerable and unjust, to the last degree. It is subject to no duty to guard against such acts, and therefore is not negligent in that regard.

But, says the plaintiff, the defendant is negligent in the construction of the door, and therefore should be liable. A couple of carpenters are examined, who, after the

event, say the door was defective because it was not all glass above the middle rail, so that persons could see each other coming to the door. It is not at all certain that the same accident would have been avoided if this door had been built in that way, because the same spirit of impatience and rudeness would have prompted the same act of haste in opening the door to get through quickly, although another person was visible on the other side. But the best illustration of the fallacy of the attempt to establish negligence in this way is afforded by one of our own cases (*Hayman v. Railroad Co.*, 118 Pa. St. 508, 11 Atl. 815). There the door for the transit of the passengers from the wharf to the boat was constructed precisely as the carpenters said this one should have been, viz. all glass above the middle rail. But it happened that a passenger going through it, just behind another passenger, put up his hand to push it open, and he struck the glass with force enough to break it; and, his hand having been cut severely by the broken glass, he brought an action against the company, and sought to recover upon the presumption of negligence arising from the mere fact of the accident. But we refused to sanction that proposition, and held that the door was no part of the machinery used for the carriage of passengers, and that the plaintiff, in order to recover, must prove negligence affirmatively. In that case the accident resulted from the presence of too much glass in the door, and in this case it was contended there was too little. But both contentions were untenable. The doors were both such as are in common use, and the mere construction of neither of them justified an inference of negligence. The present case is much stronger than the *Hayman* Case, because in that the injury was the result of the mere ordinary use of the door, while here it was the result of the violent act of a stranger.

Again, it is contended that the presence of a small screw eye on the inner surface of the door was the immediate means by which the injury was inflicted, and therefore it was negligence to have it in a position where it could strike the plaintiff's head. There was no proof that such an appliance was not a usual and suitable device for holding the door open when the weather did not require it to be closed, but it was contended that it should have been at the top or the bottom of the door, so that it could not have hurt the plaintiff. It was a very small screw eye, and only projected nine-sixteenths of an inch beyond the surface. It was located four feet and ten inches from the bottom of the door, and it happened that the plaintiff was of a sufficiently short stature to bring her head on the level with this little appliance. It is a sufficient reply to the argument derived from this source to say that, if the eye had been at the bottom of the door, it might have struck her ankle,

and injured her, as was the fact in the case of *Kies v. City of Erie*, 135 Pa. St. 144, 19 Atl. 942. There the plaintiff—who was a woman, also—was passing along the street in front of an engine house, when the door, which projected, when open, six feet over the pavement, was suddenly thrown open, and struck the plaintiff on the ankle, and injured her seriously. She brought an action against the city for the injury, but the court below granted a nonsuit, which this court sustained. It was claimed that the building was negligently constructed, as to the doors, and therefore the city was liable, but we held otherwise. Mr. Chief Justice Paxson said, in the opinion: "It is true the doors of the engine house opened outwards, and were operated by springs, which, when certain bolts were pulled, opened, or assisted in opening, the doors. The case was argued upon the theory that when the bolts were pulled the springs opened the doors suddenly, and with great violence. In such case, as they swept across a considerable portion of the pavement, in opening, it can readily be seen that they might be a dangerous trap to injure persons passing along the said pavement. The only testimony on the part of the plaintiff upon this subject was substantially as follows: 'When the bolts are pulled you have to start the doors a little bit, and then the spring takes hold, and helps swing the door open. Sometimes they are opened quick, and sometimes not so quick. If the wind is blowing, it is difficult, and you have to follow the door and push it along; and when there is no wind they swing freely.' As the plaintiff was nonsuited, she is entitled to all the deductions which can fairly be drawn from this evidence. Tested by this rule, however, it is not sufficient to justify a jury in finding that the doors of the engine house were defectively constructed, and dangerous to citizens using the pavement. It is evident that the only object and effect of the springs were to aid the firemen in swinging open the heavy doors. It is not only possible, but probable, that on the occasion referred to, if the door was opened rapidly and violently, as contended by the plaintiff, it was the result of a push by the person who opened it. For his carelessness or negligence the city, under all the authorities, is not liable, and we have already said there was not sufficient evidence of the faulty construction of the building to submit to the jury." Just so in the present case. The defendant is not responsible for the act of the stranger in pushing open the door in a rude and violent manner. If it had been opened in the ordinary and usual manner, the plaintiff would not have been hurt. But the defendant is not bound to take precautions against the unusual and negligent use of its appliances by strangers or others. If they are reasonably safe, when used with ordinary care, and in the manner that prevails with the mass of mankind, the duty of the

party who supplies them is performed. A very apt illustration of this doctrine is found in the case of *Eisenbrey v. Pennsylvania Co. for Ins.*, 141 Pa. St. 566, 21 Atl. 639. There a fence was erected, inclosing the front steps of a residence, and having a door therein extending, when wide open, 10 inches beyond the limit within which obstructions were permitted by a city ordinance. The plaintiff, an old man, 69 years of age, was passing along the footwalk in front of the house, when suddenly the door or gate in the fence was thrown open, and struck him, causing him to fall, and suffer a fracture of his thigh. A verdict was recovered in the court below, but we reversed the judgment without a venire. We said: "The accident did not result from the erection of the fence. That was harmless enough, and, if in violation of the city ordinance,—which does not clearly appear,—was not necessarily dangerous, or likely to injure any one. The proximate cause of the injury to the plaintiff was the throwing open of the door suddenly. It was not contended that this was done by the company, or by any agent, employee, or servant thereof. There is no room, therefore, to apply the doctrine of respondeat superior." All of this is exactly pertinent to the present contention. For the rude and hasty act of the stranger, the defendant is not responsible. The screw eye was a perfectly proper appliance to be upon the door, to fasten it back. In itself, it was entirely innocent, and was not by any means so prominent as the knob of a door, or an outside lock, or a key projecting therefrom. In all the ordinary uses of the door, there was not the least liability to inflict injury, resulting from its presence. It is not possible to regard it as any more, or even as much, a source of danger, as a projecting knob or lock or key, or even a piece of carving, or an old-fashioned knocker. We are perfectly clear that the mere presence of such an appliance on the surface of a door is not the least evidence of negligence in the construction of the door, and the same is true of the glass plate. Upon the whole testimony, we are of opinion that the case should have been withdrawn from the jury, with a binding instruction to find a verdict for the defendant. We sustain the 5th, 6th, 7th, and 8th assignments of error. The others are immaterial. Judgment reversed.

(161 Pa. St. 252)

IN RE TUBBS' ESTATE.

(Supreme Court of Pennsylvania. April 23, 1894.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—REAL-ESTATE MORTGAGE.

At an executor's sale of two parcels of land, one of which was mortgaged for \$3,000, notice was given that the purchaser of the mortgaged parcel would take it "liable to have the amount of the mortgage collected from said lot of land in satisfaction thereof." It was sold for

\$53. On distribution the mortgagee presented the mortgage and bond accompanying for allowance as a claim against the estate. *Held*, that it was not error to award the fund arising from the sale of all the land to such mortgagee.

Appeal from orphans' court, Luzerne county.

Appeal of Edgar B. Tubbs from a decree of distribution on audit and adjudication of the first and final account of Jonas C. Tubbs, administrator of the estate of Hamilton Tubbs, deceased. Affirmed.

Hamilton Tubbs died on the 29th day of December, 1891. He left some debts. He owned some real estate, and had some personal estate. His personal property was not sufficient in value to pay his debts. Jonas C. Tubbs, who had been appointed his administrator, petitioned the orphans' court of Luzerne county for leave to sell the decedent's real estate for payment of debts. The court granted the prayer of the petition. Two separate and distinct pieces or parcels of land were advertised and offered for sale. They were numbered 1 and 2 in the order and advertisements of sale. At the time of the sale, Lewis Benscoter had a notice read, warning all bidders and buyers that he had a first mortgage on the first piece of land described, "upon which there is, unpaid, debt and interest to date in the sum of \$3,258.80. Whoever purchases said above-described lot of land will purchase subject to the above-cited mortgage, and will be liable to have the said amount collected from said lot of land in satisfaction thereof." After this notice had been read, the land was sold for \$53 to John Benscoter, brother of Lewis. After the administrator had filed his account, showing in his hands from the personal estate \$196.41, and from real-estate sales \$568.39, an audit was held. Among the claims presented for allowance and payment were Edgar Tubbs, work and labor, \$347.55, Jonas C. Tubbs, work and labor, \$493.30; also, Lewis Benscoter, upon mortgage and bond accompanying the same, for balance of \$3,000, with interest from February 28, 1874. The court disallowed the claims of Edgar Tubbs and Jonas C. Tubbs, and against objection he awarded the fund to Lewis Benscoter on the bond accompanying the mortgage.

Exceptions to report of audit: "The learned court erred in the following particulars: (1) In overruling the objections made to the mortgage and bond accompanying, as presented by Lewis Benscoter, for the reason 'that the said Benscoter gave notice at the sale that the land covered by this mortgage was subject to it; and, secondly, because the allowance of this claim would be detrimental to the other creditors.' (2) In disallowing the claims of Edgar Tubbs and Jonas C. Tubbs. (3) In awarding to Lewis Benscoter in the distribution the sum of \$605.30."

The opinion of the orphans' court is as follows:

"The second exception relates to the claims of Edgar and Jonas C. Tubbs for services. Upon reviewing the testimony we are unable to change our former conclusions, and so dismiss the exceptions. *Keener v. Zartman*, 144 Pa. St. 179, 22 Atl. 889; *McConnell's Appeal*, 97 Pa. St. 31; *Houck v. Houck*, 99 Pa. St. 552. The exceptant was, however, a brother of the decedent, and as heir he has a right to contest the claim set forth in the first exception, and we proceed to discuss that subject. The fund for distribution arose from a sale of real estate. The claim presented by the executors of Benscoter is in the form of a bond accompanying a purchase-money mortgage. The land was sold under a notice by said executors that the purchaser would take the land 'liable to have the amount of the mortgage collected from said lot of land in satisfaction thereof.' The lien of the mortgage would not have been disturbed without the notice. Act March 22, 1887 (P. L. 6). The bond was not in judgment, as in *Com. v. Wilson*, 34 Pa. St. 63, and this claim was not based upon the mortgage, as in *Appeal of Penn Square Bldg. Ass'n*, *81 Pa. St. 330. A general bond accompanying a mortgage is the principal evidence of the debt, and the mortgage is but collateral to it. *Appeal of Eagle Ben. Soc.*, 75 Pa. St. 226; *Hodgdon v. Naglee*, 5 Watts & S. 217. We say, where a debt is based upon a bond accompanying a mortgage (before judgment at least), it is a general debt payable out of any fund in the hands of the personal representatives of the deceased debtor. The death of the debtor creates a lien independent of the mortgage. 3 Rhone, *Orph. Ct. Pr.* 233, 234. It is a common thing for a creditor to get a partial payment on his bond while retaining the lien of his mortgage as security for the balance. *Shunk's Appeal*, 2 Pa. St. 304; *Merkel's Estate*, 131 Pa. St. 584, 18 Atl. 931; and this is so although the estate is insolvent. *Mason's Appeal*, 89 Pa. St. 402. If the Benscoters get this fund now, it does not follow that the purchaser will derive the benefit thereof, for the land still remains liable for the whole mortgage—First, to the Benscoters for the balance; and, second, to this estate by way of equity. *Graff's Estate*, 139 Pa. St. 69, 21 Atl. 233. Under this last-cited case it would have been our duty, if required, to have withheld the present fund from the Benscoters until after they had exhausted the land by a sale under the mortgage. But no such demand has been made, notwithstanding the discussion of the subject before the court. By declining to make such a demand we infer that it is doubtful whether the entire mortgage debt can be realized by a sale.

"The exceptant's counsel contends stoutly that under the cases of *Appeal of Penn Square Bldg. Soc.*, and *Com. v. Wilson*, supra, we have erred, not only in allowing the claim, but in taking any notice of it what-

ever. We think we have made clear the distinction between these cases, and that of *Graff's Estate*, supra, by saying that this claim is based upon a general bond not in judgment, which was not the fact in the cases relied upon by the exceptant's counsel. In *Com. v. Wilson*, the court, by Read, J., says (page 69): 'The sale [sheriff's sale] in this case under the junior judgment was subject to the lien of the first mortgage, and of the whole debt secured by it, and no part of the proceeds of that sale should have been applied to the payment of the judgments on the mortgage bonds.' But to us it seems clear that the death of the debtor here gave these claimants a lien on any fund secured by the administrator independent of his record lien. In the *Penn Square Case* the court says: 'That the mortgagee whose title is unaffected has no right to come upon the fund produced by the sale is too clear for argument.' In the report of that case there is no mention of any bond, and in the absence of a bond we can see how the collection of the debt might have been restricted to the land, or at least how the debt was not a general one. With this explanation, the cases cited will not be in conflict. If the Benscoters had proceeded against the land upon the mortgage since the orphans' court sale, and had realized from a sheriff's sale of it less than the whole debt, with interest and costs, we think it would not be seriously contended that they had no claim on this fund, for the balance especially, as the only contestant is an heir of the decedent. So the real contest seems to be whether the mortgage creditor or the heir (or, if you please, an unsecured creditor) of the decedent shall be obliged to pursue the land. This question seems to have been settled in New Jersey by statute. *Association v. Stockton*, 148 Pa. St. 146, 23 Atl. 1063. Under the equity powers of this court we might have ordered the Benscoters to sell on their mortgage; but this has not been demanded, so they have their option as to the mode of procedure. *Morris v. Olwine*, 22 Pa. St. 441.

"Again, at common law a judicial sale of land divests all liens, and no one but a lien creditor has any claim on the fund; but in this state such sales do not divest the lien of first mortgages, and hence such mortgages are not paid out of the fund. But as to general debts of a decedent, not of record, the death alone creates a lien. Having a lien by mortgage, and also by death, why are the Benscoters not entitled to the whole value of the land if necessary to satisfy their debt? The orphans' court sale was not under their control, and it ought not to be allowed to work them any injury. We conclude that the claimants were bound to present their claim here and now, or run the risk of losing a portion of their debt, to the enrichment of the heir of the decedent, who has no claim to the estate until all

the decedent's debts are paid in full. Therefore, the first and third exceptions are also dismissed, and the report of audit is confirmed absolutely."

James R. Scouten and Isaac P. Hand, for appellant. Q. A. Gates, for appellee.

PER CURIAM. The opinion of the learned judge of the orphans' court sufficiently vindicates the conclusions he has reached, and the distribution resting upon them must be sustained. The decree is accordingly affirmed.

(161 Pa. St. 259)

FREIBERG et al. v. STODDART.

(Supreme Court of Pennsylvania. April 23, 1894.)

INSOLVENCY OF BANK—TRUST CREDITORS—PREFERENCE.

A bank received two drafts, indorsed to it for collection, on account of the drawers, against two of its depositors. After acceptance by the latter the bank charged to each depositor's account the amount of the draft accepted by him. Before remitting to the drawers, the bank assigned, having on hand cash sufficient to pay such drafts. *Held*, that the drawers were not entitled to a preference as to the funds on hand at the time the bank failed, where the assignee holds nothing which he or such drawers can identify with the drafts, or trace as a payment of them.

Appeal from court of common pleas, Luzerne county; Charles E. Rice, Judge.

Action by Joseph Freiberg and Abram Freiberg, doing business as J. & A. Freiberg, against William Stoddart, assignee for benefit of creditors of F. V. Rockafellow & Co., for an injunction to restrain defendant from distributing certain money received by him among the general creditors, and requiring him to pay it to plaintiffs. From a judgment overruling plaintiffs' exceptions to, and confirming, the master's report, and dismissing the bill, plaintiffs appeal. Affirmed.

The opinion of the trial court is as follows:

"On January 25, 1893, the plaintiffs drew a draft to their order on M. Rosenbluth for one hundred and twenty-three dollars and seventy-three cents, at one day sight, and on January 27th drew a similar draft for two hundred and eight dollars and fourteen cents on Sol Hirsch, and indorsed the same: 'Pay to the order of F. V. Rockafellow & Co., for collection, for account of J. & A. Freiberg.' The drawees were depositors in the bank of F. V. Rockafellow & Co., and each had a balance in the bank more than sufficient to pay the draft drawn on him. The first-mentioned draft was accepted on January 27th, and the account of the drawee was charged therewith on February 7th. The other draft was accepted by the drawee, and his account was charged therewith, on February 1st. On February 7th, F. V. Rockafellow & Co. sent to the plaintiffs

drafts on the City National Bank of Philadelphia for the respective amounts of the foregoing. At this time, and for a long time prior thereto, F. V. Rockafellow, who was doing business under the name of F. V. Rockafellow & Co., was insolvent. On February 8th the doors of the bank were not opened, and on February 11th Rockafellow made an assignment for the benefit of creditors, to the defendant. The two drafts sent to the plaintiffs were presented for payment, and protested, on February 11th, and are now in the plaintiffs' hands. When the assignee took charge of the property of the assignor, he found cash in the vaults of the bank, but there is a dispute as to the amount; the plaintiffs alleging that it was thirteen thousand dollars, and the defendant alleging that it was only five thousand dollars. The plaintiffs claim that, of this money, three hundred and thirty-one dollars and seventy-three cents—the amount of the drafts collected, as aforesaid, by F. V. Rockafellow—belongs to them; and they pray for a decree enjoining the assignee from distributing the same amongst the general creditors, and ordering and directing him to pay it to the plaintiffs. The legal propositions upon which the plaintiffs rely, are (1) that by reason of the restrictive indorsements the title to the drafts, and to the proceeds arising from the collection thereof, was never in F. V. Rockafellow; (2) that the moneys passed into his hands in trust for the plaintiffs, and also passed into the hands of the assignee impressed with the same trust; (3) that the plaintiffs have a right to follow the proceeds of the collection so long as the same can be identified; (4) that they have sufficiently traced and identified the same by showing that the cash on hand at the time the bank closed, exceeded the aggregate of these collections.

"An indorsement for collection is restrictive, and carries no power of sale with it. In such case the indorsee is a mere agent for the indorser, and such indorsement has been said not to amount to a transfer of title. So an indorsement 'for collection for my account,' or 'for account of it,' is restrictive, and does not pass the title, or the right to the proceeds, of the instrument. The indorsee takes the instrument as agent or trustee for the indorser; and if he disposes of it for his own use the indorser may recover from the purchaser the amount collected on it, or he may recover the bill itself, in an action of trover. By such restrictive indorsement the indorsee takes the instrument subject to the trust created.' *Rand. Com. Paper*, § 726; *Daniel*, *Neg. Inst.* § 698; *White v. Bank*, 102 U. S. 658; *Sweeny v. Easter*, 1 Wall. 166; *Bank v. Gregg*, 79 Pa. St. 384; *Hackett v. Reynolds*, 114 Pa. St. 328, 6 Atl. 680. The general doctrine regarding the right to follow trust funds is thus stated in 2 Story, *Eq. Jur.* (13th Ed.) §§ 1258, 1259: 'The general

proposition which is maintained, both at law and in equity, upon this subject, is that if any property, in its original state and form, is covered with a trust in favor of the principal, no change of that state and form can divest it of such trust, or give the agent or trustee converting it, or those who represent him in right (not being purchasers for value without notice), any more valid claim in respect to it than they, respectively, had before such change. * * * It matters not, in the slightest degree, into whatever other form different from the original the change may have been made,—whether it be that of promissory notes, or of goods, or of stock; for the product of the substitute for the original thing still follows the nature of the thing itself, so long as it can be ascertained to be such. The right ceases only when the means of ascertainment fail.' See, also, *Bisp. Eq. § 86*; *Bank v. King*, 57 Pa. St. 202; *Sadler's Appeal*, 87 Pa. St. 154; *Sheetz v. Marks*, 2 Pears. 302, and cases cited; *Bank v. Bache*, 71 Pa. St. 213; cases cited in notes to *Dyer v. Dyer*, 1 White & T. Lead. Cas. Eq. (Blackstone Ed.) *250. If, therefore, when these drafts were accepted, F. V. Rockafellow had withdrawn so much money from the general funds of the bank, and had invested it in other property, this would have been a very plain case for the application of the rule above stated. So, also, there would be no difficulty if he had placed the money in an envelope, or had otherwise set it apart and designated it; and in that case the fact that some of the bills or coins were taken out, and others put in their place, would not destroy the substantial identity of the fund, so as to prevent the cestui que trust from following and recovering it. In regard to money, substantial identity is not oneness of pieces of coin, or of bank bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor to his principal. The principal may, by the law, claim out of the chest the sum which belonged to him before the admixture.' *Pennell v. Deffel*, 4 De Gex, M. & G. 372, quoted with approval in *Bank v. King*, 57 Pa. St. 202. But in this case no money was added to the assets of the bank, and no part of the money in bank was separated, or set apart, or in any way appropriated, to the payment of the drafts; and, so far as appears, the assignor did nothing to indicate an intention on his part to treat any portion of the funds in bank as different from the remaining deposits. Assuming that at the time the drafts were accepted, and the accounts of the drawers were charged therewith, he had on hand sufficient money which he could rightfully apply to their payment (a fact, which, by the way, does not affirmatively appear), his failure to remit the amount to the drawers was a

breach of duty; but it does not necessarily follow that the funds in bank—much less subsequent deposits—became impressed with a trust or charge in favor of the drawers which would give them a preference on distribution. A trust creditor is not entitled to preference over general creditors of the insolvent merely on the ground of the nature of the claim. To authorize such a preference, some specific, recognized equity, founded on agreement or relation of the debt to the assigned property, must be shown, which entitles the claimant, according to equitable principles, to preferential payment. *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504. The plaintiffs, therefore, must show something more than a breach of duty on the part of their agent, in order to put their claim in relation to the fund which went into the hands of the assignee on a different footing from those of other depositors. In determining whether they have shown such title to the portion of the cash assets claimed by them as entitles them to the relief prayed for, it should be remembered that this is not the case of a trustee mingling trust money with his own; and therefore we are of opinion that the decisions relating to a charge or lien on the whole fund, in such a case, do not apply. Let us suppose that the drawees had paid Rockafellow & Co. the amounts of the drafts in cash, and that the banker had used it in paying debts. Would the drawers have a charge or lien on the cash found in his vaults, or against his general estate? We concede that some of the cases cited by the plaintiffs' counsel seem to hold that they would; but these decisions are not put upon the ground that the trust moneys have been thus traced into a specific fund or property, but upon the ground that, according to the doctrine of modern equity, it is not necessary to trace them into some specific property in order to enforce the trust, and that it is sufficient if they can be traced into the estate of the defaulting agent or trustee, thereby swelling the volume of his assets, or were used in paying debts. *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *Francis v. Evans*, 69 Wis. 115, 33 N. W. 93; *Bowers v. Evans*, 71 Wis. 133, 36 N. W. 629. These, as well as the other cases belonging to the same class, are elaborately considered in *Bank v. Dowd*, 38 Fed. 172, where it was held that if a bank, on receiving from another bank commercial paper 'for collection and immediate return,' makes the collection, and mingles the money collected with its general funds, and thereafter becomes insolvent, having cash on hand sufficient to cover such collection, the fund collected must be held to have so lost its identity that the cash on hand will not be impressed with a trust lien in favor of the bank for which the collection was made, as against general creditors. We are not required to go so far as that, in this case;

but we cannot escape the conclusion that the doctrine of the Wisconsin cases is a departure from the rule laid down in *Story*, which has thus far been adhered to by the courts of our own state, and goes beyond anything actually decided in the celebrated case of *Knatchbull v. Hallett*, 18 Ch. Div. 696. In *Thompson's Appeal*, 22 Pa. St. 16, it appeared that an individual, as executor, received moneys which he used in his own business, and, also being otherwise indebted, made an assignment for the benefit of creditors. The court below held that the heirs of the decedent were entitled to a preference. The supreme court, after quoting the rule laid down in *Story*, said: 'It is impossible for a chancellor to lay his hand upon a single article of property, or on a single dollar of money, included in the assignment, and say that any particular thing or sum of money is either the original property of *Seth Matthews'* heirs, or the product of it. The decree below was therefore erroneous.' This case, and the principle upon which it was decided, were recognized in *People's Bank's Appeal*, 98 Pa. St. 107; and in *Hopkins' Appeal* (Pa. Sup.) 9 Atl. 867, the point expressly decided was that, where there is a failure to trace trust funds into any specific property of the trustee, they are not entitled to priority of payment over the claims of other creditors. In *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, it was decided that the use of the funds to pay debts does not entitle the principal or cestui que trust to such preference. See, also, *Milligan's Appeal*, 82 Pa. St. 389; *Oress' Appeal*, 97 Pa. St. 471. The case we have supposed for the purpose of illustration is not more unfavorable to the plaintiffs than the case at bar. When the assignor charged these drafts against the accounts of the drawees, he canceled so much of his indebtedness to them, but did not add a dollar to the fund in bank. It is true, his estate was benefited by the transaction, because his indebtedness was thereby reduced; but, as he was insolvent at the time, such benefit to the estate only equalled the pro rata shares which would have been awarded to the drawees on distribution. If a preferred lien or charge upon the fund in bank is to be recognized upon the ground of the benefit received by the estate or fund through the transaction, such lien or charge ought to be measured by the benefit actually received, and not by the benefit which it would have received if the fund had been increased by a deposit of an amount equivalent to the amount of the drafts. But if we hold to the rule that, to entitle one claiming to be a trust creditor to preference, he must trace the trust money into some specific property, or into some particular fund or account of the assignor, with which the latter has mingled it, we think the plaintiffs have failed, because they have not shown that the assignor received any money, as the proceeds of the drafts,

which he added to and mingled with the general mass of deposits in bank, or that any part of the money in bank was ever set apart, or in any manner appropriated, to the payment of the drafts. The case of *People v. Merchants' & Mechanics' Bank*, 78 N. Y. 269, is so closely analogous to this case that we think it may be referred to as sustaining this conclusion. The fund claimed by the plaintiffs has not merely lost its identity by being 'mixed and confounded in a general mass of property of the same description,' but it never had any distinct identity as a trust fund. There are no reported Pennsylvania decisions of the precise question before us, but, applying the general principles regarding the right to follow trust funds, as we understand them to be held in this state, we conclude that the plaintiffs are not entitled to the preference claimed by them. Therefore, the motion to continue injunction is denied."

Cist & Kronacher, Wm. R. Gibbons, and Wm. S. McLean, for appellants. Henry A. Fuller, for appellee.

PER CURIAM. We concur in the conclusions reached by the learned master and the court below. If, at the time of the assignment, the plaintiffs' notes had been found by the assignee uncollected, he should have returned them. If a draft or bond, or a specific package of money, received in payment of the notes, had been found among the assets coming into his hands, it should have been turned over to the plaintiffs. But neither the notes, nor any security or sum of money received in payment of them, came into his hands. He holds nothing which he or the plaintiffs can identify with the notes, or trace as a payment of them. This is clearly pointed out in the opinion of the learned judge of the court below, and we think the case may very properly be affirmed upon his opinion. The judgment is affirmed.

(61 Pa. St. 215)

In re HUMMEL'S ESTATE.

(Supreme Court of Pennsylvania. April 23, 1894.)

DESCENT AND DISTRIBUTION—GIFTS IN FRAUD OF WIDOW.

1. Under the statutes giving the widow of an intestate dying without issue half the realty for life, and half the personalty absolutely, and permitting her to reject the provisions of the will, in favor of those of the intestate law, the widow takes as purchaser, not as heir; and therefore her husband cannot defraud her of her rights by voluntary gifts of his obligations payable after his death, when her rights vest.

2. Bonds payable after death, not founded on a valuable consideration, are not "just debts," first payable out of the estate before the widow's share.

3. Bonds payable at death of the maker, though founded on no valuable consideration, and intended to defraud the maker's widow,

and the inheritance tax, are good, as against the maker's heirs, if the obligees were innocent of the fraud.

Appeal from orphans' court, Schuylkill county; Cyrus L. Pershing, Judge.

In the matter of the estate of Charles Hummel, deceased. Appeal of Margaret J. Hummel, widow, from the decree of distribution. Reversed.

Following is the opinion of the court below (Pershing, P. J.) on exceptions to the auditor's report:

"Charles Hummel, on the 4th day of November, 1885, executed two promissory notes under seal,—one to Annie Riland, and the other to Emma Dietrich. They were the daughters of a deceased sister of said Hummel's first wife, and had resided with Hummel, as members of his family, from their childhood till their marriage. On the 2d day of June, 1888, Hummel executed three other promissory notes under seal,—two of them to nephews, and the other to a niece, of the obligor. The aggregate amount of these notes was \$4,000, and all were made payable after his death. Hummel was twice married, but left no issue by either wife. His will, which was probated October 5, 1890, devised to his wife a house, 'as long as she lives, or as long as she shall bear my name,' etc. The balance of his estate, which was nearly the whole of it, was not disposed of. His widow refused to accept the provisions of the will. She, together with two of the collateral heirs, contested the payment of these notes out of the estate of Charles Hummel, deceased. The auditor finds (1) that the said promissory notes were given by the decedent to evade the payment of the collateral inheritance tax to the state, and to deprive his widow of her just share of his estate, 'and that none of the obligees were parties to, or participated in, his illegal purposes.' (2) That said notes were founded on a 'good,' as distinguished from a 'valuable,' consideration,—'what the law defines as "voluntary deeds."' (3) That there was a delivery of the notes to the several obligees, and, further, that the estate of the obligor was liable for their payment after the widow—as against whom the auditor finds the notes were void—was first paid her portion of the estate. In the language of the report, he decides that the notes in this case are payable out of the residue of the personal estate, after first deducting therefrom the costs of audit and the widow's share, and out of the proceeds of the sale of decedent's real estate. The personal estate is more than sufficient to pay the notes, but, after appropriating one-half of it to the widow, the remaining half is insufficient for their payment in full; and the auditor rules that the deficiency shall be paid out of the proceeds of the sale of the decedent's real estate.

"Accepting the facts found by the auditor, we cannot concur in his conclusion. We

will not refer in detail to the many authorities cited on the argument. In the latest case on this subject (*Lines v. Lines*, 142 Pa. St. 149, 21 Atl. 809), Chief Justice Paxson said: 'It is the settled law of the state that a man may do what he pleases with his personal estate during his life. He may even beggar himself and his family, if he chooses to commit such an act of folly. When he dies, and then, only, do the rights of his wife attach to his personal estate. She then becomes entitled to her distributive share, and of this she cannot be deprived by will, or any testamentary paper. "Who so ignorant," said Chief Justice Gibson in *Ellmaker v. Ellmaker*, 4 Watts, 91, "as not to know that a husband may dispose of his chattels during the coverture, without his wife's consent, and freed from every post mortem claim by her? This point was expressly decided and thoroughly discussed by the late Justice Sharswood in *Pringle v. Pringle*, 59 Pa. St. 281, where it was said that a man's wife and children have no legal right to any part of his goods, and no fraud can be predicated of any act of his to deprive them of the succession." See, also, *Dickerson's Appeal*, 115 Pa. St. 198, 8 Atl. 64. It is sufficient to announce a rule so firmly settled, without discussing it.' As to personal property by gift *inter vivos*, the husband's power is absolute. *Pringle v. Pringle*, supra.

"Stress was laid on the language of the act which provides for the distribution of a decedent's estate 'after all just debts and legal charges' were paid. It was contended that the notes in controversy were not just debts. But if these notes, as decided by the auditor, were founded on a good consideration, were delivered to the obligees, and were not testamentary in their character, they became just debts, as against Charles Hummel, the obligor, and were payable out of his estate. In our opinion, the widow of Charles Hummel was not entitled to take one-half of the personal estate of her deceased husband, clear of the payment of these notes; and the distribution, in this respect, should be corrected. We say nothing about the claim of the state for collateral inheritance tax. That, it was agreed, should be paid, and the state is not an exceptant to the distribution reported by the auditor."

F. W. Bechtel, for appellant. W. H. Unger and Guy E. Farquhar, for appellees.

STERRETT, C. J. It is too well settled to admit of any doubt that a voluntary bond, payable at the maker's death, is, both in law and equity, a gift of the money. It is strictly debitum in praesenti solvendum in futuro, and as irrevocable as any other obligation under seal, which imports a consideration. *Mack's Appeal*, 68 Pa. St. 231. It must, it is true, be postponed in distribution to creditors, but is good as against the maker, his heirs and legatees (*Candor's Appeal*, 27 Pa. St. 119), and, if made in good faith,

will conclude even his widow (Ross' Appeal, 127 Pa. St. 4, 17 Atl. 682). But fraud will render any transaction voidable, at the instance of those who have been defrauded, as against those who were parties or privies; and this should be especially true when the fraud is in violation of marital rights. The husband, standing, as he does, in a relation of contract and confidence, is bound to the exercise of the utmost good faith. He may give away or squander his property, and thus reduce himself and wife to poverty, according to the authorities; but no case has gone so far as to sustain a voluntary obligation given and received with intent to defraud the wife's rights. That she has an interest capable of being defrauded was settled in Mack's Appeal, supra. True, until her husband's death, her interest is contingent. But a creditor has only a contingent interest in his debtor's goods, and yet he may be defrauded in respect of that interest; and why not the wife? It is conceded that the donees, in this case, were not parties or privies to the fraud, and consequently the widow can have no claim, as against them; but she stands in a different relation to the heirs of her deceased husband. These are but volunteers, and can claim no advantage from their ancestor's fraud which he could not have claimed, while the widow, occupying, as she does, in contemplation of law, the position of purchaser (Reed v. Reed, 9 Watts, 263; Greiner's Appeal, 103 Pa. St. 89), has a "higher equity," which gives her a right to compensation out of the estate.

It follows, therefore, that the schedule of distribution reported by the learned auditor is correct, and that the decree of the court below should be reversed. Decree reversed, with costs to be paid by the appellees; and it is now adjudged and decreed that the fund be distributed in accordance with the schedule of distribution recommended by the auditor.

(161 Pa. St. 379)

McKELVY v. GERMAN-AMERICAN INS. CO. OF NEW YORK.

(Supreme Court of Pennsylvania. April 30, 1894.)

FIRE INSURANCE—ADDITIONAL INSURANCE—MISTAKE.

The holder of a policy conditioned against other insurance, on discovering after a loss that his wife had also insured the property, is bound in good faith to at once reveal the existence of such other policy to his insurer, and to unequivocally disclaim any benefit thereof.

Appeal from court of common pleas, Allegheny county; F. H. Collier, Judge.

Action by John R. McKelvy against the German-American Insurance Company of New York on a policy of fire insurance. Judgment for plaintiff. Defendant appeals. Reversed.

Lazear & Orr, for appellant. Petty & Friend, for appellee.

McCOLLUM, J. The policy in suit was, by its terms, void if, without the consent of the insurer indorsed thereon, there was, when it was issued, or at any time during its continuance, other insurance upon all or any portion of the property covered by it. It is conceded that the plaintiff was the exclusive owner of this property, and that at the time of the fire, and for 17 months previous thereto, there was other insurance in his name on a part of it. Prima facie, therefore, a case of double insurance was presented, and to the extent of it, at least, the policy issued by the defendant company was void. The "other insurance" was obtained from the London Assurance Corporation six months after this policy was issued, and soon after the fire an itemized statement and appraisal of the loss upon the property included in it was furnished to the corporation with the assistance of its agents, who had been duly notified of the loss. Four months after the fire the plaintiff forwarded to the defendant company his proofs of loss, and declared therein there was no other insurance on his property "known, authorized, or acknowledged" by him. These proofs having been returned to him for correction in accordance with the requirements of the company, he made and forwarded an amended statement, accompanied by a copy of the policy issued upon his property by the London Assurance Corporation, and declared that he then disclaimed any benefit under said policy, and looked wholly to the defendant company for compensation for his loss. The facts above stated are not controverted, and they seem upon their face to constitute a bar to any recovery by him in this action of compensation for the loss of property covered by the London policy. But he testified on the trial that he did not know of the existence of this policy until after the fire, and that he then learned that his wife had procured it, and had, with the aid of the agents of the London company, made and delivered to it the statement and appraisal already referred to. He was corroborated by his wife, who testified that she obtained and carried the policy without notice to him, and that she did not know of the existence of other insurance upon the property covered by it before she made for the London Company a statement of the loss. In other words, there was a concurrence in their testimony to the effect that before the fire each was without knowledge of the insurance procured by the other. They testified also that since they discovered there was a double insurance neither of them had made any claim upon the London company for the loss of the goods on which its policy was issued, but they did not testify that they had surrendered the policy, or notified the company that the insured disclaimed any benefit thereunder. We cannot find in their evidence any notice to the defendant company or its agents of such disclaimer until the record or

amended proofs were filed, more than five months after the loss occurred. The reference to other insurance in the plaintiff's first proofs of loss was disingenuous, because it was so expressed that it might convey the impression that he did not then know of the existence of additional insurance upon his property, when the fact was that he knew of it immediately after the fire.

The learned judge instructed the jury to the effect that, if the plaintiff did not authorize or ratify the additional insurance, and if, when he was informed of it, he promptly repudiated it, his claim upon the policy in suit was not affected by it. From that portion of the charge which related to the claim of the plaintiff that he did not know until after the fire that his wife had taken out additional insurance we quote as follows: "Did he know that before the fire? He says he did not, and she says he did not. After the fire, what was his duty? As soon as he found it out, his duty was immediately to disavow it, which he says he did. He says he told the agent about the policy, and told him he did not recognize it at all. I say to you that if you find that he really did not know it,—did not know his wife had taken out this policy,—and as soon as he found it out he told the agent of the defendant company: 'I do not recognize that at all. I know nothing about it. I stand on my policy with you,'—he can recover, provided the other facts are made out." The vice of this instruction was that the plaintiff was inadvertently represented by it as having sworn to that which nowhere appears in his testimony. It was a clear misstatement of the evidence on a vital point in the case, and, as it is probable that the defendant company was injured by it, we sustain the first specification of error.

The majority of the court are not satisfied that the learned judge erred in the other instructions complained of, and the second, third, and fourth specifications are overruled. Judgment reversed, and venire facias de novo awarded.

(161 Pa. St. 218)

In re WELLES' ESTATE. (No. 301.)

Appeal of "SECURITY CO."

(Supreme Court of Pennsylvania. April 23, 1894.)

ANCILLARY ADMINISTRATION—JURISDICTION—DISTRIBUTION.

1. Though the surplusage of personal estate in process of ancillary administration must generally be remitted from the ancillary to the domiciliary jurisdiction for distribution, yet where there are parties entitled to share in such property, claiming distribution in the ancillary jurisdiction, and no domiciliary creditors, the ancillary court will assume jurisdiction, and make distribution according to the law of the domicile.

2. The Connecticut intestate law provides that when intestate shall be a minor, and shall leave no lineal descendants or brother or sister of the whole blood, or any descendants

of such brother or sister, or any parent, his ancestral estate shall be distributed equally to the next of kin to the intestate of the blood of the person or ancestor from whom such estate came or descended; and that in ascertaining the next of kin in all cases the rule of the civil law shall be adopted. *Held*, that where one-half such intestate's estate was derived from his mother and one-half from his brother, and he left him surviving a maternal aunt and two half-brothers, domiciled in the state where intestate died, one-half of the fund should be awarded to the aunt and the other to the principal administrator.

3. Such statute embraces both personal and real estate.

4. The conversion into money of the real estate inherited by intestate does not destroy its character as ancestral estate, and give it a new direction, as the statute in terms operates on the "estate," and form, therefore, is immaterial.

Appeal from orphans' court, Berks county; H. Willis Bland, Judge.

Adjudication of the account of William J. Young, the Pennsylvania administrator of Hubert G. Welles, deceased, and the distribution of the balance embraced in said account. From the decree of distribution so made, "Security Company," the principal administrator of the decedent, appeals. Affirmed.

Decedent was a minor, and at the time of his death was domiciled in Connecticut, and "Security Company" was appointed principal administrator. The fund in dispute was in the hands of a Pennsylvania guardian. At the request of "Security Company," principal administrator of the decedent, the register of Berks county, Pa., granted ancillary letters of administration to William J. Young. On the settlement of the guardian's account, the balance was distributed by the orphans' court of Berks county to William J. Young, the decedent's Pennsylvania administrator, and comprised the entire assets coming into his hands. Upon the settlement of the administration account a balance of \$1,376.01 remained for distribution. The fund had the following origin: John M. Hale, the maternal grandfather of the decedent, died February 4, 1869, intestate, seised at the time of his death of certain real estate situate in Reading, Pa. He left to survive him a widow, since deceased, and five children, one of whom was Susan M. Hale, the mother of decedent. Susan M. Hale, who had been married to Thomas G. Welles, died December 18, 1880, intestate, leaving to survive her a husband, who afterwards died, and two children, viz. Hubert G. Welles, the decedent, and John M. H. Welles, who died a minor. April 4, 1882, unmarried, and without issue. Proceedings in partition in the orphans' court of Berks county took place in 1883, resulting in a sale of the above-mentioned real estate, whereby the decedent's one-fifth interest in the said real estate was converted into the present fund. The decedent left to survive him neither father nor mother, nor any lineal descendants, nor any brother or sister of the whole blood, nor descendants of any. His surviving next of kin of his mother's blood

was Caroline H. Steinman, his mother's sister. He also left two half-brothers, Samuel and Thomas Welles, children of his father by a second wife, who are domiciled in the state of Connecticut.

William J. Young, for appellant. Isaac Hlester, for appellee.

STERRETT, C. J. All the material facts of this case sufficiently appear in the record of the court below, and hence special reference to them is unnecessary. The question whether the fund for distribution is to be regarded as real or personal estate is answered by application of the principle of *Wentz's Appeal*, 126 Pa. St. 541, 17 Atl. 875, and cases there cited. It was in fact and in law personalty when the owner died, and is distributable as such.

While the general rule requires that the surplusage of personal estate shall be remitted from the ancillary to the domiciliary jurisdiction for distribution (*Barry's Appeal*, 88 Pa. St. 131), there is a well-recognized exception, which grew out of the duty of every government to protect its own citizens, where there are parties entitled to share in such property, claiming distribution in the ancillary jurisdiction, and no domiciliary creditors. In such case the court will not send the parties, to seek their rights, at great and unnecessary expense and delay, to a foreign tribunal, but will make distribution in accordance with the law of the domicile; and the situs rei, the presence of the parties, and the principles of justice, public law, and international policy sustain its assumption of jurisdiction. *Dent's Appeal*, 22 Pa. St. 514; 2 Kent, Comm. 433. There are admittedly no domiciliary creditors of this decedent.

But is there a resident claimant entitled to share in the fund for distribution? The proviso to the Connecticut intestate law declares that in cases like the present "the estate shall be distributed equally to the next of kin of the intestate of the blood of the person or ancestor from whom such estate came or descended," and that "in ascertaining the next of kin in all cases the rule of the civil law shall be adopted." Half of the present "estate," having been derived through decedent's mother, was properly awarded to appellee, and the other half, having been derived through the decedent's brother, to appellant, under that rule.

The appellant insisted that the proviso to said intestate law was only applicable to real estate, and consequently not to this fund; but it was authoritatively settled in *Clark's Appeal*, 58 Conn. 207, 20 Atl. 456, that it embraced both real and personal estate. "The purpose of the proviso," said the court, "manifestly is to take the ancestral estate of a certain class of intestates out of the operation of the statute, and to give to that estate, whether it be real, or real and

personal, estate which is referred to, a different direction from that it would take but for the proviso."

So it was urged that the sale of the real estate which Hubert G. Welles had inherited destroyed the ancestral character of the estate, and that it must take from that fact a new direction. But the obvious answer to this is that the statute by its terms operates on the "estate," and form is therefore immaterial. No matter through how many transmutations it may pass, so long as it can be identified it is still an "ancestral estate." The substance remains, although the form is changed, and is within both the letter and spirit of the statute. The cases of *Terry's Appeal*, 28 Conn. 339, and *Bristol v. Austin*, 40 Conn. 438, cited for appellant, have no application to the facts of this case. It follows from what has been said that there is no error in the decree. Decree affirmed, and appeal dismissed, with costs to be paid by the appellant.

(161 Pa. St. 218)

In re WELLES' ESTATE. (No. 349.)

Appeal of STEINMAN.

(Supreme Court of Pennsylvania. April 23, 1894.)

Appeal from orphans' court, Berks county; H. Willis Bland, Judge.

Adjudication of the account of William J. Young as administrator of the estate of Hubert G. Welles, deceased. From the decree of distribution, Caroline H. Steinman appeals. Affirmed, and appeal dismissed.

Isaac Hlester, for appellant. William J. Young, for appellee.

STERRETT, C. J. The questions involved in this appeal grew out of substantially the same state of facts as was presented in *Security Co.'s Appeal* (No. 301, Jan. Term, 1894) 28 Atl. 1116, and have been sufficiently considered in opinion just filed in that case. For reasons there given, the decree should be affirmed. Decree affirmed, and appeal dismissed, with costs to be paid by appellant.

(161 Pa. St. 276)

WOLF v. GUFFEY.

(Supreme Court of Pennsylvania. April 30, 1894.)

OIL LEASE—CONSTRUCTION.

An oil lease required the lessee to drill a well within six months, or in default to pay a specified sum per annum for such delay within three months after the time for completing the well, failure to complete the well or to make any such payments within the time specified to avoid the lease. *Held*, that where no well was completed within six months, and the lessor, within a few days thereafter, leased the premises to others, all the rights of the parties to the first lease became extinguished, and no rent could be recovered from the lessee thereunder.

Appeal from court of common pleas, Allegheny county.

Action by John M. Wolf against James M. Guffey to recover rent alleged to be due un-

der a lease. From a judgment for defendant, plaintiff appeals. Affirmed.

The lease was dated May, 1886, and provided that operations on the leased premises should be commenced, and one well completed, within six months from the date thereof, and that, in case of failure to complete one well within such time, the party of the second part should pay to the party of the first part for such delay the sum of \$260 per annum, within three months after the time for completing such well as above specified, payable at the premises; that the party of the first part should agree to accept such sum as full consideration and payment for such yearly delay until one well should be completed, and that a failure to complete one well or to make any such payments within such time and at such place as above mentioned should render the lease null and void, and to remain without effect between the parties thereto.

Denna C. Ogden, W. S. Kerr, and Shiras & Dickey, for appellant. Willis F. McCook, for appellee.

McCOLLUM, J. If it be conceded that the lessor could have maintained this action in affirmance of the lease, it does not necessarily follow that he may do so after he has elected to forfeit it, and rented the property to another party. The cause of the forfeiture arose when the lessee failed to complete a well on the premises within six months, or to pay the sum sued for within three months thereafter. According to the contention of the lessor, a right of action for this sum accrued on the 18th of February, 1887, and he is still entitled to receive it, although he immediately accepted the nonpayment of it as a forfeiture of the lease and an extinguishment of the rights and liabilities of the parties thereunder. By the payment of this sum within the time stipulated, the lessor would have been compensated for past delay, and the lessee would have had another year within which to complete the well. In other words, such payment would have been, under the most favorable construction for the lessor, in the interest and for the benefit of both parties, as it would have extended the time allowed the lessee to test or develop the property, as well as satisfied the claim of the lessor. The covenant of the lessee to pay this sum, and the mutual agreement of the parties that the nonpayment of it should render the lease void and without effect between them, were in a certain sense for the benefit of the lessor, because they enabled him to forfeit the lease on the occurrence of the default. But they did not *ipso facto* forfeit it, and extinguish the rights and liabilities created by it; they merely rendered it optional with the lessor to terminate the lease or treat it as still in force. If he had accepted payment of this sum the day after the right to declare a forfeiture was com-

pletely vested in him, such acceptance would have operated as a waiver of the right, and would have protected the lessee as effectually as if the payment had been made or tendered the day before it so vested. In this case it was the act of the lessor which rendered the lease null and void and without effect between the parties. Within six days after his right of action accrued, and without demanding payment of the sum sued for, he let the premises to the Philadelphia Company for a term of 20 years. This was a prompt, plain, and decisive election by him to enforce the forfeiture clause, and thenceforth the lease was a nullity, and the rights and liabilities arising from it were extinguished. That he understood the effect of his election is shown by his conduct and declarations during the next four years. He said that the lease was dead, and that there was nothing due to him on account of it. He was manifestly content with his new lease, and the rents he was receiving under it, until a lawyer called to see him, assured him that he had a valid claim to the sum in controversy, and offered to prosecute it on shares. Very soon thereafter this suit was brought to enforce the performance of a covenant in a lease which the plaintiff had by his own act annulled more than four years before. It will thus be seen that the suit is based on a construction of the lease at variance with the understanding and intention of the parties to it. Prior to the call referred to, it had not occurred to the lessor that his remedies on the lease were cumulative; he supposed that it was optional with him, on the default of his lessee, to forfeit the lease or to affirm it, and that, having made his election, the law and the understanding of the parties required that he should abide by it. In this view of the situation we think he was right. If his present contention is sound, a lessor may stipulate for the payment of the first year's rent on the second day of the term, forfeit the lease on the third day for nonpayment of it, and subsequently recover the full year's rental. A construction which will produce such a result has no equitable considerations to support it, and is not authorized by the law. There was no error in the affirmance of the defendant's point. Judgment affirmed.

FENNELL v. GUFFEY.

(Supreme Court of Pennsylvania. April 30, 1894.)

Appeal from court of common pleas, Allegheny county.

Action by Andrew Fennell against James M. Guffey for rent alleged to be due on a lease. There was judgment for defendant, and plaintiff appeals. Affirmed.

Denna C. Ogden, W. S. Kerr, and Shiras & Dickey, for appellant. Willis F. McCook, for appellee.

McCOLLUM, J. This judgment is affirmed for the reasons stated in the opinion just filed in *Wolf v. Guffey* (282 Oct. Term, 1893) 28 Atl. 1117.

(161 Pa. St. 391)

CONSHOHOCKEN TUBE CO. v. IRON CAR EQUIPMENT CO.

(Supreme Court of Pennsylvania. April 30, 1894.)

ASSUMPSIT—INTEREST COUPONS—DEMAND—EVIDENCE.

1. When the mortgagor's directors have resolved to default on an interest coupon, and provided no funds to pay it, the holder is not required to present it for payment before bringing suit.

2. Where defendant does not deny the execution of bond coupons in suit, these may be introduced without the mortgage given to secure them.

Appeal from court of common pleas, Huntingdon county; A. O. Furst, Judge.

Foreign attachment in assumpsit by the Conshohocken Tube Company against the Iron Car Equipment Company. Verdict ordered for plaintiff, and judgment thereon. Defendant appeals. Affirmed.

The charge of the court below (A. O. Furst, P. J.) is as follows: "The plaintiff in this case claims to recover on coupons Nos. 3 and 4, being severally for six months' interest, No. 3 for interest due July 1, 1892, and No. 4 for interest due January 1, 1893, each sum of interest being \$25, being coupons Nos. 3 and 4 on bonds of the Iron Car Equipment Company, bearing date the 31st day of December, 1890, and severally numbered from No. 30 to 94, inclusive, being coupons on 65 one thousand dollar bonds. According to the evidence in this case, the coupons numbered 3 were presented at the office of the Central Trust Company of New York, and payment demanded and refused. There is no direct evidence of the presentation of coupon No. 4; but Mr. Murphy, who was a director of the Iron Car Equipment Company, testifies that the company was unable to meet the interest on these coupons; that they made an effort to secure the money to meet coupon No. 3, and failed; and that they then abandoned the effort to raise the money to meet coupon No. 4, and they were allowed to go by default.

Being a director of the company, he says he is absolutely acquainted with the facts. The evidence showing that there was no money of the trust funds to meet coupon No. 3, and the company testifying here by the mouth of one of its directors that they had no money to meet either coupon No. 3 or coupon No. 4, the law does not require the holder of the coupon to do a useless act; and that would, in the judgment of the court, relieve the plaintiff from the formal presentation of coupon No. 4, because it would be simply useless to waste time to present it, when the company say they did not have the money there to meet it. Objection is made to any recovery in this case without the production of the mortgage. We think, as the suit has been brought upon these bonds, so far as the coupons are involved, and the execution of the instrument is not denied in this case by the pleadings, if the defendant had any defense which arose upon the mortgage it would be substantive on his part, and it would be his duty to show it. A recovery may be had on a bond, even though it be secured by a mortgage. It is a personal action, and therefore we saw no force in the objection; and, if there were any, it would be substantive evidence to be offered on the part of the defendant, and therefore we received this evidence; and we say to you that, under the evidence in this case, the plaintiff is entitled to recover the amount due on these coupons. There are 130 of them,—65 of No. 3 and 65 of No. 4,—on bonds ranging from No. 30 to No. 94, inclusive; and therefore it will be your duty to render a verdict in favor of the plaintiff for the amount due. You will therefore render a verdict in favor of the plaintiff for \$3,521.15, the amount that is due on these coupons."

Geo. B. Orlady, for appellant. Saml. T. Brown, Chas. G. Brown, and H. M. Tracy, for appellee.

PER CURIAM. There is no merit in either of the specifications. The proof of plaintiff's claim was clear, distinct, positive, and uncontradicted, and hence there was no error in directing the jury to find in favor of plaintiff for the amount of its claim. Judgment affirmed.

